A Fear of Commitment: The Supreme Court's Refusal To Pronounce a First Amendment Standard for Cable Television in Denver Area Educational Telecommunications Consortium, Inc. v. FCC

Diana Israelashvili
Since its inception in the 1950s, the cable television industry has expanded tremendously and now serves almost sixty million subscribers. Congress began regulating the industry by applying extant communications legislation before the first cable television system was ever installed. Eventually, however, laws specifically dealing with the cable industry were implemented.

---

1 See United States v. Southwestern Cable Co., 392 U.S. 157, 161-65 (1968) (discussing early development of cable television); JAMES W. ROMAN, CABLEMANIA 1 (1983) (explaining that precise date of origination of cable television is unclear).

2 See Erik Forde Ugland, Cable Television, New Technologies and the First Amendment After Turner Broadcasting System, Inc. v. FCC, 60 Mo. L. REV. 799, 799 (1995) (citing BROADCASTING & CABLE YEARBOOK, vol. 2, xi (1995)). In 1965, less than 2,000 cable television systems were in operation, but the industry was growing rapidly. See Southwestern Cable Co., 392 U.S. at 162.

3 It is possible to trace federal regulation of cable television back to the Communications Act of 1934 ("1934 Act"). See Communications Act of 1934, 47 U.S.C. §§ 151-609 (1994). The 1934 Act created the Federal Communications Commission ("FCC") for the purpose of regulating interstate and foreign commerce in communication by wire and radio...." 47 U.S.C. § 151 (1994). Early in the development of the cable television industry, however, the FCC failed to exercise its authority over the industry and permitted local governments to monitor the industry. See Toni Elizabeth Gilbert, Note, Economic Regulation of the Cable Television Industry: Reigning In a Giant at the Expense of the First Amendment, 45 CATH. U. L. REV. 615, 634 n.108 (1996) (explaining that FCC declined to regulate industry because it determined it lacked jurisdiction over cable systems under 1934 Act). The FCC increased its regulatory authority over the industry after 1960. See Southwestern Cable Co., 392 U.S. at 165-67 (detailing early FCC regulations of cable television industry); Gilbert, supra, at 634 ("Until 1975, the FCC’s primary concern was the relationship between cable and broadcasting [but] as the industry grew ... the FCC became more concerned with the emergence of cable as part of the national communications structure and further entered the field of regulation.").

Judicial review of these laws was usually confined to deciding the scope of the Federal Communication Commission's ("FCC" or "Commission") regulatory authority over the cable industry.\(^5\) With the passage of the Cable Television Consumer Protection and Competition Act of 1992\(^6\) ("1992 Cable Act"), Congress has provided the judiciary with an opportunity to expand upon and clarify the scope of cable television jurisprudence.

Among the Act's provisions is section ten, which vests cable operators,\(^7\) rather than the FCC, with the power to refuse carriage of leased access\(^8\) or public access\(^9\) programming that the operator believes to be excessively sexually explicit or indecent.\(^10\)

---

\(^5\) See, e.g., United States v. Midwest Video Corp., 406 U.S. 649, 662-63 (1972) (affirming FCC's jurisdiction over matters "reasonably ancillary" to broadcasting); Southwestern Cable Co., 392 U.S. at 167 (noting that Court's inquiry is only into FCC's regulatory authority and concluding FCC has jurisdiction over cable industry).


\(^7\) "Cable operators typically own a physical cable network used to convey programming over several dozen cable channels into subscribers' houses." Denver Area Educ. Telemcos. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2381 (1996).

\(^8\) Federal law requires a cable operator to reserve some channels, referred to as "leased access channels," for commercial lease by third parties. See 47 U.S.C. § 532(b) (listing requirements for designation of channel capacity for commercial use); see also David Ehrenfest Steinglass, Extending Pruneyard: Citizens' Right to Demand Public Access Cable Channels, 71 N.Y.U. L. Rev. 1113, 1115 n.11 (1996) ("By contrast with public access channels, cable operators charge programmers for the use of leased access channels.").

\(^9\) Public access channels are channels that local governments require cable systems to reserve for public, educational, or governmental purposes as consideration for the cable operator's use of the public streets to install cable. See 47 U.S.C. § 531 (authorizing franchising authority to establish requirements for use or designation of public, education, or government channels); see also Steinglass, supra note 8, at 1115 n.11 ("Public access channels] are made available to the public on a first-come, first-served basis. Access channels have been set aside as a result of negotiations between a local franchising authority and a cable operator bidding for a franchise to operate a cable system within a community.").

Congress enacted this section in an effort to prevent children from viewing, on cable television, the same type of sexually explicit programming that had previously been barred from network (or free) television. Specifically, Congress gave cable op-

tection From Indecent Programming On Leased Access Channels). Section 10(a) of the 1992 Act permits cable operators to refuse to carry leased access programming which the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Id. § 10(a), 106 Stat. at 1486 (amending § 612(h) of the 1934 Act at 47 U.S.C. § 532(h)) (codified at 47 U.S.C. § 532(h)). Section 10(c), which is similar to section 10(a) except insofar as 10(c) applies to public access channels, instructs the FCC to promulgate regulations that will "enable a cable operator of a cable system to prohibit ... programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct [on public, educational, governmental access facilities]." Id. § 10(c), 106 Stat. at 1486 (codified at 47 U.S.C. 531 note). Section 10(b) of the 1992 Act authorizes the FCC to prescribe rules that will require programmers to inform cable operators if the programming is indecent under FCC regulations and to require "cable operators to place" such material on a "single channel" and "to block such single channel unless the subscriber requests access to such channel in writing." Id. § 10(b), 106 Stat. at 1486 (amending § 612 of the 1934 Act at 47 U.S.C. 532) (codified at 47 U.S.C. § 532(j)).


The ban against obscene and indecent broadcast programs was originally provided by the 1934 Act and the Radio Act of 1927. See generally JOHN R. BITNER, LAW AND REGULATION OF ELECTRONIC MEDIA 122-26 (2d ed. 1994) (detailing history of Congress' regulation of indecent and obscene broadcasting programs). In 1948, the ban was removed from the acts and was incorporated into the United States Criminal Code section 1464, which states: "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1994). Courts have applied section 1464 to both radio and television. See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 731 (1978) (applying statute to radio broadcast); Gillett Comm. of Atlanta, Inc. v. Becker, 807 F. Supp. 757, 762 (N.D. Ga. 1992) (applying statute to television broadcast).

The authority to enforce section 1464 lies with the Department of Justice and the FCC. The Commission's power is enhanced by the 1934 Act which gives the FCC the authority to order a broadcaster to cease and desist from broadcasting indecent or obscene material. 47 U.S.C. § 312(b) (1994). The FCC may also impose fines, 47 U.S.C. § 803(b)(1)(D) (1994), or revoke or refuse renewal of the broadcast station's
operators the power to restrict the content of some of the programs carried on access channels, a power which may have significant First Amendment ramifications.12

Heretofore, the First Amendment implications of cable television regulation had only received marginal attention from the judiciary.13 Prior to 1979, federal courts had only tangentially confronted the potential First Amendment issues.14 In 1979, the Supreme Court for the first time addressed the possible First Amendment implications of such regulations in *FCC v. Midwest Video Corp.*15 by noting that such claims were “not frivolous.”16 Following the Supreme Court’s pronouncement, lower courts began to directly confront First Amendment issues raised by the cable regulations.17

In analyzing the constitutionality of the regulations, courts first had to determine the appropriate standard of review.18 De-
spite several opportunities to do so, the Supreme Court consistently failed to pronounce a definitive standard applicable to the cable industry.\textsuperscript{19} This lack of guidance has resulted in skirmishing among the lower courts for the appropriate constitutional status of governmental regulation of cable television and its effects on the First Amendment.\textsuperscript{20} A resolution of this matter appeared to be on the horizon in 1994, when the Court in \textit{Turner Broadcasting Systems, Inc. v. FCC}\textsuperscript{21} held that an intermediate level of scrutiny was appropriate for the content-neutral “must-carry”\textsuperscript{22} regulations of the 1992 Cable Act.\textsuperscript{23} Recently, however,
in Denver Area Educational Telecommunications Consortium, Inc. v. FCC, the Supreme Court rejected the opportunity to re-endorse this standard and retreated to its earlier reluctance to announce a First Amendment standard. The Court expressly refused to decide the issue and narrowly decided the specific claims before the Court.

In Denver Area, a group of cable television “access” programmers and organizations of cable television watchers petitioned for judicial review of FCC orders implementing section 10 of the 1992 Cable Act. The group claimed that the three provisions of section 10 and the FCC regulations implementing them violated the First Amendment because the provisions restricted the content of leased access channels by permitting cable operators to prohibit programming that they considered indecent. A panel of the Court of Appeals for the District of Columbia agreed with petitioners and held that sections 10(a) and 10(c) were inconsistent with the First Amendment. The constitutionality of television stations will retain a large enough potential audience to earn necessary advertising revenue ... to maintain their continued operation.” Id. at 2461.

In Turner, a number of cable television system operators and programmers challenged the constitutionality of the must-carry provisions of the 1992 Act, which require cable systems to carry local broadcast stations. Id. at 2455. The Turner Court concluded that the must-carry provisions were content-neutral and therefore demanded an intermediate level of scrutiny applied under the O'Brien test. Id. at 2469. The O'Brien test requires that a content-neutral regulation be sustained if three factors are satisfied. First, the regulation must further an important or substantial governmental interest; second, the governmental interest must be unrelated to the suppression of free expression; and third, the incidental restriction on alleged First Amendment freedoms must not be greater than is necessary for the furtherance of that interest. United States v. O'Brien, 391 U.S. 367, 377 (1968). Although the Court found the government met the first part of the test by demonstrating that the must-carry provisions served important government interests, the Court lacked the facts necessary to complete the analysis under the O'Brien test. Turner Broad., 114 S. Ct. at 2472. The Court's determination and application of a standard was believed to be an indication the Court finally desired to directly address the issue of cable television and the First Amendment. See, e.g., Ugland, supra note 2, at 800 (“Turner ... ends nearly half a century of reticence by the Supreme Court regarding the constitutional status of cable television.”).

Id. at 2385 (“Rather than decide these issues [of the applicable standard], we can decide this case more narrowly....”).


Denver Area, 116 S. Ct. at 2383. The group maintained that the requirements of section 10 placed a burdensome restriction on the content of speech considered by some to be indecent. See Brief for Petitioners, 1995 WL 763716.

Alliance for Community Media, 10 F.3d at 831.
section 10(b) was remanded to the FCC in light of the invalidity of the other two provisions. Upon hearing the case *en banc*, however, the Court of Appeals reversed, finding all three statutory provisions constitutional. In a plurality decision, the Supreme Court reversed in part, holding that section 10(a) was valid, while declaring the other two provisions violative of the First Amendment.

Writing for the plurality, Justice Breyer refused to apply a categorical standard, such as those developed in analogous contexts, namely broadcasting and common carriers, to the area of cable television. The Court maintained that there was no “definitive choice” among the various First Amendment standards that would enable the Court to declare a “rigid single standard, good for now and for all future media and purposes.”

Noting the rapid changes occurring in technology and the law of telecommunications, the Breyer plurality felt “it unwise and unnecessary definitively to pick one analogy or one specific set of words now.” Although the Court was resolute in its refusal to articulate a standard, the Court nevertheless applied a somewhat unprecedented test: the Court sought to “closely scrutiniz[e] [section] 10(a) to assure that it properly address[ed] an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech.” The plurality, however, was unwilling to utilize this test for the other two sections.

---

29 Id.
30 *Alliance for Community Media*, 56 F.3d at 110.
31 *Denver Area*, 116 S. Ct. at 2385.
32 Id. at 2385 (“[N]o definitive choice ... allows us to declare a rigid single standard,...”).
33 Id. The Court claimed that application of the categories used for common carriers and bookstore owners would “import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.” *Id.* at 2384.
34 *Id.* at 2385.
35 *Denver Area*, 116 S. Ct. at 2385.
36 The Court did not articulate the “close scrutiny” test in its analysis of sections 10(b) and 10(c). In the Court’s consideration of the constitutionality of section 10(b), the Court did not apply only one formulation. Rather, the Court concluded the section would fail both the strict “least restrictive alternative” test and the less strict formulation of “not more extensive than necessary.” *Id.* at 2391. The Court similarly did not apply its “close scrutiny” test to section 10(c); instead, the Court’s only statement of the applicable standard was the Court’s conclusion that the section
In a dissenting opinion, Justice Kennedy criticized the plurality for failing to enunciate a standard applicable to cable television.37 Justice Kennedy argued that because sections 10(a) and 10(c) restricted non-obscene, indecent programming,38 a protected category of speech, on the basis of content, strict scrutiny analysis should be the Court's starting point.39 In order to sur-

---

37 Denver Area, 116 S. Ct. at 2405-07 (Kennedy, J., dissenting). Justice Kennedy began his dissenting opinion by arguing that:

"When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles. This is the essence of the case-by-case approach to ensuring protection of speech under the First Amendment, even in novel settings." Id. at 2404. Justice Kennedy's dissenting opinion emphasizes that the plurality refused to apply strict scrutiny, yet it was compelled to apply some sort of standard—whether the Act "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." Id. at 2406. According to Justice Kennedy, "the words end up being a legalistic cover for an ad hoc balancing of interests." Id. at 2407.

38 Material that is found to be obscene has no First Amendment protection. See Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 124 (1989) ("We have repeatedly held that the protection of the First Amendment does not extend to obscene speech."); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973) (reaffirming basic holding of Roth v. United States, 354 U.S. 476, 485 (1957) that obscene material is not protected by First Amendment); Miller v. California, 413 U.S. 15, 23 (1973) (recognizing well settled principle that obscene material is unprotected form of speech under First Amendment); Roth, 354 U.S. at 485 (holding that "obscenity is not within the area of constitutionally protected speech or press"). The test for obscenity was articulated in Miller v. California as follows:

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 specified by the applicable state law; and c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citations omitted). Sex-related materials which are indecent but not obscene, however, are within a protected category of speech. See Sable Comm., Inc., 492 U.S. at 126 ("Sexual expression which is indecent but not obscene is protected by the First Amendment."); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975) ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from images that a legislative body thinks unsuitable for them.").

39 See Denver Area, 116 S. Ct. at 2407 (Kennedy, J., dissenting). The First Amendment prevents the government from restricting speech or expressive conduct because of the ideas expressed. See Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458 (1994) ("The First Amendment ... does not countenance governmental control over the content of messages expressed by private individuals."); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the
vive strict scrutiny, the law had to address a "compelling [government] interest" and had to be "narrowly tailored" to serve that interest. Consequently, Justice Kennedy argued for the use of a strict scrutiny test by analogizing cable operators with common carriers. While Justice Kennedy acknowledged that Congress had a compelling interest in protecting children from indecent programming, he found that sections 10(a) and 10(c) were not narrowly tailored to further that interest and therefore failed to withstand strict scrutiny analysis.

This Comment asserts that the Supreme Court in Denver Area should have pronounced a First Amendment standard for cable television in order to finally remedy the inconsistencies among lower court analyses and decisions. Part I of this Comment explores the Court's reluctance to set such a standard by examining the Court's history of evading the establishment of a constitutional standard for similar emerging technologies. Part II examines the effect that the Supreme Court's lack of direction has had upon lower courts. Specifically, it will be shown that the lack of Supreme Court direction has led lower courts to focus on the medium rather than the speech to which the restrictions apply. It is asserted in Part III that such distinctions between media infract important First Amendment principles. Finally, this Comment concludes by proposing that the Court should

First Amendment. (citations omitted). Laws which encroach upon First Amendment protections by restricting the content of speech are to be analyzed under strict scrutiny. See Turner Broad., 114 S. Ct. at 2459 (noting that Supreme Court has consistently applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"); see also Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124-25 (1991) (Kennedy, J., concurring) (discussing application of strict scrutiny analysis to New York statute imposing severe restrictions on authors and publishers using content as its sole criterion); Boos v. Barry, 485 U.S. 312, 321 (1988) (applying "most exacting scrutiny" to content-based restriction on speech directed against foreign governments).

40 See Denver Area, 116 S. Ct. at 2416 (Kennedy, J., dissenting); see also Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (holding Florida law requiring newspapers to allow response of criticized politicians was content-based and required that law be necessary to achieve compelling government interest and narrowly drawn to achieve that interest).

41 Denver Area, 116 S. Ct. at 2411-15 (Kennedy, J., dissenting). Justice Kennedy posed the issue as whether strict scrutiny should apply to a law permitting a common carrier to exclude specified speech on the basis of content. Id. at 2412. Although no existing case was directly on point, Justice Kennedy equated common carriers with a traditional public forum, and therefore would subject the law to strict scrutiny. Id.
adopt the standards used in the print medium for analyzing First Amendment violations in cable television.

I. THE SUPREME COURT'S HISTORY OF AVOIDING THE ISSUE: "WHAT STANDARDS APPLY TO NEW TECHNOLOGIES?"

When the Constitution was drafted to protect both the freedom of speech and of the press, the printing press was a "phenomena of communications." While the drafters intended to extend protection to this form of communication, they never could have envisioned the advanced forms of communication that subsequently developed in order to expressly provide for their protection. Accordingly, courts have had difficulty applying the First Amendment to these new forms of communication.

Historically, the Supreme Court has been reluctant to extend constitutional guarantees to new communication technologies. Yet, in situations where a new technology had integrated itself into society, and had become mainstream, the Court slowly extended First Amendment guarantees to the new medium and thereby began to define the degree of protection the new medium was to be accorded. For instance, when film was considered a new invention, the Supreme Court refused to acknowledge the industry as a form of communication deserving of full First Amendment protections. Instead, the infant film industry was viewed as "a business ... originated and conducted for profit ... not to be regarded, nor intended to be regarded ... as part of the press of the country." Decades later, however, the Court renounced its prior position by holding that "moving pictures, like

---


49 See U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press....") (emphasis added).

50 Frelix, supra note 43, at 685.

51 See generally Corn-Revere, supra note 43, at 265-81 (discussing slow recognition of First Amendment status of new technologies by courts and policy-makers).

52 See id. at 275-76.


54 Mutual Film, 236 U.S. at 244.
newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.

Likewise, with the advent of broadcasting, which encompasses both radio and television, the courts first refused to extend First Amendment protection to the new medium. Later, when the Supreme Court finally recognized broadcasters' constitutional rights, it applied a lower level of protection than accorded the print medium because of broadcasting's seemingly special characteristics. The Court highlighted both the scarcity of spectrums ("scarcity" rationale) and the intrusive ability of broadcasters to enter the home ("intrusiveness" or "pervasiveness" rationale) as justifications for restrictions on broadcasting.

---

50 United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); see also Joseph Burstyn, 343 U.S. at 502 (overruling Mutual Film insofar as it denied First Amendment protection to motion pictures).

51 See, e.g., Trinity Methodist Church v. Federal Radio Comm'n, 62 F.2d 850, 851 (D.C. Cir. 1932) (holding refusal to review broadcast license due to defamatory material within scope of federal radio commission's power) See generally Corn-Revere, supra note 43, at 266 (discussing unwillingness of courts to advance First Amendment protections to broadcasting).


53 Justice Frankfurter first articulated the scarcity rationale in National Broad. Co. v. United States, 319 U.S. 190, 226-27 (1943). The Court noted that since "the radio spectrum simply is not large enough to accommodate everybody," regulation is necessary to prevent interference between signals. Id. at 213; see also Red Lion, 395 U.S. at 386-90. The broadcasters in Red Lion alleged that the fairness doctrine, which required radio and television broadcasters to present public issues on their stations and to grant fair and equal coverage to each side of the issue, infringed their freedom of speech and press. Red Lion, 395 U.S. at 386. Although noting that broadcasting clearly implicates a First Amendment interest, the Court upheld the regulations under the scarcity rationale. Id. at 388. The Court found that "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id.; see also FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984). Although the Court in League of Women Voters adhered to the validity of the scarcity rationale in the broadcasting arena, it noted the rationale had been criticized due to advances in cable technology which have provided communities with a far greater range of stations, thereby diminishing the doctrine's accuracy. League of Women Voters, 468 U.S. at 376-77 n.11. Nevertheless, the Court refused to reconsider the approach unless guided by Congress or the FCC. Id.

54 See e.g., Pacifica, 438 U.S. at 748-49. The Court relied on the pervasiveness of radio and television in the home to justify allowing extensive regulations of "indecent" broadcasts. Id. at 748-49. The Court likened the broadcast media to an "intruder" into the home and thereby upheld the content-based regulations. Id. at
otherwise constitutionally protected speech.\(^5\)

Not surprisingly, the Court has shown a similar ambivalence towards the First Amendment implications of cable television regulation.\(^6\) After the Court's 1968 decision in *United States v. Southwestern Cable Co.*,\(^7\) which affirmed the FCC's right to regulate cable television, the FCC imposed extensive regulations, covering various areas such as syndicated program exclusivity, non-broadcast services, cross-ownership, and technical standards.\(^8\) The regulations were guided by the FCC's fear that cable television posed a potential economic threat to broadcast television.\(^9\) By 1977, the FCC began to relax cable regulations following the decision in *Home Box Office, Inc. v. FCC*,\(^6\) which greatly limited the FCC's authority by declaring that the Commission could not use its power to protect broadcasters.\(^6\)

It was not until 1979 in *Midwest Video*, however, that the Supreme Court finally acknowledged the possible First Amendment protections afforded cable television.\(^6\) Although the Court removed much of the FCC's ability to regulate the cable television industry, it still refrained from conducting extensive First Amendment review; instead, the Court decided the case on statutory grounds.\(^6\) Later, in *Los Angeles v. Preferred Communications, Inc.*,\(^6\) the Court recognized that a local government's grant of exclusive franchises implicated First Amendment inter-

---

5 The First Amendment guards against government efforts to restrict speech because of the message such speech conveys. Thus, regulations which restrict the content of speech are subject to strict scrutiny. See supra notes 18 & 39. Certain categories of speech, however, such as obscenity, do not garner First Amendment guarantees and may, therefore, be constitutionally restricted. See supra note 38.

6 See supra notes 13-25 and accompanying text (discussing Supreme Court's ambivalence).

7 392 U.S. 157 (1968). Notably, the Court specified that the FCC regulations had to be "reasonably ancillary" to its regulation of broadcasting. Id. at 178.


9 See CREECH, supra note 58, at 167 ("[T]he underlying premise of most of the rules was the protection of broadcasters.").


11 Id. at 28-34; see also BITTNER, supra note 11, at 262 (stating that regulations after 1977 were "patchwork legislation").

12 See FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979) ("Because our decision rests on statutory grounds, we express no view on [the question of First Amendment rights], save to acknowledge that it is not frivolous ... ").

13 Id.

but the Court again refused to advance a First Amendment standard for the analysis of such interests. 

Finally, five years later, in *Leathers v. Medlock*, the Court definitively stated that cable television "is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.' " The Court, however, failed to go further and abstained from pronouncing a standard of scrutiny.

Although the Supreme Court has recognized that First Amendment constitutional protections extend to cable television, the Court has repeatedly failed to determine the appropriate level of protection to be afforded the industry. The Court's reluctance seems to stem from a fear that a decision today will be determinative of the appropriate First Amendment standards for future technologies. This reluctance was clearly evidenced in *Denver Area*, in which the Court, rather than committing itself to one standard, utilized different standards in its analysis of the three challenged provisions of the 1992 Cable Act.

In the Court's analysis of section 10(a), which permits a cable operator to refuse to carry leased access programming that it "reasonably believes describes or depicts sexual or excretory ac-

---

65 *Id.* at 494 (noting cable operator's selection of programming evidences editorial discretion and is protected speech).

66 *Id.* at 494-95. The *Preferred Communications* Court evaded the issue by stating: Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers .... We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question ....


68 *Id.* at 444.

69 *See id.* at 448 ("[T]here is no indication that [the state] has targeted cable television in a purposeful attempt to interfere with its First Amendment activities.").

70 *See supra* notes 62-69 and accompanying text (discussing Supreme Court's failure to set standard of review).

71 *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996) ("[A]ware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.") (citations omitted); *see also* Corn-Revere, *supra* note 43, at 260 (forecasting that "the outcome of the current controversy [concerning the standard for cable television] will determine not just the First Amendment rights of cable operators, but of all electronic publishers [and] likely will define the rules of the road for the electronic superhighway").
tivities or organs in a patently offensive manner," the plurality used close scrutiny. First, the Court noted that the government's compelling interest in protecting children from exposure to sex-related programming had repeatedly been accepted by the Court. Next, the plurality noted that, but for previous acts of Congress which required "must carry" and "PEG access" channels, cable operators could freely select the programming of the cable channels they offered even though once a cable operator selected a programmer, it could not directly control the content of the channel. Finally, the plurality acknowledged that the problems addressed by, and the balancing of interests involved in section 10(a) were analogous to the "indecent" radio broadcast regulations at issue in FCC v. Pacifica Foundation. In Pacifica, the Court held that a restriction on "indecent" speech in broadcasting was constitutional because the broadcasting medium was "uniquely accessible to children" and had established a "uniquely pervasive presence" in society. The Denver Area plurality not

---


73 See supra note 35 and accompanying text (quoting Court's "close scrutiny" formulation).

74 Denver Area, 116 S. Ct. at 2386. The Court has often accepted the government's interest in protecting children from exposure to sexually explicit material as compelling. See Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (recognizing government interest in protecting children from indecent material as compelling interest); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968) (accepting government's interest in shielding children from materials not obscene by adult standards).

75 Denver Area, 116 S. Ct. at 2386.

76 438 U.S. 726 (1978). The competing First Amendment interests were those served by the access requirements increasing programmers' access to means of expression and those of cable operators and other programmers to whom cable operators would have otherwise assigned the channels committed to access. See Denver Area, 116 S. Ct. at 2386.

In Pacifica, the respondent's radio station broadcast a monologue by comedian George Carlin, entitled "Filthy Words," at about two o'clock in the afternoon. Pacifica, 438 U.S. at 730-31. A man, while driving with his young son, heard the monologue which contained profane language and complained to the FCC. Id. at 731. The FCC later attempted to install a 24-hour ban on indecent material in broadcasting, but the District of Columbia Court of Appeals declared the ban unconstitutional. See Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991). The FCC then adopted a safe harbor regulatory policy which required that such programming be aired only during the midnight to 6 A.M. time slot, a time when fewer children would be in the broadcast audience. See Creech, supra note 58, at 125-27 (discussing emergence of safe harbor rule).

77 Pacifica, 438 U.S. at 748-50 (noting difficulty of protecting viewers or listeners from possible offensive material because warning may appear before viewer or listener turns radio or television dial to offensive program and consequently render-
only found that cable television possessed both of these characteristics, but it also declared that the permissive nature of section 10(a) hampered less speech than the time restrictions at issue in Pacifica. Accordingly, the Denver Area Court held that section 10(a)'s restriction of patently offensive material on cable television's leased access channels passed constitutional muster.

In contrast to section 10(a), the Denver Area plurality distinguished section 10(c) and chose not to utilize its "close scrutiny" test. While the two sections are similar, section 10(c) permits a cable operator to prohibit public access programming, rather than leased access programming, that it believes "contains obscene materials, sexually explicit conduct, or material soliciting or promoting unlawful conduct ...." An important distinction is apparently found in the fact that while cable operators have historically exercised editorial control over the leased access channels regulated by section 10(a), they have not had the same control over the public access channels affected by section 10(c). Instead, public access programming is normally subject to supervision from public and private elements. Thus, a "cable operator's veto" in public access programming will likely result in the exclusion of marginal programs that the community considers worthwhile and which the public access system encour-
Accordingly, the plurality did not accept the government’s contention that there is a problem of patently offensive programming on public access channels significant enough to support the restriction imposed by section 10(c). Consequently, the Court declared section 10(c) unconstitutional.

Unlike sections 10(a) and 10(c), section 10(b) did not merely permit cable operators to restrict speech but, rather, it required such restriction by the use of “segregate and block” requirements for patently offensive sex-related material on its other cable channels. The plurality found section 10(b) unconstitutional because, given the other means available to and previously used by the government to protect children from sex-related programming, the “segregate and block” requirements did not “properly accommodate the speech restrictions they impose[d]” and were not “narrowly tailored” to further their objective. Hence, the Court concluded that the provision failed both strict scrutiny and the less stringent formulation of “least restrictive alternatives.”

II. THE RELIANCE OF LOWER COURTS ON MEDIUM-DEPENDENT ANALYSIS

As the Supreme Court awaits the “proper” moment to enunciate a standard of review for cable regulation, lower courts are deciding First Amendment claims without guidance. Not surprisingly, the Court’s reticence has led to the development of an irregular body of law, and lower courts have produced different outcomes in similar cases. For instance, the United States District Court for the Northern District of California in Century

---

65 Id. at 2395 (asserting that cable operator’s ability to exclude marginal programming is unnecessary in light of community involvement through access managers and supervisory boards in determining public access programming).
66 Id. at 2396-97.
67 Id. at 2397.
68 Denver Area, 116 S. Ct. at 2390-91.
69 Id. at 2391. Alternative, less restrictive methods available to the government to protect children from “patently offensive” material on cable television include “scrambling” and “blocking” such programming upon a subscriber’s request, using “lockboxes” that allow parents to “lock out” channels or programs they do not want their children to view, and requiring manufacturers to make television sets with a “V-chip”—a device that automatically identifies and blocks sex-related and violent programs. Id. at 2392-94.
70 Id. at 2391; see supra note 36 (discussing Court’s analysis of section 10(b)).
Federal, Inc. v. City of Palo Alto\textsuperscript{91} held that an exclusive franchise arrangement that limits the number of cable operators in a city violated the First Amendment.\textsuperscript{92} The court declared that cable television, which does not have the problem of scarcity of airwaves, was more analogous to traditional media than to broadcasting, and therefore it is entitled to greater First Amendment protection than is granted to broadcasting.\textsuperscript{93} In contrast, the Circuit Court of Appeals for the Eighth Circuit in Central Telecommunications, Inc. v. TCI Cablevision, Inc.,\textsuperscript{94} held that an exclusive cable television franchise similar to the arrangement in Palo Alto did not violate the Constitution on the grounds that the natural monopoly characteristics of cable television justified such a restriction.\textsuperscript{95}

The inconsistency in results is best explained by the tendency of courts to focus on the characteristics of the particular medium by which speech is transmitted rather than the speech itself. In assessing First Amendment claims concerning cable television, courts have sought to determine whether the characteristics of cable television are analogous to those of the printing press,\textsuperscript{96} which has been granted the fullest First Amendment guarantees, or those of broadcasting,\textsuperscript{97} which has received less protection.\textsuperscript{98} Courts have also considered whether the character-
istics of cable television require an entirely new analysis. Thus, some courts have invalidated regulations on the basis that cable systems are unlike broadcasting systems, while other courts have held that cable television and broadcasting share common characteristics and should be similarly regulated. Still, other courts have upheld regulations on the ground that cable television is a natural monopoly.

---


Different communications media are treated differently for First Amendment purposes. In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis.

Id. (citations omitted); Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."); Gilbert, supra note 3, at 627-28 (explaining that different levels of protection apply to media depending on specific medium of communication). See generally Corn-Revere, supra note 43, at 268-87 (discussing classification of different media and various levels of protection attached to certain categories). This medium-dependent varying standard approach was established by a regulatory scheme, comprising the 1934 Act and the 1984 Act, which define and categorize media of communications as broadcast systems, common carriers, such as telephone companies, and cable television. See Ditthavong, supra note 97, at 479-90. These categorizations and definitions of media have received different levels of protection from the First Amendment. See generally Ditthavong, supra note 97, at 480-97 (describing First Amendment protections of different forms of media); Gilbert, supra note 3, at 627-28 (describing varying levels of protection); Philip H. Miller, Note, New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services, 61 FORDHAM L. REV. 1147, 1161-1189 (1993) (examining several rationales for government regulation of different media of communication).

100 See, e.g., Palo Alto, 648 F. Supp. at 1471. The district court in Palo Alto found that the traditional justification for regulation of the broadcast media—physical scarcity—is absent in the context of cable television and thus cannot justify increased government intrusion in cable television. See id.; see also Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985). The Court of Appeals in Cruz rejected the application of Pacifica's "intrusive" or "pervasive" rationale as a justification for extensive regulations of "indecent" programming on cable television. Cruz, 755 F.2d at 1420-21; see also Community Television of Utah, 555 F. Supp. at 1166-87 (explaining Pacifica decision is inapplicable to cable television industry due to numerous differences between cable and broadcast television).

101 See e.g., Omega Satellite, 694 F.2d at 127-28. The court explained that cable should be equated with broadcasting because both use public-rights-of-way. Id. While broadcasting may be regulated because of its use of the public airwaves, cable can be regulated because of its use of other public rights-of-way, such as telephone poles and underground ducts. Id.

III. DEFECTS OF A MEDIUM-DEPENDENT ANALYSIS

It is submitted that the medium-dependent analysis is flawed and that the Supreme Court should take steps to end its proliferation. A fundamental problem with the medium-dependent approach is that it lacks "a consistent method of application." Courts are losing sight of First Amendment principles and are instead focusing on the mode of communication. Another basic problem is that, as technology advances, courts will have difficulty categorizing media and developing new standards applicable to each invention because complex technologies may share certain characteristics but differ in other respects.

---

1987) ("Cable television's physical intrusion into the public rights of way and the ease with which operators are able to create a natural monopoly in a local market have provided justification for governmental regulation."); Community Comms. Co., Inc. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981) (agreeing that cable television's status as natural monopoly justifies reduction in protection).

103 Corn-Revere, supra note 43, at 287.

104 See Frelix, supra note 43, at 735 ("[C]ourts are refraining from evaluating how the regulations inhibit individual rights of speech, and are instead focusing on the source which transmits the message. In doing so, there is a great likelihood that free speech protections will be compromised."). Courts can avoid the complications of media differentiation by looking to First Amendment principles. Some commentators have suggested that:

[to overcome the media dependency dilemma, the courts should look to First Amendment principles, and not allow technical advancements ... to obscure its protective values. One of the most important values of the First Amendment is promoting the flow of information. The First Amendment accomplishes this by restricting government intervention in the production and dissemination of information.]

Dithavong, supra note 97, at 488 (citations omitted).

105 Technology that provides easy access to data and communication is expanding. For instance, "local telephone companies, as well as private providers, will soon be able to deliver a plethora of information services and video programming, using various data formats such as voice, video, and text over telephone networks." Angelyn M. Wright, Note, Indecent Exposure on the Information Superhighway: Regulating Pornography on Integrated Broadband Telecommunications Networks, 11 GA. ST. U. L. REV. 465, 465-66 (1995) (citations omitted). As technology advances, the FCC develops methods of classification. For example, the FCC issues licenses for services such as direct broadcast satellites (DBS), multichannel multipoint distribution service (MMDS), operational fixed service (OFS), and instructional television fixed service (ITFS). See Corn-Revere, supra note 43, at 287. Each of these sources are classified differently in spite of similarities of function. Id.

106 One problem with media differentiation is the difficulty in ascertaining the similarities among media, such determinations tend to be subjective and prone to disagreement. See Corn-Revere, supra note 43, at 287. Another difficulty is that a particular medium may be similar to many forms of communication. Id.

Multimedia, for example, is "like" newspapers because it transmits text. It is "like" books when presented over a personal player on CD-ROM. However, it is also "like" broadcasting or cable because it may transmit video,
For instance, the differences between cable and broadcasting have created problems in applying broadcasting standards to cable television, despite the close similarities in projecting visual programming to viewers. The primary difference between the media lies in the manner by which each transmits its programming. Broadcast systems send messages to viewers by transmitting "electromagnetic signals from a central transmitting antenna." In contrast, cable systems, like telephone systems, transmit messages via "cable or optical fibers strung above-ground or buried in ducts to reach the [viewers]." Hence, the cable industry is subject to government regulation because, like telephone systems, they must request permission from local governments to use the public rights-of-way. Another important difference is that broadcasters provide their service at no charge, while cable subscribers must pay a monthly fee in order to receive cable programming. Both of these differences permit cable systems to provide subscribers with a greater variety of programming because they are capable of transmitting more channels than can broadcasting systems. Accordingly, the argument that government regulation of broadcasting is necessary due to the physical scarcity of radiowaves can not be extended to cable television because problems of frequency interference do not arise with cable television.

Thus, by focusing on technical differences, courts utilizing medium-dependent analysis will be forced to determine whether such differences require the application of a different standard. As a result, the rights afforded to categories of protected speech are being diluted when courts afford less protection to the ex-
pression based upon the medium by which it is transmitted.\textsuperscript{115}

IV. PROPOSAL: APPLICATION OF PRINTING MEDIUM STANDARDS TO CABLE TELEVISION

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."\textsuperscript{116} This principle is best served when restrictions on speech are limited.\textsuperscript{117} Doctrines and rules developed in the print medium restrain government regulation of the content of speech and provide for the fullest First Amendment protections.\textsuperscript{118} In addition, these rules allow for flexibility of application so that the examination of the regulations can include an analysis of the relevant characteristics of the medium.\textsuperscript{119} For instance, a content-based

\textsuperscript{115} See Frelix, supra note 43, at 735 (explaining that First Amendment rights are being compromised by media-dependent analysis). Speech that is broadcast has garnered fewer protections because of the means of transmission, in spite of the classification of the speech as protected. For instance, the Supreme Court declared that newspaper publishers cannot be required to print the replies of those whom they criticize because such restrictions are content-based and thus in violation of the First Amendment. See Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244, 258 (1974). The Court, however, did not afford the same protection to broadcasters. See Red Lion, 395 U.S. at 396 (reviewing right of reply requirements for broadcasting). On the contrary, the Court required that broadcasters give reply time to political candidates criticized during the course of their broadcast. Id. Similarly, the Court allowed the FCC to prohibit the use of indecent language (that is not obscene) in the broadcast arena despite its contrary holdings assigning constitutional protection when published in newspapers. See FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978). If the Court did not differentiate between forms of communication, the regulation would have been subject to strict scrutiny analysis and would most likely not have passed constitutional muster. See supra notes 46-55 and accompanying text (describing different standards used for different means of communication).

\textsuperscript{116} Turner Broad., 114 S. Ct. at 2458; see also Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

\textsuperscript{117} See Jerry Berman & Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 YALE L.J. 1619, 1620 (1995) ("Though there are circumstances in which restrictions on expression are permissible, in general First Amendment values are best served when such restrictions are kept to an absolute minimum.").

\textsuperscript{118} See Berman & Weitzner, supra note 117, at 1621 (explaining that print medium is least tolerant of intrusive regulation); Gilbert, supra note 3, at 628 (explaining that "highest level of First Amendment protection has been afforded to newspapers and other print media").

\textsuperscript{119} See Corn-Revere, supra note 43, at 310-11 ("[T]hese considerations may result in a somewhat different First Amendment analysis for each medium of communication, but
regulation of the print medium is strictly scrutinized with a two-part test: (1) whether the government has a "compelling interest" in regulating the speech; and (2) whether the regulation is "narrowly tailored" to further that interest.120

As the Supreme Court determined in Denver Area, cable television possesses special characteristics in that it is "uniquely pervasive" and "uniquely accessible" to children.2 These two factors are pertinent to the determination of whether the government has a "compelling interest" or whether the regulation is "narrowly tailored."2 Therefore, rather than passively allowing

they do not require different First Amendment standards."). See also JONATHAN W. EMORD, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT 128-29 (1991). Emord proposes a "preservationist perspective," which is composed of two elements: static barriers against government intervention and adaptive definitions for the terms "speech" and "press." Id. at 128. Under this approach,

[any effort by government to invade the private speech and press sphere and to reorder existing relationships there will directly implicate the First Amendment and must be subjected to strict judicial scrutiny. [The Adaptive Definitions] element is designed to prevent the amendment ... from being construed to condone precisely that intervention into a new medium that would clearly be unconstitutional were it to occur in an older print medium. The Adaptive Definitions aspect ensures that the protection afforded the print media and face-to-face communication will apply to all new media forms, guaranteeing that the Static Barriers remain virtually impenetrable, high, wide, and thick despite technological evolution.

Id. at 128-29. This approach grants to other forms of communication the protections given to the print media and allows the characteristics of such other media to be taken into account under the "adaptive definitions" element.

120 See supra notes 18, 38-40 and accompanying text.
121 See supra notes 76-78 and accompanying text.
122 See Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993), rev'd en banc, 56 F.3d 105 (D.C. Cir. 1995), aff'd in part and rev'd in part sub nom., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996). The court in Alliance applied strict scrutiny to section 10 of the 1992 Act. Id. at 828. The court found that the FCC must offer evidence to assist the court in determining whether leased access channels present a special problem of indecent programming, thereby justifying the restrictive provisions of section 10. Id. at 829. According to the court:

[The FCC] presents no evidence that indecent material on access channels takes viewers by surprise in a manner that regular commercial programming does not; there is no evidence that program guides are less helpful in the access context; no evidence regarding the relative prevalence, or severity of indecent material on leased access versus regular commercial channels; and no evidence indicating that children are more frequently exposed to indecent material on leased access channels than on regular commercial channels.

Id. at 828. Essentially, the court sought evidence of the special characteristics of the particular media, leased access channels on cable television, that would assist it in applying a strict scrutiny analysis. The court remanded the issue to the FCC to examine the "relative prevalence and severity of and the relative exposure of children
less First Amendment protections to be afforded speech because of the means of communication, the Supreme Court should direct the lower courts to apply the laws and doctrines developed in the print medium context to cable television in order to protect important First Amendment principles and to achieve versatility.¹²³

CONCLUSION

An examination of the Supreme Court's decisions reveals the Court's uncertainty regarding treatment of new communications technologies and its reluctance to commit to a constitutional standard for the new mediums of expression. The Court's failure to declare the appropriate First Amendment standard for cable television in Denver Area has injured First Amendment principles and has hindered the First Amendment rights of cable television programmers. Lower courts are differentiating between the mediums of expression instead of guaranteeing First Amendment protections. The Supreme Court should offer guidance to the lower courts and should direct their attention to the characteristics of the speech itself, rather than the characteristics of the mode of expression. This can be accomplished by applying the standards employed in the printing press context to cable television. The Denver Area Court, by failing to pronounce the appropriate standard, has merely prolonged the inevitable and has permitted violations of First Amendment rights to proliferate. The Court's continuous evasion of the issue is unacceptable in a constitutional system in which citizens have structured their endeavors on the basis of their First Amendment freedoms.

Diana Israelashvili

¹²³ See Berman & Weitzner, supra note 117, at 1621 ("[T]he print medium [is] a powerful demonstration of how to achieve diversity and limit government content regulation."); James A. Bello, Comment, Turner Broadcasting System, Inc. v. FCC: The Supreme Court Positions Cable Television on the First Amendment Spectrum, 30 NEW ENGL. L. REV. 695, 739 (arguing that "cable speech should not receive diminished protection and [that] restrictions on it should be treated in the same manner as any other restriction on speech").