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Bradley J. Howard

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NOTES

PULLING THE PLUG: CONTROVERSIAL PROGRAMMING ON PUBLIC ACCESS TELEVISION AND THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

INTRODUCTION

The concept was noble: the establishment of cable channels for the exclusive use of the public would provide an unrestricted forum for voicing local concerns, creative programming, and informative debate. Public access television would be the “electronic soapbox” of the future — a haven for free speech in a world of regulated media.¹ Unfortunately, these lofty ideals have been tarnished in recent years by the proliferation of public access programs featuring overt racism or graphic depictions of sexual conduct. In a typically inappropriate response, Congress has recently given cable operators the unilateral power to prohibit certain public access programming under section 10(c) of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).² What is more troubling than section 10(c)’s potential impact on public access television is its blatant encroachment on the fundamental freedoms guaranteed under the First Amendment to the United States Constitution.³

This Note begins by providing background information on cable television. Second, it traces the historical development of public access television, addresses the censorship provisions of the Cable Communications Policy Act of 1984 (1984 Cable Act),⁴ and discusses the recent rise in controversial programming on public access. This includes a review of various programs which have

1. Wally Mueller, *Controversial Programming on Cable Television’s Public Access Channels: The Limits of Governmental Response*, 38 DEPAUL L. REV. 1051 (1989). “Public access channels offer citizens the unprecedented opportunity to express themselves over the powerful medium of television — free from the control of the government or media conglomerates.” *Id.*

2. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

3. The First Amendment to the Constitution provides that, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I.

4. Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559 (1985).

recently been the subjects of debate across the country. Third, this Note examines section 10(c) of the 1992 Cable Act. As an integral part of this discussion, this Note identifies and analyzes the problems with current obscenity and indecency standards, particularly when applied in the unique context of public access. Finally, this Note proposes that section 10(c) be eliminated in favor of a "lockbox" approach, thus transferring the misplaced power of censorship from the cable operator to the cable subscriber. This Note concludes that the current version of section 10(c) of the 1992 Cable Act is not only unworkable for the cable operator, but violative of the freedoms guaranteed under the First Amendment.

I. THE ORIGIN AND DEVELOPMENT OF PUBLIC ACCESS TELEVISION

In discussing the evolution of public access television, this section first traces the development of cable television. This section then addresses the various federal regulations and judicial decisions which together formed the basis for the emergence of public access. Finally, this section outlines the growth of public access itself and includes a discussion of the relevant provisions of the 1984 and 1992 Cable Acts.

A. *Development of Cable Television*

The predecessors of modern cable television, called community antenna television (CATV) systems, began sprouting up around the United States in the late 1940s.⁵ These primitive systems were much different than the advanced satellite systems in use today. CATV systems retransmitted a small number of broadcast signals to remote areas of the country.⁶

However, rapid advancements in technology quickly thrust CATV into the future. First, channel capacity increased dramatically.⁷ While the early systems could handle only three or five channels, by the early 1980s many systems were able to accommodate well over sixty channels.⁸ Second, the ability to broadcast original programming became available to CATV operators.⁹

5. Mueller, *supra* note 1, at 1052-58.

6. *Id.* at 1053. CATV systems transmit television signals from a central location directly to the viewer's television. Robert Schwartz, *Public Access to Cable Television*, 33 HASTINGS L.J. 1009, 1010 (1982). The signals are transmitted by wire, much like a telephone transmission. *Id.*

7. Improvements in technology increased the channel capacity of single cable systems to 12 channels in the 1960s, then to 20 channels in the early 1970s, to 36 channels in the late 1970s, and to a 54-channel capacity in the early 1980s. Mueller, *supra* note 1, at 1054.

8. *Id.* A 1983 sample of 1227 cable systems across the Midwest revealed that 24 systems had a capacity for more than 60 channels. *Id.* Some state-of-the-art systems now have the capacity for more than 100 channels. *Id.*

9. *Id.* "The term 'cablecasting' means programming which is distributed on a

Along with the limited capabilities of the early systems, the term "CATV" quickly became outdated and such systems are now generally referred to as "cable television."¹⁰

The cable television industry has rapidly grown into a multi-billion dollar industry comprised of more than 8,000 systems across the nation.¹¹ Over sixty percent of American households with televisions currently subscribe to basic cable television service.¹² As the industry has grown, the federal government has gradually increased its regulation of the cable television medium. A basic understanding of the historical development of these regulations provides a useful starting point for an examination of public access as it exists today.

B. Federal Regulation of Cable Television

Federal regulation of cable television can be traced back to the Communications Act of 1934.¹³ The Act created the Federal Communications Commission (FCC), which was given control over all forms of electrical communication.¹⁴ Although the Act did not

CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." *Midwest Video Corp. v. United States*, 441 F.2d 1322, 1324 (8th Cir. 1971) (quoting 47 C.F.R. § 74.1101(j) (1970)), *rev'd*, 406 U.S. 649 (1972).

10. "Because of the broader functions to be served by such facilities in the future," the Federal Communications Commission (FCC) adopted the "more inclusive term cable television systems." Cable Television Report and Order, 36 F.C.C.2d 141, 144 n.9 (1972). Accordingly, CATV operators are now known as "cable operators." The term cable operator is defined as:

[A]ny person or group or persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of a cable system.

FCC Report and Order, *available in* LEXIS, 1985 F.C.C. LEXIS 3475, at 3-4 (1985).

11. Mueller, *supra* note 1, at 1054.

12. Pat Widder, *For Many, Cable Just Got Cheaper*, CHI. TRIB., Sept. 1, 1993, at 1. As of 1992, over 57 million households received basic cable television service. *Id.* Moreover, the substantial increase in cable subscribers which has taken place over the past decade is likely to continue indefinitely. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(3), 106 Stat. 1460 (1992) (finding that the percentage of households which subscribe to cable will continue to increase).

13. Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976).

14. The Communications Act of 1934 created the FCC:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . and for the purpose of securing a more effective execution of this policy by centralizing authority with respect to . . . wire and radio communi-

expressly include cable television in its provisions,¹⁵ Congress clearly intended that such communications technology be included within the FCC's jurisdiction.¹⁶

In 1968, the United States Supreme Court recognized Congress' intent in *United States v. Southwestern Cable Co.*¹⁷ The Court held that the FCC had the authority to regulate cable under section 2(1) of the Act,¹⁸ but restricted this power to regulation which is "reasonably ancillary to the effective performance of the [FCC's] various responsibilities for the regulation of television broadcasting."¹⁹

In 1969, less than a year after *Southwestern*, the FCC promulgated a rule requiring CATV systems having more than 3,500 subscribers to broadcast original programming.²⁰ In *United States v. Midwest Video Corp. (Midwest Video I)*, Midwest Video Corporation, a CATV operator, challenged the rule on the ground that the FCC was not authorized to regulate cable in this capacity.²¹ However, the Supreme Court upheld the origination rule under the "reasonably ancillary" standard set forth in *Southwestern*, thus expanding the authority of the FCC to regulate cable television.²² *Midwest Video I* provided the basis for the promul-

cation, there is created a commission to be known as the "Federal Communications Commission."

Id. § 151.

15. Schwartz, *supra* note 6, at 1012. Cable television did not exist when the Communications Act was enacted in 1934. *Id.*

16. *Id.* In *FCC v. Midwest Video Corp.*, the Supreme Court stated that although the Communications Act of 1934 preceded the advent of cable, "it is clear that Congress meant to confer 'broad authority' on the Commission." 440 U.S. 689, 696 (1979) (citing H.R. REP. No. 1850, 73d Cong., 2d Sess. 1 (1934)).

17. 392 U.S. 157 (1968).

18. *Id.* at 178. The Supreme Court held that the FCC's authority, under the Communications Act, to regulate "all interstate communication . . . by wire or radio" includes CATV (cable) systems. *Id.*

19. *Id.* The Supreme Court stated that "[t]here is no need here to detail the limits of the [FCC's] authority to regulate [cable]. It is enough to emphasize that the authority which we recognize . . . is restricted to that *reasonably ancillary to the effective performance of the [FCC's] various responsibilities for the regulation of television broadcasting.*" *Id.* (emphasis added).

20. 47 C.F.R. § 74.1111 (a) (1970) (repealed 1974). CATV systems which failed to comply with the rule were proscribed from carrying the signal of any broadcast station. *Id.*

21. 406 U.S. 649 (1972) [hereinafter *Midwest Video I*].

22. *Id.* at 669. A five Justice majority held that "the regulation preserves and enhances the integrity of broadcast signals and therefore is 'reasonably ancillary to the effective performance of the [FCC's] various responsibilities for the regulation of television broadcasting.'" *Id.* at 670 (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). The Court concluded that the "program-orientation rule [was] within the Commission's authority recognized in *Southwestern.*" *Id.* at 670.

Nevertheless, the FCC subsequently repealed the mandatory origination rule

gation of a series of extensive regulations which govern the cable television industry today.²³ Accordingly, the following discussion relates to the regulations which brought public access television into existence.

C. Development of Public Access

Public access channels are those which are "set aside by the cable operator for exclusive use by local individuals and community groups."²⁴ While the concept of public access television began as a few local experiments in the late 1960s,²⁵ modern public access has developed through contemporary federal regulation. In 1972, the Federal Communications Commission broke new ground for public access with the release of its Cable Television Report and Order.²⁶ For the first time, cable system operators were required to provide channels for the exclusive use of the public.²⁷ However, in 1979, the Supreme Court struck down the mandatory access rules in *FCC v. Midwest Video Corp. (Midwest Video II)*.²⁸ Nevertheless, many cable operators continued to maintain public access channels on their systems.²⁹ The next five years brought a brief period of status quo with respect to cable television regulation. However, the biggest changes were yet to come.

in 1974. See 39 Fed. Reg. 43,302 (1974). Citing poor economic conditions and an overly optimistic assessment of origination's appeal, the FCC determined "that the mandatory origination scheme would not be the most effective method for providing an outlet for local viewpoints." Mueller, *supra* note 1, at 1072. The FCC decided that access channels would be a more effective means of achieving this goal. *Id.*

23. Schwartz, *supra* note 6, at 1014 (stating that "*Midwest I* firmly established the FCC's authority to regulate cable television").

24. Mueller, *supra* note 1, at 1060.

25. *Id.* at 1061. One of the first reported uses of public access occurred in 1968, when a cable operator in Dale City, Virginia began airing community programming on his local origination channel. *Id.* However, lack of funding brought the so-called "Dale City Experiment" to an abrupt end in early 1970. *Id.*

26. Cable Television Report and Order, *supra* note 10, at 141.

27. The rules required that every new cable system in the top 100 markets provide one channel each for public, governmental, educational, and leased access programming. *Id.* at 192.

28. 440 U.S. 689 (1979). The Supreme Court distinguished its previous holding in *Midwest Video I* by concluding that "the origination rule did not abrogate the cable operators' control over the composition of their programming, as do the access rules." *Id.* at 700. Thus, the Court held that the access rules were beyond the jurisdiction of the FCC. Mueller, *supra* note 1, at 1073.

29. Mueller, *supra* note 1, at 1074. Approximately 2,000 public access channels are currently in operation across the nation. Laura A. Kiernan, "Public Access" Tests Limits of TV Tolerance; Cable Communities Grapple With Issues, BOSTON GLOBE, Sept. 2, 1992, Metro/Region, at 23.

1. The Cable Communications Policy Act of 1984

In 1984, Congress specifically addressed public access for the first time by passing the Cable Communications Policy Act (1984 Cable Act).³⁰ The 1984 Cable Act amended the Cable Communications Act of 1934 by adding Title VI, entitled "Cable Communications," under which the FCC regulates all cable communications.³¹ The intent of the 1984 Cable Act, as stated in the FCC's 1985 Report and Order, was "to establish a national policy that encourages the growth and development of cable television services and assures that cable systems are responsive to the needs and interests of the local communities they serve."³² The Act included a comprehensive array of rules dealing with virtually every conceivable aspect of cable television.³³

Section 611(e) of the 1984 Cable Act addressed the power to control the content of access programming.³⁴ Section 611(e) expressly prohibited cable operators from "exercis[ing] any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section."³⁵ However, sec-

30. Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559 (1985).

31. FCC Report and Order, *supra* note 10, at 3-4.

32. *Id.* The six purposes of the 1984 Cable Act were set forth in § 601:

- (1) establish a national policy concerning cable communications;
- (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
- (3) establish guidelines for the exercise of Federal, State, and Local authority with respect to the regulation of cable systems;
- (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
- (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
- (6) promote competition in cable communications and minimize unnecessary regulation that would impose and undue economic burden on cable systems.

Cable Communications Policy Act of 1984, 47 U.S.C. § 521 (1985).

33. The 1984 Cable Act covered such diverse areas as pole attachments (§ 4), ownership restrictions (§ 613), franchise requirements and fees (§§ 621, 622), rate regulation (§ 623), and unauthorized reception (§ 633). Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559 (1985).

34. *Id.* § 531(e).

35. *Id.* However, § 624 of the 1984 Cable Act provided that "[i]n 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." *Id.* § 544. It is important to note that § 624 did not apply to access channels. FCC Report and Order, *supra* note 10, at 3-4. The devices referred to in this provision are commonly known as "lockboxes." For a discussion of lockbox

tion 639, entitled "Obscene Programming," provided that persons transmitting obscene material over cable systems would be subject to substantial fines and/or imprisonment.³⁶ Thus, the 1984 Cable Act expressly prohibited the cable operator from censoring public access programming while, at the same time, providing that the operator could be punished for broadcasting obscene material over a public access channel.

The obscenity provisions of the 1984 Cable Act were the subject of litigation in *Missouri Knights of the Ku Klux Klan v. Kansas City, Missouri*.³⁷ In *Missouri Knights*, the Ku Klux Klan (KKK) brought an action seeking to enjoin the city from eliminating its only public access channel.³⁸ After the KKK had requested weekly time on the access channel to air a series of programs,³⁹ the cable franchisee and city officials adopted a plan which would eliminate the channel and replace it with one subject to their editorial control.⁴⁰ The KKK alleged that the elimination of the channel violated the First and Fourteenth Amendments, as well as section 611(e) of the 1984 Cable Act.⁴¹ The court denied Kansas City's motion to dismiss, holding that there was a private right of action under 42 U.S.C. § 1983⁴² for violations of section 611(e) of the Act.⁴³ Shortly after this decision, Kansas City officials restored the channel.⁴⁴ Thus, *Missouri Knights* lent judicial support to the asserted right of public access producers to have virtually unrestricted use of the medium pursuant to the 1984 Cable Act.⁴⁵

technology, see *infra* Part III of this Note.

36. Cable Communications Policy Act of 1984, 47 U.S.C. § 559. Section 639 provided: "Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than \$10,000 or imprisoned not more than two years, or both." *Id.*

37. *Missouri Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989). Given the confusion surrounding the constitutional definition of obscenity, it was inevitable that the censorship provisions of the 1984 Cable Act would lead to litigation.

38. *Id.* at 1350-51.

39. The 45 programs, titled "Race and Reason," offered political and social commentary from a "racialist" standpoint. *Id.* at 1349. For a further discussion of "Race and Reason," see *infra* note 48 and accompanying text.

40. *Missouri Knights*, 723 F. Supp. at 1350.

41. *Id.* Section 611(e) prohibited cable operators from exercising editorial control over access channels. Cable Communications Policy Act of 1984, 47 U.S.C. § 531(e) (1985).

42. Section 1983 provides that "[e]very person who, under color of any statute . . . [or] regulation . . . of any state . . . subjects or causes to be subjected any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law [or] suit in equity." 42 U.S.C. § 1983 (1988).

43. *Missouri Knights*, 723 F. Supp. at 1354.

44. Mueller, *supra* note 1, at 10.

45. However, the 1984 Cable Act restricts the freedom from editorial control to

2. Controversial Programming Since the 1984 Cable Act

During the years since Congress put the 1984 Cable Act into effect, many producers have taken the freedoms of public access to the extreme. The following are but a few examples of the many controversial programs which have been aired in recent years on public access channels across the country:

"Infosex" — Two men engage in oral sex, a man masturbates, and various other sexual acts between men are depicted.⁴⁶

"Lifestyles of the Up and Coming" — Men pour buckets of ice into the bathing suits of women, the women wiggle in apparent delight, then the host of the show attempts to talk female bystanders into taking off their clothes, often with success.⁴⁷

"Race and Reason" — Tom Metzger, leader of the White Aryan Resistance (WAR), produces this popular half-hour talk show. Host Herbert Poinsett, in full Nazi uniform, preaches hate and violence against various minorities.⁴⁸

"It's Time to Wake Up" — Ta-Har, High Priest of the Black Israelites, swings a baseball bat while threatening to "[beat] the hell out of you white people. We're going to take your little children and dash them against the stones [and] rape and ravish your white women."⁴⁹

"The Worst Show" — Host instructs viewers on the best methods of suicide.⁵⁰

programming which is not obscene. *See supra* note 36 (discussing § 639 of the 1984 Cable Act).

46. Sue Anne Pressley, *Letter From Texas; Cable Access Program Tests Limits of Obscenity*, WASH. POST, Aug. 26, 1993. After "Infosex" premiered on the public access station in Austin, Texas, the producer of the show was suspended. *Id.* In addition, a Travis County attorney has initiated a criminal investigation of "Infosex," and the video may be submitted to a grand jury to determine if it violated obscenity laws. *Id.*

47. Howard Troxler, *Bad Taste? Evil? Maybe. But Who Gets to Say?*, ST. PETERSBURG TIMES, Dec. 2, 1992, at 1B.

48. Bill Duryea & Brad Snyder, *They Preach Hate on Public Access TV*, ST. PETERSBURG TIMES, July 12, 1993, at 1A.

For white supremacist groups such as the Ku Klux Klan and the White Aryan Resistance — groups long shunned by the mainstream media — public access is a technological promised land. . . . "You can say whatever you want without being censored," Metzger said. "We can reach hundreds of thousands of people and that's more than we could do at any rallies or speeches on the street."

Id.

49. Joseph Berger, *Forum for Bigotry? Fringe Groups on TV*, N.Y. TIMES, May 23, 1993, § 1, at 29. Lawyers representing the American Civil Liberties Union do not think that even these blatant threats of violence against women and children could be banned because "they do not pose the kind of imminent threat of violence that . . . is the only grounds for prohibition under Supreme Court interpretations of the First Amendment." *Id.*

50. David McLemore, *Trying to Pull the Plug; San Antonio Cable TV Suicide*

"Morbid Underground" — Host of death-metal music show airs a video of a punk-rock "musician" defecating and urinating on stage.⁵¹

Even more shocking than the programs themselves is the fact that such content is often aired during early hours when children are likely to be watching.⁵² Furthermore, this type of programming has not been limited to a few isolated productions. In a 1991 report, the Anti-Defamation League identified fifty-seven programs preaching bigotry which have run on public access channels, reaching a potential audience of tens, if not hundreds, of thousands.⁵³

Predictably, the increase in controversial programming on public access has caused a great deal of public uproar.⁵⁴ As a re-

Guide Angers Many, DALLAS MORNING NEWS, Nov. 14, 1992, at 1A. In 1991, an episode of "The Worst Show" demonstrated how to build an acid bomb. *Id.* A week later, an acid bomb exploded in the driveway of a San Antonio police officer's home. *Id.*

51. Bill Duryea, *Cable TV Producer Off Hook*, ST. PETERSBURG TIMES, May 7, 1993, at 1B. The producer/host of "Morbid Underground" could not be prosecuted because "excretory conduct is not specifically prohibited in Florida; the dissemination of obscene videotapes is not against the law; and the obscenity statute does not clearly define 'prurient interest,' a cornerstone of most obscenity law." *Id.*

52. Berger, *supra* note 49, at 29; see also Jan Fuglaar, *Get Porn of Access Houston*, HOUS. CHRON., July 26, 1993, at A15 (reporting that access programming which featured full frontal nudity aired during early evening hours, "a prime viewing time for young children who flip through the channels").

53. IRWIN SUALL ET AL., ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, ELECTRONIC HATE: BIGOTRY COMES TO TV 2 (1991). Hate groups have embraced public access which enables them to reach unprecedented numbers of American viewers. *Id.* at 1. The report also notes that the use of the television medium lends an air of legitimacy to racial and religious bigotry. *Id.* In addition to the increased use of public access, hate groups have begun to employ other sophisticated technology to better spread their message, including computer bulletin boards, telephone hotlines, and talk show appearances. *Id.*

Tom Metzger is perhaps the most prolific producer of hate programming. A former Grand Dragon of the California Ku Klux Klan, Metzger claims to have produced programs similar to "Race and Reason" on over 60 cable systems in 40 cities. Michael Granbury, *Film Spurs Review of Metzger's Probation*, L.A. TIMES, June 5, 1992, Metro, at B1. Authorities decided to review a Nazi propaganda film produced by Tom Metzger for public access to determine whether he violated the terms of a court-ordered probation that followed his conviction of a hate crime in 1991. *Id.*

54. See, e.g., Michael Levy, *Explicit Movie Triggers End of "Dino, Rocco" — Airing of Pornography Violates Cable Contract*, BUFF. NEWS, Mar. 25, 1993, Local, at 1 (reporting that after "Dino and Rocco's Back Alley" aired on a Buffalo, New York public access station, 25 complaints were phoned in); Rob Polner, *TV Nazi Draws Viewer's Fire*, NEWSDAY, May 21, 1993, at 3 (reporting that about 100 people phoned Manhattan Community Access following a local news report on "Race and Reason" and demanded that it be taken off the air). The host of the weekly series, Herbert Poinsett, said that the only reason that his show is met with such opposition in New York is because "anything the Jews don't believe with [sic] is controversy." *Id.*; see also Tom Scherberger, *Meet the Bad Boys of Public Access*, ST. PE-

sult, cable operators have employed various methods in an indirect pursuit of editorial control over public access programming. These methods have included the airing of disclaimers and warnings before all access programs,⁵⁵ pre-screening videos and rescheduling potentially offensive content at later hours,⁵⁶ and encouraging counter-programming.⁵⁷ Local governments have also attempted to gain some level of control over public access programming. Some city governments have threatened to withdraw funding for public access,⁵⁸ while others have tried to dictate policy under the terms of their franchise agreements with cable operators.⁵⁹ Nevertheless, section 611(e) of the 1984 Cable Act presented a substantial obstacle to any attempts at censorship.⁶⁰ Further legislation was inevitable, and it came in the form of section 10(c) of the Cable Consumer Protection and Competition Act of 1992.⁶¹

3. The Cable Consumer Protection and Competition Act of 1992

In recognition of the difficulty which cable operators encountered in regulating the content of access programming, Congress enacted section 10 of the 1992 Cable Act.⁶² Section 10 defines the

TERSBURG TIMES, Nov. 30, 1992, at 1B (stating that "[w]hen Tampa's public access channels started showing naked women in prime time . . . the phone lines at the county courthouse began to light up").

55. R.A. Dyer, *Warner Cable Disclaimers Draw Objections; Producers Demand Freedom of Speech*, HOUS. CHRON., July 28, 1993, at A17. Warner Cable has started to air disclaimers before every video shown on its public access channel, regardless of content. *Id.*

56. R.A. Dyer, *TV Channel Censorship Is Denied*, HOUS. CHRON., July 31, 1993, at A34. Warner has also adopted a new policy to pre-screen all public access programming and to reschedule potentially offensive programs for later hours. *Id.*

57. "The best thing that a Jewish community can do is counter-program," according to the programming director for Jones Intercable in Tampa, Florida, "[b]ut they don't seem to want to do that." Duryea & Snyder, *supra* note 48, at 1A. According to a report issued by the Anti-Defamation League of B'nai B'rith, counter-programming is generally welcomed by cable operators, and has even been encouraged in some instances. SUALL ET AL., *supra* note 53, at 8.

58. Karen Welch, *Council Censors Public Access Television*, BUFF. NEWS, July 14, 1993, at 2. The Buffalo Common Council recently threatened to withdraw its funding for the local public access station unless it stopped airing "Dino and Rocco's Back Alley Show". *Id.*

59. R.A. Dyer, *Warner Puts Explicit Videos In Late Time Slot*, HOUS. CHRON., July 14, 1993, at A21. The franchise agreement between Warner Cable and the city of Houston provides "that the city shall adopt policies and procedures for the use of the public . . . access channel." *Id.*

60. See *supra* text accompanying note 35 (stating that § 611(e) expressly prohibited cable operators from exercising editorial control over PEG channels).

61. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460 (1992).

62. The executive director of the Justice Department's National Obscenity Enforcement Unit testified before the Senate Judiciary Committee in 1988 that "[t]he

rights of a cable operator regarding the prohibition of "indecent"⁶³ programming on both commercial leased access⁶⁴ and public, educational, and governmental (PEG) access channels. Subsection (c) of section 10 sets forth three categories of programming which are subject to censorship. This provision now authorizes operators to prohibit "[1] programming which contains obscene materials, [2] sexually explicit conduct, or [3] material promoting or soliciting unlawful conduct" on PEG channels.⁶⁵

The third category of programming prohibited under section 10(c), that which contains "material soliciting or promoting unlawful conduct," may present its own problems;⁶⁶ they are, however, beyond the scope of this Note. However, as the next section of this Note demonstrates, the implementation of the first two categories

Cable Communications Policy Act [of 1984] is so muddled with respect to obscenity that legislation is needed to clear up the matter." Robert Homan, *Justice Dept. Backs Cable 'Obscenity' Curbs*, ELEC. MEDIA, June 13, 1988, at 3.

63. "Indecent" programming is defined in § 10(a) of the 1992 Cable Act. For a discussion of § 10(a), see *infra* note 128.

64. Commercial leased access channels differ from public access channels in that cable operators charge leased access users an hourly fee for airtime. Mueller, *supra* note 1, at 1066. In addition, § 612(b) of the Communications Act requires operators of cable systems with 36 or more channels to provide commercial leased access channels. Cable Communications Policy Act of 1984, 47 U.S.C. § 532(b) (1985). However, cable operators are no longer required to provide public access channels. See *supra* note 28 and accompanying text (stating that *Midwest Video II* struck down the mandatory access rules in 1979). Nevertheless, franchising authorities may require that an operator provide access channels under § 531(b) of the 1984 Cable Act. Mueller, *supra* note 1, at 1081. A franchising authority is defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise." *Id.* at 1081 n.208 (quoting § 522(9) of the 1984 Cable Act).

65. Section 10(c) provides:

(c) Prohibits System Use. Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460 (1992) (emphasis added).

66. *In re* Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Second Report and Order, 8 F.C.C.R. 2638, ¶¶ 16-17 (1993) [hereinafter Second Report and Order] (discussing the application of the term material "soliciting or promoting unlawful conduct"); see also *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam). In *Hess*, the Supreme Court set forth the requirements for speech which may be prohibited as having a tendency to lead to violence, stating that:

[U]nder our decisions, the constitutional guarantees of free speech do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. (emphasis added).

of prohibited programming under section 10(c) will be extremely difficult, if not impossible.

II. PROBLEMS WITH THE CENSORSHIP PROVISIONS OF THE 1992 CABLE ACT

This section first addresses various problems associated with the standards which govern the obscenity provision of section 10(c). This includes both an analysis of the problems with obscenity law in general, and as applied under section 10(c). This section then turns to the sexually explicit conduct provision of section 10(c) and concludes that the provision is improperly applied to public access.

A. The Vague Law of Obscenity

The First Amendment to the Constitution provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." ⁶⁷ The debate surrounding the prohibition of speech, in its various forms, is as old as the First Amendment itself. Throughout American jurisprudence, the courts have struggled to determine which types of speech, if any, may be prohibited by law. ⁶⁸ Despite extensive litigation of speech-related issues, the Supreme Court has recognized only three categories of speech which may be prohibited: (1) "obscenity"; ⁶⁹ (2) "indecenty"; ⁷⁰ and (3) speech which advocates, and is directed towards inciting or producing, imminent unlawful conduct. ⁷¹

Pursuant to the 1992 Cable Act, the FCC subsequently pro-

67. U.S. CONST. amend. I.

68. "Defining obscenity has been, and continues to be, a most difficult task. The judicial effort to find an acceptable definition of obscenity constitutes one of the longest and most arduous struggles in the history of American jurisprudence." DANIEL S. MORETTI, *OBSCENITY & PORNOGRAPHY: THE LAW UNDER THE FIRST AMENDMENT* xi (1984).

69. See *Miller v. California*, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."). However, the Court has failed to settle on a standard for obscenity. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (stating that material must be "utterly without redeeming social value" to be classified as obscene); *Ginzburg v. United States*, 383 U.S. 463, 467 (1966) (deciding whether a publication is advertised "to appeal to the erotic interests of customers"); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating that "I know [hard-core pornography] when I see it"); *Roth v. United States*, 354 U.S. 476, 487 (1957) (concluding that "[o]bscene material is material which deals with sex in a manner appealing to a prurient interest").

70. See *infra* note 120 (discussing the Supreme Court's recognition of the FCC's power to regulate indecent speech in *Pacifica Found. v. FCC*, 438 U.S. 726 (1978)).

71. *Hess v. Indiana*, 414 U.S. 105, 108 (1973). See *supra* note 66 (setting forth the *Hess* standard for prohibiting speech as having a tendency to lead to violence).

mulgated rules implementing section 10(c).⁷² With respect to the obscenity provision of section 10(c), the FCC stated that “cable operators should be guided by the *Miller* obscenity standard in their determinations of what materials fit into [programming which ‘contains obscene materials’].”⁷³ In *Miller v. California*,⁷⁴ the Supreme Court set forth a three-pronged test in yet another attempt to define obscenity:

The basic guidelines for the trier of fact must be: (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 applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷⁵

The Court rejected the idea of a national standard for obscenity.⁷⁶ Instead, the Court held that local communities should be permitted to set their own standards to govern the first two prongs of the *Miller* test.⁷⁷ However, under the third prong of the test, findings must be made pursuant to an objective “reasonable person” standard.⁷⁸

Justice Douglas dissented and criticized the *Miller* test as vague, unworkable, and inherently subjective.⁷⁹ He further noted that the test did not give the public fair warning as to what constitutes obscenity.⁸⁰ There is well-grounded support for Justice

72. See generally Second Report and Order, *supra* note 66.

73. *Id.* ¶ 13.

74. 413 U.S. 15 (1973).

75. *Id.* at 24. The final inquiry of the *Miller* test, “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value,” replaced the preceding terminology that “a work must be ‘utterly without redeeming social value.’” DONALD E. LIVELY, *MODERN COMMUNICATIONS LAW* 134 (1991) (citing *Miller v. California*, 413 U.S. 15, 24 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966)).

76. See *Miller*, 413 U.S. at 31-34 (rejecting various arguments for a national standard).

77. See *id.* at 32 (stating that “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City”).

78. *Id.* “The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.” *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). “Notwithstanding its operation, the [reasonable person] standard does not entirely eliminate the problem of subjectivity insofar as all reasonable persons do not subscribe to like values or have the same sensitivities.” LIVELY, *supra* note 75, at 134.

79. See generally *Miller*, 413 U.S. at 37-47 (Douglas, J., dissenting) (discussing various problems with the standards).

80. MORETTI, *supra* note 68, at 33. In his dissent, Justice Douglas stated, “To

Douglas' criticisms. A two-year study conducted by the U.S. Commission on Obscenity and Pornography concluded:

These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts between prohibited and permissible materials often appear indefensible.⁸¹

Paris Adult Theatre I v. Slaton,⁸² a companion case to *Miller*, was the first obscenity case to apply the *Miller* test. In *Paris Adult Theatre I*, two local officials brought suit against the owners and operators of an adult theatre in Georgia, seeking to enjoin the showing of two allegedly obscene motion pictures in the theatre.⁸³ The trial judge dismissed the complaints, but the Georgia Supreme Court unanimously reversed, holding that the films were obscene and should have been enjoined.⁸⁴ The United

send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." *Miller*, 413 U.S. at 43-44 (Douglas, J., dissenting).

81. *Miller*, 413 U.S. at 40 (Douglas, J., dissenting) (quoting REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY 53 (1970)).

82. 413 U.S. 49 (1973).

83. *Id.* at 49-50. In 1970, the respondents filed civil complaints alleging that the films in question, "Magic Mirror" and "It All Comes Out in the End," were obscene under Georgia state law. Although the Georgia obscenity statute defined a criminal offense, the exhibition of obscenity could be enjoined in a civil proceeding. *Id.* at 52. The statute provided, in relevant part:

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters

. . . .

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed \$5,000, or both.

GA. CODE ANN. § 26-2101., reprinted in *Paris Adult Theatre I*, 413 U.S. at 52.

84. *Paris Adult Theatre I*, 413 U.S. at 52-53. The trial judge stated that, although obscenity was established, "[i]t appears to the Court that the display of these films in a commercial theatre when surrounded by requisite notice to the public of this nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible." *Id.* at 53. On appeal, the Georgia Supreme Court reversed on the ground that the exhibition of such material is not protected by the First Amendment, regardless of whether it is seen only by consenting adults. *Id.* (citing *Slaton v. Paris Adult Theatre I*, 185 S.E.2d 768, 770 (Ga.

States Supreme Court vacated the judgment and remanded to the Georgia Supreme Court in order to reevaluate the state obscenity statute in light of the standards announced in *Miller v. California*.⁸⁵

Justice Brennan strongly dissented from this holding and engaged in a comprehensive critique of the *Miller* test.⁸⁶ Given that cable operators must use the *Miller* test in deciding whether certain access programming is obscene,⁸⁷ Brennan's dissent provides a useful framework for analyzing the problems with the obscenity provision of section 10(c).

Justice Brennan began by noting that "[n]o other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards."⁸⁸ Obscenity standards are unavoidably deficient in that they are inherently vague.⁸⁹ The vagueness of the *Miller* test gives rise to a number of distinct problems in its application.⁹⁰

1. Lack of Fair Notice

First, and perhaps most importantly, the *Miller* test does not provide "fair notice" of exactly what materials are prohibited from dissemination.⁹¹ Lack of fair notice is a problem normally associ-

1971).

85. *Id.* at 69 (stating that the State of Georgia could regulate the allegedly obscene material exhibited in petitioner's theatre, provided that the state laws complied with the First Amendment standards set forth in *Miller v. California*, 413 U.S. 15, 23-25 (1973)).

86. *See Paris Adult Theatre I*, 413 U.S. at 73-114 (Brennan, J., dissenting).

87. *See* Second Report and Order, *supra* note 66, ¶ 13 (stating that the *Miller* standards should guide the cable operator).

88. *Paris Adult Theatre I*, 413 U.S. at 73 (Brennan, J., dissenting). Brennan concluded that the Supreme Court's ad hoc approach to obscenity, beginning with *Roth v. United States*, 354 U.S. 476 (1957), jeopardized First Amendment rights and should be abandoned. *Paris Adult Theatre I*, 413 U.S. at 73-74 (Brennan, J., dissenting). "We have failed to formulate a standard that sharply distinguishes protected from unprotected speech, and . . . we have resorted to [an] approach which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct." *Id.* at 83.

89. *Paris Adult Theatre I*, 413 U.S. at 84. "Any effort to draw a constitutionally acceptable boundary . . . must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concept necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them." *Id.*

90. *Id.* at 86 (stating that vagueness produces a number of distinct problems).

91. *Id.* Under the Due Process Clause of the Fourteenth Amendment, criminal laws must provide fair notice of "what the State commands or forbids." *Id.* (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not

ated with vague laws which force potential offenders to guess whether their conduct is unlawful.⁹² However, it follows that the individuals charged with enforcing vague laws also must guess whether certain conduct is proscribed.⁹³ Thus, cable operators acting pursuant to section 10(c) of the 1992 Cable Act will inevitably face the problem of uncertainty when deciding whether public access programming is obscene. The FCC has stated that cable operators should be "guided" by the *Miller* standards in determining whether programming is obscene.⁹⁴ However, an examination of the three-prong *Miller* test reveals that it provides little, if any, practical guidance to the cable operator.

The FCC has made a number of perplexing assumptions relating to implementation of the first prong: that every cable operator is an "average person"; that the operator knows what the prevailing "contemporary community standards" happen to be; and that the operator has the ability to eliminate any conflicting subjectivity in the application of those standards in finding whether the work "appeals to the prurient interest."⁹⁵ The second prong, under which the cable operator must decide whether the material is "patently offensive," is similarly troublesome.⁹⁶ Again, the obvious problem with the use of this term is one of inherent subjectivity. Plainly, what is offensive to one may not be offensive to another. Therefore, cable operators will necessarily have to rely on their personal likes and dislikes, morals, and tastes. In order to apply the third prong, a cable operator must not only act as a reasonable person would,⁹⁷ but must also know what constitutes serious literary, artistic, political, or scientific value.⁹⁸

reasonably understand to be proscribed." *Id.* at 87 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

92. In the area of First Amendment rights, this problem is often referred to as "overbreadth." For a discussion of overbreadth, see *infra* Part II.A.2 of this Note.

93. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 87-88 (1973) (Brennan, J., dissenting) (concluding that insufficient notice results in an "utterly intolerable" level of uncertainty, which not only compels potential offenders to guess whether their conduct is illegal, but invites "arbitrary and erratic enforcement of the law").

94. Second Report and Order, *supra* note 66, ¶ 13.

95. The first prong of the *Miller* test is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . ." *Miller v. California*, 413 U.S. 15, 24 (1973).

96. The second prong of the *Miller* test is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law. . . ." *Id.*

97. See *supra* note 78 and accompanying text (stating that the third prong of the *Miller* test employs an objective reasonable person standard).

98. The final inquiry under the *Miller* test is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

The *Miller* test was intended to guide the trier of fact in obscenity cases, not to assist individual cable operators in deciding whether a particular access program should be prohibited.⁹⁹ It is unreasonable to expect cable operators, who are merely laymen in the area of obscenity law, to know whether certain programming constitutes obscenity.¹⁰⁰ In short, by placing the burden of prohibiting obscene programming on the cable operator, the FCC has attempted to do the impossible.

2. Overbreadth

Justice Brennan identified a second, closely related problem which has arisen out of the Supreme Court's obscenity decisions. When one is forced to guess whether certain conduct will violate a statute, the problem of "overbreadth" exists in that the fear of a wrong guess often deters the exercise of fundamental rights.¹⁰¹ The chilling effect which *Miller* has had on the exercise of First Amendment freedoms is particularly egregious since these are among the most precious and important of all constitutional rights.¹⁰²

The problems associated with overbreadth become especially manifest when the *Miller* standards are applied in the context of public access programming. The power of the cable operator to censor programming will undoubtedly stifle the creativity of those who choose to use the public access forum to express themselves. Since there is no way to know in advance whether the cable operator will decide that a program is obscene, many public access producers will be hesitant to submit material which has even a remote possibility of being found offensive.¹⁰³ In this respect,

99. The introduction to the *Miller* test explicitly states, "The basic guidelines for the trier of fact must be . . ." *Id.* (emphasis added).

100. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 86 (1973) (Brennan, J., dissenting). "[N]o person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by [the Supreme] Court whether certain material comes within the area of 'obscenity' . . ." *Id.* at 87 (quoting *Ginzburg v. United States*, 383 U.S. 463, 480-81 (1966) (Black, J., dissenting)).

101. See *Barenblatt v. United States*, 360 U.S. 109 (1959) (Black, J. dissenting): [T]he 'vice of vagueness' is especially pernicious where legislative power over an area involving speech . . . is involved For a statute to be broad enough to support infringement of speech . . . against the unequivocal demand of the First Amendment necessarily leaves all person to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others.
Id. at 137-38.

102. *Paris Adult Theatre*, 413 U.S. at 90. (Brennan, J., dissenting) (stating that "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society").

103. Cable operators are permitted to require certifications from access users

section 10(c) clearly undermines the original intent of public access channels to be an outlet for unrestricted expression.¹⁰⁴

It is a fallacy to believe that the First Amendment was created with the expectation that all expression will be found agreeable by everyone. On the contrary, the framers of the Constitution clearly intended that the First Amendment facilitate the dissemination of diverse views and ideas in order to ensure a healthy democracy.¹⁰⁵ By giving the cable operator the power to censor material in a public forum, the FCC has encroached on one of the most fundamental of all rights guaranteed under the U. S. Constitution — the right to free speech.

3. Institutional Stress

The third problem associated with the vagueness of the *Miller* standards concerns the "institutional stress" which has been placed on the judiciary.¹⁰⁶ Because of the failure to define standards which are capable of being applied with any consistency by state and lower federal courts, nearly every obscenity case raises a constitutional question which must be dealt with by the Supreme Court itself.¹⁰⁷ Justice Brennan explained this problem by stating, "One cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so . . . The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court."¹⁰⁸ Additionally, the Court

that their programming does not contain material proscribed under § 10(c). Second Report and Order, *supra* note 66, ¶ 25. Under such a policy, cable operators may request indemnification from access users for the costs of defending a prosecution for carriage of an allegedly obscene program where the user has certified that the program is not obscene. *Id.* at 23 n.13.

104. Congress intended public access to provide a public forum for free debate and the open exchange of ideas. Rick K. Wilson, *Meddling With Access Houston Would Be Blow to Free Speech*, HOUS. CHRON., July 18, 1993, Outlook, at 5. "Congress' recognition of free speech is embodied in its access channels. Congressional legislation (and subsequent court action) protects public opinion from the intrusion of cable operators and franchisers alike." *Id.*

105. "The Constitution guarantees freedom of speech to promote the free exchange of ideas that is vital to a democratic society." Schwartz, *supra* note 6, at 1009. The First Amendment is vital to a healthy democracy because it protects minority opinions. Wilson, *supra* note 104, at 5. "In democratic societies opinions often clash . . . [b]y ensuring a voice for the dissenter, the majority will always be reminded of its fallibility. One hallmark of a democratic society is that all opinions have the right to be heard and judged." *Id.*

106. *Paris Adult Theatre I*, 413 U.S. at 91.

107. Justice Brennan stated that virtually every obscenity case "presents a constitutional question of exceptional difficulty." *Id.*

108. *Id.* at 92. In addition to the sheer number of cases and the necessity to arrive at a difficult constitutional determination in each, Justice Brennan complained that the Court should not have to waste its time by viewing the allegedly

has often been forced to resort to per curiam reversals or denials of certiorari in order to deal with the tremendous volume of obscenity cases.¹⁰⁹ By leaving lower court decisions intact, these methods effectively censor expression which may be protected.¹¹⁰ Furthermore, the need for an independent determination by the Court produces a continuing source of tension between state and federal courts.¹¹¹

The obscenity provision of section 10(c) will undoubtedly compound the institutional stress placed on the judiciary. It is important to note that all of the problems addressed by Justice Brennan arose from the application of obscenity standards by courts of law. If individual cable operators attempt to implement the *Miller* standards, it is staggering to think of the enormous potential for conflict. Hundreds, or even thousands, of new disputes over prohibited public access programming are likely to inundate the court system. Cable operators may be subject to lawsuits no matter what course of action they take.¹¹² These cases will add to an already overburdened Supreme Court docket, along with increasing the existing tension between state and federal courts.

The only thing clear about the *Miller* standards is that they are exceedingly vague. As such, the standards have proven to be

obscene materials. *Id.* at 92-93 (stating that "it is hardly a source of edification to the members of this Court who are compelled to view [the material] before passing on its obscenity").

109. *Id.* at 93 (stating that relying on per curiam reversals or denials of certiorari "conceals the rationale of the decision and gives at least the appearance of arbitrary action by the Court").

110. *Id.*

111. As for the cases which the Supreme Court does hear, the Court's inability to justify its decisions with any consistent rationale creates the appearance of second-guessing state courts. See *Paris Adult Theatre I*, 413 U.S. at 93.

112. There are two situations which will give rise to litigation. The first is where a cable operator rejects a program based on content. The chief operating officer for Media General Cable predicted that cable operators will be sued constantly under the 1992 Cable Act. Laurie Kellman, *Public-Access Cable Could Be Censored Under a New Law*, WASH. TIMES, Nov. 20, 1992, at B8. The official went on to say, "Who's to say that I'm the arbiter of good taste? Someone's going to disagree with me. In the long haul, it creates such aggravation for the people who franchise it that they'll pull access programming." *Id.*

The second situation is where the cable operator airs a program which is found to be obscene by viewers. Section 10(d) of the 1992 Cable Act amended § 638 of the Communications Act of 1934 by eliminating the immunity of cable operators from criminal prosecution or civil liability for programs which contain obscene material. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460 (1992). Section 638 of the Communications Act of 1934 now provides that "cable operators shall not incur any . . . liability for any program carried on any channel designated for public, educational, [or] governmental use . . . unless the program involves obscene material." Communications Act of 1934, 47 U.S.C. § 683 (1976) (emphasis added).

extremely problematic in both theory and practice. In a deceptively simple statement, the FCC has ruled that the *Miller* standards should guide the cable operator in deciding whether certain public access programming is obscene. However, the *Miller* test is far more confusing than helpful. It offers virtually no guidance to courts of law, much less individual cable operators. The implementation of section 10(c)'s obscenity provision will have serious repercussions reaching far beyond public access itself, ultimately infringing upon the fundamental rights guaranteed under the First Amendment.

B. The Sexually Explicit Conduct Provision of Section 10(c) is Properly Applied to Public Access

In addition to obscenity, section 10(c) also provides that a cable operator may prohibit programming which contains "sexually explicit conduct" on PEG channels.¹¹³ According to the FCC, the definition of sexually explicit conduct is synonymous with that of indecency as defined under section 10(a) of the Act.¹¹⁴ Thus, for purposes of section 10(c), sexually explicit conduct is defined as material "that depicts or describes sexual or excretory activities in a patently offensive manner as measured by contemporary community standards."¹¹⁵

This definition incorporates the terms "patently offensive" and "contemporary community standards," and therefore brings with it all of the problems associated with vagueness.¹¹⁶ Nevertheless, this definition has recently withstood constitutional challenge, as applied to telephone communications, in *Dial Information Services Corp. v. Thornburgh*.¹¹⁷ In *Dial Information Ser-*

113. Section 10(c) provides that a cable operator is authorized "to prohibit the use . . . of any channel capacity of any public, educational, or governmental access facility for any programming which contains . . . *sexually explicit conduct*" Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460 (1992) (emphasis added).

114. The FCC expressly rejected the contention that "sexually explicit conduct" should be construed to mean "obscene." Second Report and Order, *supra* note 66, ¶¶ 14-15. The FCC stated that the underlying purpose of § 10, to reduce the exposure children to indecent programming on access channels, indicates that a construction of the term "sexually explicit conduct" to mean indecent programming is reasonable. *Id.* ¶ 15. "[W]e believe that the same standard applicable under § 10(a) and, as defined for us for purposes of § 10(b), should also govern cable operators' determinations under § 10(c)." *Id.*

115. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(a), 106 Stat. 1460 (1992).

116. For a detailed analysis of the problems associated with the use of vague terms, see *supra* Part II.A.1-3 of this Note.

117. 938 F.2d 1535 (2d Cir. 1991). The court held that this definition of obscenity is "sufficien[t] . . . to provide guidance to the person of ordinary intelligence in the conduct of his affairs." *Id.* at 1541 (quoting *Grayned v. City of Rockford*, 408 U.S.

vices, the challenged statute prohibited providers of indecent telephone communications for commercial purposes from making their services available to persons under eighteen years of age.¹¹⁸ The FCC has interpreted *Dial Information Services* to mean that similar standards may be applied to cable television.¹¹⁹ However, the courts have expressly rejected the application of indecency standards to cable television.¹²⁰

Despite the unwillingness of the courts to permit the application of indecency standards to cable, the FCC claims that the definition of indecency as used in the 1992 Cable Act is constitutionally permissible because it represents a "compelling governmental interest" and is "carefully tailored" to the medium.¹²¹

104, 108 (1972)).

118. *Id.* at 1536. Known as the Helms Amendment to the Communications Act of 1934, the statute provides for fines of up to \$50,000, imprisonment up to six months, or both. 47 U.S.C. §§ 223(b)-(c) (1989).

119. The FCC stated that *Sable Communications v. FCC*, 492 U.S. 115 (1989) and its progeny, *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991) and *Information Providers' Coalition v. FCC*, 928 F.2d 966 (9th Cir. 1991), "indicate that regulation of indecent matter on other forms of expression is constitutionally permissible provided that it meets the "compelling governmental interest" test and is "carefully tailored." *In re* Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, First Report and Order, 8 F.C.C.R. 998, ¶ 10 (1993) [hereinafter First Report and Order].

120. See Laurence H. Winer, *The Signal Cable Sends, Part II — Interference From the Indecency Cases?*, 55 *FORDHAM L. REV.* 459, 506 (1987) (discussing the various cases which have expressly rejected the applicability of indecency standards to the cable medium). The Supreme Court first recognized the power of the FCC to prohibit nonobscene, indecent speech in *Pacifica Found. v. FCC*, 438 U.S. 726 (1978). In *Pacifica*, The Pacifica Foundation, a not-for-profit owner of non-commercial radio stations, aired comedian George Carlin's infamous monologue featuring what he identified as seven "dirty" words: "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker," and "tits." Winer, *supra*, at 490 n.170. The Supreme Court held that the FCC was not barred from sanctioning Pacifica for broadcasting indecent, though not obscene, material over the radio. See *Pacifica*, 438 U.S. at 750-51 (stating that "[w]e simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."). The Supreme Court described indecent speech as "expression which, although it may have social, political or artistic value, fails to conform to accepted standards of morality." Mueller, *supra* note 1, at 1054 (discussing *Pacifica*, 438 U.S. at 739-41).

However, in *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167 (D. Utah 1982), the court compared traditional broadcasting and cable and concluded that the inherent differences preclude *Pacifica's* applicability to cable. In *Cruz v. Ferre*, 571 F. Supp. 125, 132 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985), the Court stated that "[the] opportunity to completely avoid the potential harm to minor or immature viewers sounds the death-knell of *Pacifica's* applicability in the cable television context." Unlike the television viewer, the cable subscriber may consult viewing guides, cancel his subscription at any time, or use a free "lockbox" or "parental key" available from the cable company in order to avoid offensive programming. *Id.* See *infra* Part III of this Note for a proposal to eliminate § 10 of the 1992 Cable Act in favor of a lockbox approach.

121. See First Report and Order, *supra* note 119, ¶¶ 9-11 (discussing the permis-

The asserted purpose underlying section 10 is to reduce the exposure of children to indecent programming.¹²² Indeed, few would argue that this is not a compelling governmental interest. However, whether the definition of indecency adopted by the FCC is carefully tailored to public access is another matter.

The FCC has attempted to group together two very different types of access channels by applying the indecency standard of section 10(a) to section 10(c). While the programming on leased commercial access usually consists of various forms of advertising,¹²³ all public access programming is noncommercial.¹²⁴ This distinction is legally significant in that the Supreme Court affords a greater degree of protection to noncommercial speech than to commercial speech.¹²⁵ Thus, by applying the indecency standard of section 10(a), which governs leased *commercial* access, to public access, the FCC has simply ignored this fundamental rule of law.

Clearly, the FCC's current approach to implementing section 10(c) is riddled with problems. The stated purpose of the legis-

sibility of regulating indecent programming). In *Sable Communications v. FCC*, 492 U.S. 115 (1989), the Supreme Court held that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.* at 126.

122. *Id.* at 6. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460 (1992) (providing that "the Commission shall promulgate regulations designed to limit the access of children to indecent programming . . ."). Almost 15 years prior to the passage of the 1992 Cable Act, the FCC noted:

The concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

FCC Memorandum Opinion and Order, 56 F.C.C.2d 94, 98 (1978).

123. Mueller, *supra* note 1, at 1066.

124. *Id.* at 1082. Public access channels consist solely of noncommercial programming and are provided without charge on a first-come, first-served nondiscriminatory basis. *Id.*

125. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (stating that "our decisions have recognized 'the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978))). Accordingly, the Constitution affords less protection to commercial speech than to noncommercial speech. *Id.* at 562-63. "With respect to noncommercial speech, [the Supreme] Court has sustained content-based restrictions only in the most extraordinary circumstances In light of the greater potential for deception or confusion in the context of certain advertising messages . . . content-based restrictions on commercial speech may be permissible." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

lation is to reduce the exposure of children to offensive programming on access channels.¹²⁶ However, this does not warrant the intrusion upon the right of willing adults to produce, or to view, such material. Fortunately, as the next section of this Note demonstrates, there is a less restrictive means to achieve this purpose.

III. THE PERFECT SOLUTION

The good news is that the seemingly insurmountable difficulties associated with the implementation of section 10(c) of the 1992 Cable Act in its present form can be completely avoided. It is rare when technology is able to solve legal problems of this magnitude, but such is the case with offensive access programming. Ironically, the comments to section 10(b) of the Act suggest the answer — lockboxes.

In proposing that section 10(c) be repealed in favor of a lockbox approach, this section first responds to the various arguments asserted by the FCC in its previous rejection of lockboxes.¹²⁷ This section then addresses the economic aspects of the lockbox approach. Finally, this section discusses the additional benefits of lockboxes.

A. The Lockbox Arguments

While section 10(c) addresses PEG access programming, sections 10(a) and 10(b) apply to leased access channels. Section 10(a) of the Act authorizes cable operators voluntarily to enforce a policy of prohibiting indecent programming on commercial leased access channels on their systems.¹²⁸ Section 10(b) mandates that

126. See *supra* note 122 and accompanying text (discussing the asserted governmental interest of reducing the exposure of children to offensive programming on access channels).

127. The FCC expressly rejected lockboxes as an alternative means of reducing children's exposure to indecent programming on leased commercial access. See First Report and Order, *supra* note 119, ¶¶ 12-17 (discussing the least restrictive means issue).

128. *Id.* ¶ 1. Section 10(a) of the Act provides:

Sec. 10. CHILDREN'S PROTECTION FROM INDECENT PROGRAMMING ON LEASED ACCESS CHANNELS.

(a) Authority to Enforce. Section 612(h) of the Communications Act of 1934 (47 U.S.C. § 532(h)) is amended —

- (1) by inserting "or the cable operator" after "franchising authority"; and
- (2) by adding at the end thereof the following: "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(a), 106 Stat. 1460 (1992).

For purposes of the Act, "indecent" programming is defined as programming

any indecent programming which is not voluntarily prohibited by the operator under section 10(a) must be placed on a single leased access channel.¹²⁹ Further, the channel must be blocked by the operator unless the cable subscriber requests access to the channel in writing.¹³⁰

In April of 1993, a conglomeration of public interest groups known collectively as "Alliance"¹³¹ challenged the constitutionality of section 10(b). Alliance argued that the blocking approach chosen by the FCC is not the least restrictive means available.¹³² According to Alliance, the utilization of "lockboxes" would be equally effective, yet less restrictive than blocking.¹³³

"that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." First Report and Order, *supra* note 119, ¶ 34. "The concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." FCC Memorandum Opinion and Order, *supra* note 122, at 98.

However, "[c]able operators . . . need not prohibit indecent programming but are free to ban such programming on their commercial leased access channels as long as they have a written and published policy and, in enforcing any such prohibition, exercise their reasonable belief about which programming is or is not indecent." First Report and Order, *supra* note 118, ¶ 32. Thus, the cable operator is afforded wide discretion as to whether programming is classified as indecent. *Id.* ¶ 29.

129. Section 10(b) provides:

Communications Regulations. Section 612 of the Communications Act of 1934 (47 U.S.C. § 532) is amended by inserting after subsection (i) (as added by subsection 9(c) of this Act) the following new subsection:

'(j)(1) Within 120 days following the date of this subsection, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designed for commercial use under this section;

(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).'

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(b), 106 Stat. 1460 (1992).

130. *Id.* (providing that "cable operators [are required] to block such single channel unless the subscriber requests access to such channel in writing").

131. The Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union, and People for the American Way are referred to jointly as "Alliance." First Report and Order, *supra* note 119, app. B.

132. *Id.* ¶¶ 3, 12.

133. *Id.*

A lockbox is a simple device which allows the subscriber to select the programming to be blocked out.¹³⁴ Though not a novel idea,¹³⁵ the FCC summarily rejected lockboxes in favor of the current blocking approach by which the cable operator decides whether programming may be aired.¹³⁶

1. The FCC's Rationale Is Inapplicable To Public Access

In support of its decision, the FCC relied on *Dial Information Services Corp. v. Thornburgh*.¹³⁷ In *Dial Information Services*, the Second Circuit held that a pre-subscription blocking approach was the least restrictive means to reduce children's access to indecent telephone communications.¹³⁸ The Court declared the approach to be an ineffective means, citing the fact that only four percent of residential telephone lines had been blocked in the two years central blocking had been available.¹³⁹

This rationale, while perhaps sound as applied to telephone communications, is misplaced with respect to public access. First, the central blocking system at issue in *Dial Information Services* is different than the lockbox approach in certain important respects. The central blocking process involved the assignment of a

134. *Id.* ¶ 3 n.4. The term lockbox refers to two different systems. Some cable systems offer devices the sole function of which is to block out channels. *Id.* However, the regular cable tuners which most cable systems currently use have the additional capability of blocking out channels through the use of a "Parental Authorization" feature. See, e.g., SCIENTIFIC ATLANTA, INC., SERIES 8580 SET-TOP TERMINAL USER'S GUIDE, PUB. NO. 69T147B, PART NO. 232139 18 (1988) (discussing the "Parental Authorization" feature).

135. The courts are aware of such devices. See *Cruz v. Ferre*, 571 F. Supp. 125, 132 (S.D. Fla. 1983) (noting that "to protect children or other immature viewers from unsuitable programming, subscribers need only use a free 'lockbox' or 'parental key' available from [the cable operator]"). Congress is not only aware of lockbox technology, but has even gone so far as to require cable operators to provide lockboxes, upon request, to their subscribers in order to restrict the viewing of obscene or indecent programming on premium cable channels such as Home Box Office or Showtime. Cable Communications Policy Act of 1984, 47 U.S.C. § 544(d)(2)(A) (1985). However, the lockbox requirements do not apply to PEG access channels. Winer, *supra* note 120, at 511 n.282.

136. See generally First Report and Order, *supra* note 119, ¶¶ 12-17 (addressing the least restrictive means issue).

137. 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

138. First Report and Order, *supra* note 119, ¶ 13 (citing *Dial Information Services*, 938 F.2d at 1542). Under the "central blocking" approach at issue in *Dial Information Services*, telephone subscribers could request that the telephone company block access to sexually explicit telephone services. *Dial Information Services*, 938 F.2d at 1541. The Court concluded that central blocking was not as effective as the "pre-subscription" approach, which is similar in principle to the method currently employed under § 10(b) of the 1992 Cable Act. *Id.* at 1542.

139. *Dial Information Services*, 938 F.2d at 1542. The Court also relied on an "awareness study" which revealed that half of the residential households in New York were unaware of sexually explicit telephone services or central blocking. *Id.*

three digit prefix to the phone numbers of sexually explicit telephone services.¹⁴⁰ When parents received a telephone bill, they would be put on notice that a child was making calls to these services and could request central blocking.¹⁴¹ Under the lockbox approach, every cable subscriber would be asked if they wanted a lockbox as part of their basic cable package. The cable operator would be required to furnish a lockbox to every subscriber who requested one. Therefore, unlike the central blocking system in *Dial Information Services*, all cable subscribers would be made fully aware of the availability of lockboxes.¹⁴²

Second, sexually explicit telephone communications and public access programming are two entirely different media. Such telephone services are businesses exclusively engaged in providing various forms of "phone sex" for profit.¹⁴³ In contrast, public access channels are nonprofit and exist solely to provide a forum for noncommercial programming.¹⁴⁴ Public access channels and sexually explicit telephone services cannot be rationally equated. Thus, the attempt by the FCC to use the rationale of *Dial Information Services* to support its decision is illogical, particularly in light of the fact that each medium of expression requires individualized treatment.¹⁴⁵

2. Lockboxes Are Simple To Operate

The FCC also identified what it considered to be another drawback of the lockbox approach. The FCC felt that lockboxes

140. *Id.* at 1541.

141. *Id.* at 1541-42.

142. In *Dial Information Services*, the Court reasoned that the low percentage of households which were aware of central blocking rendered the approach ineffective. *Id.* at 1542.

143. The statute at issue in *Dial Information Services* prohibited "providers of indecent telephone communications for commercial purposes" from making their services available to minors. *Dial Information Services*, 938 F.2d at 1536 (emphasis added). Although the plaintiffs-appellees described themselves as "electronic publishers" and "information providers," the Court characterized them as "purveyors of pornography" and referred to the services collectively as "dial-a-porn." *Id.* at 1537.

144. See *Wilson*, *supra* note 104, at 5 (stating that "[Congress] reserved [public access] to provide a public forum in which citizens could exercise their rights to free speech").

145. "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and natures' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981); see also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) ("Each method tends to present its own peculiar problems.").

were too difficult to install, activate and deactivate in the attempt to block out offensive programming.¹⁴⁶ However, this speculation is based upon a misunderstanding of lockbox technology. A lockbox is no more difficult to install than a regular cable tuner.¹⁴⁷ Professional installers employed by the cable system are capable of making any necessary equipment changes. To operate a lockbox, the user need only punch in a private code or turn a key, depending on the system, to lock or unlock specific channels.¹⁴⁸ Lockboxes enable the parent to block out any channels, access or otherwise, in a matter of seconds before leaving a minor unsupervised.¹⁴⁹ When desired, such channels can be reactivated just as easily.¹⁵⁰ Accordingly, there is little merit to the argument that lockboxes are too difficult to install and operate.

3. *The Lockbox Approach Is Economically Viable*

Cable companies may object to the lockbox requirements as imposing an unreasonable economic burden on them. However, most cable systems already have lockbox technology in place.¹⁵¹ Cable subscribers on systems which do not currently offer such capabilities could help subsidize the cost of the devices through slightly increased subscription rates.¹⁵² More significantly, by preventing the inevitable lawsuits challenging the current version of section 10(c), the lockbox approach has the potential to save cable companies millions in legal fees.¹⁵³ These savings alone will more than make up for any additional costs which the cable systems are forced to bear.

B. Additional Benefits

The lockbox approach is not merely less restrictive than the FCC's rules, it completely avoids the problems associated with

146. First Report and Order, *supra* note 119, ¶ 15. The FCC contended that since offensive programming may be shown randomly under the lockbox approach, subscribers would likely forego receiving access programming entirely by leaving the lockbox activated permanently. *Id.*

147. See SCIENTIFIC ATLANTA, INC., *supra* note 134, at 18 (providing instructions for installation of unit).

148. Winer, *supra* note 120, at 516.

149. See SCIENTIFIC ATLANTA, INC., *supra* note 134, at 8-9 (providing instructions for activating and deactivating the "Parental Authorization" feature).

150. *Id.*

151. See *supra* note 134 (stating that the cable tuners which most cable systems currently use incorporate a "Parental Authorization" feature).

152. All subscribers to cable systems which offer premium cable channels currently subsidize lockboxes which must be provided pursuant to § 544(d)(2)(A) of the 1984 Cable Act. Winer, *supra* note 120, at 517 n.299.

153. See *supra* Part II.A.3 of this Note for a discussion of the inevitable litigation which will result under the current version of § 10(c) of the 1992 Cable Act.

giving the power of censorship to the cable operator.¹⁵⁴ Since the cable operator will not be forced to decide whether certain programming is obscene or indecent, the vagueness of these standards will no longer be a concern.

Furthermore, the lockbox approach is more effective than the FCC rules. By transferring the power of censorship from the cable operator to the cable subscriber, concerned parents are given total control over the programming their children may view. Certainly, not every parent will agree with a cable operator regarding what constitutes appropriate programming for their children. Thus, lockboxes provide parents with a level of flexibility and control which the FCC rules simply cannot match.

CONCLUSION

There is no question that the exposure of children to offensive programming is a legitimate concern. However, this concern does not justify section 10(c)'s encroachment on the fundamental freedoms guaranteed under the First Amendment. The FCC has promulgated rules which undermine the very concept of public access as a forum for free expression.

The FCC rules implementing section 10(c) are on very tenuous constitutional grounds. In November of 1993, a three-judge panel of the United States Court of Appeals for the District of Columbia ruled that the Act's ban on indecent material violates the First Amendment.¹⁵⁵ Fortunately, there is a better alternative.

This Note proposes that the FCC adopt a lockbox approach to reduce the exposure of children to offensive programming on access channels. The lockbox approach avoids all the problems associated with putting cable operators in the untenable position of deciding whether certain programming is obscene or indecent. Furthermore, lockboxes offer parents greater control over their children's viewing habits than do the FCC rules.

The responsibility of preventing the exposure of children to offensive programming lies with parents, not cable operators. The

154. See *supra* Part II of this Note for a discussion of the problems with § 10(c).

155. See *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993). This ruling has since been vacated by the full Court of Appeals pending rehearing *en banc*. *Alliance for Community Media*, 15 F.3d 186 (D.C. Cir. 1994) (*en banc*). *But cf.* *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335, 1345 (N.D. Cal. 1994) (holding the District of Columbia Court of Appeals' stay is not binding on the Ninth Circuit).

lockbox approach gives parents the ability to meet this responsibility, while preserving the unique medium of public access — “the electronic realization of the First Amendment.”¹⁵⁶

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156. Kellman, *supra* note 112, at B8.

