# Diverse Programming vs. Community Standards: The Constitutionality of Municipal Censorship of Leased Access Cable

*In 1984, Congress enacted the Cable Communications Policy Act to provide a national scheme for the regulation of cable television. Sections 531 and 532 of the Cable Act require cable operators to provide "leased access" to programmers who are unaffiliated with the cable operator. The cable operator has no editorial control over the programs. Instead, section 532(h) of the Act allows the franchising authority to restrict offensive programming. The section, however, has two serious flaws. First, the section's language ostensibly violates the overbreadth doctrine. Second, the section lacks procedures necessary to safeguard constitutionally protected expression. The section, therefore, arguably violates the first amendment.*

Cable television access channels provide opportunities for expression unavailable in other media. Access channels are generally of four types: public, educational, government, and leased access. Public access channels are the "video equivalent to the speaker's soap box or . . . the printed leaflet."[1] Educational and government access channels bring the local schools and government into the home. Leased access channels provide channel capacity for program suppliers other than the cable operator.

While cable operators have economic incentives to provide diverse programming to attract subscribers, they have little incentive to provide programming capacity for others. This is especially true if the proposed programming conflicts with the cable operator's social, moral, or political views, or competes with the operator's current programming.[2] To realize the opportunities available through access

1. H.R. REP. NO. 934, 98th Cong., 2nd Sess. 55, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655 [hereinafter HOUSE REPORT].

2. HOUSE REPORT, *supra* note 1, at 48, *reprinted in* 1984 U.S. CODE CONG. &

channels, Congress attempted to provide such incentive externally by establishing a "clear and comprehensive scheme for commercial access"[3] in the Cable Communications Policy Act of 1984[4] ("Cable Act"). In reality, the provisions create considerable uncertainty for both prospective access users[5] and franchising authorities.[6] This Comment explores one of the most problematic of the 1984 leased access provisions, section 532(h).[7]

Section 532(h) gives a franchising body authority to prohibit or condition programming which, in its view, is "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution."[8] The purpose of this provision is questionable given Congress' stated goal of encouraging the "widest possible diversity of information sources."[9] Section 532 widens programming diversity by mandating leased access channels,[10] while section 532(h) restricts diversity by granting franchising authorities extensive power to regulate content on channels.

This Comment addresses the substantive and procedural flaws of section 532(h). Part I places the Cable Act in historical perspective, discussing the various attempts to implement and regulate access programming. Part II interprets the scope of the statutory language, "obscene . . . lewd, lascivious, filthy, or indecent or . . . otherwise unprotected by the Constitution," within the constraints of statutory construction and the first amendment. Part III discusses the proce-

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ADMIN. NEWS 4685.

3. HOUSE REPORT, *supra* note 1, at 31, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4668. The Cable Act uses the term "commercial access" rather than the traditional term, "leased access." 47 U.S.C. § 532 (Supp. III 1985).

4. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (pertinent sections codified at 47 U.S.C. §§ 521, 522, 531-533, 541-547, 551-559, 601-611 (Supp. III 1985)).

5. Winer, *The Signal Cable Sends, Part II - Interference From the Indecency Case?*, 55 FORDHAM L. REV. 459, 510 (1987); *see infra* text accompanying notes 161-71.

6. In most cases, the franchising authority is the municipality. For an explanation of the basis for municipality regulation of cable television, *see infra* text accompanying notes 36-41.

7. 47 U.S.C. § 532(h) (Supp. III 1985).

> Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States.

*Id.*

8. *Id.* The language of the statute seems to indicate that material which is lewd, lascivious, filthy or indecent, but which falls short of being obscene, is unprotected by the Constitution. This is not the case. Only obscenity is wholly unprotected by the Constitution. *See* Miller v. California, 413 U.S. 15 (1973). This Comment will address the extent of protection given broadcast indecency. *See infra* notes 71-127 and accompanying text.

9. 47 U.S.C. § 532(a) (Supp. III 1985).

10. *Id.* § 532(b).

dural defects of section 532(h). Finally, this Comment concludes that the substantive and procedural flaws of section 532(h) render it unconstitutional, and therefore useless as a guide to the franchising authority, and provides practical recommendations for legislating a replacement provision.

## I. SECTION 532 IN HISTORICAL PERSPECTIVE

The earliest cable television, called "Community Antenna Television" (CATV),[11] began as a means to improve local reception in mountainous areas.[12] Since the new industry served only small towns which would not otherwise receive broadcast stations, the broadcast industry had few complaints.[13] Therefore, both federal and state governments were slow to assert jurisdiction over the budding industry.[14] However, as improvements in technology allowed the cable systems to expand into metropolitan areas, broadcasters demanded regulation of this new competition.[15]

At first, the Federal Communications Commission (FCC) doubted its power to regulate cablecasters.[16] Under the Communications Act of 1934, the FCC had authority to regulate "all interstate and foreign communication by wire or radio."[17] Since the Act predated cable television,[18] it provided no direct authority for FCC regulation of cable. However, in 1968 the Supreme Court held that the FCC had authority to regulate cable to the extent that such regulation was "reasonably ancillary" to FCC regulation of broadcast television

11. I. STEIN, CABLE TELEVISION HANDBOOK AND FORMS 1-6 (1985).

12. P. PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 12 (1987). "One big antenna could provide a clear signal for an entire town." I. STEIN, *supra* note 11, at 1-7.

13. P. PARSONS, *supra* note 12, at 13.

14. I. STEIN, *supra* note 11, at 1-10.

15. P. PARSONS, *supra* note 12, at 13. The cable systems offered the broadcast audience expanded channel choice, broadcast programming imported from other cities, new cable programming uninterrupted by commercials, and national programming of movies, sports, news and specialty programs for children, seniors and minorities. HOUSE REPORT, *supra* note 1, at 21. In contrast, broadcast television's limited offerings provided little variety to retain their audiences. The broadcasters therefore turned to the government for protection.

16. Frontier Broadcasting v. Collier, 24 F.C.C. 251 (1958) (refusing to assert jurisdiction over cable when 13 broadcasters requested FCC regulation of cable on the grounds that cable transmission of distant programming threatened the economic viability of broadcasters).

17. 47 U.S.C. § 152(a) (1982).

18. The first nonprofit cable system began in Astoria, Oregon in 1947, and the first commercial system started in Mahony and Lansford, Pennsylvania in 1949. I. STEIN, *supra* note 11, at 1-6; P. PARSONS, *supra* note 12, at 10.

under the Communications Act.[19]

The FCC immediately began to examine the kinds of regulations it could adopt under the ruling.[20] Its focus quickly shifted from protecting the broadcast industry to developing cable technology for the benefit of the public.[21] The Supreme Court endorsed this new focus by upholding regulations requiring cable systems to produce a significant amount of local programs.[22] In 1972 the FCC promulgated a comprehensive set of cable regulations covering signal carriage, importation, program exclusivity, channel capacity, technical standards, state and local regulation, and certificates of compliance.[23] In addition, the FCC mandated that access channels satisfy the "increasing need for channels for community expression."[24] The new rules required cable operators to provide free channels for public, government, and educational access, with the remaining capacity available for leased access.[25]

Finding the 1972 regulations unworkable,[26] the FCC rewrote the access rules in 1976. The 1976 rules applied to cable systems with over 3500 subscribers.[27] The FCC required that these systems provide channels for public, educational, government, and leased access.[28] Until demand was sufficient, all access programing could

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19. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (upholding FCC regulations requiring cable systems to carry local broadcast television signals, forbidding duplication of local broadcast programming, and restricting transmission of distant signals to only the 100 largest markets).

20. DEREGULATION OF CABLE TELEVISION 6 (P. MacAvoy ed. 1977).

21. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 417 (1968). The FCC was now faced with the "broad question of how to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public with particular immediate reference to CATV technology." *Id.*

22. The Court upheld an FCC regulation requiring that " 'no CATV system having 3500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.' " United States v. Midwest Video Corp., 406 U.S. 649, 653-54 (quoting 47 C.F.R. § 74.1111(a)), *reh. denied*, 409 U.S. 898 (1972). Although the Court upheld the regulation, the FCC abandoned the rule in 1974. S. RIVKIN, A NEW GUIDE TO FEDERAL CABLE TELEVISION REGULATIONS 304-05, n.10 (1978).

23. I. STEIN, *supra* note 11, at 1-20.

24. Cable Television Report and Order, 36 F.C.C.2d 143, 191 (1972).

25. I. STEIN, *supra* note 11, at 15-3 to 15-4.

26. *Id.* at 15-4. The new regulations made expansion of a cable system more costly. P. PARSONS, *supra* note 12, at 20. These increased costs, compounded by a recessive economy which hurt industry revenues and investment, severely inhibited the growth of the industry. I. STEIN, *supra* note 11, at 1-21. In addition, the regulations required extensive, detailed supervision, making full enforcement difficult if not impossible. Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77, 98 (1981). Moreover, the general disfavor with federal regulation during this period assured the end of these comprehensive regulations. *Id.*

27. Report and Order, Cable TV Capacity and Access Requirements, 59 F.C.C.2d 294, 297 (1976).

28. 47 C.F.R. § 76.254(a) (1977) (repealed 1980).

share one or more channels.[29] Cable operators had no editorial control over access programming, except to prohibit lottery information, commercial matter, obscenity, and indecency.[30] In addition, cable operators were to provide time on the public and leased access channels on a first come, nondiscriminatory basis.[31]

In 1979 the Supreme Court held that the FCC had exceeded its "reasonably ancillary" jurisdiction in promulgating the 1976 regulations, and thus the regulations were voided.[32] The Court reasoned that the 1976 regulations relegated cable systems to common-carrier status in violation of section 3(h) of the Communications Act of 1934.[33] In response to this decision, the FCC repealed many of the 1976 regulations,[34] leaving cable regulation in the hands of state and local governments.[35]

Unlike broadcasting, cable television has always been under the dual jurisdiction of the FCC and local authorities. This dual jurisdiction arises from the way programing is transmitted on cable systems. Cable systems transmit programming by electronic impulses through a coaxial cable[36] placed on utility poles, under public streets, or through private property.[37] Broadcasting, in contrast, radiates electromagnetic energy through the air.[38] Thus, both cable operators and broadcasters must get FCC approval to transmit television programing.[39] However, cable operators must obtain an easement from the municipality to erect utility poles and lay cables underneath the streets.[40]

The necessary easement, called a "franchise," gave the municipality power over cablecasters which they did not have over other media

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29. 47 C.F.R. § 76.254(b) (1977) (repealed 1980).
30. 47 C.F.R. § 76.25(b),(d)(1977) (repealed 1980).
31. 47 C.F.R. § 76.256(d)(1),(3)(1977) (repealed 1980).
32. F.C.C. v. Midwest Video Corp., 440 U.S. 689, 700-01 (1979).
33. *Id.* Section 3(h) states in pertinent part, "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." 47 U.S.C. § 153(h)(1982).
34. Cable Television Channel Capacity and Access Requirements, 83 F.C.C.2d 147 (1980).
35. Comment, *Public Access to Cable Television*, 33 HASTINGS L.J. 1009, 1028 (1982).
36. Comment, *Expanding the Scarcity Rationale: The Constitutionality of Public Access Requirements in Cable Franchise Agreements*, 20 U. MICH. J.L. REF. 305, 307 (1986).
37. I. STEIN, *supra* note 11, at 10-1.
38. Comment, *Cable Television: The Constitutional Limitations of Local Government Control*, 15 SW. U.L. REV. 181, 182-83 (1984).
39. *Id.* at 184; I. STEIN, *supra* note 11, at 10-1.
40. Comment, *supra* note 38, at 184; I. STEIN, *supra* note 11, at 10-1.

providers.[41] This power, combined with the lack of federal regulation, left municipalities free to promulgate their own access regulations.[42] With the demand for cable service increasing and competition for cable franchises tightening, cable companies were willing to comply with local regulations demanding access channels.[43] The increase in local regulation created problems with national uniformity. Congress, fearing inconsistent regulation, responded by enacting the 1984 Cable Communications Policy Act.[44]

The Cable Act contains two sections of access rules. Section 531 gives the franchising body authority to designate certain channel capacity for public, educational, or government access[45] and allows local regulation of the channels.[46] Section 532 addresses leased access[47] and is the only section of the Cable Act which states its own purpose: "to assure that the widest possible diversity of information sources are [sic] made available to the public from cable systems in a manner consistent with growth and development of cable systems."[48] Section 532(b) requires cable operators to provide channel capacity for leased access channels based on their total number of activated channels.[49] These channels are reserved for use by persons unaffiliated with the cable operator.[50] The cable operator cannot exercise any editorial control over program content.[51] Section 532(c) allows the operator to consider content only when establishing a reasonable price for use.[52] Other subsections address the promulgation

41. I. STEIN, *supra* note 11, at 10-1.
42. Comment, *supra* note 35, at 1028-29.
43. *Id.*
44. Congress described the purpose of the act as follows: "[To] establish a national policy concerning cable communications [and to] establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(1), (3)(Supp. III 1985).
45. 47 U.S.C. § 531(b)(Supp. III 1985). "A franchising authority may in its request for proposals require as part of a franchise . . . that channel capacity be designed for public, educational, or governmental use . . . ." *Id.*
46. 47 U.S.C. § 531 (Supp. III 1985).
47. *Id.* § 532.
48. *Id.* § 532(a).
49. *Id.* § 532(b).
50. *Id.* § 532(b)(1). The Cable Act does not define the term "unaffiliated." However, to fully realize the goal of promoting diverse programming sources, it must be read broadly to forbid any economic relationship between the cable provider and the programmer, other than, of course, the commercial use agreement. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543, 592 n.290 (1985).
51. 47 U.S.C. § 532(c)(2) (Supp. III 1985).
52. *Id.* Section 532(c) codifies an important departure from the mandatory access requirements struck down in F.C.C. v. Midwest Video Corp., 440 U.S. 689 (1979). Whereas the previous access regulations mandated nondiscriminatory access channels, sections 532(c)(2) and 532(c)(3) allow the cable operator to set rates, terms and conditions based on the nature of the programming. HOUSE REPORT, *supra* note 1, at 51, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 1688. If cable operators were required to charge one nondiscriminatory rate, they would be forced to set that rate at

and violation of the leased access rules.[53]

The remainder of this Comment will focus on section 532(h), which provides:

> Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States.[54]

A franchising authority's control of the content of leased access programs is governed by this provision. To determine the extent of that control, the franchising authority must understand the scope of "obscene . . . lewd, lascivious, filthy, . . . indecent or . . . otherwise unprotected by the Constitution."[55]

## II. UNDERSTANDING THE SCOPE OF "OBSCENE . . . LEWD, LASCIVIOUS, FILTHY, OR INDECENT"

The string of adjectives, "obscene, lewd, lascivious, filthy, or indecent," presents an ambiguous and possibly unconstitutional standard for franchising authorities. Congress has used these five adjectives in other statutes[56] in an attempt to regulate communications referring to sexual or excretory activities which may offend audiences. The courts have typically interpreted such statutes to prohibit only obscene matter.[57] Recently, the Supreme Court in *F.C.C. v. Pacifica Foundation*[58] interpreted 18 U.S.C. section 1464[59] to restrict both

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the average for all types of programming. Programming with a higher fair market price would flood the channels, while programming with a lower fair market price could not afford access. Thus, the legislature justifies the cable operator's consideration of the *nature* of the programming in setting the rates, terms and conditions. The legislative history states that, in order to set a price based on the *nature* of the programming, it is "obviously necessary" that the cable operator consider the *type* of programming. *Id.* Thus, it follows that the cable operator must be allowed to consider the *content* of the programming, but only to set a reasonable price, not to determine the terms or conditions. *Id.* The legislative history, therefore, seems to indicate that content is only relevant to the extent that it dictates the nature of the programming upon which rates are based. Any other relevance the legislature finds between content and price, however, is unclear and is beyond the scope of this Comment.

53. 47 U.S.C. § 532(d)-(g) (Supp. III 1985).
54. *Id.* § 532(h).
55. *Id.*
56. *See, e.g.*, 18 U.S.C. §§ 1461, 1462, 1465 (1988); 19 U.S.C. § 1305(a) (1988).
57. *See infra* text accompanying notes 135-51.
58. 438 U.S. 726 (1977). *See infra* text accompanying notes 152-59.
59. 18 U.S.C. § 1464 (1988). "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." *Id.*

obscene and indecent broadcasting. It is possible that the Court might apply *Pacifica* to section 532(h) based on the similarities between cable and broadcasting.[60] Indeed, without such an interpretation, section 532(h) may violate the overbreadth doctrine.[61]

### *A. An Introduction to the Overbreadth Doctrine*

A statute is facially void if it not only controls activities which are constitutionally unprotected, but also "sweeps within its ambit" areas of protected activity.[62] Because many laws potentially apply to protected activity, a law is "void for overbreadth" only when the protected activity constitutes a significant portion of the statute's target and cannot otherwise be severed from the statute's constitutional applications in a single proceeding.[63] While this doctrine applies to any statute, the requirement of a single severance, rather than the usual case-by-case approach to statutory construction, is critical in the sensitive area of first amendment protection. Typically, a particular application of a statute is struck down only when challenged as applied.[64] Meanwhile, the prospect of legal battles will undoubtedly discourage the activity in question. While this may be an acceptable risk in many areas of the law, the discouragement of protected expression is intolerable. This "chilling effect" upon protected expression necessitates the invalidation of such laws.

In recent years, the Court has demonstrated an increased reluctance to invalidate entire statutes under the overbreadth doctrine. Instead, the Court has shown a willingness to reconstruct challenged statutes in order to cure constitutional defects.[65] The degree to which the Court can reconstruct federal statutes is somewhat limited, how-

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60. *See infra* text accompanying notes 78-127.

61. *See generally*, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1.

62. Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (statute banning picketing held to be void for overbreadth because it forbade peaceful picketing which is constitutionally protected).

63. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1022 (2d ed. 1988). Where the protected activity is not a significant part of the statute's target, the law may stand although application to the protected activity is not allowed.

64. *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (holding that the Sherman Act did not prohibit concerted lobbying efforts); Marsh v. Alabama, 326 U.S. 501 (1946) (holding that a trespass ordinance did not prohibit dissemination of religious material in company town).

65. L. TRIBE, *supra* note 63, at 1026-27. The traditional treatment of "obscene, lewd, lascivious, filthy or indecent" provides an apt illustration of this tendency. Rather than invalidate the statutes for referring to protected expression, the Courts interpreted the statutes to ban only unprotected obscenity. *See, e.g.*, Marks v. United States, 430 U.S. 188, 195 (1977) (interpreting 18 U.S.C. § 1461); *see also infra* text accompanying notes 135-51. In another obscenity case, the Court supplied the lacking procedural safeguards in a statute providing for the seizure of obscene material imported into the United States. United States v. Thirty-Seven Photographs, 402 U.S. 363, 368-75 (1971) (interpreting 19 U.S.C. § 1305(a)); *see infra* text accompanying notes 192-200.

ever, by the separation of powers doctrine.[66] At some point, judicial efforts at reconstruction become "relegislation," a job reserved for Congress. This problem is further complicated because the alternative to reconstruction is facial invalidation, which presents practical problems of its own. Once a statute is invalidated, the legislature must work to enact a valid replacement, leaving "unprotected and presumably harmful speech . . . wholly unregulated" in the interim.[67] Moreover, in light of the legislature's vulnerability to political pressures, it is doubtful that judicial invalidation of repressive statutes will substantially increase legislative sensitivity to free speech when the public demands censorship.[68] Faced with these alternatives, it behooves the Court to strive for a constitutional construction of the statute. However, the Court must respect the delicate balance between proper judicial functions and "relegislation."

### *B. The Constitutional Limits For Regulation Of Cable Content*

A constitutional construction of section 532(h) requires an examination of the extent to which sexually offensive material on cable television is protected. The ability of the franchising authority to regulate cable obscenity is not questioned. "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."[69] In *Miller v. California*, the Court expounded a definition of obscenity which marked the outer limits of constitutional protection afforded all media.[70] This standard re-

66. Monaghan, *supra* note 61, at 30.
67. *Id.* at 32.
68. *Id.* at 33.
69. Miller v. California, 413 U.S. 15, 23 (1973); *see also* Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Reidel, 402 U.S. 351 (1971); Roth v. United States, 354 U.S. 476 (1956).
70. 413 U.S. at 24. The *Miller* obscenity test asks:

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

*Id.* (citation omitted).

The Court had great trouble defining obscenity. *Roth v. United States* first defined obscenity as "deal[ing] with sex in a manner appealing to prurient interest." 354 U.S. 476, 487 (1956). A decade later, the Court severely limited *Roth* by requiring, in addition, that the material "be utterly without redeeming social value." Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966). In spite of the formulation, no majority could agree upon a standard by which to judge alleged obscenity. *Miller*, 413 U.S. at 22. One Justice expressed his frustration with defining the term: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand descrip-

mained intact until *F.C.C. v. Pacifica Foundation.*[71]

### *1. Applying* Pacifica *to Cable*

*Pacifica* arose out of a 2:00 p.m. broadcast of a George Carlin monologue entitled "Filthy Words."[72] A father who had heard the broadcast while driving with his son complained. The FCC could consider that incident, and any others, when the time came to renew Pacifica's license. Pacifica challenged FCC authority to regulate a radio broadcast that was indecent but not obscene. The court found that the unique characteristics of broadcasting made the particular regulation acceptable.[73] In emphasizing the narrowness of its holding, the Court noted that "differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant" in deciding the extent of constitutional protection afforded a medium.[74] The narrowness of *Pacifica* has since been reaffirmed as the Court has refused to apply the same rationales to indecency regulations on unsolicited mail[75] and "dial-a-porn."[76]

The Court has long held that "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it."[77] Therefore, to determine the applicability of *Pacifica* to cable television, a comparison must be made between cable and broadcasting. Lower federal courts making this comparison have consistently distinguished the two media, finding the *Pacifica* rationales inapplicable to cable.[78]

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tion. . . . But I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This led to the *Redrup* approach of reversing convictions where at least five members found the material to be protected under whatever personal test they applied. Redrup v. New York, 386 U.S. 767 (1967). By the time *Miller* was decided, 31 cases had been resolved that way. *Miller*, 413 U.S. at 22 n.3.

71. 438 U.S. 726 (1977).

72. *Id.* at 729.

73. *Id.* at 748.

74. *Id.* at 750. The Court did not indicate any particular differences in the media which it might find relevant. However, the Court recognized that some differences did exist which could vary the level of appropriate constitutional protection. The Court also emphasized that the time of day, content of the program, and composition of the audience were important considerations. *Id.* This aspect of the holding is discussed later in this Comment. *See infra* text accompanying notes 177-83.

75. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (statutory ban on unsolicited advertisements for contraceptives violates first amendment).

76. Sable Communications of California, Inc. v. F.C.C., 109 S. Ct. 2829 (1989) (statutory ban on indecent telephone messages violates the first amendment).

77. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (city plays); *see also* Metromedia v. San Diego, 453 U.S. 490, 501 (1981) (billboards); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 386 (1969) (broadcasting).

78. Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985) (Miami ordinance regulating indecent and obscene cable television); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D.C. Utah 1985) (holding Utah Cable Television Programming Decency Act to be unconstitutionally overbroad and vague), *aff'd sub nom.* Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986) (per curium), *aff'd* 480 U.S. 926 (1987); Community

### 2. *The "Unique" Pervasiveness of Broadcasting*

The *Pacifica* Court focused on two "unique" characteristics of broadcasting in limiting the reach of constitutional protection: pervasiveness and accessibility to children. "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans."[79] Although one court interpreted this pervasiveness to refer to the "ever-presen[ce]" of broadcast transmissions in the air,[80] the holding seems to rest more on the idea that "material presented over the airwaves confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[81] To define pervasiveness literally would support content regulation of a medium solely because of its wide public acceptance.[82] This approach seems contradictory since wide acceptance implies public approval, indicating that content regulation is unnecessary.

In *Pacifica*, the Court characterized the broadcast listener as a member of a captive audience who is subjected to an unwanted intrusion into the privacy of his home.[83] Lower federal courts have distinguished cable television from this characterization of broadcasting by focusing on the subscription aspect of cable as an invitation into the home.[84] The subscriber requests cable service, chooses the scope of channels, pays for it on a monthly basis, and may cancel it at any time. The subscriber may also change to one of the many other channels offered by cable or simply turn off the set.[85]

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Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (N.D. Utah 1982) (striking down municipal ordinance banning distribution of pornography or indecency); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (C.D. Utah 1982) (striking down Utah statute banning distribution of pornographic or indecent material over wire or cable); *see also infra* text accompanying note 84.

79. F.C.C. v. Pacifica Foundation,, 438 U.S. 726, 748 (1977).

80. *Roy City*, 555 F. Supp. at 1169.

81. *Pacifica*, 438 U.S. at 748.

82. G. SHAPIRO, P. KURLAND & J. MERCURIO, 'CABLESPEECH' THE CASE FOR FIRST AMENDMENT PROTECTION 34 n.15 (1983). *But see* Wardle, *Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television Programming*, 63 DEN. U.L. REV. 621, 650 (1986).

83. *Pacifica*, 438 U.S. at 748.

84. *Cruz*, 755 F.2d at 1420; *Wilkinson*, 611 F. Supp. at 1113-14 n.76; *Roy City*, 555 F. Supp. at 1168; *Home Box Office*, 531 F. Supp. at 1001-02.

85. Admittedly, the option of turning the receiver (television set or radio) off is identical in broadcast and cable. Furthermore, the Court seems to have rejected this option. "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." *Pacifica*, 438 U.S. at 748-49. Although an audience offended by dialogue in a public setting must turn away, the same does not hold true within the sanctity of the

Advocates seeking similar treatment of cable and broadcasting point to the lack of viewer choice in both media.[86] "Unlike purchasers of books, magazines or video cassettes who obtain only the specific material they desire, television viewers are confronted with programming selected for them by others."[87] This argument does not carry much weight. The same reasoning would support an argument to reduce the protection of newspapers and magazines. Each issue brings to the subscriber a group of articles chosen by the publisher, not by the subscriber. The subscriber, like the cable viewer, may pick and choose which article to read (or program to watch) and cancel the subscription if desired.[88] However, the print media has historically received the greatest constitutional protection.[89] In light of the subscription aspect of cable and the extensive selection of channels, cable viewers are not the captive audience that *Pacifica* found radio listeners to be.

### 3. *The Protection of Children*

The *Pacifica* Court also based its holding on the unique accessibility of broadcasting to children, "even those too young to read."[90] The Court traditionally has given children special first amendment treatment. For example, the Court has upheld the restriction of a minor's access to sexually explicit magazines which were not obscene.[91] More recently, the Court upheld a state prohibition on the

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home. *Id.* at 749 n.27.

86. *See, e.g.*, Wardle, *supra* note 82, at 650.

87. *Id.*

88. *See Roy City*, 555 F. Supp. at 1172.

89. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down a Florida statute giving political candidates a right to reply to criticism printed in newspaper). This special treatment arises out of a traditional belief that separating government and the press is the best way to fulfill the "national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." Becker, *Electronic Publishing: First Amendment Issues in the Twenty-First Century*, 13 FORDHAM URB. L.J. 801, 832 n.136 (1985) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). The validity of this long-standing American tradition is beyond the scope of this Comment, but is discussed at length in Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975); Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does It Add To Freedom Of Speech?*, 26 HASTINGS L.J. 639 (1975); Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979); *see also* First National Bank v. Belloti, 435 U.S. 765 (1978) (Burger, C.J., concurring), *reh. denied*, 438 U.S. 907 (1978).

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

91. Ginsberg v. New York, 390 U.S. 629, *reh. denied*, 391 U.S. 971 (1968).

> First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . [P]arents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. . . . Moreover,

distribution of material depicting sexual performances of children under sixteen years of age, even though the performances were not necessarily obscene.[92] The Court also let stand a city ordinance prohibiting adult theaters within 1000 feet of any residential zone, family dwelling, church, or park as well as within one mile of any school.[93] This concern about the availability of sexually explicit programming to children is reflected in the legislative history of the Cable Act.[94]

However, the Court will not go as far in protecting children as to "reduce the adult population . . . to reading . . . only what is fit for children."[95] The *Pacifica* Court noted that the FCC did not "reduce adults to hearing only what is fit for children" because adults could find the identical monologue on tapes, records, or in nightclubs.[96] This limitation is apparent in the Court's decisions since *Pacifica*.

In *Bolger v. Youngs Drug Products Corp.*,[97] the Court held that a statute[98] which prohibited the mailing of unsolicited advertisements for contraceptive devices was unconsitutional.[99] The Court noted that parents already exercise considerable control over their mail once it is received.[100] Thus, the "receipt of mail is far less intrusive and uncontrollable" than the radio broadcast in *Pacifica*.[101]

In *Sable Communications of California, Inc. v. F.C.C.*,[102] the protection of children argument failed to save a statute[103] banning inde-

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the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children [or for themselves].

*Id.*

92. New York v. Ferber, 458 U.S. 747 (1982).

93. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (noting that the ordinance left over 5% of the city's land area for adult theater sites), *reh. denied*, 475 U.S. 1132 (1986).

94. HOUSE REPORT, *supra* note 1, at 69, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4706. "The Committee is extremely concerned with the dissemination of programming containing explicit sexual material which might be offensive to many cable subscribers. The Committee is particularly concerned about the availability of such programming to child viewers." *Id.*

95. Butler v. Michigan, 352 U.S. 380, 383 (1957) (striking down statute prohibiting distribution of any publication containing obscene language which corrupts the morals of youth).

96. *Pacifica*, 438 U.S. at 750 n.28.

97. 463 U.S. 60 (1983); *see supra* note 75.

98. 39 U.S.C. § 3001(e)(2) (1982).

99. *Bolger*, 463 U.S. at 75.

100. *Id.* at 73.

101. *Id.* at 74.

102. 109 S. Ct. 2829 (1989).

103. 47 U.S.C.A. § 223(b)(2) (West Supp. 1989).

cent as well as obscene interstate commercial telephone messages.[104] The Court felt that credit card rules, access codes, and scrambling rules, already implemented by the FCC, sufficiently protected children from dial-a-porn without banning the messages entirely.[105] In both *Bolger* and *Sable Communications*, the regulation of indecent material far exceeded that which was necessary to protect minors, and limited adults to material fit for children. The Court, therefore, found the regulations in question to be unconstitutional.

Similarly, regulation of cable indecency exceeds the goal of protecting children and restricts adults to material fit for children. Parents have greater control over cable television than over broadcast radio and television. Parents order cable service, choose the scope of service, and may cancel at any time. Parental lock boxes[106] and program guides provide additional control. While program guides are also available for broadcast television, they are not available for broadcast radio, the medium at issue in *Pacifica*.[107] Nonetheless, where there are such opportunities for parental control, regulation replaces parental authority, allowing government, rather than parents, to decide what children may view.[108] Such regulation cannot be justified on the basis of protecting children. Appropriate governmental intervention aids parents in rearing their children. It does not override parental decisions.

In addition, the programs on leased access, unlike the Carlin monologue in *Pacifica*, are probably unavailable anywhere else. This is an important distinction. A primary rationale behind mandatory leased access channels is to provide a forum otherwise not available. To now limit that forum would negate the purpose of those channels and unacceptably restrict adult viewing.

### *4. Physical Scarcity*

Although the *Pacifica* Court did not rely on "physical scarcity" as a basis for its holding, the concept is one of the rationales supporting broadcast regulation.[109] Public airwaves can only accommodate a

104. *Sable Communications*, 109 S. Ct. at 2839.

105. *Id.* at 2838 n.10.

106. Section 544(d)(2)(A) provides: "In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2)(A) (Supp. III 1985). The term "lock box" is used in the legislative history concerning this provision. HOUSE REPORT, *supra* note 1, at 70, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4707.

107. This may be one of the differences between radio and television which supports different constitutional treatment. *See supra* note 74 and accompanying text.

108. G. SHAPIRO, *supra* note 82, at 47-48.

109. *See, e.g.*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 386-90 (1969) (imposing broadcast fairness doctrine requiring broadcaster to provide reply time to poli-

limited number of broadcasters. This arguably justifies some regulation to ensure that broadcasters use the airwaves in a manner consistent with public interest.[110]

The constitutionality of mandatory access provisions requires similar justification. Such provisions force cable operators to provide access to certain users. This fact necessarily limits the ability of a cable operator to select programming. Arguably, such a limitation infringes cable operators' first amendment rights.[111] When reviewing the FCC's first attempt to enact mandatory access regulations,[112] the Eighth Circuit suggested that there may be first amendment problems with mandatory access.[113] Similarly, the Ninth Circuit questioned, but did not resolve, whether sections 531 and 532 violated the First Amendment.[114] When promulgating sections 531 and 532, Congress was aware of first amendment challenges to mandatory access provisions. However, Congress found that sections 531 and 532 were "consistent with and further the goals of the First Amendment."[115]

Commentators discussing mandatory access suggest that some justification is necessary to force cable operators to set aside channel capacity for public, educational, government, or commercial access.[116] The traditional physical scarcity justification, however, is

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tician to respond to criticism broadcaster aired); National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943) (upheld chain broadcasting regulations).

110. Wardle, *supra* note 82, at 651.

111. The fairness doctrine, which requires that the targets of political criticism have reply time, similarly burdens the first amendment rights of the media provider. If the government forces the provider to give time or space to one user, the provider can choose one less user. For that very reason, the doctrine was held unconstitutional as applied to newspapers. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-58 (1974). However, the doctrine was upheld as applied to broadcasters on grounds of physical scarcity. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 387-93 (1969).

112. *See supra* text accompanying notes 26-35.

113. Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1055-56 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). Both the Eighth Circuit and the Supreme Court based their holdings on the finding that the FCC had exceeded its jurisdiction in promulgating the mandatory access regulations. F.C.C. v. Midwest Video Corp., 440 U.S. 689, 700-01 (1979); *Midwest Video*, 571 F.2d at 1052. However, the Court did not address the constitutionality of mandatory access.

114. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1401 n.4 (9th Cir. 1985) (reversing dismissal of first amendment challenge to city's auctioning procedure for cable franchise), *aff'd on other grounds*, 476 U.S. 488 (1986). The court refers to sections 611 and 612. These were the original section numbers of section 531 and 532 before the Cable Act's codification.

115. HOUSE REPORT, *supra* note 1, at 31, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4668.

116. *See, e.g.*, Comment, *supra* note 36 (advocating an expanded scarcity rationale to justify mandatory access); Note, *Access to Cable, Natural Monopoly, and the First*

clearly inapplicable to cable.[117] Coaxial cables have the technological capacity to carry many more channels than the airwaves.[118] Failing in their attempt to apply "strict" physical scarcity analysis to cable, advocates of mandatory access regulation have attempted to expand physical scarcity to include the limited capacity on utility poles and under streets.[119]

Another justification for mandatory access is based on the cable industry's use of public resources. Under this theory, disruption of public streets, inconvenience to citizens, and the threat to public safety support regulation.[120] The use of public resources may justify some regulation, but only of the installation and maintenance of a cable system, not the content of the system's programming.[121] When the physical scarcity of those resources limits access, regulation to ensure diverse allocation may be appropriate. However, physical scarcity, even if applied to cable, cannot justify the content censorship in section 532(h).

### 5. *Economic Scarcity*

Some advocates rely on the related theory of economic scarcity to justify cable regulation.[122] This theory is based on the assumption that cable systems constitute a monopoly and are therefore subject to regulation. This theory is not without its problems. The categorization of cable as a natural monopoly market is highly questionable.[123] The economies of scale present in the cable industry do not render cable systems natural monopolies.[124] The Cable Act itself provides

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*Amendment*, 86 COLUM. L. REV. 1663 (1986) (finding mandatory access unconstitutional based on failure of natural monopoly theory).

117. Some authorities suggest that the scarcity rationale is obsolete even for broadcasters. *See*, Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434, 1449 n.32 (D.C. Cir. 1985); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982).

118. Lee, *Cable Leased Access and the Conflict among First Amendment Rights and First Amendment Values*, 35 EMORY L.J. 563, 580 (1986) (quoting *Quincy*, 768 F.2d at 1448). While Lee places capacity at 200 channels, another authority claims that cable capacity is "almost infinite." Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 135 (1976).

119. Comment, *supra* note 36, at 324; Ryerson & Sinel, *Regulating Cable Television in the 1990s*, 17 STETSON L. REV. 607, 633 n.112 (1988).

120. Comment, *supra* note 36, at 319 n.67.

121. *Quincy*, 768 F.2d at 1449.

122. *See, e.g.*, Wardle, *supra* note 82, at 652-656; Comment, *supra* note 36, at 325-26.

123. Lee, *supra* note 118, at 586-91.

124. *Id.* at 587. Advocates of economic scarcity argue that the fixed installation costs of a cable system run very high and do not increase substantially with additional subscribers. Comment, *supra* note 36, at 325. This is referred to as economies of scale, where the business cost per customer decreases as the number of customers increases. These advocates conclude that, because of economies of scale, only one cable company

for numerous cable franchises in any given area.[125] Furthermore, the Court expressly rejected economic scarcity as justification for regulation of a newspaper in a "one newspaper town".[126] Thus, economic scarcity is not a sufficient justification for extending broadcast regulation to cable.

#### *6. Setting the Limit*

As the above discussion indicates, the constitutional limit of content regulation in cable television is not readily apparent. At first glance, the *Pacifica* rationales seem applicable to cable television. Upon further analysis, however, cable is sufficiently distinguishable from broadcasting to render *Pacifica* inapplicable to this medium. *Bolger* and *Sable Communications* demonstrate the Court's reluctance to expand upon *Pacifica's* narrow holding. While this may change in the future, at present the *Miller* standard of obscenity governs the regulation of cable content.[127]

### *C. Statutory Construction of Section 532(h)*

#### *1. Congressional Intent*

Although the Cable Act has several other sections which address offensive programming, section 532(h) is the only section which contains the language, "lewd, lascivious, filthy or indecent." The other sections simply refer to material which is "obscene or otherwise unprotected by the Constitution."[128] There are several plausible explanations for the differing language.

First, sections 531 and 532 are the only sections which govern programing that cable operators have no authority to censor. Section 559 prohibits the transmission over the entire cable system of matter which is "obscene or . . . otherwise unprotected by the Constitution."[129] Section 544(d)(1) permits the franchising authority and the

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can operate "efficiently and profitably" in a community. *Id.* However, "up to a certain point in size, every business operates under conditions of decreasing unit cost." J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 12 (1961) (quoted in Lee, *supra* note 118, at 587 n.94).

125. 47 U.S.C. § 541(a)(1) (Supp. III 1985).

126. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (striking down a Florida statute giving political candidates a right to reply to criticism printed in newspaper).

127. *See supra* note 70 and accompanying text.

128. 47 U.S.C. §§ 559, 544(d)(1) (Supp. III 1985).

129. *Id.* § 559.

cable operator to specify in their franchise agreement that cable services which are "obscene or are otherwise unprotected by the Constitution" will be proscribed entirely or provided subject to conditions.[130] It is entirely possible that Congress intended to give the franchising authority greater control over content to compensate for the lack of control allowed the cable operator. However, the goal of diverse programming, which lies behind leased access, demands less rather than more censorship. Nevertheless, the additional adjectives in section 532(h) seem to expand the level of censorship condoned by the other provisions.

Second, Congress may have intended the Cable Act to consistently proscribe the same type of matter from all types of channels. Assuming this intent, the addition of "lewd, lascivious, filthy or indecent" in section 532(h) may add nothing to interpretion of the provision. Unfortunately, the legislative history of the Cable Act provides no explanation for the special language of section 532(h). The discussion of section 532(h) in the legislative history used only "obscene or otherwise Constitutionally unprotected programming."[131] In addition, it refers the reader to the discussion of section 544(d)[132] which explains that Congress used "obscene or . . . otherwise unprotected" to permit "changing constitutional interpretations to be incorporated into the standard set forth in [544(d)(1)], should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable."[133] Thus, perhaps the legislature intended, as its history ostensibly indicates, that section 532(h) allow franchising authorities to regulate only those cable services which are "obscene or otherwise unpro-

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130. *Id.* § 544(d)(1).

131. HOUSE REPORT, *supra* note 1, at 55, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4692.

> Subsection 612(h) [codified as § 532(h)] addresses an issue of particular concern to the Committee—the potential availability of obscene or Constitutionally unprotected programming over cable system. . . . Since leased access channels are not subject to the editorial control of the operator, the Committee believed it necessary to assure that the franchising authority have the ability to restrict the availability of obscene or otherwise unprotected programming over channels designated for use under this section. Thus, this subsection empowers franchising authorities to prohibit or condition the provision of cable services which are obscene or otherwise unprotected by the Constitution.

*Id.*

132. 47 U.S.C. § 544(d)(1) (Supp. III 1985).

> Nothing in this subchapter shall be construed as prohibiting the franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

*Id.* This section applies to all cable channels, not only leased access channels.

133. HOUSE REPORT, *supra* note 1, at 69, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4706.

tected by the Constitution." However, such a result is disconcerting given Congress' inclusion of "lewd, lascivious, filthy or indecent."

Finally, it is possible that Congress simply borrowed the "obscene, lewd, lascivious, filthy or indecent" language from other statutes dealing with offensive material. This does not explain the absence of the language in sections 544(d)(1) and 559. However, an examination of the judicial treatment of similarly worded statutes will aid in interpreting section 532(h).

### 2. *Similarly Worded Statutes*

Several statutes which proscribe offensive material use some combination of the words "obscene, lewd, lascivious, indecent, and filthy" to describe the material in question.[134] Traditionally, the Court has interpreted these statutes to proscribe only obscenity. For example, in *Roth v. United States*,[135] the Court affirmed a conviction under 18 U.S.C. section 1461 which prohibits the mailing of "[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance."[136] In its decision, the Court referred only to "obscenity," defining the term as involving prurient interests.[137]

In *Manual Enterprises, Inc. v. Day*[138], the Court reversed a conviction under section 1461 for mailing three magazines containing nude and semi-nude photographs.[139] While recognizing that the adjectives in question had "different shades of meaning," the Court noted that the statute's target was "obnoxiously debasing portrayals of sex."[140] The Court therefore held that the statute only reached material which "taken as a whole appeals to the prurient interest."[141]

In *Hamling v. United States*,[142] section 1461 was challenged as

134. *See, e.g.*, 18 U.S.C. §§ 1461, 1462, 1465 (1988); 19 U.S.C. § 1305(a) (1988).
135. 354 U.S. 476 (1956) (affirming conviction under § 1461 for mailing obscene circulars and advertisements).
136. 18 U.S.C. § 1461 (1988).
137. "Prurient" is defined as "arousing or appealing to an obsessive interest in sex." THE AMERICAN HERITAGE DICTIONARY 998 (2d college ed. 1982). The term was adopted by the Court when it set forth its test for obscenity in Miller v. California, 413 U.S. 15 (1973); *see supra* note 70.
138. 370 U.S. 478 (1962).
139. *Id.* at 491.
140. *Id.* at 483.
141. *Id.* at 484.
142. 418 U.S. 87, 114 (1973) (affirming conviction under § 1461 for mailing obscene advertising brochures).

being vague and overbroad. The Court dismissed this challenge by interpreting section 1461 to prohibit only the mailing of "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller v. California.*"[143] The Court relied heavily on a footnote in *United States v. 12 200-ft. Reels of Film*[144] in which the Court indicated a willingness to construe the same terms used in 19 U.S.C. section 1305(a)[145] and in 18 U.S.C. section 1462,[146] to mean obscenity if necessary to prevent vagueness.[147] *Marks v. United States*[148] reaffirmed this construction.

It is unclear whether this historical interpretation survives *F.C.C. v. Pacifica Foundation.*[149] In *Pacifica*, the FCC recorded the occurrence of the broadcast in the company's file for future reference. The FCC found authority for this action in 18 U.S.C. section 1464, which prohibits the broadcast of "obscene, indecent or profane language."[150]

Before upholding the FCC's action, the Court discussed whether the "patently offensive" broadcast "was indecent within the meaning of [section] 1464."[151] Pacifica agreed that the broadcast was "patently offensive," but challenged the FCC's definition of "indecent" because it did not require prurient appeal.[152] Pacifica argued, and the dissent agreed, that the historical interpretation of "indecent" implied that the term meant obscene as defined in *Miller.*[153] The majority disagreed. They distinguished cases construing section 1461, explaining that the provision had a history of concern with the prurient,[154] whereas the FCC had long interpreted section 1464 more broadly.[155] Furthermore, section 1461 dealt with mailings while sec-

143. *Id.* at 114 (quoting United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973)).

144. 413 U.S. 123 (1973) (remanding conviction under 19 U.S.C. § 1305(a) for importing obscene films, slides. and photographs for application of *Miller* standard).

145. 19 U.S.C. § 1305(a) (1988).

146. 18 U.S.C. § 1462 (1988). The statutes prohibit the importation (sections 1462 & 1305(a)) and interstate transportation (section 1462) of material which section 1305(a) describes as "obscene or immoral" and which section 1462 describes as "obscene, lewd, lascivious, . . . filthy . . . or indecent."

147. *12 200-ft. Reels of Film*, 413 U.S. at 130 n.7, *construed in Hamling*, 418 U.S. at 113-14.

148. 430 U.S. 188 (1977). In *Marks*, the Court stated that because 18 U.S.C. 1465 used "sweeping language" to describe the forbidden material, it was necessary to confine the statute's application to the constitutional limits defined by *Miller. Id.* at 195.

149. 438 U.S. 726 (1978).

150. 18 U.S.C. § 1464 (1988).

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

152. *Id.*

153. *See id.* at 740, 777-80 (Stewart, J., dissenting).

154. *Id.* at 740-41; *see also supra* text accompanying notes 135-51.

155. *Pacifica*, 438 U.S. at 741 n.16 (citing Enbanc Programming Inquiry, 44 F.C.C. 2303, 2307 (1960); *In re* WUHY-FM, 24 F.C.C.2d 408 (1970); *In re* Sonderling Broadcasting Corp., 27 R.R.2d 285 (1973), *aff'd*, 515 F.2d 397 (1974)). In spite of the Commission's broad interpretation, several courts have construed section 1464 consist-

tion 1464 regulated broadcasting, which traditionally had been subjected to greater regulation.[156]

In essence, the *Pacifica* Court defined "indecent" and "obscene" in section 1464 separately because it found that broadcast indecency could be regulated to the extent the F.C.C. had attempted. On the other hand, "indecent" in section 1461 had to be synonymous with obscenity because indecent mail was constitutionally protected. In other words, regardless of the language used, the Court allowed each statute to proscribe as much material as the Constitution would allow.

If applied to section 532(h), this analysis would allow the franchising authority to prohibit or condition material in three instances. First, the franchising authority would have the power to censor obscene programming. The franchising authority presently has such power. Second, if the Court lessens the constitutional protections of such material on cable, it would be able to constitutionally restrict material which is indecent, lewd, lascivious or filthy. Third, the franchising authority would be able to regulate any material not described by the statute which the Court finds "otherwise unprotected by the Constitution."[157]

This approach to 532(h) complies not only with *Pacifica* but also with the legislative history behind the section by instantly incorporating changing constitutional standards.[158] However, this construction illustrates a common problem arising out of judicial reconstruc-

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ently with section 1461. In a case cited by *Pacifica*, the appellate court held that the conviction under section 1464 should be judged by the Roth v. United States, 354 U.S. 476 (1956) and Memoirs v. Massachusetts, 383 U.S. 413 (1966) standards. Illinois Citizens Committee for Broadcast v. F.C.C., 515 F.2d 397 (D.C. Cir. 1975); *see supra* note 70. In applying the predecessor of section 1464, another court of appeal defined profanity separately, but reversed the conviction because the language did not "arouse lewd or lascivious thought." Duncan v. United States, 48 F.2d 128, 132-33 (9th Cir.), *cert denied*, 283 U.S. 863 (1931). In *Tallman v. United States*, the court rejected a vagueness attack on section 1464 by defining profanity separately and referring to the *Roth* standard, which required an appeal to the prurient for obscenity and indecency. 465 F.2d 282, 285-86 (7th Cir. 1972). However, two courts reversed convictions for failure to define indecency in addition to obscenity in the jury instruction. United States v. Smith, 467 F.2d 1126 (7th Cir. 1972); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966). Neither court provided a definition of indecency. Nevertheless, upon examination of this history of section 1464 and the treatment of indecency in United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973), the Seventh Circuit, equated indecency to obscenity in section 1464. United States v. Simpson 561 F.2d 53, 59-60 (7th Cir. 1977).

156. *Pacifica*, 438 U.S. at 741 & n.16.

157. 47 U.S.C. § 532(h) (Supp. III 1985).

158. *See supra* notes 131-33 and accompanying text.

tion of statutes. In attempting to cure overbreadth, courts may create an equally fatal defect: vagueness.

### *3. Overbreadth vs. Vagueness*

"A law is void on its face if it is so vague that persons 'of common intelligence must necessarily guess at is meaning and differ as to its application.' "[159] A vague statute raises several concerns. First, such a statute violates due process by failing to provide citizens fair warning of its prohibitions.[160] Second, it encourages arbitrary and discriminatory application.[161] Third, when it regulates a form of expression, a vague statute may have a "chilling effect," discouraging constitutionally protected rights.[162]

As discussed earlier,[163] obscenity is the only material completely without constitutional protection. By ostensibly regulating material which is "lewd, lascivious, indecent or filthy," in addition to obscenity, section 532(h) and similar statutes "sweep . . . within [their] ambit"[164] protected expression. Thus, the statutes risk being void for overbreadth.[165] Before *Pacifica*, the Court consistently saved such statutes by construing all the adjectives to mean "obscene" as defined by *Miller*. This approach cured the overbreadth of the statutes by severing, in one judicial proceeding, the potentially unconstitutional applications. In *Pacifica*, however, the Court went one step further. The Court suggested that the meaning of identical terms in each of these statutes varies with the medium and the current constitutional protection given that medium. In effect, this approach interprets the terms to mean "obscene or otherwise unprotected by the Constitution" at the present time.[166] While this interpretation may be convenient for Congress, it is inappropriate where the consequence is the suppression of constitutionally protected expression.

One legal scholar[167] illustrates the concept of vagueness with the following hypothetical. Suppose a statute existed which stated: "*It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments.*"[168] This statute "is

159. L. TRIBE, *supra* note 63, at 1033 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

160. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (upholding control noise ordinance which sufficiently restricted prohibition to disruption of school activities).

161. *Id.* at 108-09.

162. *Id.* at 109.

163. *See surpa* note 69 and accompanying text.

164. Thornhill v. Alabama, 310 U.S. 88, 97 (1940); *see supra* note 60 and accompanying text.

165. For a discussion of the overbreadth doctrine, *see supra* text accompanying notes 62-68.

166. 47 U.S.C. § 532(h) (Supp. III 1985).

167. L. TRIBE, *supra* note 63, at 1031.

168. *Id.*

guaranteed not to be overbroad since, by its terms, it literally forbids nothing that the Constitution protects.[169] It is "nonetheless patently vague"[170] because it fails to define what expression is prohibited. The statute's flaw, and the reason for invalidating it on vagueness grounds, is that a boundary of constitutional protection requires continuous refinement. In the interim, protected expression is suppressed by those unsure of the scope of constitutional protection.

Arguably, the attempt at a constitutional construction of section 532(h) fails because it turns an overbroad statute into a vague one.[171] One way to avoid an invalidation for overbreadth is to return to precedent and interpret section 532(h) as regulating only obscenity as defined by Miller. In the future, should courts expand upon *Miller* to make other types of sexual expression unprotected, Congress could address those concerns at that time. In the interim, section 532(h) would unambiguously protect the cable audience from obscenity. However, this approach strains the limits of judicial construction as noted above.[172] Construing five adjectives to mean only one of those words rewrites the statute and is more appropriately left to Congress.

The alternative is to invalidate section 532(h) entirely. This would leave obscenity on leased access channels unregulated. Absent a saving construction, section 532(h) is void for overbreadth if the protected expression which the statue discourages is a significant part of its target.[173] Potentially offensive cable services which are not obscene constitute a significant part of this provision's target. Legislative history indicates that Congress intended to provide franchising authorities with the ability to restrict leased access programming which is offensive to the community. Moreover, programming which is deemed offensive by a franchising authority is most likely to be encountered on an access channel over which the cable operator has no editorial control.[174] The purpose behind withdrawing editorial control from the cable operator on these channels is "to assure . . . the widest possible diversity of information sources"[175] beyond those

169. *Id.*
170. *Id.*
171. The vagueness of interpreting section 532(h) to prohibit obscene or otherwise unprotected leased access programming implies, of course, that sections 559 and 544(d)(1) are also patently vague for their use of the same wording. However, this discussion is beyond the scope of this Comment.
172. *See supra* note 65-68 and accompanying text.
173. *See supra* text accompanying note 63.
174. 47 U.S.C. § 532(c)(2) (Supp. III 1985).
175. *Id.* § 532(a).

which the cable operator would otherwise provide. Given that a significant amount of constitutionally protected expression is undoubtedly discouraged by section 532(h), the provision must be restrictively interpreted to avoid the overbreadth doctrine.

## III. Procedural Defects of Section 532(h)

Section 532(h) provides that "any [leased access] cable service . . . shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority" is within the scope specified. This provision has several procedural flaws which may render the statute unconstitutional.

First, assuming that *Pacifica* permits some regulation of cable indecency, the franchising authority's ability to prohibit or extensively condition the allegedly indecent programming exceeds *Pacifica's* narrow holding. In *Pacifica*, the FCC did not attempt to ban or condition the program. The Commission merely noted the indecent broadcasting in Pacifica's file. In finding the FCC action constitutional, the Court emphasized the time of day, the content of the program, and the composition of the audience.[176] Furthermore, the Court noted that broadcasting the program during late evening was not foreclosed.[177] The failure to consider these variables and the imposition of a complete ban rather than a channeling of the material to other times of the day was the fatal flaw in the cases which limited *Pacifica's* reach.[178] In both *Sable Communications* and *Bolger*, the Court found that *Pacifica* did not justify a complete ban of indecent material.[179] The lower federal courts have reinforced this limitation on *Pacifica*.[180]

In *Cruz v. Ferre*,[181] the court found that the ordinance regulating indecent as well as obscene cable programming impermissably exceeded *Pacifica* by failing to consider the time of day, the context of the program in which the material appeared, and the composition of the viewing audience.[182] Similarly, section 532(h) does not require the franchise authority to consider any of these variables in making its determination. Therefore, even if a court extends the rationales for limiting constitutional protection of broadcast indecency to cable, *Pacifica* would not permit the franchising authority to prohibit or

176. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 750 (1977).
177. *Id.*
178. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Sable Communications of California, Inc. v. F.C.C., 109 S. Ct. 2829 (1989); *see supra* notes 75-76.
179. *Bolger*, 463 U.S. 60; *Sable Communciations*, 109 S. Ct. 2829.
180. *See* cases cited *supra* note 78.
181. 755 F.2d 1415 (11th Cir. 1985) (Miami ordinance regulating indecent and obscene cable television).
182. *Id.* at 1422.

extensively condition the material.[183]

The statute is also procedurally flawed because it does not comply with the censorship guidelines set forth by the Court. In *Freedman v. Maryland*, the Court struck down a state statute requiring the preview of motion pictures by a censorship committee.[184] In doing so, the Court recognized that a censor is "less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression."[185] Moreover, if judicial review is delayed or difficult to obtain, the censor's decision is final for all practical purposes.[186] The Court held that censorship could only withstand constitutional scrutiny if the censor had the burden of proving its constitutionality in an adversary proceeding before judicial determination.[187] Furthermore, the Court required some assurance that these judicial proceedings would follow within a brief period specified by the statute or by judicial construction.[188] When the censor suppresses material before a final judicial determination (only to "preserve the status quo for the shortest fixed period compatible with sound judicial resolution"), the procedures must provide for prompt judicial review of the suppression.[189]

Section 532(h) provides none of these safeguards "against undue inhibition of protected expression."[190] When a statute fails to provide such safeguards, a court may choose to read them into the statute to preserve its constitutionality.[191] For example, the *Freedman* Court upheld a statute after supplying the missing time limits for prompt judicial review.[192] However, the Court refuses or is unable to do so in

183. In 1987, the F.C.C. renewed its battle against indecent radio broadcasts. For a discussion of the Commission's latest efforts, see Sheehy & Friedner, *FCC Intensifies Its Crackdown on 'Indecent' Radio Broadcasts*, NAT'L L.J., Jan. 29, 1990, at 15. Currently, the FCC is compiling a record to support the constitutionality of a 24-hour ban on indecent broadcasts which the D.C. Circuit stayed in January 1989. Action for Children's Television v. F.C.C., No. 88-1916 (D.C. Cir.), *discussed in* Sheehy & Friedner, *supra*, at 16, col. 3.

184. Freedman v. Maryland, 380 U.S. 51, 52 (1964).

185. *Id.* at 57-58.

186. *Id.*

187. *Id.* at 58.

188. *Id.*

189. *Id.* at 59; *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (*Freedman* procedures required for municipal board prohibiting performance of musical on city stage); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (*Freedman* procedures required in seizure by custom agents); Blount v. Rizzi, 400 U.S. 410 (1971) (*Freedman* procedures required in postal censorship).

190. *Freedman*, 380 U.S. at 60.

191. *See, e.g., id.* at 58-59; *Thirty-Seven Photographs*, 402 U.S. at 369.

192. *Freedman*, 380 U.S. at 58-59.

some situations. For instance, the Court cannot supply the necessary safeguards to save a state statute.[193] In addition, while the Court has the jurisdiction to provide an authoritative construction of a federal statute, it will not rewrite the statute entirely.[194]

In *United States v. Thirty-Seven Photographs*, the Court provided the time limits during which a censor must seek judicial determination as required by *Freedman*.[195] However, the Court distinguished *Thirty-Seven Photographs* from *Blount v. Rizzi*[196] in which the Court refused to provide the lacking procedural safeguards. While the statute in *Thirty-Seven Photographs*[197] complied with *Freedman* except for the missing time limits, the statute in *Blount*[198] failed to provide for any judicial review of the obscenity determination.[199]

This distinction also applies to section 532(h). Unlike the statute in *Thirty-Seven Photographs*,[200] section 532(h) requires no judicial review whatsoever. Salvation of the provision would therefore require judicial "relegislation" of the type the Court has been unwilling to provide. Inasmuch as section 532(h) contains none of the procedural safeguards mandated by the Court in *Freedman*, the section cannot withstand constitutional scrutiny.

## IV. CONCLUSION

In drafting the Cable Act, Congress had noble intentions. Hoping to expand access to cable television, Congress mandated leased access channels for use by programmers unaffiliated with the cable provider. In addition, Congress limited the cable provider's editorial control over the content of the leased access programming. Theoretically, such action should create the "widest possible diversity of information sources,"[201] Congress' express goal. However, in that wide range of programming, some materials will undoubtedly offend some viewers. In addressing that concern, Congress enacted section 532(h). The "same Congress which distrusted the editorial judgments of cable publishers entrusted local governments with the power to decide exceptionally sensitive questions affecting the con-

193. *Thirty-Seven Photographs*, 402 U.S. at 369.
194. *Id.*
195. *Id.* at 374-75.
196. 400 U.S. 410 (1971).
197. 19 U.S.C. § 1305(a) (1988). Congress has made some minor revisions to the statute since 1971. The former version of the statute is quoted by the Court in *Thirty-Seven Photographs*, 402 U.S. at 365.
198. 39 U.S.C. § 4006 (renumbered by Postal Reorganization Act, 85 Stat. 747 (1970) to 39 U.S.C. § 3006).
199. *Thirty-Seven Photographs*, 402 U.S. at 367-68.
200. 19 U.S.C. § 1305(a) (1988).
201. 47 U.S.C. § 532(a) (Supp. III 1985).

tent offered to cable subscribers."[202]

In doing so, Congress enacted an overbroad statute which fails to provide the necessary procedural safeguards. While courts may construe section 532(h) in line with precedent to prohibit only programming described by the *Miller* standard, the procedural defects are incurable by judicial construction. The section is therefore unconstitutional and, as such, unenforceable. This will leave obscenity on leased access channels completely unregulated until Congress enacts a replacement statute.

If a replacement provision is enacted, unlike current section 532(h), it should not allow the regulation of content which is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution. Instead, it should only allow the regulation of obscene material which is constitutionally unprotected under *Miller*. Furthermore, the new statute should provide sufficient procedural safeguards for constitutionally protected expression. The legislature might look to the procedures in 19 U.S.C. section 1305(a)[203] which *Thirty-Seven Photographs* implicitly approved. Of course, the legislature should also specify time limits for judicial determination as required by *Freedman* and incorporate the distinguishing aspects of cable programming.

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202. Lee, *supra* note 118, at 595.

203. 19 U.S.C. § 1305(a) (1988).

> Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided . . . . Upon the seizure of such book or matter such customs officer shall transmit information thereof to the United States attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall be not be excluded from entry under the provisions of this section.
>
> In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

*Id.*