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Constitutionality of Applying the FCC's Indecency Restriction to Cable Television

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Henry Cohen
Legislative Attorney
American Law Division

Constitutionality of Applying the FCC's Indecency Restriction to Cable Television

Summary

Various federal officials have spoken in favor of extending the Federal Communication Commission's indecency restriction, which currently applies to broadcast television and radio, to cable and satellite television. This report examines whether such an extension would violate the First Amendment's guarantee of freedom of speech.

The FCC's indecency restriction was enacted pursuant to a federal statute that, insofar as it was found constitutional, requires the FCC to promulgate regulations to prohibit the broadcast of indecent programming from 6 a.m. to 10 p.m. The FCC has found that, for material to be "indecent," it "must describe or depict sexual or excretory organs or activities," and "must be patently offensive as measured by contemporary community standards for the broadcast medium."

In 1978, in *Pacifica*, the Supreme Court held that, because broadcast radio and television have a "uniquely pervasive presence" and are "uniquely accessible to children," the government may, during certain times of day, prohibit "[p]atently offensive, indecent material" on these media. In 1996, however, a Supreme Court plurality held that, with respect to "how pervasive and intrusive [television] programming is . . . cable and broadcast television differ little, if at all."

Then, in 2000, the Court held that governmental restrictions on speech on cable television are, unlike those on broadcast media, entitled to strict scrutiny. Thus, whereas, in *Pacifica*, the Court upheld a restriction on "indecent" material on broadcast media without applying strict scrutiny, the Court apparently would not uphold a comparable restriction on "indecent" material on cable television unless the restriction served a compelling governmental interest by the least restrictive means.

It seems uncertain whether the Court would find that denying minors access to "indecent" material on cable television would constitute a compelling governmental interest. Assuming that it would, then, whether or not there is a less restrictive means than a 6 a.m.-to-10 p.m. ban by which to deny minors access to "indecent" material on cable television, it appears that a strong case may be made that applying the FCC's indecency restrictions to cable television would violate the First Amendment. This is because, as the Supreme Court wrote when it struck down the ban on "indecent" material on the Internet, "the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'" In addition, the Court, in the 2000 case mentioned above, struck down a speech restriction on cable television, in part because "for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so."

Contents

Introduction	1
Constitutionality of Applying the FCC's Indecency Restriction to Cable	
Television	3
Applying Strict Scrutiny	6
Compelling Governmental Interest	6
Least Restrictive Means	8
Summary and Conclusion	11

Constitutionality of Applying the FCC's Indecency Restriction to Cable Television

Various federal officials have spoken in favor of extending the Federal Communication Commission's indecency restriction,¹ which currently applies to broadcast television and radio, to cable and satellite television.² This report examines whether such an extension would violate the First Amendment's guarantee of freedom of speech.

Introduction

The FCC's indecency restriction was enacted pursuant to a federal statute that, insofar as it was found constitutional, requires the FCC to promulgate regulations to prohibit the broadcast of indecent programming from 6 a.m. to 10 p.m.³ The FCC has found that, for material to be "indecent," it "must describe or depict sexual or excretory organs or activities," and "must be patently offensive as measured by contemporary community standards for the broadcast medium."⁴

Another federal statute makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication."⁵ This statute has been applied to pictures as well as words and to broadcast television as well as radio.⁶ In *Federal Communications Commission v. Pacifica Foundation*, the Supreme Court held that

¹ 47 C.F.R. § 73.3999(b).

² This report hereinafter does not refer to satellite television, but its references to cable television to may read to include satellite television. For references to support for applying the indecency restriction to cable television, see, e.g., Paul K. McMasters, *Inside the First Amendment: Surrendering our choices to a sense of decency*, Gannet News Service (Apr. 11, 2005); Drew Clark, *Lawmakers May Only Be Partially Pleased by Cable*, National Journal's Technology Daily (Apr. 4, 2005).

³ 47 U.S.C. § 303 note; *Action for Children's Television v. Federal Communications Commission*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996) (striking down the statute insofar as it banned "indecent programming" on non-public broadcast stations from 10 p.m. to midnight).

⁴ *In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, File No. EB-00-IH-0089 (April 6, 2001). [<http://www.fcc.gov/eb/Orders/2001/fcc01090.html>]

⁵ 18 U.S.C. § 1464.

⁶ See, e.g., *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011 (Sept. 22, 2004).

the statute does not violate the First Amendment when enforced during hours when children are likely to be in the audience.⁷

The Court in *Pacifica* explained:

[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve “the public interest, convenience, and necessity.” Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

Second, broadcasting is uniquely accessible to children, even those too young to read. . . . Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629, that the government’s interest in the “well-being of its youth” and in supporting “parents’ claim to authority in their own household” justified the regulation of otherwise protected expression. . . .⁸

In sum, the Court held that, because broadcast radio and television have a “uniquely pervasive presence” and are “uniquely accessible to children,” the government may, during certain times of day, prohibit “[p]atently offensive, indecent material” on these media, as such material threatens the well-being of minors and their parents’ authority in their own household. Since 1978, however, when the Court decided *Pacifica*, cable television has become more pervasive, thereby rendering broadcast media a less “uniquely pervasive presence.” In *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications*

⁷ 438 U.S. 726 (1978) (“It is appropriate, in conclusion, to emphasize the narrowness of our holding. . . . The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience.” *Id.* at 750). A federal court of appeals later declared a 24-hour-a-day ban unconstitutional. *Action for Children’s Television v. Federal Communications Commission*, 932 F.2d 1504 (D.C. Cir. 1991), *cert denied*, 503 U.S. 913 (1992).

⁸ *Id.* at 748-749.

Commission, a Supreme Court plurality held that, with respect to “how pervasive and intrusive [television] programming is . . . cable and broadcast television differ little, if at all.”⁹

If cable and broadcast television differ little, if at all, then, one might argue, they should be treated alike with regard to indecency restrictions. But does this mean, if one accepts that argument, that cable should be treated like broadcast or that broadcast should be treated like cable? In other words, should cable be made subject to the FCC’s indecency restriction, or should broadcast no longer be subject to them? This report will consider these questions from a constitutional standpoint, not from a policy standpoint.

Although one might argue that the fact that broadcast media is no longer uniquely pervasive should render *Pacifica* invalid, no court has found that to be the case, and the Supreme Court has cited *Pacifica* with approval in recent years.¹⁰ The FCC’s indecency restriction, therefore, appears to remain constitutional as applied to broadcast media.¹¹ But would it be constitutional to apply the indecency restriction to cable?

Constitutionality of Applying the FCC’s Indecency Restriction to Cable Television

In *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court held that a content-based speech restriction on cable television “can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative. To do otherwise would be to restrict speech without an adequate

⁹ 518 U.S. 727, 748 (1996). The plurality, quoting words from *Pacifica* that appear in the indented quotation above, added that cable television “is as ‘accessible to children’ as over-the-air broadcasting, if not more so,” has also “established a uniquely pervasive presence in the lives of all Americans,” and can also “‘confron[t] the citizen’ in ‘the privacy of the home,’ . . . with little or no prior warning.” *Id.* at 744-745. Justice Souter concurred that “today’s plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television. . . .” *Id.* at 776.

¹⁰ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

¹¹ This is not to say that every application of them by the FCC is necessarily constitutional. The FCC’s application of the restrictions to Bono’s single use of a four-letter word as a modifier, and to Janet Jackson’s “wardrobe malfunction” during a Superbowl halftime show, are being challenged; see CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Angie A. Welborn and Henry Cohen.

justification, a course the First Amendment does not permit. . . . It is rare that a regulation restricting speech because of its content will ever be permissible.”¹²

The indecency restriction is content-based; therefore, for its application to cable television to be constitutional, it must meet “strict scrutiny,” which means that it must promote a compelling governmental interest and be the least restrictive means to do so. This is the same standard that the Supreme Court applies to speech in newspapers, the Internet, and every other medium except broadcast radio and television.¹³ The Court does not apply strict scrutiny to broadcast media because, as noted in the above quotation from *Pacifica*, the Court holds that broadcast media have less First Amendment protection than other media.¹⁴ The Court, therefore, did not apply strict scrutiny in *Pacifica*, and the fact that in *Pacifica* it upheld the constitutionality of the indecency restriction as applied to broadcast media does not imply that it would uphold its constitutionality as applied to cable.

Playboy concerned federal restrictions on a type of “indecent” material on cable television: “signal bleed,” which refers to images or sounds that come through to non-subscribers, even though cable operators have “used scrambling in the regular course of business, so that only paying customers had access to certain programs.”¹⁵ These restrictions, which are found in section 505 of the Communications Decency Act of 1996, require operators of cable channels “primarily dedicated to sexually-oriented programming” to implement more effective scrambling — to fully scramble or otherwise fully block programming so that non-subscribers do not receive it — or

¹² *Playboy*, *supra* note 10, at 813, 818 (citations omitted).

¹³ The Court in *Playboy* wrote, however, “Cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts.” *Id.* Nevertheless, because the Court applied strict scrutiny in *Playboy*, this comment apparently means not that the Court would apply less than strict scrutiny to restrictions on cable television, but that applying strict scrutiny to restrictions on cable television might involve considerations not present when applying it to restrictions on other media.

¹⁴ The lower level of First Amendment protection for broadcast media dates back to *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 369 (1969), in which the Supreme Court upheld the FCC’s “fairness doctrine,” which “imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.” The reason that the Court upheld the imposition of the fairness doctrine on broadcast media, though it would not uphold its imposition on print media, is that “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” *Id.* at 388. In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 639 (1994), the Court held that this “spectrum scarcity” problem does not apply to cable television. In *Denver Area*, *supra* note 9, 518 U.S. at 748, the Court noted that spectrum scarcity, in any event, “has little to do with a case that involves the effects of television viewing on children. Those effects are the result of . . . how pervasive and intrusive that programming is.”

¹⁵ *Id.* at 806.

to “time channel,” which, under an FCC regulation meant to transmit the programming only from 10 p.m. to 6 a.m.¹⁶

“To comply with the statute,” the Court noted, “the majority of cable operators adopted the second, or ‘time channeling,’ approach. The effect . . . was to eliminate altogether the transmission of the targeted programming outside the safe harbor period [6 a.m. to 10 p.m.] in affected cable service areas. In other words, for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.”¹⁷ The Court also noted that “[t]he speech in question was not thought by Congress to be so harmful that all channels were subject to restriction. Instead, the statutory disability applies only to channels ‘primarily dedicated to sexually-oriented programming.’”¹⁸

The Court then applied strict scrutiny to section 505. It did not explicitly say that shielding children from sexually oriented signal bleed was a compelling interest, but it would “not discount the possibility that a graphic image could have a negative impact on a young child.”¹⁹ This suggests the possibility that, even if shielding young children from seeing graphic images on cable television is a compelling governmental interest, the Court might not find that shielding older children from such images is a compelling governmental interest. In addition, the Court rejected another interest as compelling: “Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech.”²⁰ In any case, it was not necessary for the Court to make an explicit finding of a compelling governmental interest, because it held the statute unconstitutional for not constituting the least restrictive means to advance any such interest.

The Court noted that there is “a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis. . . . [T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners”²¹ Furthermore, targeted blocking is already required — by section 504 of the Communications Decency Act, which requires cable operators, upon request by a cable service subscriber, to, without charge, fully scramble or otherwise fully block audio and video programming that the subscriber does not wish to receive.²² “When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to

¹⁶ 47 U.S.C. § 561.

¹⁷ *Playboy*, *supra* note 10, at 806-807.

¹⁸ *Id.* at 812.

¹⁹ *Id.* at 826.

²⁰ *Id.* at 825.

²¹ *Id.* at 815.

²² 47 U.S.C. § 560.

achieve its goal. The Government has not met that burden here.”²³ The Court concluded, therefore, that section 504, with adequate publicity to parents of their rights under it, constituted a less restrictive alternative to section 505.

Applying Strict Scrutiny

We now consider how a court might apply strict scrutiny in determining whether applying the FCC’s indecency restriction to cable television would be constitutional. We consider first whether a court would find that applying the restriction to cable television would serve a compelling governmental interest, and then, on the assumption that it would, we consider whether a court would find it the least restrictive means to advance that interest.

Compelling Governmental Interest. When the Court considers the constitutionality of a restriction on speech, it ordinarily — even when the speech that is restricted lacks full First Amendment protection and the Court applies less than strict scrutiny — requires the government to “demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”²⁴ With respect to restrictions designed to deny minors access to sexually explicit material, by contrast, the courts appear to assume, without requiring evidence, that such material is harmful to minors, or to consider it “obscene as to minors,” even if it is not obscene as to adults,²⁵ and therefore not entitled to First Amendment protection with respect to minors, whether it is harmful to them or

²³ *Playboy*, *supra* note 10, 529 U.S. at 816.

²⁴ *Turner Broadcasting*, *supra* note 14, 512 U.S. at 664 (incidental restriction on speech). *See also*, *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993) (restriction on commercial speech); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000) (restriction on campaign contributions). In all three of these cases, the government had restricted less-than-fully protected speech, so the Court did not apply strict scrutiny. Because “indecent” material is generally entitled to full First Amendment protection (except on broadcast media), one might expect that the Court, in determining the constitutionality of applying the FCC’s indecency restriction to cable television, would be all the more likely to require the government to demonstrate that harms it recites are real and that the indecency restriction would alleviate these harms in a direct and material way. But see the next sentence in the text.

²⁵ Material that is obscene as to adults is not entitled to First Amendment protection, whether or not it is harmful to adults. *Miller v. California*, 413 U.S. 15 (1973); *see* CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen.

not.²⁶ In *Pacifica*, as quoted above, the Court implied that making “indecent” material unavailable to children serves their “well-being.”²⁷

This is not to say with certainty that the Supreme Court would find a compelling governmental interest in denying minors access to “indecent” material. It might, for example, distinguish among different types of “indecent” material, and, even if it

²⁶ *Interactive Digital Software Association v. St. Louis County, Missouri*, 329 F.3d 954, 959 (8th Cir. 2003). The Supreme Court has “recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.” *Sable Communications of California v. Federal Communications Commission*, 492 U.S. 115, 126 (1989). The Court has also upheld a state law banning the distribution to minors of “so-called ‘girlie’ magazines,” even as it acknowledged that “[i]t is very doubtful that this finding [that such magazines are “a basic factor in impairing the ethical and moral development of our youth”] expresses an accepted scientific fact.” *Ginsberg v. New York*, 390 U.S. 629, 631, 641. “To sustain state power to exclude [such material from minors],” the Court wrote, “requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.” *Id.* at 641. *Ginsberg* thus “invokes the much less exacting ‘rational basis’ standard of review,” rather than strict scrutiny. *Interactive Digital Software Association, supra*, 329 F.3d at 959.

In addition, before *Playboy* reached the Supreme Court, a federal district court wrote:

We are troubled by the absence of evidence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children and that the avoidance of this harm can be recognized as a compelling State interest. We recognize that the Supreme Court’s jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved.

Playboy Entertainment Group, Inc. v. United States, 30 F. Supp.2d 702, 716 (D. Del. 1998), *aff’d*, 529 U.S. 803 (2000). The district court therefore found that the statute served a compelling governmental interest, though it held it unconstitutional because it found that the statute did not constitute the least restrictive means to advance the interest. As noted in the text above, the Supreme Court affirmed on the same ground.

In another case, a federal court of appeals, upholding the FCC’s indecency restrictions as applied to broadcast media, noted “that the Supreme Court has recognized that the Government’s interest in protecting children extends beyond shielding them from physical and psychological harm. The statute that the Court found constitutional in *Ginsberg* sought to protect children from exposure to materials that would ‘impair[] [their] *ethical and moral* development. . . . Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material. . . .” *Action for Children’s Television v. Federal Communications Commission, supra* note 3, 58 F.3d at 662 (brackets and italics supplied by the court of appeals). A dissenting judge in the case noted that, “[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful — indeed, the nature of the alleged ‘harm’ is never explained.” *Id.* at 671 (Edwards, C.J., dissenting).

²⁷ *See*, note 8, *supra*.

found a compelling governmental interest in denying minors access to sexually explicit material, it might find otherwise with respect to four-letter words, in light of the fact that minors generally hear such words elsewhere than on cable television, and in light of the fact that such words may be used as adjectives or expletives, arguably with no sexual or excretory connotation.²⁸ The Court might also distinguish among minors of different ages, even with respect to access to sexually explicit material. As noted above, in *Playboy* the Court seemed to leave open the possibility that it might not find a compelling governmental interest in shielding older children from sexually oriented material. In addition, when the Court struck down the portion of the Communications Decency Act of 1996 that prohibited “indecent” material on the Internet, the Court would “neither accept nor reject the Government’s submission that the First Amendment does not forbid a blanket prohibition on all ‘indecent’ and ‘patently offensive’ messages communicated to a 17-year-old — no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government’s interest in protecting minors is not equally strong throughout the coverage of this broad statute.”²⁹

The Supreme Court has cited another governmental interest that might be asserted to justify applying the FCC’s indecency restriction to cable, but the Court has not stated whether it is “compelling”: it is the interest “in supporting ‘parents’ claim to authority in their own household.”³⁰ A dissenting judge has argued that “a law that effectively *bans* all indecent programming . . . does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my . . . television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming.”³¹

Perhaps, however, the Supreme Court would take the approach it did in *Playboy* and focus on the second aspect of strict scrutiny: whether the FCC’s indecency restriction is the least restrictive means available to advance the government’s interest.

Least Restrictive Means. Assuming for the sake of argument that applying the FCC’s indecency restriction to cable television would serve a compelling governmental interest, is there a less restrictive means by which that interest could be served? If so, then applying the FCC’s indecency restriction to cable television would be unconstitutional. The Court in *Playboy*, as quoted above, noted that there

²⁸ The FCC, however, has ruled that “given the core meaning of the ‘F-Word,’ any use of that word, or a variation, in any context, inherently has a sexual connotation. . . .” In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, File No. EB-03-IH-0110 (Mar. 18, 2004).

²⁹ *Reno v. American Civil Liberties Union*, *supra* note 10, 521 U.S. at 878.

³⁰ *Pacifica*, *supra* note 7, 438 U.S. at 749, quoting *Ginsberg*, *supra* note 26, 390 U.S. at 639. *See also*, *Playboy*, *supra* note 10, 529 U.S. at 815.

³¹ *Action for Children’s Television v. Federal Communications Commission*, *supra* note 3, 58 F.3d at 670 (emphasis in original) (Edwards, C.J., dissenting).

is “a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis. . . . [T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners”³²

The targeted blocking, however, that the Court in *Playboy* found to be a less restrictive means to keep signal bleed from viewers who object to it, would not seem as feasible to keep “indecent” material from viewers who object to it. In the case of signal bleed, a viewer could request blocking of channels that he knows to present pornography. By contrast, in order for targeted blocking to keep “indecent” programming from viewers who object to it, viewers would have to know what channels would ever, between 6 a.m. and 10 p.m., allow on any program the utterance of a four-letter word or the exposure of a woman’s breast, among other things. For viewers to know this would seem to entail that every channel be required to state whether it will refrain from transmitting “indecent” material on all future programming, and, if a channel stated that it would, to be bound by that statement. This requirement would appear to burden freedom of speech to the extent that it might well violate the First Amendment.³³ It might even be viewed as a prior restraint, and prior restraints are almost always unconstitutional.³⁴

To the extent that technology allows viewers to block particular programs as opposed to entire channels, the same First Amendment difficulties would apparently arise. For such blocking to be effective, producers who did not wish to be blocked for transmitting “indecent” programming would have to agree to refrain from ever allowing the utterance of a four-letter word on a program, even if the program ordinarily contained nothing deemed “indecent.”

Thus, there may be no less restrictive means that would be constitutional to keep “indecent” material off cable television during certain hours than to apply the FCC’s indecency restrictions.³⁵ This, however, would not necessarily mean that to apply them to cable television would be constitutional. Two federal courts of appeals have written that “[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.”³⁶ The

³² *Playboy*, *supra* note 10, 529 U.S. at 815.

³³ “The 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.” *Playboy*, *supra* note 10, at 812.

³⁴ See CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Henry Cohen.

³⁵ The government could, of course, reduce the numbers of hours per day that it bans “indecent” material, though the Supreme Court might be less likely to find a compelling governmental interest in a shorter ban, because a shorter ban would be less effective in denying minors access to “indecent” material.

³⁶ *American Civil Liberties Union v. Reno*, 217 F.3d 162, 179 (3d Cir. 2000), *vacated and* (continued...)

more recent of these cases affirmed a preliminary injunction against the enforcement of the Child Online Protection Act, which banned material that is “harmful to minors” from the Internet.³⁷ The older case upheld FCC regulations that implemented a statute that restricted minors’ access to obscene “dial-a-porn” services.

It appears that a strong case may be made that applying the FCC’s indecency restriction to cable television would be “unreasonable” under the above court of appeals’ formulation. This is because, as the Supreme Court wrote when it struck down the ban on “indecent” material on the Internet, “the Government may not ‘reduc[e] the adult population . . . to . . . only what is fit for children.’ ‘[R]egardless of the strength of the government’s interest’ in protecting children, ‘[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.’”³⁸

One might reply that to apply the FCC’s indecency restriction to cable would limit the adult population’s discourse only from 6 a.m. to 10 p.m. But the fact the Supreme Court in *Pacifica* upheld such a limitation on broadcast media does not mean that it would uphold it on cable television. In *Pacifica*, as noted, the Court did not apply strict scrutiny. In *Playboy*, where the Court did apply strict scrutiny to a speech restriction on cable television, it held the speech restriction unconstitutional, in part because, as quoted above, “for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.”³⁹ In addition, the Court struck down the ban in the Communications Decency Act of 1996 on “indecent” material on the Internet, notwithstanding that such material is available to adults in other media.⁴⁰ It seems clear that governmental restrictions of fully protected speech, including “indecent” material on cable television, are unconstitutional unless they pass strict scrutiny, even if they do not close all outlets for such speech.

³⁶ (...continued)

remanded on other grounds sub nom., *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002), quoting *Carlin Communications, Inc. v. Federal Communications Commission*, 837 F.2d 546, 555 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988).

³⁷ In *Reno v. American Civil Liberties Union*, *supra* note 10, 521 U.S. 844 (1997), the Supreme Court struck down the Communications Decency Act of 1996, which banned “indecent” material on the Internet, and, in *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004) (a second Supreme Court decision in *American Civil Liberties Union v. Reno*, *supra* note 36), the Court upheld a preliminary injunction against enforcement of the Child Online Protection Act, which banned “harmful to minors” material on the Internet. In both cases, the Court applied strict scrutiny and suggested that filtering software might be a less restrictive alternative. 521 U.S. at 844; 124 S. Ct. at 2792. This alternative, of course, would not be an option with respect to cable television.

³⁸ *Reno*, *supra* note 10, 521 U.S. at 875 (citations omitted).

³⁹ *Playboy*, *supra* note 10, at 806-807.

⁴⁰ *Reno*, *supra* note 10.

Summary and Conclusion

In 1978, in *Pacifica*, the Supreme Court held that, because broadcast radio and television have a “uniquely pervasive presence” and are “uniquely accessible to children,” the government may, during certain times of day, prohibit “[p]atently offensive, indecent material” on these media. In 1996, however, in *Denver Area Consortium*, a Supreme Court plurality held that, with respect to “how pervasive and intrusive [television] programming is . . . cable and broadcast television differ little, if at all.”

The fact that a plurality of the Court views cable and broadcast television as differing little with respect to their pervasiveness and intrusiveness might suggest that the Court would apply the First Amendment to both media in the same way. The Court, however, continues to cite *Pacifica* with approval, but, in *Playboy*, it held that governmental restrictions on cable television are, unlike those on broadcast media, entitled to strict scrutiny. Thus, whereas, in *Pacifica*, the Court upheld a restriction on “indecent” material on broadcast media without applying strict scrutiny, the Court apparently would not uphold a comparable restriction on “indecent” material on cable television unless the restriction served a compelling governmental interest by the least restrictive means.

It seems uncertain whether the Court would find that denying minors access to “indecent” material on cable television would constitute a compelling governmental interest. Although the Court has held that denying minors access to sexually explicit material constitutes a compelling governmental interest, not all “indecent” material is sexually explicit. In addition, the Court has suggested that it may not view minors of all ages identically for First Amendment purposes.

Assuming for the sake of argument that the Court would find a compelling governmental interest in denying minors access to “indecent” material on cable television, there does not appear to be a less restrictive means than the FCC’s restrictions to advance this interest, other than banning “indecent” material for fewer hours per day. The lack of a less restrictive means, however, would not necessarily mean that to apply the FCC’s restrictions to cable television would be constitutional. This is because, as two federal courts of appeals have written, “[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.” The Supreme Court has not spoken on this proposition, however.

It appears that a strong case may be made that applying the FCC’s indecency restriction to cable television would be “unreasonable” under this formulation. This is because, as the Supreme Court wrote when it struck down the ban on “indecent” material in the Internet, “the Government may not ‘reduc[e] the adult population . . . to . . . only what is fit for children.’” In *Playboy*, the Court, applying strict scrutiny, struck down a speech restriction on cable television, in part because “for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.” Thus, it appears likely that a court would find that to apply the FCC’s indecency restriction to cable television would be unconstitutional.