

Smut on the Small Screen: The Future of Cable-Based Adult Entertainment Following *United States v. Playboy Entertainment Group*

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I. INTRODUCTION.....	320
II. THE TELECOMMUNICATIONS ACT OF 1996	321
III. SECTIONS 504 AND 505	322
A. <i>Section 504's Effects, or Lack Thereof</i>	323
B. <i>Section 505's Background</i>	323
C. <i>Section 505's Casualties and Beneficiaries</i>	324
IV. THE CASE.....	326
A. <i>The Majority's Perspective</i>	326
B. <i>The Dissent</i>	330
C. <i>Applications of "Least Restrictive" Analysis</i>	332
D. <i>Significance of the Case</i>	335
1. What's Not Significant	335
2. The Broadcast Media/Cable Television Distinction	335
3. Signal Bleed—Significantly Insignificant	336
V. CONCLUSION.....	337

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I. INTRODUCTION

On May 22, 2000, the Supreme Court narrowly affirmed a decision of the United States District Court for the District of Delaware, holding that section 505 of the Telecommunications Act of 1996 violates the First Amendment.¹ Under section 505, cable television providers offering channels “primarily dedicated to sexually-oriented programming” were required to either “‘fully scramble or otherwise fully block’ those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m.”² Because scrambling technology can be imprecise and allow portions of some programs, though scrambled, to nevertheless be seen or heard through a “phenomenon known as ‘signal bleed,’” most “cable operators adopted the . . . ‘time channeling’ approach” as their method of compliance with the statute.³ The decision to engage in time channeling effectively eliminated the transmission of the targeted programming to every household in those service areas for two-thirds of the day.⁴ Furthermore, cable providers were already required by section 504 of the same Act to “without charge, fully scramble or otherwise fully block” the reception of *any* channel to a particular customer’s house upon request by the customer.⁵ Playboy Entertainment Group brought suit and successfully argued that section 505 was “unnecessarily restrictive content-based legislation violative of the First Amendment.”⁶

The ramifications of *United States v. Playboy Entertainment Group* remain to be seen. Should interested parties view the decision as evidence of the Court ushering in a more conducive era for sexually-oriented cable programming? Has the Court quietly issued a landmark case in First Amendment telecommunications regulation? Perhaps the *Playboy* decision will become “the case” for cable television regulation in the incipient years of the Third Millennium; on the other hand, it may simply be an example of the Court disposing of an unconstitutional statute without departing from existing law. What are the consequences of invalidating a statute designed to protect children from harmful influences when the statute imposes a financial burden upon speech, but stops short of a ban? Is “signal bleed” a

1. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

2. *Id.* at 806 (quoting 47 U.S.C. § 561(a) (Supp. V 1999)).

3. *Id.*

4. *Id.*

5. 47 U.S.C. § 560(a) (Supp. V 1999).

6. *Playboy*, 529 U.S. at 807.

legitimate hazard to children, or merely a politicized issue bearing the mantle for a wealth of unspoken indecency concerns? Most importantly, what should interested parties take away from this decision?

This Note argues that the most important aspect of *Playboy* is the Court's determination that cable television is not analogous to broadcast media. Provided it withstands the test of time, this distinction allows the cable industry to avoid the more stringent regime placed upon broadcast media. The *Playboy* decision also shows the Court's willingness to invalidate laws even when they serve a compelling interest and impose less restrictions than a complete ban. Members of the Court differed on whether "signal bleed" actually constituted an influence harmful to children. This discrepancy evinces a significant disagreement on where lines should be drawn discerning dangerous from harmless material. It also demonstrates the extent to which the "least restrictive alternative" test can be bent to serve competing interests.

Part II of this Note provides a general explanation and analysis of the Telecommunications Act of 1996, examining the competing goals and interests leading to and served by the Act. Part III delineates the substantive effects of sections 504 and 505, both intended and unforeseen. Part IV discusses *Playboy* in depth, including an analysis of the majority's and the dissent's perspectives, a look at past applications of the "least restrictive alternative" test, and an inquiry into the existence and degree of significant consequences of the case. This Note concludes in Part V by restating the major impacts of the case and making limited recommendations for interested parties.

II. THE TELECOMMUNICATIONS ACT OF 1996

Simply put, the Telecommunications Act of 1996 (the 1996 Act) is the latest of several enactments designed to stimulate competition in the telecommunications industry.⁷ Though the Act's ultimate consequences may be unsettled and its degree of approval varied, it has thus far achieved relatively greater success than its predecessors.⁸ Congress's express goal in passing the 1996 Act was to deregulate the telecommunications industry so as to reduce entry barriers and promote competition,⁹ and evidence suggests

7. The 1996 Act was preceded by such bills as the Communications Act of 1934, the Cable Communications Policy Act of 1984, and the Cable Television Consumer Protection and Competition Act of 1992. See Thomas W. Hazlett, *Economic and Political Consequences of the 1996 Telecommunications Act*, REGULATION, Jan. 1, 2000, at 36-37.

8. See *id.* at 36 ("Improvements in competitiveness are modest by some standards but impressive when judged against the results of other legislation with the announced goal of increasing market rivalry (e.g., the 1984 and 1992 Cable Acts).").

9. See *id.* at 37.

that, at least to some degree, the Act *has* in fact accomplished this goal.¹⁰ It would be naïve, however, to assume that competition and consumer gains were the only factors influencing the terms of the Act.

Lobbyist contributions may have played a large role in shaping the 1996 Act. In examining the Act, Professor Thomas Hazlett observed that federal policymakers had benefited through increased political contributions from telecommunications firms and executives.¹¹ He added that the Act provided a platform for particularly newsworthy social issues, including TV violence, the V-Chip, and Internet indecency,¹² implying that industry players may not have been the only interested lobbyists. Many consumer activists view the Act as a failure and cite contributions by corporate Political Action Committees (“PACs”) as the source of the perceived failure.¹³ Figures compiled by the Center for Responsive Politics reveal that “[i]n the 1996 and 1998 election cycles, federal political contributions by telecommunications firms rose absolutely and relative to the overall rise in political giving”¹⁴

That telecommunications regulation now accounts for a larger percentage of political contributions is not necessarily a negative. It does, however, relate back to the subject of adult entertainment on cable television because “‘hot button’ social issues”¹⁵ were addressed by powerful lobby groups. One can infer that certain provisions in the 1996 Act, perhaps including section 505, were included for the sake of votes and future contributions, rather than for increasing competition and aiding consumers.

III. SECTIONS 504 AND 505

Both sections 504 and 505 of the Telecommunications Act of 1996 relate to the blocking or scrambling of cable channels, but they operate in significantly different ways. Section 504 favors parents and other private individuals as decision makers regarding the cable programming entering their homes; section 505 places this role in the hands of legislators.

10. *See id.* at 38.

11. *Id.* at 44-45. Thomas Hazlett is a Professor in the Department of Agricultural and Resource Economics and Director of the Program on Telecommunications Policy at the University of California, Davis. *See* Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 905 (1997).

12. Hazlett, *supra* note 7, at 45.

13. *Id.* at 36 (“The activist denounces the Telecommunications Act ‘as an abysmal failure that has led to consolidation, not competition, and higher prices, not consumer cost savings.’”).

14. *Id.* at 44-45.

15. *Id.* at 45.

Whether the sections compliment or corrupt one another is the major source of debate.

A. *Section 504's Effects, or Lack Thereof*

Though a chief purpose of section 504 is to enable cable customers to keep sexually explicit material out of their homes, the provision does not explicitly state it.¹⁶ Section 504 provides that “[u]pon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.”¹⁷ Thus, a person disapproving of a channel’s programming for any reason could keep it from being transmitted into his or her household. Blocking under section 504, however, was used sparsely, even during the period of more than a year when it was the only blocking mechanism.¹⁸ This notion is quantified by the fact that “[b]etween March 1996 and May 1997, while the Government was enjoined from enforcing § 505 . . . fewer than 0.5% of cable subscribers requested full blocking [under section 504]. . . .”¹⁹

B. *Section 505's Background*

Unlike section 504, section 505 is explicitly aimed at sexually-oriented programming. Section 505’s requirement reads as follows:

In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall *fully* scramble or otherwise *fully* block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.²⁰

The statute requires that channels be “fully” blocked or scrambled because current scrambling technology, used to keep customers from receiving channels for which they have not paid, often fails to do so. Cable television systems typically use radio frequency or “baseband” scrambling systems, “which may not prevent signal bleed, . . . [meaning] discernible

16. Section 504 was included in a portion of the 1996 Act entitled “Title V—Obscenity and Violence.” See H.R. CONF. REP. NO. 104-458, at 81-86 (1996). Sections 501-509 are included under “Subtitle A—Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities” and sections 501-503, and 505 specifically mention obscene or explicit programming. One can reasonably infer that section 504 was included with the same context in mind. See *id.*

17. 47 U.S.C. § 560(a) (Supp. V 1999).

18. See *Playboy*, 529 U.S. at 816 (2000).

19. *Id.*

20. 47 U.S.C. § 561(a) (Supp. V 1999) (emphasis added).

pictures may appear from time to time on the scrambled screen,” and audio portions may be heard.²¹ Though suitable alternatives exist that would eliminate signal bleed, they currently are not economical for system-wide use.²² Perhaps anticipating that cable providers would be unable to scramble the programming fully, the drafters included an “implementation” clause in section 505, stating that until cable providers complied with the requirements, they were restricted from broadcasting such programming during “the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.”²³ The hours of the day when children are unlikely to be watching, as determined by the Commission, are from 10 P.M. to 6 A.M.²⁴ Due to the previously mentioned financial burden associated with fully scrambling, most cable providers used the “time channeling” approach, only broadcasting such channels between 10 P.M. and 6 A.M.²⁵ According to one survey, 69% complied with section 505 in this fashion.²⁶ Therefore, in over two-thirds of the cable-receiving United States, even paying customers desiring to view the explicit programming could not do so between the hours of 6 A.M. and 10 P.M. This constituted a considerable restriction, since it is estimated that “30 to 50% of all adult programming is viewed by households prior to 10 p.m.”²⁷

C. Section 505's Casualties and Beneficiaries

Section 505 had severe effects on many parties. Cable providers were left with the options of implementing economically burdensome scrambling systems, or offering sexually-oriented programming for only one-third of the day, either way decreasing the profitability of offering such stations. In turn, entertainment companies producing explicit programming found their product less profitable, eventually prompting the suit by Playboy Entertainment Group.²⁸ Adult consumers willing to pay for sexually-oriented programming were generally able to do so for only eight hours a day. Parents fearing that their children would be exposed to

21. *Playboy*, 529 U.S. at 807.

22. *See id.* at 808. Digital systems, predicted to become the systems of choice in the near future, would eliminate the problem of signal bleed. *Id.* This possibility is discussed at greater length *infra*.

23. 47 U.S.C. § 561(b).

24. *Playboy*, 529 U.S. at 806.

25. *Id.* at 806-07.

26. *Id.* at 809.

27. *Id.* (citing *Playboy Entm't Group, Inc. v. United States*, 30 F. Supp. 2d 702, 711 (D. Del. 1998), *aff'd*, *Playboy*, 529 U.S. 803).

28. *Id.*

inappropriate images through signal bleed experienced no legitimate net gain, as they could have had the programming completely blocked from their televisions by placing a phone call under section 504.²⁹

One must wonder who actually benefited from section 505. Supporters would be expected to point to the child as the chief beneficiary. Considering the child a beneficiary of section 505 assumes that exposing children to sexually-oriented programming does in fact have a negative effect. While this belief may be widely held, it is not indisputable. Some parents might intentionally expose their children to explicit material to educate them or to de-mystify situations which the children will inevitably be exposed to at some point. Additionally, young children typically are supervised sufficiently enough to keep them from viewing inappropriate material. Conversely, any children *not* kept under regular supervision are often those whose parents have in some way determined to be old or mature enough to handle some responsibilities, including television-viewing choices. These children are the ones most likely “protected” by section 505. The dangers of exposing such older children to fleeting images of explicit material seem considerably less severe than those of exposing less mature children to the same material.

Despite the more stringent provisions contained in section 505, the fact remains that children would be as well served by section 504, thereby giving a minimal amount of deference to parents in raising their own young. Children of parents who subscribe to channels such as Playboy would not benefit from the addition of section 505, as it only applies to nonsubscribers. Children of parents who contact their cable company to have such channels fully blocked would not benefit from the addition of section 505 because the channels will already have been completely blocked from their homes twenty-four hours a day. Children of parents who take an active role in determining what their children view would not benefit from section 505 because the parents themselves would act as human blocking devices. The only children who stand to gain a substantial benefit are those whose parents would prefer to shield them from explicit material, but who fail to ensure this result. Considering that the latter example suggests a lack of any supervision, one might imagine that the potential to view intermittent images of sexual behavior would be among the most benign influences on such children’s development. For example, such children would lack both the appropriate encouragement for education and other valuable activities, and also the appropriate discouragement of such adolescent influences as drugs and gang involvement. Any benefit

29. 47 U.S.C. § 560(a).

derived under section 505 in “protecting” a subclass of children from the supposedly deleterious effects of scrambled blips of sexual material is marginal at best.

Section 505, however, is not without beneficiaries. In the apparent “unmitigated political success” of the 1996 Act,³⁰ one can infer that many pieces of legislation, especially those seemingly unnecessary and unconstitutional due to similar less restrictive sections in the same enactment, are the product of political compromises related to soft money and PAC contributions. Thus, the policymakers responsible for section 505, and in fact the whole 1996 Act, may have enjoyed very substantial benefits as a consequence of the section’s enactment.

The above is not intended to imply that section 505, or indeed any other section, was included under anything less than legitimate circumstances. It is not the goal of this Note to cast doubt on the American political system or any actor within it. It *is*, however, a goal of this Note to determine the reasoning behind section 505’s enactment as well as the significance of its invalidation. Given the fact that the 1996 Act made television content a key political issue,³¹ this analysis would be remiss if it failed to address the possibility that section 505 constituted a political reward. The lawmakers responsible for section 505 will be making future telecommunications law, and a legislative readiness to make questionable law in return for contributions or votes is significant to the future of telecommunications law.

IV. THE CASE

Regardless of *ex post facto* concerns about the wisdom or methodology behind section 505’s inclusion in the 1996 Act, it was included, and subsequently invalidated. However, was the section *correctly* invalidated? The case was decided 5-4, with the majority and dissent strongly opposing one another on several key issues. One must examine both sides to fully comprehend the ramifications of the case.

A. *The Majority’s Perspective*

Writing for the majority in *Playboy*, Justice Stevens begins by stressing “[t]wo essential points” which the majority believes “should be

30. Hazlett, *supra* note 7, at 45, stating that “[i]n both categories (soft money and PAC donations) in both [the 1996 and 1998 election] cycles, telecommunications spending increased. Such success could be achieved by random chance only 6 times out of 100.” *Id.*

31. *Id.* (“[T]he Telecommunications Act has provided a platform for an exceptionally newsworthy set of public issues, [including] . . . ‘hot button’ social issues like TV violence, the V-chip, and Internet indecency.”).

understood concerning the speech at issue”³² He stated that: (1) the Court “assume[s] that many adults themselves would find the material highly offensive; and . . . consider[ing] the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it;”³³ and (2) “all parties bring the case . . . on the premise that Playboy’s programming has First Amendment protection.”³⁴ He added that “the Government disclaim[ed] any interest in preventing children from seeing or hearing [the material]” with their parents’ consent.³⁵

Early in the opinion, Justice Stevens recites the “general rule . . . that the right of expression prevails” over “shield[ing] the sensibilities of listeners.”³⁶ Generally, “[w]e are expected to protect our own sensibilities ‘simply by averting [our] eyes.’”³⁷ The majority also points out, however, that “[c]able television, like broadcast media, presents unique problems . . . which may justify restrictions that would be unacceptable in other contexts.”³⁸ For example, in *FCC v. Pacifica Foundation*, the Court held that the FCC did not violate the First Amendment when proscribing the broadcast of indecent material.³⁹ The Court based its holding in *Pacifica* on two main arguments: (1) “the broadcast media have established a uniquely pervasive presence in the lives of all Americans” because “offensive, indecent material . . . confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder;”⁴⁰ and (2) “broadcasting is uniquely accessible to children, even those too young to read. [Though a] written [indecent] message might have been incomprehensible to a first grader . . . [a] broadcast could . . . enlarge[] a child’s vocabulary in an instant.”⁴¹

One could argue that just as one instant of exposure to language can enlarge a child’s vocabulary, one instant of exposure to explicit behavior can enlarge a child’s awareness of sexuality, perhaps at an age where such knowledge will likely do more harm than good. Justice Stevens explains,

32. *Playboy*, 529 U.S. at 811.

33. *Id.*

34. *Id.* The First Amendment protection is based on the fact that the material was “not alleged to be obscene,” thus “adults ha[d] a constitutional right to view [the material].” *Id.*

35. *Id.*

36. *Id.* at 813.

37. *Id.* (alteration in original) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

38. *Playboy*, 529 U.S. at 813.

39. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

40. *Id.* *See also* *Rowan v. Post Office Dep’t*, 397 U.S. 728 (1970).

41. *Pacifica*, 438 U.S. at 749.

however, that despite the similarities between broadcast media and cable television, there is also a “key difference . . . on which [the *Playboy*] case turns.”⁴² He continues:

Cable systems have the capacity to block unwanted channels on a household-by-household basis. The option to block reduces the likelihood . . . that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary . . . is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt.⁴³

This point may well be the most important element to glean from *Playboy*. Had the Court viewed cable television as substantively no different from broadcast media, the case would have fallen under the *Pacifica* precedent, and the Government would almost surely have prevailed. In fact, in the *Playboy* dissent, Justice Breyer writes that “[i]t is difficult to reconcile . . . [the *Playboy*] decision with . . . [the Court’s] foundational cases that have upheld similar laws, such as *FCC v. Pacifica Foundation*.”⁴⁴ This statement suggests disagreement with the majority’s broadcast media/cable television distinction, though the dissent never explicitly says such.⁴⁵

Section 505 was undisputedly a content-based restriction, as it “applie[d] only to channels primarily dedicated to ‘sexually explicit adult programming or other programming that is indecent,’” and was unconcerned with signal bleed from other channels.⁴⁶ Sections such as 505, which single out particular speech based on content, “can stand only if . . . [they] satisf[y] strict scrutiny.”⁴⁷ Content-based speech restrictions “must be narrowly tailored to promote . . . compelling Government interest[s].”⁴⁸ The general rule is that “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”⁴⁹

The District Court found that section 504, given adequate publicity, would be a less restrictive alternative.⁵⁰ At the Supreme Court level, “[n]o

42. *Playboy*, 529 U.S. at 815.

43. *Id.*

44. *Id.* at 847. (Breyer, J., dissenting).

45. *Id.* at 835-47.

46. *Id.* at 811.

47. *Id.* at 813; see *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

48. *Playboy*, 529 U.S. at 813.

49. *Id.* See also *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Comm.*, 492 U.S. at 126.

50. *Playboy*, 529 U.S. at 816.

one dispute[d] that § 504 . . . [was] narrowly tailored to the Government's goal of supporting parents who want[ed] . . . channels blocked," but questions remained as to whether section 504 could be effective.⁵¹ In the existence of a "plausible, less restrictive alternative . . . it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."⁵² That being the case, the Government turned to "empirical evidence showing that § 504 . . . generated few requests for household-by-household blocking" to support its position that it was not an effective alternative.⁵³ The District Court found support for the Government's contention sorely lacking, remarking that the Government only pointed to "two city councilors, eighteen individuals, one United States Senator, and the officials of one city" who had actually complained about viewing signal bleed, and that with the exception of one individual, the cable companies had, in each instance, offered to rectify the situation for free.⁵⁴ The Supreme Court acceded, stating that "[i]f the number of children transfixed by even flickering pornographic television images in fact reached into the millions . . . [the Court] would have expected to be directed to more than a handful of complaints."⁵⁵ The Court thus agreed with the District Court that "the Government ha[d] failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban."⁵⁶

The Supreme Court also agreed with the District Court that there was no proof that a properly publicized section 504 would be ineffective:

("[The Government's argument that § 504 is ineffective] is premised on adequate notice to subscribers. It is not clear, however, from the record that notices of the provisions of § 504 have been adequate"). There is no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed (if they are not yet aware of it) and about their rights to have the bleed blocked (if they consider it a problem and have not yet controlled it themselves).⁵⁷

51. *Id.*

52. *Id.*

53. *Id.* Later in the same paragraph, Justice Stevens quantifies this contention, noting that "[a] survey of cable operators determined that fewer than 0.5% of cable subscribers requested full blocking during that time." *Id.* (citing *Playboy Entm't Group*, 30 F. Supp. 2d at 712).

54. *Id.* at 820 (quoting *Playboy Entm't Group*, 30 F. Supp. 2d at 709) (footnote and record citations omitted).

55. *Id.* at 822.

56. *Playboy*, 529 U.S. at 823.

57. *Id.* (quoting *Playboy Entm't Group*, 30 F. Supp. 2d at 719).

The Court added that section 504 will likely serve the Government's interests better than the time channeling approach, commonly used as a means of compliance with section 505, because "[t]he whole point of a publicized § 504 would be to advise parents that indecent material may be shown and to afford them an opportunity to block it at all times, even . . . after 10 p.m. Time channeling does not offer this assistance."⁵⁸ The majority concluded by referring to the "[b]asic speech principles" at stake, declaring that the Government had not "show[n] that § 505 is the least restrictive means for addressing a real problem"⁵⁹

B. *The Dissent*

As expected, the *Playboy* dissent had a decidedly different view, characterizing sections 504 and 505 as complimentary provisions that work together creating "default rules" that "respect viewer preferences."⁶⁰ The dissent claimed that the two sections worked together to permit viewers to see what they want, since "[s]ection 504 requires a cable operator to 'fully scramble' any channel . . . if a subscriber asks *not* to receive it," and "[s]ection 505 requires a cable operator to 'fully scramble' every adult channel *unless* a subscriber asks to receive it."⁶¹ The dissent went on to portray the sections as "opt-in" and "opt-out" provisions, saying that "a subscriber wishing to view an adult channel must 'opt in,'" and "[a] subscriber wishing not to view any other channel . . . must 'opt out.'"⁶²

The dissent admits that the "less restrictive alternative" test presents a close question, but their view of the sections as "opt-in" and "opt-out" provisions leads to the major point of disagreement.⁶³ Seen this way, sections 504 and 505 "work differently in order to achieve very different legislative objectives."⁶⁴ In the dissent's opinion, section 505 works similarly to laws restricting access to "adult cabarets or X-rated movies" by aiding parents who "may be unaware of what [their children] are watching," parents who "cannot easily supervise television viewing habits," and parents who "do not know of their § 504 'opt-out' rights."⁶⁵

The dissent was unconvinced that better notice requirements on section 504 would make it an effective alternative, doubting that "calling

58. *Playboy*, 529 U.S. at 825.

59. *Id.* at 827.

60. *Id.* at 837.

61. *Id.*

62. *Id.*

63. *Id.* at 846.

64. *Playboy*, 529 U.S. at 841.

65. *Id.* at 842.

additional attention to adult channels through a ‘notice’ on ‘barker’⁶⁶ channels[] will make more than a small difference[.]’⁶⁷ The dissent went on to apparently call into question the constitutionality of requiring such notice: “More importantly, why would doing so not interfere . . . with the cable operators’ own freedom to decide what to broadcast?”⁶⁸ Asserting that imposing expansive restrictions on certain material creates no freedom of speech problems while mandating that cable companies include a statement of customers’ rights in their promotions is somehow an egregious violation, rings a bit hollow.

Aside from the irony in the dissent posing the aforementioned question to support their argument, the proposition simply is not supported by precedent. In *Turner Broadcasting System v. FCC*, the appellant challenged portions of the Cable Television Consumer Protection and Competition Act of 1992, requiring it “to dedicate some of [its] channels to local broadcast television stations.”⁶⁹ The Court ruled that forcing a broadcaster to carry certain material constituted a content-neutral restriction on speech, subject to intermediate scrutiny.⁷⁰ The Court found that guaranteeing that local video providers retain a voice relative to the more powerful cable companies was an “important” governmental interest,⁷¹ and that the “provisions [did] not burden substantially more speech than necessary to further those interests.”⁷² The dissent itself maintains that protection of children is not only an “important,” but a “compelling” government interest.⁷³ Thus, in claiming that requiring notice of “opt-out” provisions runs into constitutional trouble, the dissent in essence argues that requiring a notice on a “barker” channel is a more substantial burden on speech than actually requiring that the cable company carry additional channels. Such a proposition simply is not logical.

The dissent curiously, and perhaps intentionally, never addresses one of the majority’s main contentions—that broadcast media and cable television should not be treated analogously. When viewed as a similar scenario to that of an indecent radio broadcast, the case fits much more neatly into the precedent set by cases such as *Pacifica*.⁷⁴ Indeed, the dissent

66. “Barker” channels are “preview channels of programming coming up on Pay-Per-View.” *Playboy Entm’t Group*, 30 F.Supp 2d at 719.

67. *Playboy*, 529 U.S. at 844.

68. *Id.* at 844-45.

69. *Turner Brdcast. Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

70. *Id.* at 185.

71. *Id.* at 190.

72. *Id.* at 185.

73. *Playboy*, 529 U.S. at 843 (Breyer, J., dissenting).

74. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

cites this as a major source of dispute, writing “[i]t is difficult to reconcile [the *Playboy*] decision with our foundational cases that have upheld similar laws, such as . . . *Pacifica*.”⁷⁵ If one accepts the majority’s claim that broadcast media and cable television pose dissimilar problems, however, the relevance of *Pacifica* is fundamentally different. This is one of, if not *the* major rift between the majority and dissent.

The dissent takes a stronger position on the value of protecting children from signal bleed. While the majority questions the extent of “children transfixed by even flickering pornographic television images,”⁷⁶ the dissent takes offense to the notion that it might not be a problem, stating that they “could not disagree more when the majority implies that the Government’s independent interest in offering such protection—preventing, say, an 8-year-old child from watching virulent pornography without parental consent—might not be ‘compelling.’”⁷⁷ The fact that one side characterizes signal bleed as merely “flickering images,” and the other refers to it as “virulent pornography” evidences a major difference in opinion.

Another difference lies in the two sides’ treatment of burdens on speech *vis-à-vis* bans on speech. The majority believes there to be little if any difference, claiming that “[t]he distinction between laws burdening and laws banning speech is but a matter of degree. The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.”⁷⁸ The dissent takes an opposite stance, opining that laws making speech less profitable are not equal in weight to those making speech illegal, stating that “[t]he difference—between imposing a burden and enacting a ban—can matter even when strict First Amendment rules are at issue.”⁷⁹ The dissent relies on this logic throughout their opinion to support their contention that the statute is “narrowly drawn.” The two opinions obviously disagree on the importance of the difference between burdens and bans.

C. Applications of “Least Restrictive” Analysis

The opinions clearly apply the “less restrictive alternative” test to reach different results, but this is hardly surprising, as it is one of the most malleable judicial tools at the Court’s disposal. Justice Blackmun wrote in 1979 that a “judge would be unimaginative indeed if he could not come up

75. *Playboy*, 529 U.S. at 846.

76. *Id.* at 821.

77. *Id.* at 843.

78. *Id.* at 812.

79. *Id.* at 838.

with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.”⁸⁰ Some might question whether the test carries any meaning, or if it is simply a device judges use to serve personal agendas. It is helpful to compare *Playboy* to other cases in which the Court applied a “least restrictive” analysis, while keeping in mind the Court’s division on topics such as broadcast media versus cable television and burdens versus bans.

In *Sable Communications v. FCC*, the Court affirmed the lower court’s decision invalidating a ban on indecent commercial telephone messages.⁸¹ Sable’s service, commonly known as “dial-a-porn,” allowed users to listen to pre-recorded sexually explicit messages via a toll telephone call.⁸² This case obviously turned on the fact that outright bans are considered to be particularly suspect. The Court relied on this principle in distinguishing *Pacifica*, saying “*Pacifica* is readily distinguishable from these cases, most obviously because it did not involve a total ban on broadcasting indecent material.”⁸³ The Court recognized that a compelling interest existed in “protecting the physical and psychological well-being of minors,” but found that “the statute’s denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages”⁸⁴ Thus, less restrictive alternatives inevitably existed, and the ban could not survive.

In another case regarding the blocking of sexually explicit cable programming, *Denver Area Educational Telecommunications Consortium v. FCC*, the Court refused to allow a provision requiring “‘patently offensive’ sex-related material appearing on leased channels” to be segregated and blocked.⁸⁵ Specifically, the provision “require[d] cable system operators to place ‘patently offensive’ leased channel programming on a separate channel; to block that channel; to unblock the channel within 30 days of a subscriber’s written request for access; and to reblock the channel within 30 days of a subscriber’s request for reblocking.”⁸⁶ The Court commented on the restrictive effects the requirements would impose:

These requirements have obvious restrictive effects. The several up-to-30-day delays, along with single channel segregation, mean that a subscriber cannot decide to watch a single program without

80. *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

81. *Sable Comm.*, 492 U.S. at 117.

82. *Id.* at 117-18.

83. *Id.* at 127.

84. *Id.* at 126, 131.

85. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 753 (1996).

86. *Id.* at 753-54.

considerable advance planning and without letting the “patently offensive” channel in its entirety invade his household for days, perhaps weeks, at a time. These restrictions will permit programmers from broadcasting to viewers who select programs day by day (or, through “surfing,” minute by minute); to viewers who would like occasionally to watch a few, but not many, of the programs on the “patently offensive” channel; and to viewers who simply tend to judge a program’s value through channel reputation, *i.e.*, by the company it keeps.⁸⁷

As in *Sable*, the Government cited protection of the “physical and psychological well-being of minors” as the compelling interest it sought to protect.⁸⁸ The Government additionally questioned whether indecent material on television commanded the “strictest First Amendment ‘standard of review.’”⁸⁹ The Court found the argument inconsequential, saying that “once one examines this governmental restriction, it becomes apparent that, not only is it not a ‘least restrictive alternative’ and is not ‘narrowly tailored’ to meet its legitimate objective, it also seems considerably ‘more extensive than necessary.’”⁹⁰

The *Denver* Court then specifically referred to sections 504 and 505 as less restrictive alternatives, while being careful to note that it was not determining whether those sections were in fact lawful.⁹¹ It is worth mentioning that, in writing for the *Denver* majority, Justice Breyer stated that sections 504 and 505 both serve the same interest—protecting children from “patently offensive” material;⁹² yet writing for the dissent in *Playboy*, Justice Breyer says “[s]ection 504 . . . and § 505 . . . work differently in order to achieve *very different legislative objectives.*”⁹³ This apparent inconsistency illustrates another shortcoming of strict First Amendment scrutiny. By defining the relevant “compelling interest” narrowly, alternative methods rarely seem to serve the same interest, and thus fail to operate as legitimate alternatives; however, by defining the “compelling interest” in broader terms, one can easily conceive of numerous alternatives that would serve the interest in less restrictive ways.

87. *Id.* at 754.

88. *Id.*

89. *Id.* at 755.

90. *Id.*

91. *Denver*, 518 U.S. at 756.

92. *Id.*

93. *Playboy*, 529 U.S. at 841 (emphasis added).

D. *Significance of the Case*

Many observers will find the relevance of *Playboy* not immediately perceptible. The apparent abandoning of long-held precedent, the use of an ambiguous standard, and the existence of a spirited dissent all coalesce to produce a decision that is not easily digested. Upon further scrutiny, however, several key points emerge as the most significant.

1. What's Not Significant

While an endless list of cases applying “least restrictive” analysis to different ends could be compiled, the cases described in the preceding section at least begin to illustrate the point that the test is malleable. This fact is relevant to the *Playboy* decision because it shows, to some degree, how little can be assumed on the basis of the *Playboy* holding. The majority and dissent disagree on basic issues that appear to remain unresolved such as whether heavy financial burdens on speech should be treated the same way as outright bans on speech, and whether exposure to scrambled blips of indecent material is harmful to a child's well-being. The “least restrictive alternative” test allows jurists to frame issues so as to reach divergent results; therefore, until agreement exists on more pertinent questions like those above, it is difficult to predict what precedents *Playboy* will represent. This point is especially relevant when one considers that it is generally speculated that several Justices will retire in the near future. Without a more stable basis for the issues mentioned above, they will remain unresolved.

2. The Broadcast Media/Cable Television Distinction

Despite the uncertainty mentioned above, *Playboy* still has great precedential potential. If one assumes that by failing to dispute the majority's “cable television/broadcast media” distinction, the dissent concedes that a basic difference exists, the holding stands to have considerable impact. Given that the dissent wrote at length about other portions of the majority's opinion with which it disagreed, it is hard to believe that the dissent simply failed to address a point that was central to the majority's opinion. Rather, it seems more likely that the dissent grudgingly agreed with the distinction but was better able to support its position by avoiding the issue. Given this apparent agreement, it is likely that the single most important consequence of *Playboy* will be distinguishing cable television from broadcast media. The effect of this distinction is likely to be substantial, since it means that, in most situations, the holding of the landmark telecommunications regulation case *Pacifica*, will not apply.

The *Pacifica* Court mentioned two specific characteristics of broadcast media that justified restrictions on indecent broadcasts: (1) “the broadcast media have established a uniquely pervasive presence in the lives of all Americans;”⁹⁴ and, (2) “broadcasting is uniquely accessible to children”⁹⁵ Cable television is similarly “pervasive” and “accessible,” and the material in question was also deemed “indecent;” in fact, the *Denver* Court quoted the same language from *Pacifica*, demonstrating the basis for regulating cable television broadcasts.⁹⁶ The *Playboy* Court, however, chose not to extend the *Pacifica* reasoning. It chose instead to recognize the important differences between broadcasts that could be tailored to a particular recipient and those that are received uniformly.

Without specifically signaling a move toward liberalizing cable regulation, this distinction certainly removes a significant barrier. Given that the Supreme Court had previously suggested in *Denver* that the *Pacifica* logic *did* apply to cable television broadcasts,⁹⁷ the *Playboy* distinction is not merely the disposition of a fresh issue; it is the revocation of earlier reasoning now believed to be inaccurate. The significance of this distinction should not be underestimated. In *Playboy*, Justice Stevens referred to it as a “key” point upon which the case turned.⁹⁸ Undoubtedly, the distinction could constitute the turning point in future cases as well.

3. Signal Bleed—Significantly Insignificant

Perhaps it is appropriate that the case’s major impact relates only marginally to the issue of signal bleed. Signal bleed, while now an issue of Supreme Court proportions, likely will soon be reduced to a non-issue through technological innovation. The Court writes in *Playboy* that “digital systems are projected to become the technology of choice, which would eliminate the signal bleed problem.”⁹⁹ Additionally, the *Denver* Court mentioned that “manufacturers, in the future, will have to make televisions with a so-called ‘V-chip’—a device that will be able automatically to identify and block sexually explicit or violent programs.”¹⁰⁰ Thus, it seems that a holding clearly deciding whether or not signal bleed was a true

94. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

95. *Id.* at 749.

96. *Denver*, 518 U.S. at 745 (“Cable television systems, including access channels, ‘have established a uniquely pervasive presence in the lives of all Americans.’ . . . ‘Patently offensive’ material from these stations can ‘confron[t] the citizen’ in the ‘privacy of the home’ . . .”).

97. *Id.*

98. *Playboy*, 529 U.S. at 815.

99. *Id.* at 808.

100. *Denver*, 518 U.S. at 756.

danger would be useful only for a very short time.

V. CONCLUSION

The distinction between broadcast media and cable television is by far the most far-reaching result of *Playboy*. The Supreme Court could have found that because cable television possesses similarly invasive characteristics to those of broadcast media, *Pacifica* controls and section 505 should accordingly be upheld; however, such was not the Court's holding. Instead the Court put forth the idea that there is a key difference between a medium capable of being blocked on a household-by-household basis, and one that is broadcast uniformly to all recipients. As both types of media will undoubtedly be the subjects of future litigation, this distinction will be central to addressing restrictions placed upon them.

Playboy illustrates that at least five Justices hold the opinion that outright bans on speech demand a higher burden, and that, accordingly, burdens on speech should receive a level of scrutiny similar to that of bans. If this attitude wins out, additional statutes will be invalidated that serve compelling governmental interests while placing no more than a financial burden on speech. Though there is no disagreement that protecting children from harmful material is a compelling interest, the Court could not decisively say that exposure to signal bleed was actually harmful to children. As stated above, however, signal bleed is soon to be a problem of the past.

In writing telecommunications legislation, Congress must recognize that a permissible restriction on a broadcast medium such as commercial radio may not be allowed if imposed upon cable television. Additionally, it must be cognizant of the fact that statutes imposing burdens, rather than bans, are still subject to extremely high scrutiny. Cable providers need to make sure that when customers have rights, such as the option to have certain material omitted from their package, they are aware of those rights. *Playboy* and similar companies who provide adult entertainment should be cautiously optimistic. The broadcast media/cable television distinction is a victory, but not necessarily a landslide. Support can still be gained or lost, and a narrow reading of *Playboy* may only apply the holding to signal bleed, a soon-to-be-moot issue. Due to the many unresolved issues, any party having an interest in this case's outcome cannot with great certainty predict what will happen when similar cases arise in the future. Thus, as the saying goes, *don't touch that dial!*

