The Future of Cable Regulation Under the First Amendment: The Supreme Court's Treatment of Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992

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I. INTRODUCTION

The Supreme Court's plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*[1] will likely change the way in which courts analyze speech restrictions on cable television for First Amendment purposes.[2] The *Denver* plurality formulated and utilized an ad hoc standard to review the speech restrictions at issue. However, the plurality's standard departs substantially from firmly-established First Amendment precedent and was based upon an analytical approach that had previously been applied only to broadcast communications. Specifically, the plurality's analysis failed to take into consideration the fundamental differences between cable

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[1] 116 S. Ct. 2374 (1996).

[2] U.S. CONST. amend. I. provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

television and broadcast television which necessitate separate and distinct treatment under the First Amendment.

In *Denver*, the Court reviewed three sections of the Cable Television Consumer Protection and Competition Act of 1992.[3] The plurality opinion upholding section 10(a),[4] written by Justice Breyer and joined by Justices Stevens, O'Connor, and Souter, is especially noteworthy because it sets a major precedent cable television regulation under the First Amendment.[5] Section 10(a) applies only to leased access channels,[6] and permits cable operators[7] to censor programming that the cable operator reasonably believes to be patently offensive. The plurality analyzed section 10(a) by "closely scrutinizing [section] 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."[8] The Court's approach deviated significantly from well-established First Amendment precedent, affirmed as little two years earlier in *Turner Broadcasting System, Inc.*

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[3] Pub. L. No. 102-385, 106 Stat. 1460, §§ 10(a), 10(b), and 10(c), 47 U.S.C. §§ 532(h), 532(j), and 531 note (1996).

[4] Section 10(a)

> permit[s] a cable operator to enforce prospectively a written and published policy of prohibiting programming [on leased access channels] that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

47 U.S.C. § 532(h) (1996). Section 10(a) amended 47 U.S.C. § 532(h), which was established in the Cable Communications Policy Act of 1984 (1984 Act) Pub. L. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

[5] This Comment focuses solely on the plurality's treatment of section 10(a). The Court also reviewed and struck down sections 10(b) and 10(c) as unconstitutional. *Denver*, 116 S. Ct. at 2390-97. Section 10(b) required cable operators to segregate and block "patently offensive" sex-related material on leased access channels. 47 U.S.C. § 532(j) (1996). Section 10(c) permitted cable operators to prohibit "patently offensive" material on public access channels. 47 U.S.C. § 531 note (1996).

[6] Leased access channels are channels that federal law requires a cable operator to set aside for commercial lease by unaffiliated third parties. *Denver*, 116 S. Ct. at 2385.

[7] Cable operators are those who provide cable service over a cable system in which they are responsible for the management of, control, or own a significant interest in. 47 U.S.C. § 522(5) (1996).

[8] *Denver*, 116 S. Ct. at 2385.

v. FCC.[9] The plurality chose this novel approach because the uncertain and unfinished stage of cable television's development made it "unwise and unnecessary" to determine a bright line First Amendment rule applicable to all subsequent litigation involving cable television.[10] However, the Court's approach leaves the legal status of cable television in a state of confusion and provides only vague guidance for future application by lower courts.

This comment critiques the plurality's analysis of section 10(a) and considers the probable effects of this decision on the future of cable television regulations under the First Amendment. Section II provides a general background of speech regulation and cable television. In particular, this section discusses the development of permissible television regulation under the First Amendment, justifications for television regulation, and special First Amendment problems facing the regulation of television. The distinction, or lack of one, between broadcast and cable television is also be explained. In section III, this comment describes and critiques the plurality's treatment of section 10(a). Section IV then discusses two analytical frameworks that the *Denver* plurality refused to apply in their analysis of section 10(a): strict scrutiny and common carrier treatment. The bases for the plurality's refusal to apply those two approaches is also examined. Section V then presents the serious and potentially harmful implications of *Denver* for both cable television and the First Amendment.

II. FIRST AMENDMENT REGULATION OF SPEECH

The First Amendment subjects and regulation of speech to a complex and factually intensive analysis of not only the regulation, but also the medium at issue. It is therefore necessary to examine the factual circumstances and precedent faced by the Court in their analysis of section 10(a).

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[9] 512 U.S. 622 (1994). *But cf.* Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114, 1127 (1996) (describing stare decisis as a "principle of policy," not an "inexorable command" which the Court has not felt obligated to follow if the precedent is "unworkable" or "badly reasoned") This is particularly true in constitutional cases where it is very difficult to correct problems through legislation.

[10] *Denver*, 116 S. Ct. at 2385; *id.* at 2402 (Souter, J., concurring). *But see* PATRICK PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 15 (1987).

A. *The Threshold of Speech Regulation: Obscenity vs. Indecency*

In analyzing regulations on speech under the First Amendment, it is first necessary to distinguish between indecent speech and obscene speech. Indecent non-obscene speech is entitled to First Amendment protection,[11] whereas obscene speech considered to be outside the scope of the First Amendment.[12] The "patently offensive" programming that section 10(a) permits cable operators to prohibit is synonymous with "indecent speech,"[13] and is therefore speech that is protected by the First Amendment.

Although indecent speech merits First Amendment protection, the Supreme Court has permitted the government to place some narrowly-defined restrictions on the transmission of indecent speech, albeit in ways that are consistent with the First Amendment.[14] Notably, the Court has gradually increased the degree of restriction that is permissible under the First Amendment through a series of decisions, culminating in *Denver*.

B. *Content Regulation of Speech and Constitutional Scrutiny*

In analyzing restrictions on indecent and other types of protected speech, the Supreme Court has focused on whether the restriction is content-neutral, in which the restriction equally discriminates against all speakers, or content-based, in which the restrictions discriminate among speakers based upon the content of their speech.[15]

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[11] *E.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

[12] *E.g.*, Roth v. United States, 354 U.S. 476, 485 (1957).

[13] *Denver*, 116 S. Ct. at 2382.

[14] *See, e.g., Sable*, 492 U.S. at 126; FCC v. Pacifica Found., 438 U.S. 726, 744-50 (1978).

[15] In order to determine whether a restriction on speech is content-neutral or content-based, the primary focus of the reviewing court is on whether the government has adopted the particular regulation on speech in opposition to the message which that particular speech conveys, which would brand it a content-based restriction. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). The government's purpose in imposing the regulation is dispositive, so that a governmental regulation on speech that is implemented to serve purposes not related to the content of the speech is content-neutral, even if the incidental effects of the regulation restrict some speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The Court has indicated that "at least with respect to businesses that purvey

United States v. O'Brien[16] established the intermediate scrutiny test which the Supreme Court subsequently applied to content-neutral restrictions on speech.[17] The *O'Brien* test permits content-neutral speech regulation if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."[18] However, if restrictions on protected speech are content-based, strict scrutiny applies and a court will uphold the regulations "only if they are narrowly tailored to achieve a compelling state interest."[19]

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sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed" as content-neutral even if it would otherwise be construed as content-based. City of Renton v. Playtime Theaters, 475 U.S. 41, 48 (1986). However a subsequent plurality opinion indicated that an ordinance that aims at protecting viewers from "psychological damage . . . associated with viewing adult movies" deals with a "direct" rather than "secondary impact" and is insufficient to allow a court to review it as content-neutral. Boos v. Barry, 485 U.S. 312, 320-21 (1988). Additionally, some assert that *Renton* does not apply outside the context of businesses that provide sexually explicit material. *See, e.g., id.* at 334-38 (Brennan, J., concurring in part, dissenting in part). *But see, e.g.,* American Library Ass'n v. Reno, 33 F.3d 78, 85 (D.C. Cir. 1994), *reh'g en banc denied,* 47 F.3d 1215 (D.C. Cir.), *and cert. denied,* 115 S. Ct. 2610 (1995). Thus, section 10(a) could not be considered a content-neutral regulation that deals with a secondary effect of sexually explicit speech because it is aimed at protecting children from psychological damage resulting from the viewing of adult programming.

[16] 391 U.S. 367 (1968).

[17] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661-62 (1994).

[18] *O'Brien,* 391 U.S. at 377. A regulation is not required to be the least restrictive or least intrusive means of furthering the governmental interest. However, the regulation must be narrowly tailored to achieve the government's interest. *Ward,* 491 U.S. at 798. A regulation achieves narrow tailoring "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" *Id.* at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[19] *E.g.,* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); *Boos,* 485 U.S. at 321. *Pacifica* established a narrow exception to the applicability of strict scrutiny whereby broadcast media receive less constitutional protection then other media because it has a "uniquely pervasive presence" in

C. *Special Concerns of Speech Regulation on Television*

In addition to the problems and concerns present whenever protected speech is regulated, television's unique dynamics and characteristics raise several special First Amendment concerns that are not present in other areas.

1. Protecting Children From Adult Programming

Today, millions of American children spend more time in front of a television set then they do with their parents.[20] Regardless of their social class, most children between the ages of six and twelve watch between twenty and twenty-eight hours of television per week.[21] The programs that children watch on television may arguably have a substantial effect on their developing minds.[22] The omnipotent presence of television in the lives of American children sets television apart from other communications media, such as radio and computers regarding this important issue. There will always be an inherent tension between protecting children from adult material and allowing adults to gain access to material which they are constitutionally entitled to watch, and it is not clear when the need to protect children would justify placing restrictions on adult material. It is this problem that underlies the *Denver* plurality's analysis of section 10(a).

American society and is "uniquely accessibility to children" of broadcast media. *Pacifica*, 438 U.S. at 748-49. Courts have read *Pacifica*, along with *Sable*, to stand for the proposition that when evaluating a government regulation under strict scrutiny, the regulation may be entitled to more deference if the effected medium is "widely pervasive and uniquely accessible to children." Recent Case, 109 HARV. L. REV. 864, 867 (1996). *Contra Denver*, 116 S. Ct. at 2415 (Kennedy, J., concurring in part, dissenting in part).

[20] NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND 117 (1995).

[21] *Id.* at 117-18.

[22] *E.g.*, Gene Amole, *Rush to Adulthood Bears Fearful Fruit*, ROCKY MTN. NEWS, Jan. 7, 1997, at 5A.

2. Broadcast Television vs. Cable Television: Similar Yet Distinct

Although cable and broadcast television superficially appear to be similar, are they really two forms of the same medium? Some courts assert that cable and broadcast television are alike enough to be treated the same under the First Amendment.[23] However, others suggest that cable and broadcast television are two distinct media, mainly because the inherent technological differences merit separate and different treatment under the First Amendment.[24] The latter viewpoint appeared

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[23] *See* Jones v. Wilkinson, 800 F.2d 989, 1004-05 (10th Cir. 1986) (Baldock, J., specially concurring), *aff'd*, 480 U.S. 926 (1987); U.A.C.C. Midwest, Inc. v. Indiana Dept. of Revenue, 667 N.E.2d 232, 239 (Ind. Tax Ct. 1996) (asserting that cable and broadcast television are the same business, but receive their respective income from different sources); Michael I. Meyerson, *The Right to Speak, the Right to Hear, and the Right not to Hear: The Technological Resolution to the Cable/Pornography Debate*, 21 U. MICH. J.L. REF. 137, 159-61 (1987/1988); Laurence H. Winer, *The Signal Cable Sends, Part II – Interference from the Indecency Cases?*, 55 FORDHAM L. REV. 459 *passim* (1987).

[24] *See* Turner, 512 U.S. at 627-29 (1994); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700-01 (1984); Action For Children's Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 701 (1996); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438-39 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); HBO, Inc. v. Corinth Motel, Inc., 647 F. Supp. 1186, 1188 (N.D. Miss. 1986); Cruz v. Ferre, 571 F. Supp. 125, 131-32 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985); Cable-Vision, Inc. v. Freeman, 324 So. 2d 149, 153 (Fla. Dist. Ct. App. 1975), *appeal dismissed*, 336 So. 2d 1180 (Fla. 1976), *and appeal dismissed*, 429 U.S. 1032 (1977); Clear Television Cable Corp. v. Board of Pub. Util. Comm'rs, 424 A.2d 1151, 1155 (N.J. 1981); Capitol Cablevision Corp. v. Hardesty, 285 S.E.2d 412, 419-20 (W. Va. 1981); Henry Geller & Donna Lampert, *Cable, Content Regulation and the First Amendment*, 32 CATH. U. L. REV. 603, 622-23 (1983); William E. Lee, *Cable Leased Access and the Conflict Among First Amendment Rights and First Amendment Values*, 35 EMORY L.J. 563, 576-91 (1986); Robert E. Riggs, *Indecency on Cable: Can it be Regulated?*, 26 ARIZ. L. REV. 269, 287-88 (1984); Dominic Andreano, Note and Comment, *Cyberspace: How Decent is the Decency Act?*, 8 ST. THOMAS L. REV. 593, 604-06 (1996); Jeff Gray, Note, Turner Broadcasting v. FCC: *The Need for a New Approach in First Amendment Jurisprudence of the Cable Industry*, 29 U.S.F. L. REV. 999, 1008-09 (1995); *cf.* S. REP. NO. 92, 102d Cong., 1st Sess., 51 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1184 (noting inherent similarity between cable television and telephones).

to be firmly established by the Court in its *Turner* opinion.[25] However, the recent *Denver* decision raises serious questions as to the general applicability of this distinction.

Cable television has two primary benefits over broadcast television: it provides undistorted reception of its signals and a significantly greater number of channels than its broadcast counterpart.[26] Cable television's benefits over broadcast television result from the technological differences between the two media.[27] Signals from broadcast media occupy the electromagnetic spectrum and invade every home within their broadcast area. By contrast, cable service is provided only by subscription and generally requires that a subscribers home is linked to the cable provider by means of closed circuit, coaxial cable.[28]

Because of the scarcity of frequencies available in the electromagnetic spectrum, some degree of regulatory intrusion with respect to broadcast media is necessary to ensure that the various frequencies are properly assigned.[29] Thus, courts have consistently permitted greater speech restrictions on broadcast media than would otherwise be tolerated under the First Amendment.[30] This spectrum scarcity rationale provided the basis underlying the Supreme Court's decision in *FCC v. Pacifica Foundation*, which upheld the power of the FCC to place timing restrictions on the broadcast of indecent material over the radio.[31] It is the *Pacifica* decision, which the *Denver* plurality primarily relied upon in upholding section 10(a).

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[25] The Court clearly stated that the different technologies through which cable and broadcast television reach their viewers sets them apart. *Turner*, 512 U.S. at 627-29. In fact, the Court recognized this distinction as early as 1968. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400-01 (1968).

[26] *Turner*, 512 U.S. at 627-29.

[27] Although there are many distinctions between cable and broadcast television, the technological differences are most obvious.

[28] *See* Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 FED. COMM. L.J. 1, 12-13 (1991).

[29] *See, e.g., Turner*, 512 U.S. at 637-38. The Court notes that there is no spectrum scarcity with respect to coaxial cable.

[30] *See, e.g., id.*

[31] 438 U.S. 726 (1978).

In addition to spectrum scarcity, cable and broadcast television also differ with respect to funding and operations.[32] While the similarities may not be obvious, cable television's closest analogue for First Amendment purposes may actually be telephones rather than broadcast television due to the practical aspects of using public property for laying out the wires, virtual monopolies over the communities served, and the need to provide non-discriminatory service.[33] Additionally, as they switch over to the use of fiber optic technology, telephones and cable television will grow even more analogous as telephone companies will be able to carry television pictures and telephone audio signals within the same wire[34] and at a lower cost than is charged for cable service via standard coaxial cable.[35]

3. Common Carrier Regulation

The common carrier doctrine originated in the context of transportation and shipping and bestowed a quasi-public character on one who undertook to "carry for all people indifferently."[36] However, since its origin, courts have applied the common carrier doctrine in various other contexts including communications. A communications common carrier "is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. . . .'"[37] The basic duty of a

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[32] *See, e.g., Turner*, 512 U.S. at 629.

[33] S. REP. NO. 92, *supra* note 24, at 51, *reprinted in* 1992 U.S.C.C.A.N. at 1184.

[34] DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO, § 1.03[2], at 1-6 to 1-10 (1997). Utilization of the same wire is not practical without fiber optic technology because telephone wires without the use of expensive compression techniques do not have adequate bandwidth to carry television pictures and telephonic audio simultaneously. *Id.* Fiber optic cable television systems are already being tested and used in parts of the United States and Europe. *Id.* at 1-8.

[35] LELAND L. JOHNSON, TOWARD COMPETITION IN CABLE TELEVISION 27 (1994).

[36] National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640-42 (D.C. Cir. 1976), *cert. denied sub nom.* National Ass'n of Radiotelephone Sys. v. FCC, 425 U.S. 992 (1976).

[37] FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (quoting *In re* Amendment of Rules Insofar as they Relate to the Industr. Radiolocation Serv., 5 F.C.C.2d 197, 202 (1966) (Report and Order)) (internal footnotes omitted).

communications common carrier is to transmit information for all people indifferently without discriminating or refusing to deal with customers it is suited to serve.[38] The basic underlying rationale of the common carrier doctrine is to guarantee "fair and equal access to the carrier's service."[39] A finding that a communications medium or provider is a common carrier requires that strict scrutiny be used to analyze any laws restricting common carriers from delivering protected speech.[40]

III. *DENVER* AND SECTION 10(A)

A. *The Plurality's Analysis of Section 10(a)*

In addressing the constitutionality of section 10(a), the *Denver* plurality construes the exercise of the regulatory powers entrusted to cable operators by section 10(a) to be state action for First Amendment purposes.[41] Next, as a result of their restatement of the essence of First Amendment protection, the plurality asserted that case law has established the power of the government to "directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech."[42] It is through this formula that section 10(a) is "closely scrutiniz[ed]" by the plurality.[43] The plurality opinion upheld section 10(a) under this standard because of the importance of the interest at stake,[44] the accommodation of cable operators in editing the contents of their channels and the cable programmers' inter-

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[38] David Kupetz, Note, *Cable's "Non-Cable Communications Services": Cable Television as a Common Carrier,* 8 COMM/ENT L.J. 75, 89 (1985) (internal quotations omitted).

[39] Midwest Video Corp. v. FCC, 571 F.2d 1025, 1036 (8th Cir. 1978), *aff'd,* 440 U.S. 689 (1979).

[40] *Denver,* 116 S. Ct. at 2412 (Kennedy, J., concurring in part, dissenting in part) (citing Sable Communications of Cal, Inc. v. FCC, 492 U.S. 115, 131 (1989)).

[41] *Denver,* 116 S. Ct. at 2383.

[42] *Id.* at 2384-85.

[43] *Id.*

[44] *Id.* at 2385-86. The interest at stake is the protection of children from exposure to patently offensive depictions of sex. *Id.*

ests in maintaining access channels,[45] the similarity between the issues present in both *Pacifica* and *Denver*,[46] and the fact that section 10(a) offers a flexible approach that permits cable operators to exercise editorial discretion.[47] These four grounds led the plurality to reach the conclusion that section 10(a) "is a sufficiently tailored response to an extraordinarily important problem."[48]

B. *Critique of the Denver Plurality Opinion*

The problem with the plurality's approach is that three of the four grounds relied upon in upholding section 10(a) are flawed. In particular, the plurality weighs the cable operators' interests in exercising discretion over leased access channels too heavily as against the interests of the cable programmers. In addition, the plurality incorrectly analogized the instant case to Pacifica, disregarding precedent that would require full First Amendment protection based upon the absence of spectrum scarcity on cable television. Furthermore, the Denver plurality incorrectly viewed section 10(a)'s approach to regulation as being not overly-restrictive.

1. Protection of Children

The first factor cited by the plurality is the need to protect children from sexually explicit material. Many would agree that the protection of children from sexually explicit material which section 10(a) seeks to address is an important one.[49] The other three factors used to up-

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[45] *Id.* Cable programmers are those who produce programming which is sold or licensed to cable operators. *Turner*, 512 U.S. at 628.

[46] *Denver*, 116 S. Ct. at 2385-87.

[47] *Id.*

[48] *Id.* at 2385-86.

[49] *Id.* at 2386; *id.* at 2416 (Kennedy, J., concurring in part, dissenting in part); *cf.* Shea v. Reno, 930 F. Supp. 916 *passim* (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 2501 (1997) (discussing the problem of preventing children from gaining access to sexually explicit material on the internet). *But see* Fabulous Assocs. v. Pennsylvania Pub. Util. Comm'n, 693 F. Supp. 332, 339 n.14 (E.D. Pa. 1988), *aff'd*, 896 F.2d 780 (3d Cir. 1990); Brett Ferenchak, Comment, *Regulating Indecent Broadcasting: Setting Sail from Safe Harbors or Sunk by the V-Chip?*, 30 U. RICH. L. REV. 831,832 (1996).

hold section 10(a), however, are more questionable and merit closer examination.

2. The Accommodation of Cable Operators' Editorial Discretion

The plurality asserted that the accommodation of the cable operators' interest in exercising editorial discretion over leased access channels was of greater import than the cable programmers' interests in the use of leased access channels in order to justify upholding section 10(a).[50] The Court assumed, however, that First Amendment law entitles cable operators to exercise editorial discretion over leased access channels. Some view this question as being at "the real heart of the cable controversy."[51] The plurality's focus on the First Amendment rights of the cable operators is based upon the view that a cable operator's ability to exercise editorial discretion over the programming carried over leased access channels constitutes free speech entitled to full First Amendment protection.[52] Thus, the plurality likely saw section 10(a) as promoting the freedom of speech of cable operators.[53] According to the plurality, where a cable programmer's asserted right to transmit over leased access channels is in conflict with the cable operator's right to edit that programming, the cable operator's editorial discretion wins out.[54] However, the rights of cable operators over

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[50] *Denver,* 116 S. Ct. at 2385-86.

[51] PARSONS, *supra* note 10, at 7; *see generally* Eugene Volokh, *Cheap Speech and What it Will Do,* 104 YALE L.J. 1805, 1834-38 (1995).

[52] *Turner,* 512 U.S. at 636; FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979); Alliance for Community Media v. FCC, 56 F.3d 105, 150 (D.C. Cir. 1995) (en banc), *aff'd in part, rev'd in part sub nom. Denver,* 116 S. Ct. 2374 (1996); *cf.* Leathers v. Medlock, 499 U.S. 439, 444 (1991) (cable operators considered "part of the 'press'" by providing news, information, and entertainment).

[53] *See Alliance for Community Media,* 56 F.3d at 150. Adherents to this view assert that section 10(a) merely returns a cable operators editorial discretion which was taken away by the 1984 Act which established leased access channels. *Denver,* 116 S. Ct. at 2411 (Kennedy, J., concurring in part, dissenting in part).

[54] *Denver,* 116 S. Ct. at 2421 (Thomas, J., concurring in part, dissenting in part); *Turner,* 512 U.S. at 681 (Stevens, J., concurring in part). Justice Thomas bases his view regarding cable operators' editorial discretion on *Turner* as "implicitly recogniz[ing] . . . that the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion." A cable programmer therefore has a protected right in seeking an outlet for his programming, but no

leased access channels were extinguished by the 1984 Act which created leased access channel requirements.[55] The restoration of a cable operator's editorial discretion over leased access channels, as Justice Kennedy states, is not a compelling interest for First Amendment purposes.[56]

Additionally, as *Turner* indicated, cable operators possess unique powers because of their "control over most (if not all) of the television programming that is channeled into the subscriber's home" due to the technological structure of cable television.[57] Section 10(a) adds more editorial power to the significant power that the cable operator already holds. The cable operator's control over the information that enters a subscriber's home, already significant, is increased by the implementation of section 10(a). Because over sixty percent of American households with televisions subscribe to cable television[58] and over ninety-five percent of American households have the capability to receive cable service,[59] this power over a communications medium held by cable operators raises serious questions as to whether it is wise for a group of private individuals with economic motives to hold such tremendous power and the possibility for control over a primary source of education, entertainment, and information for millions of Americans.[60]

"free-standing First Amendment right to have that programming transmitted." Viewers rights are, according to Justice Thomas, derivative of both the rights of cable operators and cable programmers. *Denver,* 116 S. Ct. at 2421 (Thomas, J., concurring in part, dissenting in part).

[55] *Denver,* 116 S. Ct. at 2411 (Kennedy, J., concurring in part, dissenting in part).

[56] *Id.* at 2416 (Kennedy, J., concurring in part, dissenting in part). This conclusion is based upon the view that "the transmission of indecent programming over leased access channels is not [the] forced speech of the operator . . .[and] the discretion conferred by [section 10(a)] is slight" because the operator cannot broadcast substitute programming in place of the prohibited indecent material nor remove other types of offensive, non-indecent speech. *Id.*

[57] *Turner,* 512 U.S. at 656.

[58] *E.g.,* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(3), 106 Stat. 1460, 1460 (1992).

[59] JOHNSON, *supra* note 35, at 28.

[60] *Cf.* Cable Television Consumer Protection and Competition Act of 1992 §

One way in which cable television is different from other media is that the practical requirements of acquiring easements in order to lay out the cable under both public and private property mean that most communities are only served by one cable system which is granted a virtual monopoly. Other media are not faced with such impediments and consequently, it is possible for a community to be served by several newspapers of varying size and circulation in addition to national newspapers and magazines, but only one cable system. Rather than a delicate balance between the editorial discretion of cable operators and the free speech interests of cable programmers, after *Denver,* the cable programmer's interests are clearly relegated to a subordinate position behind those of the cable operator. This is especially troubling considering the fact that the original laws requiring space for leased access channels to be set aside was adopted in order to provide programmers unaffiliated with the cable operator with the ability to operate cable channels free from the cable operator's editorial control.[61]

3. The *Pacifica* Factors

Considering the lengths to which the plurality went in distinguishing the instant case from previous First Amendment case law,[62] it is difficult to justify application of the one case on which the plurality relied heavily because it "provide[d] the closest analogy" to the issues present in *Denver.*[63] The plurality chose to apply *Pacifica,* which upheld governmental restrictions on indecent material broadcast over the radio. The plurality in *Denver* found all of the factors justifying the ban in *Pacifica* to be present in analyzing section 10(a): both cable

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2(a)(4) (noting the high concentration of ownership in the cable television industry and the potential problem).

[61] *See Denver,* 116 S. Ct. at 2411-12 (Kennedy, J., concurring in part, dissenting in part).

[62] *Id.* at 2415 (Kennedy, J., concurring in part, dissenting in part).

[63] *Id.* at 2388. *But see id.* at 2415 (Kennedy, J., concurring in part, dissenting in part) (noting that *Pacifica* involved a ban occurring during *daytime* hours). *Cf.* Action for Children's Television v. FCC, 58 F.3d 654, 667 (D.C. Cir. 1995) (en banc), *aff'd in part, rev'd in part sub nom. Denver,* 116 S. Ct. 2374 (1996) (noting that daytime ban involves level of intrusion implicating First Amendment scrutiny because it would burden many adults' rights).

television and radio are "uniquely accessible to children," have established a "uniquely pervasive presence" in the lives of Americans, patently offensive material can confront citizens in the privacy of their homes without adequate warning, and adults desiring this programming can resort to other means such as video tapes or theaters.[64] The plurality's decision to apply the *Pacifica* standards is questionable, however, because the *Pacifica* decision emphasized that its holding was to be construed narrowly.[65]

Application of the *Pacifica* factors to section 10(a) throws into uncertainty the relation of cable and broadcast television for First Amendment purposes. The *Denver* plurality insisted that when the issue involves children and television, cable television differs little from broadcast television. But in *Turner,* the Court found that the spectrum scarcity of broadcast frequencies justified greater speech restrictions on broadcast television as compared to other communications media.[66]

In *Pacifica,* however, the "uniquely pervasive presence in the lives of all Americans" and "unique accessibility to children" of broadcast media justified the greater speech restrictions on broadcast radio.[67] These factors are not directly applicable to cable television.[68]

i. *Uniquely Pervasive Presence*

The first factor, a "uniquely pervasive presence," is not directly applicable to cable television because cable television's presence in the home is completely different from that of broadcast media. When homeowners request and pay for material to enter their home, as they do with cable television, application of *Pacifica* becomes unnecessary because the programming which enters the home via cable television is not an unwanted intruder as was the indecent radio broadcast in

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[64] *Denver,* 116 S. Ct. at 2386-87.

[65] *Pacifica,* 438 U.S. at 748-50. *See also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127-28 (1989); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 74 (1983); Cruz v. Ferre, 755 F.2d 1415, 1421-22 (11th Cir. 1985). The Court's decision is especially troubling because the cases that the Court chose not to apply, e.g. *Turner*, did not contain such restrictive language.

[66] *See Denver,* 116 S. Ct. at 2388.

[67] *Pacifica,* 438 U.S. at 748-50.

[68] *See* MINOW & LAMAY, *supra* note 20, at 128; Geller & Lampert, *supra* note 24, at 615-16.

Pacifica.[69] Cable can also be distinguished from broadcast television because, while subscription to cable television is very large and still growing, it still pales in comparison to broadcast television which ninety-eight percent of American households are capable of receiving.[70]

Furthermore, *Pacifica*'s assertion of broadcast radio's "uniquely pervasive presence" was based upon the Supreme Court's earlier holding in *CBS v. DNC*.[71] In *CBS*, the Supreme Court quoted an opinion of Judge Bazelon of the United States Court of Appeals for the D.C. Circuit which differentiated broadcast television from print media because the signals for broadcast television are "in the air" whereas written communication are on paper.[72] To receive messages from print media, Judge Bazelon indicated, the affirmative act of the individual to read the message is required, whereas an affirmative act is not required to receive messages that are broadcast over television.[73] The *CBS* Court's adoption of Judge Bazelon's rationale to distinguish broadcast television from print media was based upon the intrusiveness of broadcast television.[74] Although there are various ways of reading the Judge Bazelon's intrusiveness doctrine, the Court's subsequent application of the doctrine in *Pacifica* confirms that it is based upon the fact that broadcast signals are "in the air," and thus omnipresent.[75] This rationale could be consistently applied in *Pacifica* because of the technological similarities between broadcast radio and broadcast television. However, the *Denver* plurality's application of *Pacifica* and the intrusiveness doctrine to cable television is flawed, because cable television signals are not "in the air," but are transmit-

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[69] *See* Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard,* 9 HARV. J.L. & TECH. 87, 125 (1996); *cf.* MINOW & LAMAY, *supra* note 20, at 127 (Broadcasters note that as people pay to receive television signals, *Pacifica*'s rationale becomes inapplicable.).

[70] Geller & Lampert, *supra* note 24, at 623.

[71] 412 U.S. 94 (1973); *see* Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 33-35 (1995).

[72] *CBS*, 412 U.S. at 128 (quoting Banzhaf v. FCC, 405 F.2d 1082, 1100-01) (D.C. Cir. 1968).

[73] *Id.*

[74] Cate, *supra* note 71, at 33-35.

[75] *Id.* at 35.

ted through wires. Additionally, cable television requires the affirmative act of ordering and paying for reception of cable television services. Thus, cable television, for First Amendment purposes would be more akin to print media than broadcast television. *Denver*'s application of *Pacifica* thus raises the possibility that the intrusiveness doctrine is not based upon the unique nature of broadcast technology—a dramatic and sweeping departure from Supreme Court precedent in this area.

ii. *Unique Accessibility to Children*

The second *Pacifica* factor, "unique accessibility to children," is also absent in cable television because of the significantly higher costs and complexities involved with subscribing to cable television and the availability of special blocking devices for households receiving cable television. Any child with a few dollars can go to a store and purchase a radio. Yet, it would require significantly more money to purchase a television and order cable service and it would be much more likely to attract the attention of parents. It would also be much easier for a child to conceal a radio from parents. Even if the child already has access to a television, it would still be difficult to order cable service into the home without involvement from the parents. Congress has similarly recognized the technological differences between broadcast and cable technology in the Communications Act of 1934[76] which differentiated between "wire communication," on which cable television is based, and "radio communication," which is based upon broadcast technology, and provided the FCC with different regulatory authority for each medium.[77]

However, even if cable television was found to be "uniquely accessible to children" and possess "a uniquely pervasive presence," restrictions such as section 10(a) would still not be permissible because the *Pacifica* decision was based upon the spectrum scarcity of the broadcast medium.[78] This alone would render an approach based upon

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[76] Ch. 652, 48 Stat. 1064, 1065 (1934) (codified as amended in scattered sections of 47 U.S.C.).

[77] Riggs, *supra* note 24, at 287-88 (discussing 47 U.S.C. § 153 (1982)).

[78] *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824, 876 (E.D. Pa. 1996) (Dalzell, J., supporting opinion), *prob. juris. noted*, 117 S. Ct. 554 (1996), *and aff'd*, 117 S. Ct.

Pacifica inapplicable to section 10(a) because of the absence of spectrum scarcity in cable television. The plurality's application of the *Pacifica* factors thus suggests that the Court does not believe the "unique accessibility" and "uniquely pervasive presence" to emanate from the spectrum scarcity rationale or the intrusiveness doctrine. If the doctrine is not so rooted, then there is the potential to apply the *Pacifica* approach not only to cable television, but any other communications medium which is shown to be "uniquely accessible to children" and have a "uniquely pervasive presence." This presents the possibility for firmly established First Amendment principles to be circumvented once such qualities are deemed to be present in any particular medium. However, this approach would be inconsistent with the *Pacifica* Court's emphasis on the narrowness of their holding.[79] The *Pacifica* Court's emphasis that the holding was to be construed narrowly points to the fact that it was based on the specific characteristic of the medium at issue: spectrum scarcity.[80] Thus, because there is no spectrum scarcity present in cable television, the *Pacifica* factors should not apply even if the *Denver* plurality found that cable television was "uniquely accessible to children" and had "a uniquely pervasive presence" because, without spectrum scarcity, there is no justification for lessened First Amendment protection, no matter how compelling the reason.

4. Section 10(a)'s Flexible Approach

The fourth rationale used by the plurality to uphold section 10(a) is the flexibility provided by the provision's permissive approach. The plurality asserted that section 10(a) allows cable operators to exercise

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2329 (1997). The spectrum scarcity rationale is inseparable from the intrusiveness doctrine, because it is the fact that cable television signals do not occupy space on the electromagnetic spectrum, but are transmitted over wires that prevents the spectrum scarcity rationale from applying. While there is limited space on the electromagnetic spectrum, the ability to carry an increasing number of signals by wire is large and quickly increasing due to developing technologies.

[79] *Pacifica*, 438 U.S. at 750.

[80] *Cf.* Meyerson, *supra* note 23, at 150 n.73 (noting that the FCC argued that spectrum scarcity justified the restrictions on indecent speech in both the FCC order and the FCC's brief before the Supreme Court in *Pacifica*).

editorial control over the leased access channels in a manner that is less likely to restrict speech than the ban present in *Pacifica*.[81] However, this is likely more true on paper rather than in practice. The regulatory approach in *Pacifica* merely made adult programming less accessible to children, it did not ban it, as the plurality asserts.[82] *Pacifica* prohibited the broadcast of indecent material which depicted "sexual and excretory activities in a patently offensive manner" over the radio during the day when children may be in the audience.[83] The *Pacifica* Court indicated however, that this material may be not be considered indecent if it is broadcast in the "late evening," has "literary, artistic, political, or scientific value," and is "preceded by warnings."[84] Yet, section 10(a) does not make any provision for showing sexually explicit material at night, and in fact allows a cable operator to completely prohibit the showing of sexually explicit material on leased access channels.

Section 10(a)'s approach will also be more restrictive then the regulatory approach upheld in *Pacifica* because section 10(d)[85] strips the cable operators' previously held immunity for obscene material on leased access channels. Accordingly, cable operators will have a greater incentive to censor more broadly then the minimum that is required to control indecent material in order to avoid financial penalties resulting from material broadcast on its leased access channels. Cable operators may also have an incentive to use their editorial discretion broadly because section 10(a) may deter people from leasing cable channels from cable operators rather then be subject to the cable operator's editorial discretion. This would directly benefit operators who can then put their own programming on the unused leased access channels.[86] Such a result would also interfere with one of the rationales behind the creation of leased access channels which was to allow

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[81] *Denver*, 116 S. Ct. at 2385-87.

[82] MINOW & LAMAY, *supra* note 20, at 126.

[83] *Pacifica*, 438 U.S. at 731-32.

[84] *Id.* at 732 n.5 (citing *In re* Citizen's Complaint Against Pacifica Found., 56 F.C.C.2d 94, 98 (1975)).

[85] 47 U.S.C. § 558 (1996).

[86] Symposium, *Panel II: Censorship of Cable Television's Leased and Public Access Channels: Current Status of* Alliance for Community Media v. FCC, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 465, 504-05. (1996).

for "the widest possible diversity of information sources" for cable subscribers.[87]

The vague terms which section 10(a) employs to allow cable operators to restrict speech which they "reasonably believe" to be patently offensive by "contemporary community standards" will permit operators to censor more broadly than necessary, subject only to the reasonableness of their belief.

Subsequent to *Denver*, in *Reno v. ACLU*,[88] the Supreme Court struck down a provision of the Communications Decency Act of 1996[89] which prohibited the sending or displaying of "patently offensive [material over the internet] as measured by *contemporary community standards*."[90] The Court, in *ACLU*, justified their decision to invalidate that provision, in part, on the fact that "the 'community standards' criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message."[91] This same rationale should have been applied in *Denver* because many cable programmers produce their programming for a nationwide audience which a cable operator would be permitted to censor under section 10(a), based upon "contemporary community standards." Section 10(a) would thus facilitate a situation, which the Court thereafter found objectionable in *ACLU*, in which a community with the most restrictive standards would, in effect, be able to restrict what is provided by the cable operator in other communities.

The Court, in *ACLU*, also struck down provisions of the Communications Decency Act because the provisions were too burdensome,[92] and because less restrictive means of protecting children from the pat-

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[87] 47 U.S.C. § 532(a) (1996). *But see Denver*, 116 S. Ct. at 2390; Time Warner Ent. Co., v. FCC, 93 F.3d, 957, 981 (D.C. Cir. 1996); Brief for Respondent Nat'l Cable Television Ass'n, Inc. 1996 WL 32782, at *11-12, *Denver*.

[88] 117 S. Ct. 2329 (1997).

[89] Pub. L. 104-104, 110 Stat. 56, 133 (1996).

[90] 47 U.S.C.A. § 223(d) (Supp. 1997) (emphasis added).

[91] *ACLU*, 117 S. Ct. at 2347.

[92] *Id.*

ently offensive material were too costly[93] and would "soon be widely available" to consumers.[94] Similarly, in *Denver*, not only did section 10(a) present the possibility for heavily burdening and repressing speech, but less restrictive means of protecting children from adult material on leased access channels, not only are widely available, but are also relatively inexpensive.[95] The failure of the Court to reason as it did in ACLU is puzzling.

In part III of the *Denver* opinion, a six justice plurality held section 10(b) to be unconstitutional because its non-permissive requirement for cable operators to restrict "patently offensive" sexually explicit material on leased access channels is not "narrowly tailored" to meet the objective of protecting children, and is "considerably 'more extensive than necessary.'"[96] The plurality in evaluating section 10(a) however, fails to address the real possibility that section 10(a)'s permissive approach will likely differ from a complete non-permissive ban more in theory than in practice. Because it will likely restrict speech just as much as a complete ban, it follows that section 10(a) should be invalidated on the same grounds that invalidated section 10(b) as "overly restrictive."[97]

The plurality's use of an ad hoc standard to analyze section 10(a) under the First Amendment allowed the Court to discard approaches more applicable to the issue of determining section 10(a)'s constitutionality. Section IV will investigate these rejected approaches and the rationale underlying the plurality's refusal to employ them in their analysis of section 10(a).

IV. THE PLURALITY'S DISCARDED APPROACHES TO SPEECH REGULATION

Two approaches to analysis of section 10(a)'s restrictions on speech which the plurality deemed inapplicable were strict scrutiny, based upon section 10(a)'s content-based approach toward regulation of speech, and an analysis of section 10(a) under the Court's common

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[93] *Id.*

[94] *Id.*

[95] *See infra* p. 26.

[96] *Denver*, 116 S. Ct. at 2390-94.

[97] *Id.* at 2394.

carrier doctrine. Upon close examination, it is evident that the Court's refusal to employ these approaches was based on flawed assumptions. Clearly, analysis of section 10(a) under strict scrutiny or common carrier jurisprudence would have been more consistent with precedent and more attentive to the technology of leased access channels and cable television.

A. *Strict Scrutiny*

By permitting cable operators to exercise censorial power over leased access channels in order to prohibit indecent programming, section 10(a) singles out one type of speech for special treatment based upon its content: indecent programming on leased access channels. Thus, section 10(a) is a content-based restriction of protected speech that requires the application of strict scrutiny.

Strict scrutiny would likely have invalidated the provision on constitutional grounds for several reasons.[98] The Court, only two years earlier, stated that "[r]egulations that discriminate among media . . . often present serious First Amendment concerns."[99] Section 10(a) not only discriminates among media, but goes one step further by distinguishing among different types of channels on a single medium and providing for separate treatment. Additionally, the Court previously held that a complete ban on "indecent" speech cannot survive strict scrutiny.[100]

Section 10(a) would fail strict scrutiny analysis because, although the need to protect children from exposure to indecent sexually explicit programming is a compelling state interest,[101] the provision is not narrowly tailored to achieve that interest because it does not *require* the cable operator to prohibit indecent programming. The provision places enforcement power completely in the *discretion* of the ca-

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[98] *Cf.* Petitioner's Reply Brief, No. 95-124, 95-227 1996 WL 63304, at *8, *Denver* (noting the government's failure to argue that section 10(a) can survive strict scrutiny analysis).

[99] *Turner*, 512 U.S. at 659.

[100] *E.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126-27 (1989).

[101] *Denver*, 116 S. Ct. at 2386.

ble operator.[102] Furthermore, should the cable operator choose to prohibit sexually explicit indecent programming, adults, as well as children, would be deprived access to it.[103]

The plurality failed to consider less-burdensome alternatives such as addressable converters, blocking chips, and lockboxes in its analysis of section 10(a). An addressable converter would make it possible to block out certain channels from entering a home altogether.[104] Blocking chips or "v-chips" are electronic devices built into televisions that are able to block out material tagged as sexually explicit.[105] Lockboxes allow parents to lock out certain channels by means of a key or by code.[106] These devices provide a practical method of protecting children from exposure to sexually explicit material while still allowing willing adults to gain access to it.[107] The plurality's failure to consider these possible alternatives to section 10(a)'s approach is inconsistent with the Court's traditional conception of the narrow tailoring requirements of strict scrutiny.[108]

Because *Denver* involved a content-based regulation that would seemingly fail strict scrutiny analysis, the plurality's decision not to analyze section 10(a) as a content-based speech regulation merits fur-

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[102] *Id.* at 2416 (Kennedy, J., concurring in part, dissenting in part). Section 10(a) nevertheless involves state action because the cable operator's enforcement power is traceable to a Congressional Act. *Id.* at 2382-84.

[103] *Id.* at 2416-17 (Kennedy, J., concurring in part, dissenting in part).

[104] BRENNER ET AL., *supra* note 34, § 6.09[3][c], at 6-98.

[105] *See generally* JAMES C. GOODALE, ALL ABOUT CABLE, § 6.05A, at 6-70.10 to -70.13 (1996). In order to use these devices, it is necessary for programs to carry coded information which indicates the program's rating with respect to certain factors such as sexually explicit material. The blocking chip then blocks out prohibited material. *Id.* at 6-70.10.

[106] BRENNER ET AL., *supra* note 34, § 6.09[3][c], at 6-98.

[107] *See generally id.*, § 6.09[3][c], at 6-98 to -100. *But see Denver*, 116 S. Ct. at 2393, where the plurality, in analyzing section 10(b), accepted the government's arguments that lockboxes were not as effective as section 10(b)'s "segregate and block" provisions in protecting children from sexually explicit material on cable television because parents must first know that lockboxes are available, spend time and money to purchase them, learn how to use them, and finally, put them to effective use.

[108] *See Denver*, 116 S. Ct. at 2416 (Kennedy, J., concurring in part, dissenting in part).

ther investigation. The plurality indicated that the essence of First Amendment protection is "that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that [the Supreme Court has] not elsewhere required," while still leaving Congress with adequate power to deal with important problems.[109] By distilling the First Amendment down to its "essence", the plurality was able to avoid application of strict scrutiny while still claiming to remain faithful to First Amendment requirements. However, as Justice Kennedy pointed out, strict scrutiny is "the baseline rule for reviewing any content-based discrimination against speech."[110] The plurality, nevertheless, chose not to apply strict scrutiny, but insistent that the scrutiny employed differed little from the strict scrutiny called for by Justice Kennedy.[111] However, the plurality's failure to consider less-restrictive alternatives such as addressable converters, blocking chips, and lockboxes from its analysis of section 10(a), which would have undoubtedly invalidated the provision under strict scrutiny's "narrow tailoring" requirement,[112] makes clear that there is a significant difference in the level of scrutiny employed by the *Denver* plurality and the traditional conception of strict scrutiny. The plurality's failure to provide an adequate justification for its deci-

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[109] *Id.* at 2384.

[110] *Id.* at 2413 (Kennedy, J., concurring in part, dissenting in part). Additionally, the *Turner* Court had indicated that while regulations singling out one specific medium raise "serious First Amendment concerns," heightened scrutiny is not required if the "differential treatment is 'justified by some special characteristic of' the particular medium being regulated. *Id.* at 2468 (citing Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983)). Yet, there is no special characteristic of leased access channels, compared to other types of cable channel, in regards to the transmission of sexually explicit material, which merits differential treatment.

[111] *See Denver,* 116 S. Ct. at 2387-88; Shea v. Reno, 930 F. Supp. 916, 940 (S.D.N.Y. 1996), *aff'd,* 117 S. Ct. 2501 (1997).

[112] *Cf.* Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985) (noting control which blocking chips provide for parents); Recent Case, *supra* note 19, at 867-68 ("crucial" that court consider blocking chips in their "least restrictive means" analysis). *But cf. Denver,* 116 S. Ct., at 2393 (noting inadequacies of lockboxes); Time Warner Ent. Co., v. FCC, 93 F.3d 957, 982 (D.C. Cir. 1996) (noting that lockboxes are only effective if parents possessing them had previous knowledge of the programming carried on channels to which they do not subscribe).

sion not to treat section 10(a) as a content-based regulation on speech is troubling.

B. *Common Carrier Treatment*

Although the Supreme Court has previously held that cable television in general is not a common carrier, leased access channels merit common carrier treatment because they function as common carriers. Leased access channels were created "to assure that the widest possible diversity of information sources are made available to the public from cable systems . . . ."[113] However, according to the plurality, a court should not apply common carrier case law to cable television because of the uncertain and developing state of cable television.[114] The plurality insisted that a common carrier approach would not allow the government to address the underlying problems of cable television without sacrificing "the free exchange of ideas the First Amendment is designed to protect,"[115] despite the existence of precedent to the contrary.

In *FCC v. Midwest Video Corp.*,[116] the Supreme Court applied a common carrier approach to cable television. The Court held that FCC rules requiring certain cable operators to set aside channels for leased and PEG access channels[117] imposed common carrier obligations on the cable operator with respect to those access channels.[118] The *Mid-*

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[113] 47 U.S.C. § 532(a) (1996).

[114] *Denver*, 116 S. Ct. at 2384. *But see* Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1421 (1996).

[115] *Denver*, 116 S. Ct. at 2384.

[116] 440 U.S. 689 (1979).

[117] *Id.* at 691-92. The FCC regulations under review required cable operators with 3,500 or more subscribers and which carry broadcast signals to set aside certain channels for leased and PEG access. *Id.* at 691. PEG access channels are channels which cable operators are legally required to set aside for public, educational, and governmental access. *Denver*, 116 S. Ct., at 2407-09 (Kennedy, J., concurring in part, dissenting in part).

[118] *Midwest Video*, 440 U.S. at 701-02. It should be noted that the Court specifically stated that although a cable operator would have common carrier obligations with respect to the access channels, common carrier obligations would not be imposed on the cable operator with respect to non-access channels. *Id.* at 701, n.9.

west Video Court actually invalidated the FCC regulations imposing common carrier obligations on cable operators because it was beyond the FCC's authority to promulgate such common carrier regulations.[119] However, after *Midwest Video,* Congress specifically authorized the FCC to promulgate regulations for the establishment of leased access channels in the 1984 Act.[120] Given this sequence of events, it seems clear that Congress intended the FCC to impose common carrier obligations on cable operators with respect to leased access channels.[121]

The *Denver* plurality also distinguished *Sable Communications of California, Inc. v. FCC,*[122] in which the Court used common carrier principles to strike down a ban on indecent telephone conversations. To distinguish Sable, the plurality relied, in part, on the technological differences between telephones and cable television. The plurality insisted that telephones are less intrusive and allow the homeowner to exercise a greater amount of control over them as opposed to the cable television at issue in *Denver.*[123] Yet, telephones may share more in common with cable television for First Amendment purposes, as noted previously.[124]

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[119] *Id.* at 702-09.

[120] 47 U.S.C. § 532(b) (1996).

[121] Even the FCC has acknowledged similarities between cable operators and common carriers. While conceding that cable television shares several common characteristics with a communications common carrier, the FCC has indicated that a significant difference lies in the power that the cable system operator possesses to determine the signals which that system carries. Frontier Broad. Co. v. Collier, 24 F.C.C. 251, 251 (1958). However, since Congress established leased access channel requirements, this "significant difference" no longer applies and should not stand in the way of designation of cable operators as common carriers. A common carrier designation could be restricted to leased access channels because an entity could be designated a common carrier with respect to some activities but not others. National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) The specialized nature of leased access channels which makes them not realistically available to the general public also does not stand in the way of a common carrier designation because "a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users." *Id.*

[122] 492 U.S. 115 (1989).

[123] *Denver,* 116 S. Ct. at 2388.

[124] *See supra* note 33 and accompanying text.

The plurality also noted that *Sable* involved a "total governmentally imposed ban on a category of communication" which, according to the plurality, was more potent than the permissive nature of section 10(a).[125] However, this distinction is not well-founded because one must read section 10(a) in view of section 10(d),[126] which allows for the imposition of liability on cable operators for obscene programming carried on their leased access channels.[127] Fear of liability may actually induce cable operators to censor more broadly than necessary to safeguard themselves from being held liable for programs on channels which they operate. Thus, the permissive approach of section 10(a) may actually have the practical effect of being more drastic than a total governmental ban like the one present in *Sable*.[128]

Justice Kennedy's concurrence called for a common carrier approach because "[l]aws requiring cable operators to provide leased access [channels] are the practical equivalent of making [cable operators] common carriers" similar to telephone companies.[129] While the plurality disagreed with this approach, Justice Kennedy's views regarding a common carrier application to cable television actually echoed his earlier arguments in *Turner Broadcasting System, Inc. v. FCC*,[130] in which he authored the majority opinion which pointed out that "by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude."[131] This language used by Justice Kennedy in *Turner* goes to the heart of the rationale behind

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[125] *Denver*, 116 S. Ct, at 2388.

[126] 47 U.S.C. § 558 (1996). Section 10(d) removes the statutory exemption from liability for cable operators provided by the 1984 Act.

[127] James N. Horwood, *Public, Educational, and Governmental Access on Cable Television: A Model to Assure Reasonable Access to the Information Superhighway for All People in Fulfillment of the First Amendment Guarantee of Free Speech*, 25 SETON HALL L. REV. 1413, 1416-17 (1995).

[128] *See* Altmann v. Television Signal Corp., 849 F. Supp. 1335, 1342-43 (N.D. Cal. 1994); Allen S. Hammond IV, *Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259, 276 (1996); Symposium, *supra* note 86, at 492-93; *supra* pp. 20-24.

[129] *Denver*, 116 S. Ct. at 2411. (Kennedy, J., concurring in part, dissenting in part).

[130] 512 U.S. 622 (1994).

[131] *Id.* at 2466; *See also* Horwood, *supra* note 127, at 1441-43.

common carrier jurisprudence.[132] *Denver*'s plurality opinion, however, differentiated *Turner,* which assigned full First Amendment protection to cable television, because *Turner* did not involve the issue of the effects of television on children.[133] The *Denver* plurality asserted that *Turner's* insistence upon full First Amendment for cable television, as opposed to the less rigorous First Amendment standard normally applied to broadcast television, was based upon the fact that spectrum scarcity is not present in cable television.[134]

According to the *Denver* plurality, however, the differentiation of cable and broadcast media based upon spectrum scarcity rationale is not relevant when the issue "involves the effects of television viewing on children."[135] When the issue involves the effects of cable television on children, according to the plurality, the *Pacifica* approach is more appropriate. However, the "unique accessibility to children" and "uniquely pervasive presence" upon which the *Pacifica* restrictions were based are not applicable to cable television, as discussed above.[136]

The spectrum scarcity distinction between cable and broadcast media requires separate and distinct treatment of cable and broadcast media under the First Amendment, even if the effects of television on children are at issue. The *Turner* opinion emphatically stated that "the [spectrum scarcity] rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation."[137] Additionally, with the advent of

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[132] *Turner,* 512 U.S. 636-41. *Turner* held that although prior cases have not always applied a rigorous First Amendment standard to issues involving broadcast television, cable television requires "full First Amendment protection."

[133] *Denver,* 116 S. Ct. at 2388. Notably, the *Turner* opinion provides little evidence of an intent for so narrow an application of its holding.

[134] *Id.* The spectrum rationale is based on the fact that broadcast media transmits messages over the electromagnetic spectrum which does not have enough frequencies to assign to every group desiring the ability to broadcast. This scarcity of frequencies requires a regulatory framework to allocate frequencies among willing broadcasters through licensing requirements. Courts have used this scarcity to justify imposing content restrictions on broadcast licensees that the First Amendment would otherwise prohibit. *Turner,* 512 U.S. 636-38.

[135] *Denver,* 116 S. Ct. at 2388.

[136] *See supra* part III.B.3.

[137] *Turner,* 512 U.S. 637.

fiber optic technology, channel capacity will prove to be an even greater distinction between cable and broadcast television.[138] Therefore, it is difficult to argue that *Turner* provides any justification for applying diminished First Amendment protection to cable television when the issue involves the effects of cable television on children. Thus, contrary to *Denver*, cable television should receive full First Amendment protection.

V. CABLE REGULATION AFTER *DENVER*

It is clear that the primary rationale behind the plurality's decision in Denver is the unsettled state of the industry and technology of cable television.[139] However, courts have always confronted questions regarding novel and uncertain areas of law. This will likely continue with more frequency in the future as judges, often with little scientific and technical training, face technologically complex issues of law in unsettled areas of science and technology. Yet, this has not and should not prevent a court from establishing clear and guiding principles of law in new or developing areas of technology. Many issues of contemporary society involving original and unsettled problems have ended up in courts, often resulting in decisions memorable not only for the subject matter of them, but also because of the resulting rules that these cases have provided.[140] Accordingly, courts should not avoid these questions, but rather seek to provide guidance for society through establishment of bright line rules, even if it requires assistance and guidance from outside experts. Considering the many aspects of society in which courts have adjudicated, it is difficult to reconcile the *Denver* plurality's view that the status of cable television is so unique and uncertain as to be currently unfit for a rule which provides more guidance and clarity than the one announced by the plurality.

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[138] While use of a coaxial cable system provides a much greater channel capacity than is possible with broadcast television, fiber optic technology provides the opportunity for the cable operator to provide a significantly greater channel capacity than possible using coaxial cables and the ability for a much easier transition to High Definition Television. BRENNER ET AL., *supra* note 34, § 1.03[2], at 1-9.

[139] *See Denver*, 116 S. Ct. at 2385.

[140] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

The *Denver* plurality proposes that broadcast and cable television are similar for certain purposes and different for other purposes. However, such analysis is inherently subjective. In any given case, the result will rest on whether the court perceives the characteristics of cable to be sufficient to justify interference with the cable operator's editorial discretion.[141] The plurality's approach leaves parties guessing whether or not a court will consider cable and broadcast television to be similar for the specific issue in any future controversy. While there are rational arguments for either differentiating or assimilating cable and broadcast television for First Amendment purposes, the plurality's approach will likely prove unworkable because *Denver* provides no test for determining whether cable and broadcast television are comparable enough to allow for similar treatment for specific issues other than the one present in *Denver*. It is also too subjective because it places too much discretion in the hands of the judge who could analyze the two media as he sees fit in order to justify the outcome desired. This controversy will likely continue until the Court clearly establishes a more informative approach for determining how to analyze the relationship between cable and broadcast television for First Amendment purposes.

Probably the most troubling aspect of *Denver*'s treatment of section 10(a) is the fact that the plurality allowed the government to place restrictions on only one type of protected speech, indecent material on leased access channels, without engaging in consideration of any less restrictive alternatives,[142] merely by asserting that the protection of

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[141] Lee, *supra* note 24, at 576-77.

[142] *See Denver,* 116 S. Ct., at 2416 (Kennedy, J., concurring in part, dissenting in part). *But see id.* at 2431 (Thomas, J., concurring in part, dissenting in part).
The plurality's decision to strike down section 10(b) in part III of the *Denver* opinion was premised on the plurality's view that less restrictive means of protecting children, which include blocking chips, blocking channels at the request of parents, and lockboxes, are preferable to section 10(b)'s non-permissive approach. *Id.* at 2392-94. However, the plurality stated that, although such less restrictive alternatives are not as effective as section 10(b), they are *effective enough* to protect children from sexually explicit material on leased access channels so as to require that section 10(b) be struck down as "overly restrictive." *Id.* The plurality's treatment of these less restrictive alternatives to section 10(b) can be read as implicitly indicating such alternatives to be less restrictive than section 10(a), but *not effective enough* so as to overcome section 10(a)'s restrictiveness. This can be explained because section

children is a compelling interest, and that cable television is a "uniquely pervasive presence" and has "unique accessibility to children". The plurality indicated that the need to protect children from indecent material is generally not sufficient to justify "reduc[ing] the adult population . . . to . . . only what is fit for children,"[143] but conceded that cable operators may choose to ban indecent programming under section 10(a) rather than rearranging or rescheduling indecent programming.[144]

The plurality's treatment of indecent speech also continues the gradual erosion of the First Amendment status of this form of protected speech. While indecent speech has been considered a form of protected speech meriting full First Amendment protection, the Court, through a series of opinions such as *Pacifica*, and now *Denver,* has reduced the First Amendment status of indecent speech to one more akin to obscene speech. While the Court has traditionally subjected restrictions on protected speech to strict scrutiny analysis, the *Denver* plurality's ad hoc analysis upholds section 10(a) under analysis more akin to intermediate scrutiny previously adopted in *United States v. O'Brien.*[145] This trend is disturbing because of the slippery slope it creates. While restrictions on indecent sexually explicit material may

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10(a)'s provisions are less restrictive than those of section 10(b). However, the question left unanswered by *Denver* is at what point the reduced effectiveness and less restrictiveness of alternatives such as lockboxes and blocking chips outweighs the increased effectiveness but greater restrictiveness of provisions regulating speech.

The only answer to that question is somewhere between sections 10(a) and 10(b), but, beyond that, it is only speculative.

[143] *Id.* at 2393 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989)) (internal quotations omitted).

[144] *Denver,* 116 S. Ct. at 2387. The restriction thus prevents adults from gaining access to indecent material in order to shield children from exposure to it, and therefore is a ban on indecent speech which the Court has previously held to be prohibited by strict scrutiny. *Sable*, 492 U.S. at 126-27. However, the time channeling ability was directly relevant to the Court's decision to uphold the restrictions in *Pacifica*, whereas the cable operator has the power to ban indecent material outright pursuant to *Denver*.

[145] 391 U.S. 367 (1968); *see supra* part II.B.

not elicit strong opposition, it is still a form of protected speech. It is thus necessary to ask, if the government can allow for such restrictions on some forms of protected speech, what other forms of protected speech will be next and what compelling interest might justify the similar restrictions?

Denver also leaves open the possibility for the government to impose restrictions on protected speech on cable television through a showing of any "extremely important problem." Once an "extremely important problem" is shown, the government need only show that the restriction is "sufficiently tailored" to respond to the problem. As is evident in the plurality opinion, this new, intermediate standard is much easier to satisfy than a showing of "compelling interest" and "narrow tailoring," as required under strict scrutiny.[146] Not only is the new standard easier to satisfy, but it is also difficult to define and apply because the plurality fails to provide a useful guide as to what will be considered "sufficiently tailored" for purposes of analyzing future restrictions on speech.

The impact of *Denver* is evident in a recent opinion by a three-judge Federal District Court in *Playboy Entertainment Group, Inc. v. United States*,[147] which specifically withheld its decision until after the Supreme Court announced the *Denver* decision. The District Court denied a preliminary injunction to enjoin enforcement of section 505 of the Communications Decency Act of 1996[148] and the Supreme Court upheld the District Court's decision in two cases without published opinions.[149] Section 505 was enacted to protect children from the partial reception of sexually explicit material from cable television channels not ordered by a homeowner, otherwise known as signal bleed.[150] It requires cable operators to completely scramble or block

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[146] Although the plurality concludes that section 10(a) is "sufficiently tailored," *Denver*, 116 S. Ct. at 2385-86, there is little likelihood that a court could have considered the provision to be "narrowly tailored," *id.* at 2416-17 (Kennedy, J., concurring in part, dissenting in part).

[147] 945 F. Supp. 772 (D. Del. 1996), *aff'd*, 117 S. Ct. 1309 (1997) (mem.), *and aff'd sub nom.* Spice Ent. Cos. v. Reno, 117 S. Ct. 1309 (1997) (mem.).

[148] 47 U.S.C. § 561 (1996).

[149] Playboy Ent. Group v. United States, 117 S. Ct. 1309 (1997) (mem.); Spice Ent. Co. v. Reno, 117 S. Ct. 1309 (1997) (mem.).

[150] *Playboy*, 945 F. Supp., at 774.

the video and audio signals of cable channels primarily dedicated to sexually explicit programming.[151] If the cable operator is unable to accomplish this, it must broadcast sexually explicit programming when children are not likely to view it.[152] The court denied issuing a preliminary injunction regarding section 505, in part, because the court held that there was not a sufficient likelihood of the applicants successfully challenging the provision on First Amendment grounds.[153] In its decision, the court relied heavily on *Denver* by asserting that, although section 505 is content-based, it is carefully tailored to serve the compelling interest of protecting children.[154] In *Playboy*, the court also placed significant emphasis on the similarity between the time channeling provision of section 505(b) and the endorsement of time channeling in *Pacifica*.[155] The court viewed these time channeling requirements in section 505(b) as a satisfactory less restrictive alternative to the expensive and burdensome scrambling or blocking requirements in section 505(a).[156]

Playboy illustrates the situation created by *Denver* in which a court can avoid analyzing content-based cable regulation under strict scrutiny through a finding of a compelling interest. The impact of the Court's broad construction of *Pacifica* in the *Denver* decision is apparent in *Playboy*. The once narrowly-construed case involving broadcast radio was revived by the *Denver* plurality and is now applicable whenever the protection of children from sexually explicit material is at issue whether the medium is broadcast or cable, and the possibility exists for a court to construe *Denver*'s applicability even beyond those media.

While it may be true that indecent materials will be subject to a lessened degree of scrutiny on cable television in the aftermath of *Denver* through a showing of a "uniquely pervasive presence" and "unique accessibility to children,"[157] it appears that other types of of-

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[151] 47 U.S.C. § 561(a) (1996).

[152] *Id.* § 561(b).

[153] *Playboy*, 945 F. Supp. at 783-90.

[154] *Id.* at 785-87.

[155] *See id.* at 788-89; *see also supra* p. 20-21.

[156] *Playboy*, 945 F. Supp. at 788.

[157] *Cf. Playboy*, 945 F. Supp. at 787 (D. Del. 1996), *aff'd*, 117 S. Ct. 1309 (1997) (mem.), *and aff'd sub nom.* Spice Ent. Cos. v. Reno, 117 S. Ct. 1309 (1997) (mem.)

fensive non-indecent material, such as graphic depictions of violence, will still be entitled to full First Amendment protection.[158] There seems to be little justification for this inconsistency considering the problems posed by exposing children to programming containing excessive violence[159] and considering that the Court has previously held that speech regulations which are substantially underinclusive violate the First Amendment.[160] However, the plurality opinion in *Denver* failed to even mention this issue. The best chance of avoiding lessened First Amendment protection on cable television when children are at stake after *Denver* will be to demonstrate a link between the protection of children and the spectrum scarcity rationale, which allowed for full protection of cable television in *Turner*. This will likely be the case until the Court decides that cable television achieves a status at which the Court is willing to establish a bright line rule under which to analyze speech restrictions on cable television.

Even with the guidelines that the *Denver* plurality provides, it is uncertain what their actual probative value is because of the emphasis which the plurality places on the narrowness of their opinion and their reluctance to establish a clear and broad rule for analyzing cable television for First Amendment purposes.[161] Therefore, it may not be too difficult for a court to confine *Denver* to its facts. For example, Judge Williams of the United States Court of Appeals for the D.C. Circuit indicated that the underlying reasoning of *Denver* appeared to be that Congress could impose content-based conditions grants of cable chan-

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(asserting that it is largely the "uniquely pervasive presence" of radio that motivated the *Pacifica* Court to uphold the restrictions).

[157] 47 U.S.C. § 561 (1996).

[158] *See Denver*, 116 S. Ct. at 2416 (Kennedy, J., concurring in part, dissenting in part).

[159] *See, e.g.*, Editorial, *Tune Out the Violence; Kids and TV: Attorney General, AMA Join Forces to Promote Healthier Viewing Habits*, BALT. SUN, Nov. 12, 1996, at 10A; *see also* FRANK MANKIEWICZ & JOEL SWERDLOW, REMOTE CONTROL: TELEVISION AND THE MANIPULATION OF AMERICAN LIFE 13-50 (1978). *But see, e.g.*, Marc Silver, *Sex and Violence on TV. The Family Hour is Gone. There's Still a Splattering of Guts in Prime Time, But the Story of the Fall Lineup is the Rise of Sex. Will the Networks Ever Wise Up?*, U.S. NEWS & WORLD REP., Sept. 11, 1995, at 62, 68.

[160] City of Ladue v. Gilleo, 114 S. Ct. 2038, 2043 (1994).

[161] *Denver*, 116 S. Ct. at 2385.

nels to lessees.[162] Conversely, there is also the possibility that a court could broadly construe *Denver* to apply to any situation in which speech enjoys a "uniquely pervasive presence" and is "uniquely accessible to children." The ramifications of this a construction are tremendous. Settled and consistent First Amendment case law beyond the area of television could be threatened by *Denver* if a court makes the argument that any speech with these qualities is entitled to lessened First Amendment protection. Analogies could be made between *Denver* and the internet, literature, or any other communications medium. The United States Court of Appeals for the Ninth Circuit, for example, cited *Denver* as support for the proposition that "there is 'a compelling interest in protecting the physical and psychological well-being of children' [that] ' . . . extends to shielding minors from the influence of literature that is not obscene by adult standards.'"[163] Only time will tell whether courts are able to apply a *Denver*-like approach to regulation outside the context of cable television and broadcast media by finding an "extremely important problem," a "uniquely pervasive presence" and "unique accessibility."

The *Denver* plurality opinion leaves little clue as to how it should be applied in the face of new technologies confronting the cable industry such as fiber optics and direct broadcast satellite technology (DBS). DBS poses a significant threat to traditional cable television because it is more flexible than cable technology in several ways. Because it can provide regional or national coverage from a single source, it can enter new markets with relative ease and does not require easements as is the case with cable television.[164] Additionally, a DBS provider, unlike a cable operator, does not require a minimum number of subscribers before providing the service to a particular community.[165] It is thus possible for a DBS provider to enter markets scattered across the country with great flexibility. Additionally, DBS technology is more conducive to the delivery of High Definition Tele-

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[162] Time Warner Ent. Co.,. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) (per curiam) (Williams, J., dissenting), *denying reh'g en banc to* 93 F.3d 957 (D.C. Cir. 1996).

[163] Crawford v. Lungren, 96 F.3d 380, 386 (9th Cir. 1996) (citations omitted), *cert. denied,* 117 S. Ct. 1249 (1997).

[164] JOHNSON, *supra* note 35, at 111-12.

[165] *Id.*

vision (HDTV).[166] The increased channel capacity of DBS along with its ability to provide programming originating from distant communities raises questions about the viability of *Denver*'s rationale in such a setting.

In all, the uncertainties created by *Denver* surpass the guidance provided by the opinion. Primarily, two important issues remain unresolved. The first major unresolved issue regards cable operators' editorial powers over leased access channels. The other major unresolved issue is the exact status of cable television for First Amendment purposes. The plurality opinion actually created confusion over this issue that was seemingly clear after the *Turner* opinion. These issues have major ramifications for not only the two specific media, but the First Amendment in general. Confusion regarding these issues will likely continue until the Court establishes clear and stable rules. Thus, *Denver* is not likely to be the end of litigation regarding these two important and unresolved issues.

VI. CONCLUSION

The Supreme Court should have struck down section 10(a) under the First Amendment as an unconstitutional restriction on free speech. Such a holding would have been justifiable under a common carrier approach or strict scrutiny due to section 10(a)'s content-based nature. This would have allowed the Court to remain consistent to *Turner* and the cable-broadcast distinction which is accurately based upon the distinct technologies and qualities underlying the two media. However, even without strict scrutiny or a common carrier approach, section 10(a) still should have been invalidated under the plurality's ad hoc approach, because a close examination reveals that three of the four grounds relied upon by the plurality are flawed. The cable operators' editorial interests over leased access channels are not sufficient to outweigh the interests of cable programmers to transmit uncensored programming over leased access channels. Furthermore, section 10(a) does not present a situation similar to that which existed in *Pacifica*. Finally, Section 10(a)'s "permissive" approach provides the opportunity for greater restrictiveness than the plurality acknowledges.

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[166] *Id.* at 123-24.

The plurality's opinion upholding section 10(a) creates a situation in which there are no clear guiding principles when evaluating cable television under the First Amendment.[167] The status of the First Amendment regarding cable television now seems more unpredictable and vague than it was following the *Turner* decision and leaves open several undesirable possibilities. The plurality distinguished applicable First Amendment case law, some of which even involved cable television, choosing instead to apply case law involving broadcast media, through analogy, based upon disputable similarities. However, in practice, *Denver*'s precedent is inherently flawed because the First Amendment caselaw which a court can analogize to the issues in a particular case depends much upon how that court makes the analogy between cable television and broadcast media regarding the issue in controversy. Under this approach it is often possible to make a strong argument for approximating and differentiating cable and broadcast media in any given situation and the *Denver* decision leaves no clear guidance as to which particular case a judge might find to be the closest analogy.[168] Thus, courts can choose to assert that either cable is similar or different to broadcast media in order to facilitate a desired outcome in any given case.

Denver also leaves open the possibility that its holding can be applied to any medium and in any context through a showing of an "extremely important problem," a "uniquely pervasive presence," and "unique accessibility to children." While, this approach can be traced to *Pacifica,* the *Pacifica* Court did not intend it to be applied outside the immediate context of that case. However, *Denver* added enormous vitality to the *Pacifica* doctrine so that the boundaries of its application are now uncertain. This is the most troubling aspect of the plurality opinion because it could be used by a court to circumvent applicable

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[167] *See* Playboy Ent. Group, Inc. v. United States, 945 F. Supp. 772, 784 (D. Del. 1996), *aff'd,* 117 S. Ct. 1309 (1997) (mem.), *and aff'd sub nom.* Spice Ent. Cos. v. Reno, 117 S. Ct. 1309 (1997) (mem.); GOODALE, *supra* note 105, § 6.05[3], at 6-65.

[168] *Cf.* William S. Abbott, *Questions Asked by Senator Pressler and Answers Thereto by William Abbott and Robert M. O'Neil, in* REPORT OF THE HEARING OF THE SENATE COMMITTEE ON COMMERCE, July 12, 1995, at 539, 543 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. 440, 1995) ("It is clear that government regulation of speech must not be subject to ad hoc or subjective application.").

First Amendment law and justify otherwise unconstitutional restrictions on speech. These possibilities call for the Supreme Court to confine *Denver* to its facts and establish a coherent and satisfying standard for application to future issues involving cable television and the First Amendment.