

Is South Park Next? A Look at the Supreme Court, Congress and  
Regulation of Indecency on Cable Television.

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Amid increasing scrutiny of broadcast television, member of the Federal Communications Commission (“FCC” or “Commission”), Congress, and decency watchdog groups have called for an extension of the indecency statute and corresponding regulations to cable television. From a legal perspective, regulation of indecency in broadcast has been justified as a legitimate restraint on First Amendment speech because of the 1978 landmark case of *FCC v. Pacifica Foundation*.<sup>1</sup> In *Pacifica*, the Supreme Court (“Court”) provided two oft-repeated rationales for allowing what it considered protected First Amendment speech (indecent speech) to be regulated by the FCC. The first justification proffered was the pervasiveness of the broadcast medium and the second, the accessibility of the broadcast medium to children.<sup>2</sup> What is not crystal clear is whether the reasoning in *Pacifica* could be extended to allow Congress, and in turn the FCC, to regulate indecent material on cable television.

Part I of this paper will examine recent attempts by Congressional members to regulate indecent content in the cable arena as well as consider the outside pressures that may be driving such attempts. Part II of this paper will explore relevant Supreme Court cases, which shed some light on whether the Court would uphold an indecency regulation of cable, beginning with a look at *Pacifica*. In exploring these cases, the paper will provide a brief background of the issues in each case, but will concentrate heavily on the issues relevant to the cable medium and indecent material. While many federal district court and appellate court decisions have been issued regarding the regulation of indecency on cable,<sup>3</sup> those decisions will not be discussed in depth, given the Supreme Court is not bound by such precedent. Part III of this paper will analyze the importance of the decisions in Part II, attempting to thread some commonalities between the decisions and discussing what the decisions portend for indecency regulation in the cable arena. The paper will conclude that the Supreme Court is unlikely to uphold such cable indecency regulations, though as with any balancing tests the Supreme Court uses, much of the analysis depends on the deference the Supreme Court would afford Congress in this First Amendment field.

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<sup>1</sup> 438 U.S. 726 (1978).

<sup>2</sup> *Id.* at 748-49.

<sup>3</sup> *See, e.g.*, *Cruz v. Ferre*, 755 F.2d 1415 (11<sup>th</sup> Cir. 1985); *Community Television, Inc. v. Roy City*, 555 F.Supp. 1164 (D.Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982).

### **Part I. Wash Their Mouths Out: Congress and Decency Groups take on Cartman**

The most recent versions of indecency bills passed by the House and considered in the Senate in 2005 raise the maximum fine for indecency violations on broadcast television.<sup>4</sup> The bills represent a continuation of the crusade to rid broadcast airwaves of indecency, which picked up steam after the Janet Jackson/Justin Timberlake 2004 Super Bowl halftime show. While the most recent bills do not extend to cable television, there has been much speculation as to whether the next big crackdown on indecency by Congress will be in the cable arena.<sup>5</sup> Such speculation is not unfounded, and it may actually prove to be prescient.

For example, in March of 2004, the U.S. Senate Commerce Committee came just one vote shy of extending the FCC's authority to regulate indecency under 18 U.S.C. §1464 to include regulation over cable television broadcasts.<sup>6</sup> The regulation was proposed as an amendment to the Senate's proposed Broadcast Decency Enforcement Act, which was eventually passed, but never made it to the President's desk due to the Senate's and House's inability to reconcile their two different "decency" bills.<sup>7</sup>

The interest in cable isn't limited to this amendment. FCC Chairman Michael Powell, in a speech to the National Association of Broadcasters in April 2004 stated "I don't believe the First Amendment should change channels when it goes from channel 7 to channel 107."<sup>8</sup> In addition, House Commerce Committee Chairman Joe Barton declared last April that unless the cable industry cleans up its act, he would introduce a bill forcing cable to comply with the same regulatory standards as broadcast.<sup>9</sup> According to Barton, whether the content is on satellite, broadcast or cable, the same rules of decency should apply. Most recently, Alaska Senator Ted Stevens has directly called for extension of the indecency regulations to cable, stating, "I think we can put restrictions on cable itself. At least I intend to do my best to push that."<sup>10</sup>

A report on the Parents Television Council's ("PTC") website sets out the PTC's clear opinion on cable. The report cited a set of studies purporting to show that sex, foul

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<sup>4</sup> H.R. 310, 109<sup>th</sup> Cong. (2005); S. 193, 109<sup>th</sup> Cong. (2005).

<sup>5</sup> See, e.g., Adam Thierer, *A PG Tony Soprano: Should TV be censored?* NATIONAL REVIEW ONLINE (June 4, 2004) available at <http://www.nationalreview.com/comment/thierer200406040902.asp>.

<sup>6</sup> The Reporters Committee for Freedom of the Press, *Committee rejects cable indecency bill, approves violence curb* (March 10, 2004), available at <http://www.rcfp.org/news/2004/0310hr3717.html>.

<sup>7</sup> Associated Press, *Move to Raise Indecency Fines Fails* (October 11, 2004), available at <http://www.firstamendmentcenter.org/news>.

<sup>8</sup> John M. Higgins, *Under assault: Washington takes aim—and cable runs scared*, BROADCASTING & CABLE (April 26, 2004).

<sup>9</sup> *Id.*

<sup>10</sup> Frank Ahrens, *Senator Bids to Extend Indecency Rules to Cable, Industry Defends Its Self-Policing Activities as Sufficient*, WASHINGTON POST (March 2, 2005), available at <http://www.washingtonpost.com/wp-dyn/articles/A64548-2005Mar1.html>.

language, and violence on broadcast television are more prevalent and more explicit than ever before.<sup>11</sup> While lauding the FCC's crackdown on broadcast indecency, the PTC report said that it would not make any difference in the long run if indecent content were still rampant on basic cable. The report concluded that in today's media environment it made no sense to apply one set of rules to broadcast and another (or none) to cable. "Either the FCC must start looking at cable indecency, and fining the stations and cable carriers that violate decency standards, or consumers need to be given the option of buying their cable packages on an a la carte basis."<sup>12</sup> While most recent calls to regulate cable indecency focus on the a la carte offering (requiring cable operators to unbundle their tiered channel pricing structure),<sup>13</sup> according to a Booz Allen study cited by the National Cable Television Association, First Amendment scrutiny calls into question the constitutionality of such a regulatory scheme as well.<sup>14</sup> In the end, the call for a la carte pricing appears to be another way the PTC and similar groups are attempting to "sanitize" cable television. If calls for a la carte pricing fail or lose favor, it is likely that decency groups and certain members of Congress will quickly fall back onto calls for direct regulation of indecency on cable.

## **Part II. Legal Background**

### ***A. Pacifica, Broadcast and the Seven Dirty Words***

The Court's 1978 *Pacifica* case arose out of an afternoon broadcast of comedian George Carlin's 12-minute monologue entitled "Filthy Words".<sup>15</sup> The monologue, recorded before a live audience in a California theater, consisted of Carlin's use of seven dirty words he believed you couldn't say over the public airwaves.

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<sup>11</sup> Parents Television Council, *Cable Awash in Raunch, A Content Analysis of expanded cable's Original Prime-Time Series* (November 2004), available at <http://www.parentstv.org/PTC/publications/reports/2004cablestudy/main.asp>.

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Letter from Brent Bozell to Senator John McCain Concerning Cable Indecency (March 4, 2004), available at <http://www.parentstv.org/ptc/publications/release/2004/lettertomccain.asp>.

<sup>14</sup> National Cable & Telecommunications Association, *Booz Allen Study Shows that a La Carte Pricing Would Increase Cost and Reduce Programming Diversity for Most Cable Consumers* (July 15, 2004), available at <http://www.ncta.com/press/press.cfm?PRid=518&showArticles=ok>.

<sup>15</sup> *Pacifica*, 438 U.S. at 730.

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On the basis of one complaint received by the FCC, the Commission held that it could in fact regulate indecent material under 18 U.S.C. § 1464, which prohibits the utterance of “obscene, indecent, or profane language by means of radio communication.”<sup>16</sup> The Commission concluded that when certain words depict sexual and excretory activities in a patently offensive manner and are repeated over and over at a time when children are in the audience, the language is indecent.<sup>17</sup> While not advocating an outright ban on indecent material, the Commission proposed treating indecent broadcasts as a “nuisance” that could be channeled and aired only during certain hours.<sup>18</sup>

The Supreme Court, in a 5-4 decision, upheld the Commission’s ability to regulate the broadcast. The majority opinion addressed a number of issues, but for purposes of this paper, only two will be discussed in depth. The first issue considered by the Court was whether the Commission’s order was unconstitutional because the Commission’s definition of indecency was overbroad, and therefore, burdened too much protected speech.<sup>19</sup> The majority rejected this argument by stating the Court was only considering the particular broadcast in question, not a general rule regarding indecency. Additionally, three of the majority Justices maintained that while the Commission’s definition might lead broadcasters to censor themselves, it would affect only a small area of speech which they believed lay only at the periphery of First Amendment concern.<sup>20</sup> The majority’s consideration of the speech’s value led two of the majority Justices to issue a concurring opinion, wherein they disagreed with the Court’s attempt to determine First Amendment protection by placing a value system on the speech involved.<sup>21</sup>

The second, and more important issue addressed by the Court, was whether the Commission could even regulate speech that was not technically obscene within the definition of *Miller v. California*.<sup>22</sup> The majority acknowledged that Carlin’s monologue was entitled to First Amendment protection, and that the Commission’s objection to the monologue was based in part on its content.<sup>23</sup> However, the majority noted that First Amendment protections are not absolute,

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<sup>16</sup> 18 U.S.C. § 1464.

<sup>17</sup> *Pacifica*, 438 U.S. at 732.

<sup>18</sup> *Id.* at 731.

<sup>19</sup> *Id.* at 742.

<sup>20</sup> *Id.* (Justices Stevens, Chief Justice Burger, and Justice Rehnquist).

<sup>21</sup> *Id.* at 761. (Justices Blackmun and Powell).

<sup>22</sup> 413 U.S. 15 (1973). In *Miller*, the Supreme Court set forth the following guidelines for the trier of fact before finding material indecent: (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.  
*Id.*

<sup>23</sup> *Pacifica*, 438 U.S. at 742.

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listing the established exceptions to protected speech, ranging from fighting words to obscenity.<sup>24</sup> Although indecent material did not fit within any of the unprotected categories enumerated by the Court, the majority noted, “constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.”<sup>25</sup>

The majority maintained that broadcasting as a medium had received limited First Amendment protection in the past and provided two relevant reasons for such limitations in *Pacifica*. First, the majority cited the “uniquely pervasive presence”<sup>26</sup> broadcasting has in the lives of Americans. In particular, the majority explained that the broadcast audience is tuning in and out of programming, and therefore, a prior warning by the programmer that explicit material is contained in the program cannot protect the listener or viewer. Furthermore, according to the majority, once the harm is done, you cannot simply avoid the offense by turning off the program.<sup>27</sup>

The second reason given by the majority for limited protection of broadcasting was that broadcasting is “uniquely accessible to children....”<sup>28</sup> The Court explained that other forms of offensive expression can be withheld from children without restricting the expression at its source; however, broadcasting has no such ability. The Court also noted that it had previously recognized the government’s interest in protecting its youth from such material. In addition, distinguishing the Court’s opinion in *Cohen v. California*,<sup>29</sup> the Court stated that the “offensive” language on the back of Cohen’s jacket may not have been fully understood by children, while the broadcast of Carlin’s monologue “could have enlarged a child’s vocabulary in an instant.”<sup>30</sup>

Based on these rationales for affording a lower level of protection to broadcasting, the Court held that Commission had the authority to regulate the speech in question. The Court, however, noted the “narrowness of its holding.”<sup>31</sup> In particular, the Court cautioned that context is key and that a host of variables must be considered, such as the time of day the program is

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<sup>24</sup> *Id.* at 745. The Supreme Court has established several categories of unprotected speech, or speech that is deserving of less protection. See *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (commercial speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

<sup>25</sup> *Id.* at 747.

<sup>26</sup> *Id.* at 748.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 749.

<sup>29</sup> 403 U.S. 15 (1971).

<sup>30</sup> *Pacifica*, 438 U.S. at 749.

<sup>31</sup> *Id.* at 750.

broadcast, the composition of the audience and the “differences between radio, television, and perhaps closed-circuit transmissions.”<sup>32</sup>

**B. *Sable and Dial-a-Porn***

Eleven years after *Pacifica*, the Court yet again addressed the issue of indecent material, but this time the medium was the telephone. In 1988, Congress passed a statute amending §223(b) of the Communications Act of 1934, the result of which was a ban on indecent and obscene interstate commercial telephone messages.<sup>33</sup> In *Sable Communications of Cal., v. F.C.C.*,<sup>34</sup> the Supreme Court issued a unanimous decision holding that §223(b)’s prohibition on indecent telephone messages violated the First Amendment.

The Court quickly upheld the Section’s ban on obscene calls stating, “the protection of the First Amendment does not extend to obscene speech.”<sup>35</sup> However, the Court noted that “sexual expression, which is indecent but not obscene is protected by the First Amendment....”<sup>36</sup> The Court’s opinion specified that it would use the “strict scrutiny” test to assess the constitutionality of the ban on indecent speech, which test provides that the government may regulate protected speech to promote a compelling interest if it chooses the least restrictive means to do so.<sup>37</sup>

The Court recognized the government’s stated interest in protecting the physical and psychological well being of minors was indeed compelling.<sup>38</sup> But, the means the government uses to achieve those ends must also be carefully tailored. Here, the Court observed that §223(b)’s effect was to deny the protected speech to adult and child alike therefore, the statute, as it related to indecent speech, was not reasonably restricted.<sup>39</sup> The government argued that the Court should look to its *Pacifica* case, wherein the Court allowed regulation of protected indecent speech, even when that meant it would be unavailable to adults at certain hours.<sup>40</sup> Emphasizing the narrowness of the Court’s 1978 decision, the Court distinguished *Pacifica* on several grounds.

First, unlike the ban in *Sable*, the regulation the Court upheld in *Pacifica* did not completely ban indecent material on broadcast -- it channeled the speech to times when children were less likely to be in the audience.<sup>41</sup> Second, the Court noted that the *Pacifica* decision “relied

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<sup>32</sup> *Id.*

<sup>33</sup> *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 117 (1989).

<sup>34</sup> 492 U.S. 115 (1989).

<sup>35</sup> *Id.* at 124.

<sup>36</sup> *Id.* at 126.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 127.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

on the ‘unique’ attributes of broadcasting.”<sup>42</sup> Specifically, that broadcasting is pervasive and invades the individual’s home and is “‘uniquely accessible to children.’”<sup>43</sup> The telephone communications at issue in *Sable* were substantially different since they required affirmative steps to receive the communication. “Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.”<sup>44</sup>

The government argued that nonetheless, there were no less restrictive means available to prevent children from gaining access to the indecent messages. However, the Court determined that there were several, less restrictive alternatives that both the FCC and Congress had considered, such as requiring a credit card before granting access, using access codes and scrambling devices.<sup>45</sup>

In his concurring opinion, Justice Scalia cautioned that while he agreed with the decision he wanted to note that the Court was making a value judgment as to whether there were less restrictive ways to deny children the indecent material.<sup>46</sup> According to Justice Scalia, where a reasonable person draws that line will depend on how much material is categorized as indecent and how much is considered obscene material. In his opinion, the more narrow the understanding of obscenity and the larger the category for indecency becomes, the more reasonable it is to insist upon greater insulation of that material from minors.<sup>47</sup> Justice Scalia’s concurrence seemed to forecast his and other Justices’ analysis of what constitutes less restrictive means in several of the cases discussed later in this paper.

### ***C. Turner Broadcasting System and Must-Carry Rules***

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) required cable television systems to devote a specified portion of their channels to the transmission of commercial and public broadcast stations.<sup>48</sup> Congress passed the Act citing that the physical characteristics of cable transmission, compounded with the increasing concentration of economic power in the cable industry, endangered the ability of over-the-air broadcast television stations to compete for a viewing audience.<sup>49</sup> The Court in *Turner*

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (quoting *Pacifica*, 438 U.S. at 748-49).

<sup>44</sup> *Id.* at 128.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 132.

<sup>47</sup> *Id.*

<sup>48</sup> *Turner Broadcasting System, Inc. v. FCC* 512 U.S. 622 (1994).

<sup>49</sup> *Id.* at 630-31.

*Broadcasting System, Inc. v. FCC*,<sup>50</sup> considered whether Sections 4 and 5 violated the First Amendment rights of cable operators and programmers.

According to the unanimous portion of the Court's opinion, the rules requiring carriage of broadcast stations by cable operators affected speech in two ways. First, the rules reduced the number of channels over which cable operators exercised unfettered control.<sup>51</sup> Second, the rules rendered it more difficult for cable programmers to compete for the remaining channels.<sup>52</sup> While the Court ultimately split 5-4 concerning what standard of scrutiny to use in evaluating whether Sections 4 and 5 were constitutional, the Court's opinion with respect to whether cable should be treated similarly to broadcast was joined by eight of the Justices.<sup>53</sup>

The government in *Turner* argued that the Court should adopt the less rigorous standard of scrutiny<sup>54</sup> used in the past for evaluating broadcast regulations. In particular, the government relied on *Red Lion Broadcasting Co. v. FCC*,<sup>55</sup> in which the Court upheld the personal attack and political editorial rules in the face of First Amendment challenges by broadcasters. In doing so, the Court in *Red Lion* noted that while broadcasting is affected by the First Amendment, the characteristics of broadcasting justified differences in the First Amendment standards applied to them. Those particular characteristics included the "scarcity of broadcast frequencies" and the fact that more individuals want to broadcast than there are frequencies to allocate.<sup>56</sup> However, the *Turner* Court quickly distinguished *Red Lion* from the facts at hand.

In particular, the Court in *Turner* noted that whatever the rationale for applying a less rigorous First Amendment scrutiny standard to broadcast regulation does not apply in the context of cable regulation. The unique physical limitations of the broadcasting medium (frequency scarcity and having more speakers than channels) do not apply in the cable medium.<sup>57</sup> According to the Court, advances in fiber optics and digital compression technology could eliminate any practical limitations on the number of speakers who may use the cable medium. Because of the differences stated by the Court between broadcast and cable, eight of the Justices agreed that the

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<sup>50</sup> 512 U.S.622 (1994).

<sup>51</sup> *Id.* at 634.

<sup>52</sup> *Id.*

<sup>53</sup> Chief Justice Rehnquist, Justices Blackmun, O'Connor, Scalia, Souter, Thomas and Ginsburg joined Justice Kennedy in Parts II-A of the opinion. *Id.* at 636.

<sup>54</sup> This less rigorous scrutiny allows a "more intrusive regulation of broadcast speakers than of speakers in other media." *Id.* at 634.

<sup>55</sup> 395 U.S. 367 (1969).

<sup>56</sup> *Id.* at 389-90.

<sup>57</sup> *Turner* at 636.

application of the more relaxed standard of scrutiny set forth in *Red Lion* was inapt in the cable context.<sup>58</sup>

The majority of the Court in *Turner* went on to find that Sections 4 and 5 were content-neutral regulations, requiring an intermediate level of scrutiny, which will sustain a regulation if the regulation furthers an important or substantial government interest and is no greater than necessary to further that interest.<sup>59</sup> Congress asserted three interests in passing the provisions: (1) preserving the benefits of free broadcast stations, (2) promoting widespread dissemination from various sources, and (3) promoting fair competition in the television market.<sup>60</sup> According to the majority, there was not enough evidence in the record to determine whether these Congressional concerns were real and legitimate, and the Court remanded the case for further findings.<sup>61</sup>

**D. *Denver Area Educational and Cable Operator Control over Indecency***

The Court once again addressed the constitutionality of provisions within the 1992 Cable Act in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*<sup>62</sup> The question in *Denver Area* concerned three provisions of the Act, Sections 10(a), (b) and (c). Sections 10(a) and (c) specifically allowed cable operators to prohibit broadcasting or programming the operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner on leased access channels (§10(a)) and public access channels (§10(c)) respectively.<sup>63</sup> Section 10(b) of the Act provided that if a cable operator allowed “patently offensive” programming on its leased channels, the operator must proactively segregate such material on separate channels and block such channels from customer receipt unless the viewer requests access to the channels in writing.<sup>64</sup>

The *Denver Area* opinion is complicated. Six separate opinions were issued, supporting four results.<sup>65</sup> As noted earlier, this paper will examine those aspects of the opinion most relevant or telling regarding the Court’s disposition on cable indecency regulation. Justice Breyer delivered the opinion of the Court, spending much time providing a history of cable television in America. According to this history, 10-15% of cable channels are leased by unaffiliated third

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 641-42. For content-based restrictions, the standard of scrutiny is more exacting or strict scrutiny, which requires a compelling government interest which is narrowly tailored to meet such interest.

<sup>60</sup> *Id.* at 661.

<sup>61</sup> *Id.* at 667.

<sup>62</sup> 518 U.S. 727 (1996).

<sup>63</sup> *Id.* at 732-33.

<sup>64</sup> *Id.*

<sup>65</sup> Jonathan Weinberg, *Cable TV, Indecency and the Court*, 21 COLUMBIA-VLA JOURNAL OF LAW & THE ARTS, 95, 96 (1997).

parties.<sup>66</sup> Between 1984 and 1992, federal law had prohibited cable operators from exercising any editorial control over content on leased and public access channels.<sup>67</sup> Justice Breyer noted that the “upshot” of Sections 10(a) and (c) is that cable operators would have the ability to either allow or forbid the transmission of patently offensive sex-related materials over both leased and public access channels.<sup>68</sup>

One of the most interesting aspects of Justice Breyer’s opinion, and that which garners much legal commentary,<sup>69</sup> is that Justice Breyer in analyzing the First Amendment issues declined to iterate a standard of review for analyzing the constitutionality of the sections in question. According to Justice Breyer, he would not make a specific analogy to other cases and other medium forms, because the Court could decide the case more narrowly: By scrutinizing the provisions to ensure that they address an “extremely important problem without imposing...an unnecessarily great restriction on speech.”<sup>70</sup>

In examining the constitutionality of Section 10(a) regarding leased access channels, Justice Breyer believed the government had an extremely important justification: the need to protect children from exposure to patently offensive sexual material.<sup>71</sup> Of particular importance is Justice Breyer’s reliance on *Pacifica*. According to Justice Breyer, the problem Congress sought to deal with in passing Section 10(a) is the same problem the Court confronted in *Pacifica*.<sup>72</sup> The *Pacifica* Court held that the regulation was permissible because of the pervasiveness of the broadcasting medium and its accessibility to children. Justice Breyer explained that “[a]ll [the *Pacifica*] factors are present here. Cable television broadcasting, including access channel broadcasting, is as ‘accessible to children’ as over-the-air broadcasting, if not more so.”<sup>73</sup> In addition, Justice Breyer stated that cable is just as pervasive in viewer’s lives as broadcasting (at the time of *Denver Area* 63% of American homes subscribed to cable).<sup>74</sup> While noting that cable users tend to use more guides than broadcast viewers, Justice Breyer explained that there was no difference in the amount of viewing that was planned and unplanned and since cable viewers tend to surf channels more often, it was more likely that they will happen upon patently offensive material than a broadcast viewer.<sup>75</sup>

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<sup>66</sup> *Denver Area*, 518 U.S. 727 at 734.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 736.

<sup>69</sup> Weinberg, *supra* note 61 at 106-107.

<sup>70</sup> *Id.* at 743.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 744.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 745.

<sup>75</sup> *Id.*

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Justice Breyer also noted that Section 10(a) is permissive (allowing the cable operators to prohibit the patently offensive material), not a ban, and therefore would likely affect even less protected speech than the required time-channeling regulation at issue in *Pacifica*.<sup>76</sup> Justice Breyer acknowledged that cable operators in response to §10(a) might not simply choose to rearrange patently offensive content, but could discontinue providing it altogether. While that is certainly a possibility, Justice Breyer again noted that the same could be said of the regulation at issue in *Pacifica*, which the Court upheld.<sup>77</sup>

The cable operators in *Denver Area* argued that the controlling cases under which the Court should analyze the provisions were *Sable* and *Turner*, wherein the Court struck down a ban on dial-a-porn and determined the must-carry provisions would be analyzed under an intermediate scrutiny standard of review and distinguished between broadcasting and cable in doing so.<sup>78</sup> Justice Breyer, however, distinguished *Sable* from *Denver Area*, stating that the ban there was a total government ban on a medium that was “significantly less likely to expose children to the banned material, was less intrusive, and allowed for significantly more control over what comes into the home than either broadcasting or the cable transmission system before us.”<sup>79</sup> In distinguishing *Turner*, Justice Breyer noted that the Court’s distinction between cable and broadcasting in that case relied on the “inapplicability of the [*Red Lion*] spectrum scarcity problem to cable.”<sup>80</sup> According to Justice Breyer, that issue had little to do with the case at hand, which concerned the effects of viewing patently offensive material on children. “Those effects are the result of how parents and children view television programming, and how pervasive and intrusive that programming is. In that respect, cable and broadcast television differ little, if at all.”<sup>81</sup>

Based on the balancing test used, Justice Breyer (and in turn, the Court, due to the concurrence in part by Justices Thomas, Scalia, and Chief Justice Rehnquist) held that Section 10(a) was consistent with the First Amendment.<sup>82</sup> However, the Court did not uphold the permissive prohibition by cable operators of patently offensive material on public access channels (Section 10(c)) noting that there were several differences between the quality of the leased channels and public access channels.<sup>83</sup>

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<sup>76</sup> *Id.* at 745-46.

<sup>77</sup> *Id.* at 746.

<sup>78</sup> *Id.* at 748.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 753.

<sup>83</sup> *Id.* at 760-66.

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Of additional importance is the Court's treatment of Section 10(b) of the 1992 Cable Act, which required cable operators to restrict speech by segregating patently offensive sex-related materials, to initially block the channel, and to unblock the channel within 30 days of a subscriber's written request and to reblock the channel within 30 days of a subscriber's request for reblocking. This provision also required channel programmers to notify cable operators of an intended patently offensive broadcast up to 30 days before its scheduled broadcast date.

According to the government, the adverse consequences of this provision could be upheld because they represented the least restrictive means in furthering a compelling government interest: protecting children from patently offensive sexual material.<sup>84</sup> In addition, the government argued that the First Amendment review here should not be the strictest review, but the somewhat lesser standard of that applied in *Pacifica*.<sup>85</sup> Justice Breyer again agreed that the protection of children is a compelling interest, but in his opinion, Section 10(b) did not strike the appropriate balance in its attempt to pursue that compelling interest. According to Justice Breyer, the Court did not need to determine whether *Pacifica* required a lesser standard of review where indecent speech is at issue, because whether Section 10(b) is reviewed under the Court's typical "strictest" or its somewhat less "strict" requirements, it failed either way.<sup>86</sup>

Justice Breyer noted that there were several additional provisions in the more recently passed Telecommunications Act of 1996 ("1996 Telecom Act") that provided a less restrictive means of protecting children from patently offensive material on unleased cable channels. These provisions required cable operators to affirmatively scramble or block sexually-oriented programming on unleased channels (§505) and compelled cable operators to block such channels at a subscriber's request (§504). In addition, the 1996 Telecom Act required television sets to be manufactured with a V-chip that allows programming to be identified and blocked according to sexually explicit or violent programming. Furthermore, the Cable Communications Policy Act of 1984 required cable operators upon subscriber request to provide a lockbox that would permit parents to lock out those programs or channels they did not want their children to see. These measures, according to Justice Breyer, were less restrictive than Section 10(b) and the record before the Court did not explain how they would be any less adequate than Section 10(b).<sup>87</sup>

The government argued that with respect to the lockbox solution parents must know about that possibility and spend time and money to buy one.<sup>88</sup> Justice Breyer conceded that short

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<sup>84</sup> *Id.* at 754-55.

<sup>85</sup> *Id.* at 755.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 756-59.

<sup>88</sup> *Id.* at 758-59.

of an absolute ban, the alternative protections may not guard against exposure of the patently offensive material to a determined child, but this “fact alone” cannot “justify ‘reduc[ing] the adult population...to...only what is fit for children.’”<sup>89</sup> In sum, Justice Breyer’s opinion regarding the segregate and block provision held that it was overly restrictive and sacrificed too many First Amendment rights for uncertain gain.

Several concurring and dissenting opinions in *Denver Area* deserve attention for their consideration of how cable and indecency should be treated by the Court. In Justice Stevens concurrence he specifically states that his decision that Sections 10(b) and (c) were unconstitutional did not mean that the “[f]ederal [g]overnment may not impose restrictions on the dissemination of indecent materials on cable television.”<sup>90</sup> However, Justices Stevens noted while “the [g]overnment may have a compelling interest in protecting children from indecent speech on such a pervasive medium” as cable, if the government does choose to act they may not rely “solely upon conjecture.”<sup>91</sup>

Justice Souter’s concurring opinion noted his concern with Justice Breyer’s failure to use a clearly defined standard of review in this case. “Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.”<sup>92</sup> However, Justice Souter explained why he joined the Court’s decision in not announcing a definitive standard in the case. According to Justice Souter, *Pacifica* provided the most similar situation to the facts in *Denver Area* and the Court in *Pacifica* also failed to assign a specific standard level of scrutiny for reviewing the government’s regulation.<sup>93</sup> In addition, the fact that *Denver Area* dealt with cable transmission did not require the Court to choose a specific standard level of scrutiny to fit this medium. “[W]hile we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements [regarding the decision in *Turner* to distinguish the scarcity rationale of broadcast from cable], today’s plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television....”<sup>94</sup>

Justices Kennedy and Ginsburg concurred in part and dissented in part; agreeing with the Court that Sections 10(b) and (c) did not pass constitutional muster, but dissenting from the majority’s decision to uphold the leased access provision (§10(a)). In particular, Justice

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<sup>89</sup> *Id.* at 759 (quoting *Butler v. Michigan*, 352 U.S. 380, 383).

<sup>90</sup> *Id.* at 773.

<sup>91</sup> *Id.* at 773-74.

<sup>92</sup> *Id.* at 774.

<sup>93</sup> *Id.* at 776.

<sup>94</sup> *Id.*

Kennedy's opinion took aim at the majority's failure to enunciate a clear standard of review for the provision. "Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day."<sup>95</sup> According to Justice Kennedy, the provisions in question were clearly content-based and thus demanded a strict scrutiny review.<sup>96</sup> With respect to the *Pacifica* analogies, Justice Kennedy expressly rejected the government's position that indecent speech is subject to a lower standard of review. Justice Kennedy explained that *Pacifica* did not apply a special standard to indecent material, but instead relied on the rule that broadcasting had received the most limited First Amendment protection of any medium.<sup>97</sup> Concerning extending such limited protection to cable, Justice Kennedy noted "[w]e already have rejected the application of this lower broadcast standard of review to infringements on the liberties of cable operators, even though they control an important communication medium [citing *Turner*]. There is even less cause for a lower standard here."<sup>98</sup>

Thus, having established his reasoning for using the strict scrutiny test, he applied it to the facts. Justice Kennedy recognized that the Government had a compelling government interest in protecting children from indecent speech.<sup>99</sup> However, the provisions were not narrowly tailored to protect children from indecent programming on access channels. Noting that Sections 10(a) and (c) are permissive, children could still be left unprotected in those areas cable operators chose not to act. According to Justice Kennedy, partial service of a compelling governmental interest is not narrow tailoring.<sup>100</sup> In addition, to the extent cable operators do act to prohibit the content, it will deprive adults of constitutionally protected speech.<sup>101</sup> Justice Kennedy explained that there are alternative methods by which to protect children from this material with far less intrusion on the cable programmers and adult viewers.<sup>102</sup>

Justice Thomas' opinion, joined by Chief Justice Rehnquist and Justice Scalia, dissented from the majority opinion with respect to the finding that Sections 10(b) and (c) were unconstitutional. Justice Thomas, like Justice Kennedy, believed that the Court should adopt a clear standard in dealing with the facts of the case. Justice Thomas noted that the Court's First Amendment distinctions between media had placed "cable in a doctrinal wasteland in which

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<sup>95</sup> *Id.* at 785.

<sup>96</sup> *Id.* at 805.

<sup>97</sup> *Id.* at 803-04.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 806.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 807.

<sup>102</sup> *Id.*

regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or as subject to the more onerous obligation shouldered by the broadcast media.”<sup>103</sup> However, Justice Thomas believed that “[o]ver time...[the Court had] drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media.”<sup>104</sup>

According to Justice Thomas, the Court, in *Turner*, adopted much of the print paradigm and applied it to the cable medium. Justice Thomas asserted that Justice Breyer’s attempt to distinguish *Turner* on the grounds it didn’t involve the effect of patently offensive material on children “is meaningless because that factual distinction has no bearing on the existence and ordering of the free speech rights asserted in these cases.”<sup>105</sup>

While Justice Thomas determined the appropriate standard of review in this case was strict scrutiny, unlike the analysis by the majority and Justice Kennedy, Justice Thomas concluded that the government regulations in Sections 10(b) and (c) could withstand a strict scrutiny analysis and thus, he would uphold all three provisions of the 1992 Cable Act. The compelling interest accepted by Justice Thomas was the same as the other Justices, that of the protection of the physical and psychological well being of minors. In addition, Justice Thomas concluded the provisions were narrowly tailored to achieve that interest.<sup>106</sup>

According to Justice Thomas, the alternatives to Section 10(b) (the segregate and block provision) while placing control in the hands of the parents (reverse-blocking and lockboxes) did not effectively support parents’ authority in determining the “moral upbringing of their children.”<sup>107</sup> Justice Thomas asserted that since leased channel programming comes from a variety of independent sources, it would be incumbent upon parents to carefully monitor all leased access programs in order to effectively block out undesired programming. Justice Thomas explained that just because other safety measure exist (lockboxes, V-chips, reverse blocking) did not mean that Section 10(b) was not narrowly tailored.<sup>108</sup>

#### **E. *Reno v. ACLU and Indecency on the Internet***

In 1997, the Supreme Court considered in *Reno v. ACLU*<sup>109</sup> whether two provisions of the Communications Decency Act of 1997 (“CDA”)<sup>110</sup> violated the First Amendment rights of

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<sup>103</sup> *Id.* at 813-14.

<sup>104</sup> *Id.* at 814.

<sup>105</sup> *Id.* at 818.

<sup>106</sup> *Id.* at 832.

<sup>107</sup> *Id.* at 833.

<sup>108</sup> *Id.* at 835-36.

<sup>109</sup> 521 U.S. 844 (1997)

<sup>110</sup> 47 U.S.C. §§ 223 (a) and (d).

speakers over the Internet. The provisions in question criminalized the knowing transmission of obscene or indecent messages to any recipient under 18 years of age as well as knowingly sending or displaying to a person under 18 any message that in context describes or depicts in terms patently offensive as measured by contemporary community standards sexual or excretory activities or organs.<sup>111</sup> The statutes provided affirmative defenses for content providers, for instance if the content provider required a verified credit card number or an established adult identification number before providing access to the content.<sup>112</sup>

Justice Stevens delivered the opinion of the Court, which was joined by all Justices in part and six of the Justices entirely. The majority opinion noted that although sexual material is widely available on the Internet, it is not usually encountered accidentally, it is typically preceded by a warning and affirmative steps are required in order to access the material.<sup>113</sup> In addition, Justice Stevens noted that various systems have been developed to help parents control children's access to sexually explicit material, such as software filters.<sup>114</sup>

The government argued that three Supreme Court cases required the Court to uphold the constitutionality of the CDA provisions at hand: *Ginsberg v. New York*,<sup>115</sup> *Pacifica* and *Renton v. Playtime Theatres Inc.*<sup>116</sup> Justice Stevens distinguished all three cases, but the treatment of *Pacifica* is of particular importance. Justice Stevens noted that the Court's dial-a-porn decision in *Sable* seemed most apt to the facts in *Reno*, not *Pacifica*.<sup>117</sup> In fact, Justice Stevens relied on the Court's reasoning in *Sable* for distinguishing *Pacifica*. Noting that the Court's decision in *Pacifica* was "emphatically narrow", Justice Stevens explained the regulation in *Pacifica* did not involve a complete ban, unlike the CDA provisions.<sup>118</sup> In addition, the Internet medium requires affirmative steps to receive the communication, as opposed to the more limited step of turning on the radio or television.<sup>119</sup> Finally, the Internet, unlike broadcast, is not a scarce commodity. The Internet can provide relatively unlimited low cost capacity for communication of all kinds.<sup>120</sup>

Justice Stevens' opinion determined that for the regulation to be upheld, the government must withstand the strict scrutiny test. While the government has an interest in protecting children from harmful materials, here the regulation imposed an unnecessarily great restriction on speech.

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<sup>111</sup> *Reno*, 521 U.S. at 859-60.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 869.

<sup>114</sup> *Id.* at 879.

<sup>115</sup> 390 U.S. 629 (1968).

<sup>116</sup> 475 U.S. 41 (1986).

<sup>117</sup> *Reno*, 521 U.S. at 869.

<sup>118</sup> *Id.* at 867.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 870.

“The breadth of this content based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA.”<sup>121</sup> According to Justice Stevens, the Government failed to show that less restrictive means, such as parental use of filtering software, would not be as effective. Therefore, the provisions failed the Court’s strict scrutiny analysis.

**F. *Playboy Entertainment and Scrambling/Blocking Requirements***

The Supreme Court stepped back into the cable arena in 2000 when it issued its opinion in *United States v. Playboy Entertainment Group, Inc.*<sup>122</sup> *Playboy* concerned Section 505 of the 1996 Telecom Act.<sup>123</sup> The provision required cable operators providing channels primarily dedicated to sexually-oriented programming either to automatically fully scramble or block those channels or limit the transmission of the sexually-oriented program to times when children would not be in the audience (10 p.m. to 6 a.m., the so-called safe-harbor hours).<sup>124</sup> Congress passed the statute in light of what it felt was inadequate scrambling by such channels (which the programmers already utilized), which allowed for a certain amount of signal bleed, transmitting audio or discernable pictures from the channels even if households did not subscribe to the channels.<sup>125</sup>

The Court’s 5-4 opinion was delivered by Justice Kennedy. Justice Kennedy’s opinion concluded that Section 505 was a content-based regulation and as such it could stand only if it satisfied the strict scrutiny test. According to Justice Kennedy, if the stated benefit of a content-based restriction is to shield the sensibilities of listeners, the Court’s general rule is that the right of expression prevails, even if there is no less restrictive means available to shield the listeners.<sup>126</sup> However, Justice Kennedy conceded that cable television, like broadcast, presents unique problems “which may justify restrictions that might be unacceptable in other contexts.”<sup>127</sup> Still, Justice Kennedy asserted that if there is a less restrictive means to accomplishing the government’s goal, it must be used. In addition, Justice Kennedy noted one key difference between cable and broadcast: “Cable systems have the capacity to block unwanted channels on a household-by-household basis.”<sup>128</sup> Therefore, since targeted blocking is less restrictive, the

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<sup>121</sup> *Id.* at 879.

<sup>122</sup> 529 U.S. 803 (2000).

<sup>123</sup> 47 U.S.C. § 561.

<sup>124</sup> *Playboy*, 529 U.S. at 806.

<sup>125</sup> *Id.* at 808.

<sup>126</sup> *Id.* at 813.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 815.

government cannot ban speech so long as targeted blocking is a feasible and effective means of furthering its compelling interest.

According to Justice Kennedy, Section 504 of the 1996 Telecom Act<sup>129</sup> provided this less restrictive and effective means. This section requires a cable operator upon request of a subscriber, without charge, to fully scramble or otherwise fully block any channel the subscriber does not wish to see.<sup>130</sup> The majority found that the government failed to prove that Section 504 would be an ineffective alternative to Section 505. While the government argued that Section 504 would only be as effective if parents knew about and used the provision, Justice Kennedy concluded that such an argument carried no weight.<sup>131</sup> The Government had not shown that a well-publicized Section 504 would not be as effective. Nor, in Justice Kennedy's opinion, did it matter that the burden of Section 504 was on the consumer to take action or that it may not block the content perfectly in every situation. While noting that children may be exposed to signal bleed under a voluntary blocking system, Justice Kennedy noted that the same would be true of time channeling. "Just as adolescents may be unsupervised outside of their own households, it is hardly unknown for them to be unsupervised in front of the television set after 10 p.m. The record is silent as to the comparative effectiveness of the two alternatives."<sup>132</sup>

The dissenting opinion authored by Justice Breyer and joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, analyzed Section 505 under a strict scrutiny standard as well, but with a differing result. At the outset, Justice Breyer characterized the statute not as a ban, but as a burden on the speech.<sup>133</sup> In particular, Justice Breyer noted that the Court's previous zoning cases (citing *Renton* and *Pacifica*) upheld laws that burden speech by geographic or temporal zoning.<sup>134</sup>

Harkening back to the plurality opinion in *Pacifica*, Justice Breyer appeared to place a value judgment on the speech in question. According to Justice Breyer, the case concerned the regulation of the commercial transmission of virtually 100% sexually explicit material.<sup>135</sup> Justice Breyer maintained that the content providers in question present no more than trivial amounts of material with more serious value.<sup>136</sup> In addition, Justice Breyer took issue with what he viewed as the majority's lax characterization of the problem of signal bleed. According to Justice Breyer,

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<sup>129</sup> 47 U.S.C. § 560.

<sup>130</sup> *Playboy* at 816.

<sup>131</sup> *Id.* at 823-24.

<sup>132</sup> *Id.* at 826.

<sup>133</sup> *Id.* at 838.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 839.

<sup>136</sup> *Id.*

the problem presented a question of leaving 22 million children exposed to “virulent pornography.”<sup>137</sup>

In the end, Justice Breyer maintained his major disagreement with the majority was that Section 504’s opt-out system is simply not as effective alternative as Section 505’s mandatory opt-in system. Section 505, according to Justice Breyer, does more than Section 504. “Unless parents explicitly consent, it inhibits the transmission of adult cable channels to children whose parents may be unaware of what they are watching, whose parents cannot easily supervise television viewing habits, whose parents do not know of their §504 ‘opt-out’ rights, or whose parents are simply unavailable at critical times.”<sup>138</sup> Since, the record did not demonstrate a less restrictive, similarly effective alternative, Section 505, in the dissent’s opinion, restricted no more speech than necessary to further the government’s compelling need.

### **III. What it Means for Cable Indecency Regulation.**

The Supreme Court cases discussed in this paper do not necessarily lead to a tidy conclusion concerning where the Court might land if Congress passed legislation to regulate cable indecency. Nevertheless, the cases are instructive and provide quite a few insights.

The *Pacifica* case looms large over the indecency issue, even 27 years after the decision was handed down. In almost every case discussed herein (except *Turner*), the government to some extent relied on *Pacifica* to justify its regulation of indecent speech. The analogy worked to varying degrees.

The Court seemed to have no problem distinguishing over-the-air broadcast from both the telephone and Internet communications in the *Sable* and *Reno* cases. However, even when making the distinction and striking down the regulations in those cases, the Court automatically accepted as a compelling government interest the protection of the physical and psychological well being of children when it comes to indecent material. Both *Sable* and *Reno* reinforce the notion that the Court will not require the government to show any causal connection between indecent material and its affect on children. However, these cases do tell us that the Court sees *Pacifica* not as a complete ban, but as a time-channeling device and, in addition, that *Pacifica*’s reasoning won’t apply in every situation where the medium at issue is not as pervasive or as accessible to children.

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<sup>137</sup> *Id.* at 839-40.

<sup>138</sup> *Id.* at 842.

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Of most interest in *Sable* is the Court's examination of whether Congress used the least restrictive means available to it in its attempt at regulating the indecent speech in question. The Court said Congress had not, but Justice Scalia in his concurring opinion seems to forecast the disagreements among the Justices in both the *Denver Area* and *Playboy* cases. Justice Scalia, as noted earlier, explains that the Court in *Sable* is just making a value judgment as to whether the court used the least restrictive means to further its accepted compelling interest (protection of minors). In *Playboy*, the Justices arguably all used a strict scrutiny standard lens with which to view §505's requirement, but five of the Justices determined that Congress hadn't used the least restrictive means available, while four Justices concluded Congress had. Justice Scalia's concurrence in *Sable* and the later opinions clearly highlight the malleability of the strict scrutiny test.

The decision in *Turner* is interesting, given the complete absence of *Pacifica* in any of the Justices' analysis of the case – though due to the regulation at issue, the failure to use *Pacifica* is understandable. While not using *Pacifica* as a justification, the government still attempted to justify the must-carry regulations by equating the cable medium with broadcast through the Court's *Red Lion* decision. As discussed earlier, this attempt failed, with the Court noting the differences between cable and broadcast. One might conclude that after *Turner* the Court had settled the question of where cable belongs in the Court's First Amendment jurisprudence, but *Denver Area* threw such certainty into question.

In *Denver Area* at least four of the Justices (Justices Breyer, Stevens, Souter, and O'Connor) see the analogies between broadcast and cable clearly enough to point to *Pacifica* as the most instructive case for examining the regulations in *Denver Area*. In fact, as noted, Justice Stevens explicitly stated that though he agreed two of the provisions in *Denver Area* didn't pass constitutional muster that did not mean the government could not impose restrictions on indecent material on cable television. In Justice Stevens' opinion, if Congress acts, however, they cannot rely solely on conjecture -- Congress would have to clearly justify any such regulation as the least restrictive means available.

Justice Souter's concurrence in *Denver Area* simply tells us that he is unsure where to place cable and that since that is the case and the technology is still evolving, he can live with the contextual analysis in Justice Breyer's opinion. Of more interest in *Denver Area* is Justice Thomas' dissent (joined by Chief Justice Rehnquist and Justice Scalia), wherein Justice Thomas says that he has no problem establishing that the cable medium should be placed along side nonbroadcast media in the Court's First Amendment jurisprudence, and in doing so, greatly relies upon the Court's decision in *Turner*. The fact that three of the Justices in *Denver Area* clearly

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believe cable should be analyzed as nonbroadcast media and thus content regulations in the cable arena should be subject to a strict scrutiny analysis would seem to provide some hope to cable operators or programmers concerned with First Amendment rights, however, as mentioned before, the proof is in the pudding: How will the Justices apply the strict scrutiny test? The differences between the *Denver Area and Playboy* cases are instructive when considering how the test will be applied in the cable arena.

In *Denver Area*, Justices Breyer, Souter, Stevens, O'Connor, Kennedy, and Ginsburg all concluded that §10(b) of the 1992 Cable Act (the forced segregate and block requirement on leased access channels) was overly restrictive and therefore unconstitutional. While Justices Kennedy and Ginsburg reached this result explicitly using a strict scrutiny analysis, Justices Breyer, Souter, Stevens, and O'Connor reached the same result using Justice Breyer's contextual analysis. For their part, Justice Thomas, Chief Justice Rehnquist, and Justice Scalia used a strict scrutiny standard, but found the so-called less restrictive means available to Congress lacking and not as effective to further the compelling governmental interest as §10(b). As a result, they would have upheld §10(b).

When the Court confronts the facts in *Playboy* we see a different alignment of the Justices. In *Playboy* you see Justice Kennedy writing the majority opinion on behalf of Justices Stevens, Souter, Thomas, and Ginsberg. As previously noted, the Court in *Playboy* found that §505 of the 1996 Telecom Act was overly restrictive and therefore unconstitutional. It is clear that both the majority opinion and the dissent by Justice Breyer utilize the strict scrutiny analysis to examine the constitutionality §505. So it appears that by the *Playboy* decision, four years after the contextual analysis that carried the day in *Denver Area*, the entire Court is in agreement that strict scrutiny should be used for content-based restrictions in the cable arena. The trick again is in the application. In addition, there is still a holdover analysis permeating the dissent in *Playboy*. Justice Breyer, like the plurality Justices in *Pacifica*, infuses his opinion with a value judgment on the speech at issue. Justice Breyer noted that §505 regulated channels primarily devoted to sexually-oriented programming. In his opinion, the content providers affected by the provision provide no more than trivial amounts of material with more serious value. This value-laden analysis certainly affects the dissent's application of the strict scrutiny test.

Furthermore, it is interesting to note where three of the Justices land in the *Denver Area* and *Playboy* cases. Justices Breyer and O'Connor in *Denver Area*, using the contextual analysis, determined that §10(b)'s segregate and block requirements were overly restrictive. In particular, they both agreed that Congress had utilized or proposed other, less restrictive methods that could be used to protect children from indecent material (V-chip television sets, affirmative requests by

subscribers to block channels (citing §504 of the 1996 Telecom Act), and, ironically enough §505 of the 1996 Telecom Act, which would later be struck down in *Playboy*). However, in *Playboy* both Justices Breyer and O'Connor, applying a strict scrutiny analysis to §505 determined that there were no less restrictive and as effective means of ensuring that "virulent pornography" on primarily sexually-oriented channels would not reach children. This analysis included determining that the affirmative blocking providing by §504 of the Act was not as effective as §505. In the same vein, Justice Thomas in his dissent in *Denver Area* determined that the alternatives to Section 10(b)'s segregate and blocking requirement were not as effective; but concurred with Justice Kennedy's decision in *Playboy* that §504 was a less restrictive alternative to §505.

Clearly, the differences in these Justices opinions could simply turn on the reality that there are factual differences in *Denver Area* and *Playboy*. The segregate and block provision (§10(b)) in *Denver Area* concerned "patently offensive" material, not necessarily programming *primarily* devoted to sexually-oriented themes, as was the case with the regulation at issue in *Playboy*. Though, it is also clear that neither definition is entirely mutually exclusive of the other. What the two decisions seem to indicate, is that with three of the Justices from the *Denver Area* and *Playboy* cases (Justices Breyer, O'Connor, and Thomas) it is difficult to determine how much leeway they would grant Congress in crafting a regulation channeling indecency on cable to certain time-slots. If affirmative subscriber-requested blocking was not sufficient in *Playboy*, for Justices Breyer and O'Connor, perhaps the same could be said in the case of indecent material on cable in general, and with respect to Justice Thomas, if the segregate and block provisions were not overly restrictive in *Denver Area*, perhaps he would have no trouble finding the same with a time-channeling restriction of indecency on cable.

#### **IV. Conclusion**

It may be that the furor and calls for heightened regulation of indecency on both broadcast and cable will subside. However, groups such as the PTC make that somewhat unlikely. If Congress does decide to act by regulating indecency on cable, the cases analyzed herein will be the building blocks the Court uses to decide the regulation's constitutionality. Given the Court's decision in *Playboy*, this author believes that any such regulation would likely be struck down as overly restrictive. Justice Kennedy's key distinction between cable and broadcast, the ability for viewers to block out channels either using the cable lockboxes or requesting a reverse block under a provision such as §504 of the 1996 Telecom Act, makes it unlikely that a time channeling regulation would be considered the least restrictive means available. But, as noted, the key will likely be the deference that the Justices accord Congress in

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determining whether any such legislation uses the least restrictive means available to further the already accepted compelling government interests: the protection of the physical and psychological well being of minors.