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Panel II: Censorship of Cable Television's Leased and Public Access Channels: Current Status of *Alliance for Community Media v. FCC*

Moderator: Paula A. Franzese, Esq.
Panelists: Stuart W. Gold, Esq.
           Marjorie Heins, Esq.
           James N. Horwood, Esq.
           Robert T. Perry, Esq.
           Andrew Jay Schwartzman, Esq.

**DANIELLE RUBANO:** The second panel of today's Symposium is "Censorship of Cable Television's Leased and Public Access Channels." It is my great pleasure to introduce Professor Paula Franzese from Seton Hall School of Law who will be moderating the second panel.

Professor Franzese received her B.A. from Barnard College, *summa cum laude*, and her J.D. from Columbia University. She has lectured throughout the country on various issues, and has taught law at the University of Parma, Italy, as well as here at Fordham University School of Law.

Please welcome Paula Franzese.

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a. Professor, Seton Hall University School of Law, Barnard College, B.A., *summa cum laude* 1980; Columbia University School of Law, J.D. 1983.
PROF. FRANZESE: Good morning, and thank you. Welcome to this panel. As you just heard, we are going to take the opportunity to explore issues concerning censorship of cable television’s leased channels and public access channels. We will also be focusing on the status of a case called *Alliance for Community Media v. FCC.*

In June of 1995, the U.S. Court of Appeals for the D.C. Circuit upheld the constitutionality of the indecency provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the “1992 Act”). The court ruled, in an en banc opinion, that the 1992 Act, which allows cable television operators to prohibit indecent programming on leased and public access channels, did not involve state action. State action is required to trigger a First Amendment violation or protection.

The *Alliance* court further held that access channels are not public forums. In addition, the 1992 Act’s provisions, which require operators to segregate and block indecent programming on leased access channels, were held to be the least restrictive means of limiting the channels’ access to children, who would be at the greatest risk from exposure to indecent programming. The matter has been briefed and will be argued before the U.S. Supreme Court on February 21, 1996.

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3. *Alliance,* 56 F.3d at 116.

4. *Id.* at 113.

5. *Id.* at 121.


7. *Alliance,* 56 F.3d at 125.

8. *Id.*

We come together this morning at a rather auspicious time because less than a week ago, Congress rewrote the nation's communications laws by passing a bill that will transform, among other media, cable television—the Telecommunications Act of 1996 (the "1996 Act").

We will hear commentaries this morning on the actual impact and future implications of the telecommunications overhaul of cable television. Who will have access to the burgeoning cable opportunities? What limitations will be imposed? How significant a threat is the potential for private censorship?

To help us consider these questions, as well as several other thorny concerns, we have with us a very formidable group of panelists. James Horwood is a partner with Spiegel & McDiarmid in Washington, D.C. He has worked closely with the Alliance for Community Media. Robert Perry is a Professor at the NYU School of Communications, and has litigated many media cases, including cable access cases. Marjorie Heins, of the American Civil Liberties Union ("ACLU"), has worked on a host of censorship related contexts and cases. Stuart Gold of Cravath, Swaine & Moore has been counsel to a myriad of media as well as First Amendment cases. Finally, Andrew Schwartzman is an integral part of the First


10. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. § 56 (to be codified in scattered sections of 47 U.S.C.) [hereinafter 1996 Act]. The history of communications regulation began with the Communications Act of 1934, 48 Stat. § 1064 (Jun. 19, 1934) (enacted for the purpose of regulating interstate and foreign commerce in communication by wire and radio and creating the FCC). The Act has been amended repeatedly through the years. Most notably, in 1992 Congress passed the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. § 1460 (1995) (codified in scattered sections of 47 U.S.C.) which was enacted to: promote the availability to the public of a diversity of views and information through cable television and other distribution media; maximize availability to ensure continued expansion of capacity of programs offered on cable systems; protect consumer interests in receipt of cable service; and ensure cable television operators do not have undue market power. Most recently, the Act was amended by the 1996 Act, supra.
Amendment efforts of The Media Access Project in Washington, D.C., a public interest telecommunication law firm's First Amendment efforts.

I would like to first present Mr. Jim Horwood.

MR. HORWOOD: Thank you. As you will find from listening to this panel, four of us were delighted with the Supreme Court's decision to hear the appeal from the en banc decision in the Alliance case. I suspect one panelist was not delighted with that decision. I believe that will become apparent.

Let me give you a little background about what leased and "PEG" access channels are, which may help to explain correctly what the en banc court misunderstood.

Going back to the early 1960s, many local cable franchises required the reservation of capacity for use by people other than the cable operators or other dominant media buyers. These were reserved as franchises for public, educational and governmental use. To a lesser, but still relevant extent, there were required reservations for leased access channels in some franchises. These channels were to be used by individuals other than a cable operator who paid for broadcast time.

When Congress passed the Cable Communications Policy Act of 1984 (the "1984 Act"), which provided for federal regulation and federal pre-emption over local and state franchising, it permitted local and state franchising authorities to continue to require public, educational and governmental channels. It also required leased channels to be provided on cable systems. The number of leased channels varied by the size of the system.

The purpose for PEG channels, as set forth in the legislative

11. Public, Educational, or Governmental channels. See Alliance, 56 F.3d at 111.
13. Id.
14. Id.
17. Id. § 612(b)(1), 47 U.S.C. § 532 (b)(1).
18. Id.
history, was to "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." ¹⁹ These channels "contribute to an informed citizenry by bringing local schools into the home and by showing the local public government at work." ²⁰ This was the Congressional understanding of why these kinds of channels had been required in many franchises, and the reason why Congress was going to permit the continuation of these required channels. Leased access was also available. Generally, the PEG channels were for non-commercial use, and leased access channels were for commercial use.²¹

Bob Joffe, in the previous panel, talked about his view of why these kinds of requirements are unconstitutional.²² Time-Warner has appealed a decision finding these requirements to be constitutional.²³ I am firmly of the view that PEG channels, and the way they are established and set up, are constitutional. I think it is analogous to requiring a housing developer to provide green space for public parks. The government is granting a special privilege to the cable operator to use public streets and public rights of way. In return, the government can require a reasonable amount of that capacity be set aside for public purposes that promote the public good, so long as it is done in a content neutral way.

Bob Perry is going to talk about why public access channels are, and should be, viewed as public fora. Leased access is a little bit different, in that it is like common carriage.²⁴ The leased access users pay for the use of their channels.²⁵ I do not see any First Amendment issue arising out of a requirement to take part of this

²⁰. Id.
²¹. See, e.g., 1984 Act § 612(b), 47 U.S.C. § 542(b); BRENNER & PRICE, supra note 12, §§ 6.04(3)(b), 6.05(2)(c), at 6-38, 6-57.
²⁴. BRENNER & PRICE, supra note 12, § 6.05(1)(b), at 6-51.
capacity and make it available on a common carriage basis.

In the 1984 Act, Congress prohibited any kind of censorship on PEG or leased access channels.\textsuperscript{26} It allowed, however, provisions to keep obscene programs off these channels.\textsuperscript{27} Obscenity, however, is not an issue that we will be talking about in regards to the 1992 Act and the \textit{Alliance} case. Obscenity has always been prohibited.\textsuperscript{28} It was prohibited under the 1984 Act,\textsuperscript{29} and this was not changed under the 1992 Act, with one exception.\textsuperscript{30} The 1992 Act eliminated a statutory provision that exempted cable operators from liability for any obscene material that appeared on access channels over which the cable operators did not exercise any editorial control.\textsuperscript{31}

I believe that the provision in the 1984 Act was correct, and that Congress was wrong to remove the statutory immunity. If the operator cannot exercise editorial control, the operator should not be subject to any kind of liability for what it carries.

Neither the federal government’s U.S. Supreme Court brief, nor the intervenor \textit{amici} briefs presented any argument that the removal of a cable operator’s immunity is important or necessary in order to proscribe obscene programming.\textsuperscript{32}

Obscenity on cable television was always punishable. Under the 1984 Act, programmers or editors could be punished for carrying obscenity.\textsuperscript{33} If the cable operator is not producing a program or functioning as an editor in helping select the speech, the operator should not be liable for its content. Liability should be focused on the programmer. Indeed, there is at least one instance of which I am aware, where a programmer was prosecuted for putting on obscene programming.\textsuperscript{34} In that case, both the organization manag-

\textsuperscript{26} \textit{Id.} §§ 611(e), 612(c)(2), 47 U.S.C. §§ 531(e), 532(c)(2).
\textsuperscript{27} \textit{Id.} § 624(d), 47 U.S.C. § 544(d).
\textsuperscript{28} \textit{See} \textit{Alliance}, 56 F.3d at 112; \textit{see also} R.A.V. v. St. Paul, 505 U.S. 377 (1992).
\textsuperscript{29} 1984 Act § 639, 47 U.S.C. § 559.
\textsuperscript{30} \textit{See} 1992 Act § 10(a)-(d), 47 U.S.C. §§ 532(h), 532(j), 531, 558.
\textsuperscript{31} 47 U.S.C. § 558.
\textsuperscript{32} \textit{See supra} note 9.
\textsuperscript{34} \textit{See} Jack Chambers, \textit{Slowing the Flow of Societal Sewage}, SAN DIEGO UNION-
ing the access channel and the local franchising authority were originally named in the suit.\textsuperscript{35} The suit against them was later dismissed because they did not exercise control over content.\textsuperscript{36}

The 1992 Act “permits” cable operators to keep indecent programs off access channels.\textsuperscript{37} Other kinds of programs may also be prohibited, but let us talk about indecency which is what is now really driving matters.

Indecency has been defined as “programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable media.”\textsuperscript{38} There are problems with the vagueness and over-breadth of this definition,\textsuperscript{39} which Marjorie Heins will talk about later, but it has to be borne in mind that here we are discussing speech that is short of obscenity. Speech that reaches the point of obscenity because it “appeals to prurient interests and, taken as a whole, lacks serious literary, artistic, political, or scientific value” can be kept off cable.\textsuperscript{40} If such speech is on cable or on access channels, it can be dealt with under criminal and civil law.\textsuperscript{41} We


\textsuperscript{36} \textit{Id.}

\textsuperscript{37} 1992 Act §§ 10(a),(c), 47 U.S.C. §§ 532(h), 531.


\textsuperscript{39} See Miller v. California, 413 U.S. 15, 24 (1973); see also Alliance, 56 F.3d at 112 n.4.

\textsuperscript{40} 47 U.S.C. § 531. The Supreme Court set up a three-part test to determine if a work is obscene in \textit{Miller}:

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

\textsuperscript{41} 18 U.S.C. § 1468(a) (1994) provides “whoever knowingly utters any obscene matter by means of cable television or subscription services on television, shall be pun-
are talking about speech that falls short of obscenity, and therefore is constitutionally protected speech.

The D.C. Circuit in the panel decision in *Alliance* found that this law and the implementing regulations were unconstitutional.\(^{42}\) Congress set up a scheme that defined the speech permitted on access channels on a content basis. Thus, constitutionally protected speech was divided into two categories: indecent speech and not indecent speech. In doing so, Congress engaged in a content based action, and that was state action.\(^{43}\)

The en banc decision, accepting arguments that had been raised by others, including the government, said there was no state action.\(^{44}\) It determined that Congress had only restored to cable operators the right to program on all channels, which they had prior to the 1984 Act.

As I mentioned earlier, that is factually incorrect. These channels existed on most cable systems prior to 1984, so this was not a restoration by Congress.\(^{45}\) The 1992 Act preempted local franchising authorities and state laws that prohibited cable operators from censoring these channels.\(^{46}\)

The government, in its brief filed with the Supreme Court, takes a different approach, and abandons the state action argument that it raised earlier.\(^{47}\) The government is not drawing a line and claiming there is no state action here. Now the government is conceding that yes, there is state action to the extent that any passage of a law constitutes state action.\(^{48}\)

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\(^{42}\) *Alliance*, 10 F.3d at 812, 815.

\(^{43}\) *Id.* at 820.

\(^{44}\) *Alliance*, 56 F.3d at 113.

\(^{45}\) *Id.* at 109.

\(^{46}\) 1992 Act § 10(a),(c), 47 U.S.C. §§ 532(h), 531.


\(^{48}\) *Id.*
So the government’s brief now acknowledges that there is state action. But what the brief gives with one hand, it takes away with the other by saying that this may be state action, but then inquiring into what kind of state action it is and how it should be reviewed. The brief asserts that reasonable viewpoint-neutral regulation in this context is particularly unobjectionable where the subject of the regulation is indecent expression. However, the Supreme Court has invalidated laws that bar all access to indecent material, regardless of whether such measures are necessary to protect the welfare of children or the rights of third parties.49

Rather than applying strict scrutiny, which the Supreme Court has consistently required in evaluating content based laws,50 the government argues for the application of a reasonableness test.51 That test asks whether the law is a reasonable action for Congress to be taking to deal with this kind of speech.

Bear in mind, however, that this is a content based distinction. Congress did not say that cable operators can exercise editorial control over these channels. Congress provided that cable opera-

49. Id. at 26.


51. A reasonableness test has been applied in cases where the state has allowed public property to be used as a public forum to express ideas. Perry, 460 U.S. 37. The state may impose content neutral “reasonable time, place, and manner regulations” in this situation and “may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” Id. at 46; see also United States v. Kokinda, 497 U.S. 720, 726 (1990).
tors can exercise editorial control in this limited way. It set up two kinds of speech: “good” speech and “bad” speech. As far as bad speech is concerned, if it is reasonable to keep it off, that’s fine. This flies in the face of First Amendment law that has evolved since the Roth decision almost forty years ago. Not only is Congress shifting to a reasonableness standard, it is also skipping over intermediate scrutiny standards. Even if the proper test is strict scrutiny, one could argue that intermediate scrutiny under the O’Brien case should be applied. The O’Brien test asks whether the statute is sufficiently narrowly tailored to serve a compelling government interest.

Strict scrutiny, which upholds a statute only if it is the least restrictive means to regulate speech in furtherance of a compelling interest, is the test I believe should be applied when evaluating a content based law. Another tier of review is the reasonableness standard, which the government is now arguing for. Lastly, there is an intermediate standard of review to determine if a statute is sufficiently narrowly tailored to serve a compelling government

52. Section 10(a) of the 1992 Act permits a cable operator to refuse to carry leased access programming that the cable operator “reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.” 47 U.S.C. § 532(h). “Good speech” would be speech that does not come within this definition, and “bad speech” would be speech that does come within this definition.


55. United States v. O’Brien, 391 U.S. 367 (1968). In O’Brien, the Court held that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376.

56. Id.

interest.\(^\text{58}\)

Under these circumstances, I do not know how strict scrutiny would really differ from the intermediate scrutiny test. The government brief ignored the intermediate scrutiny analysis.

In the 1984 Act, Congress required cable operators to make lock boxes available for cable television systems.\(^\text{59}\) A lock box is a device that permits the subscriber to block out certain channels or certain programming.\(^\text{60}\) When the Federal Communications Commission ("FCC") established lock box regulations,\(^\text{61}\) it originally did not require lock boxes to be made available on access channels.\(^\text{62}\) The ACLU and the Alliance's predecessor, the National Federation of Local Cable Programmers, and others appealed, and were successful in having lock boxes included for access channels.\(^\text{63}\) They wanted lock boxes to be available because they thought it was important to give subscribers the ability to keep certain types of programming out.\(^\text{64}\) There is no indication in the Congressional debates over the 1992 Act that any consideration was given to whether lock boxes would work.\(^\text{65}\)

Concerning broadcast radio and television, the FCC established regulations, recently sustained by the D.C. Circuit, that indecent

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\(^{58}\) The Supreme Court explained in *Turner*: 
[T]he First Amendment, subject only to narrow and well understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.


\(^{60}\) *See Alliance*, 56 F.3d at 125.


\(^{62}\) Id.


\(^{64}\) Id.

programming can be on a time-channeled basis. Indecent programming may be on only between the hours of 10:00 p.m. and 6:00 a.m., but it cannot be kept off entirely. The 1992 Act allowed cable operators, at their discretion, to prohibit indecent programming on PEG and leased access channels. This is more intrusive than what is required for broadcast television.

The 1992 Act further provided that if a cable operator does not keep indecent programming off leased access channels, the channels must be blocked, and subscribers must notify the cable operator in writing that they want to receive the channels. In a sense, this is a more restrictive provision for leased access channels because they must either be banned or blocked. In contrast, PEG channels may be banned, but if not, there is no provision requiring them to be blocked.

That is where we are at now under the 1996 Act. As Professor Franzese mentioned, Congress has continued to tamper with the First Amendment rights of those individuals who want to use access channels either to speak or to receive programming. Congress has added to the provision that denies a cable operator any editorial control over PEG channels or leased channels new language stating that a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity.

Thus, we now have something new added to the mix: nudity in addition to indecency. Congress did not bother defining nudity when they added it, and I cannot think of another term that is more overbroad. Statutes banning nudity under certain circumstances have been upheld, such as where nudity is defined as showing genitals or bare breasts. These types of statutes have survived

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67. 1992 Act §§ 10(a), (c), 47 U.S.C. §§ 532(h), 531.
68. Id. at § 10(b), 47 U.S.C. § 532(j).
69. Id.
70. 1996 Act § 506(a), 110 Stat. at 136-37 (to be codified as amending 47 U.S.C. § 531(e)).
constitutional scrutiny, but what does nudity mean here?

How will the 1996 Act play into the arguments presented to the Supreme Court? How will the decision by the Supreme Court, assuming the Court does the right thing and finds the FCC’s regulations unconstitutional, affect the 1996 Act? I do not know. I am optimistic that if we are successful in the Supreme Court, this new provision will also be set aside.

The real difficulty here is that the indecency provision of the 1992 Act and the indecency provision of the 1996 Act are going to prevent expression by people who express themselves in ways that some might find offensive. The FCC’s regulations indicate that material is indecent if it is determined to be so within the reasonable view of the cable operator. How cable operators will view this responsibility is going to be problematic. We do not know what kind of pressures they will be under from subscribers who find certain programming offensive.

The kinds of programming that may be at issue are programs about the AIDS epidemic and breast cancer. Programs about childbirth may also become an issue now that we have the nudity provision. There is a real threat to speech here, and the greatest threat is to speech that is not favored by the big media conglomerates.

The recent mergers taking place in telecommunications were discussed in the first panel today. Disney and Microsoft may be two of the companies that survive. Will these mergers result in these corporations determining who gets to speak? Will there be any basis for some kind of public discourse? Will that discourse be so bland that people cannot express themselves in ways they believe are effective for presenting their views?

PROF. FRANZESE: Thank you, Mr. Horwood. I think that we would all agree that Mr. Horwood’s presentation and points, particularly the questions that he raised most recently are very

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73. Cable Television Consumer Protection and Competition Act of 1992, 47 C.F.R. § 76.701(a); see also Alliance For Community Media v. FCC, 10 F.3d 812, 815-816 (1993).
74. See Panel I, supra note 22.
compelling. I think they are important notions for us to return to.

It is now my pleasure to present Professor Robert Perry.

PROF. PERRY: I will address the public forum status of public access channels. This is an issue that has received relatively limited focus throughout this three-year litigation, in large measure because it was the alternative state action argument. Nevertheless, it is of great importance, not only in the Alliance litigation, but also to public access producers who quite often face censorship by cable operators, in situations where the government is not directly involved in encouraging or compelling that censorship. In those situations, the public access producer’s best argument for constitutional scrutiny of cable operator’s censorship is that public access channels are a public forum. The public forum status of public access channels is not only important for public access producers, but it is also important for poorly financed speakers in cyberspace whose marginalized expression is suppressed by ostensibly private actions. The outcome of this case will possibly add a new gloss to the problematic public forum doctrine insofar as it clarifies the scope of the doctrine’s application in cyberspace.

This is an issue I’ve been litigating since the 1980s, including in the Missouri Knights case, which I discussed on this panel two years ago. Most recently, I have worked on cases involving Glendora, the public access producer who files public interest pro se litigation and then does public access shows about the litigation.

The en banc majority in the D.C. Circuit in the Alliance case concluded that public access channels are not public fora because,

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75. See Alliance, 10 F.3d 812 (1993).
in the en banc majority's view, the public forum doctrine is applicable only when speakers seek access to government property and public access channels are private property.\textsuperscript{80}

I submitted a brief on behalf of the New York City public access producers, the third group of petitioners in the Supreme Court who were intervenors in the D.C. Circuit that focused solely on the public forum doctrine.\textsuperscript{81} The brief was written almost in the form of an \textit{amicus curiae} brief, by my colleague, Brian Graifman, a former student of mine at New York Law School who has worked with me in the \textit{Glendora} litigation, and myself. We challenged both the major and minor premises of the en banc majority.

The en banc majority's minor premise was that public access channels are private property.\textsuperscript{82} We argued, to the contrary, that public access channels are public property.\textsuperscript{83} We contended that during the cable franchising process, the public obtains an easement in these channels as a \textit{quid pro quo} for the grant to cable operators of private easements to continuously occupy public rights of way.\textsuperscript{84}

The cable franchising process is thus not unlike the subdivision development process when developers, in order to gain zoning approval, zoning variances, or subdivision plot approval, dedicate some of their private land for public purposes.\textsuperscript{85} Many parks and streets are created in this way. Private property becomes, at the very least, subject to a public easement.\textsuperscript{86} If the dedication is done formally, pursuant to state statute, fee title is actually transferred to the public.\textsuperscript{87} But even if it is done under the so-called common law method of dedication, the public obtains an easement, which is a form of public property interest.\textsuperscript{88}

\textsuperscript{80} \textit{Alliance}, 56 F.3d at 121-23.
\textsuperscript{81} Brief for New York City Petitioners, \textit{Alliance for Community Media v. FCC}, 56 F.3d 105 (D.C. Cir. 1995) (No. 95-227) [hereinafter Brief for New York City Petitioners].
\textsuperscript{82} \textit{Alliance}, 56 F.3d at 122.
\textsuperscript{83} Brief for New York City Petitioners at 11-15.
\textsuperscript{84} \textit{Id.} at 11.
\textsuperscript{85} \textit{Id.} at 12-13.
\textsuperscript{86} \textit{Id.} at 13.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} at 13-14.
Similarly we argued that public access channels are subject, at the very least, to a public easement, and perhaps even transfer of fee title through the franchise process.\footnote{Id. at 14.} The public property interest in public access channels is also confirmed by the tradition of denying cable operators editorial control in those channels.

Another factor points to public property ownership in public access channels. Among the bundle of rights that property owners have is the right to exclude third parties from using their property.\footnote{See id. at 14-15.} Cable operators, by franchise agreements and by state and federal law, have long been barred from exercising any editorial control over public access channels,\footnote{N.Y. PUB. SERV. LAW § 229 (McKinney Supp. 1996) (enacted Jan. 1, 1996, formerly N.Y. EXEC. LAW § 829 (McKinney 1982)); 47 U.S.C. § 531(e).} at least prior to the 1992 amendments.\footnote{Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992).} That denial of editorial control suggests very strongly that cable operators do not hold all the property interests in public access channels.

Our brief for the New York City Petitioners also challenged the major assumption of the en banc majority, to wit, the premise that the public forum doctrine only applies when speakers seek access to government property.\footnote{See generally Brief for New York City Petitioners.} We pointed out that there are at least eight Supreme Court decisions dating back to \textit{Hague v. CIO},\footnote{See also Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985); Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939).} the seminal Public Forum doctrine decision from 1939, which recognize either explicitly or implicitly the application of public forum analysis to private property dedicated by government to public use.\footnote{See Brief for New York City Petitioners at 15-19.} For example, there was the \textit{Greenburgh} case from 1981 involving the status of private mailboxes.\footnote{United States Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114 (1981).} While the Supreme Court concluded that such receptacles were not a public fora, it nevertheless recognized that they were part of the interstate system.
for distribution of the mail.\textsuperscript{97} Thus, even though the mailboxes were private property, they were part of a government forum. Had there been a tradition of public access to private mailboxes, the Court might have ruled that such privately owned receptacles were public fora.

The \textit{Pruneyard v. Robins}\textsuperscript{98} case from 1980 involved California's free speech guarantee, which had been interpreted to create a right of access for limited expression to private shopping centers.\textsuperscript{99} Although \textit{Pruneyard} was primarily a 14th Amendment case, the language of both the majority opinions and concurrence strongly suggested that California's free speech guarantee had created public fora on private property.

Even the seminal Public Forum decision—\textit{Hague v. Committee for Industrial Organization}\textsuperscript{100}—states that regardless of where title to parks and streets lie, they are public fora.\textsuperscript{101} That dictum strongly suggests that title is not dispositive of public forum analysis. Moreover, the Court's 1985 decision in \textit{Cornelius v. NAACP}\textsuperscript{102} expressly stated that the public forum doctrine applies to private property dedicated by government to public use.\textsuperscript{103}

There is, however, language in one Supreme Court decision to the contrary. In the 1992 \textit{Lee}\textsuperscript{104} case, involving the airport terminals in the Metropolitan New York City area, the majority rejected the proffered analogy of airports as compared to bus and rail terminals. The majority observed that the latter were privately owned in most instances and thus suggested that public forum analysis was inapposite.\textsuperscript{105} But that observation was mere dicta because the case concerned publicly owned airport terminals. Moreover, the

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\textsuperscript{97} \textit{Id.} at 128.
\textsuperscript{98} \textit{Pruneyard Shopping Center v. Robins}, 447 U.S. 74 (1980).
\textsuperscript{99} \textit{Id.} at 81.
\textsuperscript{100} 307 U.S. 496 (1939).
\textsuperscript{101} \textit{Id.} at 515.
\textsuperscript{103} \textit{Id.} at 801.
\textsuperscript{105} \textit{Id.} at 2707.
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majority's observation ignored all of the other cases I mentioned in which the Supreme Court recognized that private property dedicated to public use may become public fora.

Finally, we pointed out something to which I must credit Michael Isenman, who is one of the principal authors of the *Alliance* brief. He made a suggestion in passing a couple of years ago that none of us ever followed up on until I did so a few months ago.

Do you know, who owns sidewalks and streets—the quintessential public fora? It turns out that sidewalks and streets are in large measure privately owned. The fee title to the middle of the street, including the sidewalk, in most instances is owned by the abutting property owner.\(^1^0\) If privately owned sidewalks and streets are public fora, then public fora analysis clearly applies to private property dedicated by government for public use.

Finally, as between the traditional public forum and designated public forum category, we argued that public access channels fell into the traditional category.\(^1^0\)

If all we get is a ruling that public access channels are designated public forum, that may in the long run prove a pyrrhic victory. The Supreme Court has made clear that designated public forums can be closed at any time and that, short of closing, they can be collapsed by narrowing the subjects and the class of speakers for which such fora are available.

By contrast, traditional public forum are subject to far greater free speech protection.\(^1^0\) The closing of traditional public fora is presumptively unconstitutional. Likewise, content regulation in traditional public fora is subject to strict scrutiny. We argued that public access channels are traditional public fora, even though they have not been around from time immemorial, since from their inception public access channels have had a tradition of public expression.\(^1^0\)

\(^1^0\) See *Brief for New York City Petitioners at 18-19.*
\(^1^0\) See *id.* at 19-22.
\(^1^0\) See *Cornellius,* 473 U.S. 799-800.
\(^1^0\) Brief for New York City Petitioners at 20-21.
We also pointed out that, contrary to the famous dicta in *Hague v. CIO*, at least one category of quintessential public fora—public parks—have not been held in trust from time immemorial for public expression. 110 Indeed, public parks did not exist until the beginning of the 19th century. Arguably, therefore, public expression in public parks is merely a matter of recent convention, like public expression on public access channels.

That concludes my comments. Thank you.

PROF. FRANZESE: Thank you, Professor Perry. I'm happy to introduce now, Ms. Marjorie Heins. Ms. Heins is the counsel as well as the director for the ACLU Arts Censorship Project.

MS. HEINS: Thank you. I'm going to try to give you a quick guided tour through the mysterious world of indecency law. As you have already heard, this concept of "indecency" drives not only Section 10 of the 1992 Cable Act, 111 on which the Supreme Court will rule this term, but an increasing amount of other legislation including, most recently, the Communications Decency Act of 1996, 112 which President Clinton is about to sign.

Where did it all come from? We have to go back to the early days of what we would now call obscenity legislation or legislation designed to suppress and punish speech about sex. The origins of both obscenity and indecency law in the United States certainly go back to the 19th century in and the Comstock Act, 113 the brainchild of Anthony Comstock, who was director of the New York Society for the Suppression of Vice. 114 At the federal level, these 19th century statutes tended to have a laundry list of adjectives. 115 They would prohibit "obscene," "lewd," "lascivious," "filthy," "vile," or "indecent" speech, sent through the mails, through interstate travel, through importation from abroad, and more recently through broad-

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110. Id. at 19-20 n.16.
114. For more on Comstock, see Marjorie Heins, Sex, Sin and Blasphemy: A Guide to America's Censorship Wars 19, 27-28 (1993).
115. 18 U.S.C §§ 1461-1465.
When the Supreme Court started looking at these laws, the first thing it said was that yes, you can have an obscenity exception to the First Amendment, even though the First Amendment talks about freedom of speech with no exceptions.\(^\text{117}\) In 1957, the Court said in *Roth v. United States*,\(^\text{118}\) that generally, speech about sex is constitutionally protected.\(^\text{119}\) This is a subject of great interest to humankind and fully constitutionally protected. There is, however, a subcategory of speech about sex that, according to the Court in *Roth*, is not an "essential part of any exposition of ideas."\(^\text{120}\) That speech simply appeals to the "prurient interest" and has no "redeeming social importance."\(^\text{121}\) This kind of speech, so-called obscenity, can be punished.

Of course, the Court has ever since tried to define exactly where the line between obscenity and constitutionally protected speech about sex is. In a subsequent case, the Court admitted there was only a dim and uncertain line between most speech about sexuality, which is constitutionally protected, and prohibit obscenity.\(^\text{122}\) Nevertheless, the Supreme Court has ruled that the federal government and the states can punish and prohibit this category called obscenity.\(^\text{123}\)

Now what did the Court do with these laundry list statutes? In a number of cases, the Court said that all these terms are essentially synonyms for obscenity—that is, a category of speech about sex that is not part of the exposition of ideas and therefore punishable.\(^\text{124}\) Reading these laundry lists as synonyms was constitution-

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116. 18 U.S.C § 1464, relating to broadcasting, does not include "lewd," "lascivious," "filthy," or "vile," but prohibits "obscene, indecent or profane language by means of radio communication."
117. U.S. CONST. amend. I.
119. Id. at 487.
120. Id. at 484-85 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
121. Id.
123. Roth, 354 U.S. at 492-94.
ally required because, as the Court had already established, non-obscene speech about sex is constitutionally protected and cannot be punished.

Thus, whether you call it lewd, lascivious, indecent, or filthy, it all really means obscene. Any other result would be unconstitutional; that is, it would permit Congress to punish constitutionally protected speech. That was the law until 1978 when a bizarre case called *FCC v. Pacifica Foundation* was decided.

*Pacifica* is about a radio broadcast of the famous “seven filthy words” monologue by the comedian George Carlin. Carlin’s monologue was a political satirical statement about our taboos about four-letter words, and he repetitively uses these four-letter words in what is really a hilarious comic sketch in order to drive home his point. If you want a good laugh, I recommend that you go to the U.S. Reports and read the appendix of the *Pacifica* decision which sets out the monologue in full.

The FCC, however, did not appreciate the broadcast of Carlin’s monologue in the mid-afternoon when children might be listening, and neither did a majority of the Supreme Court. In a plurality decision, a five-to-four majority with no opinion commanding the votes of five justices, the Supreme Court in *Pacifica* upheld the FCC’s decision to sanction Pacifica radio under its indecency regulations for broadcasting the Carlin monologue at an hour when children would be likely to hear it.

One of the federal statutes, as I mentioned, prohibited obscene, profane, or indecent radio communications. The FCC, of course, has regulatory power over broadcasting. This is because the broadcast spectrum frequencies are limited. There has to be some licensing so that people do not have cacophony and competition over the same frequencies. That was the original justification for

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200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 130 n.7 (1973).
126. *Id.* at 751.
127. *Id.* at 732.
130. See Red Lion v. FCC, 395 U.S. 367, 376 (1969); *Pacifica* 438 U.S. at 741-42
licensing of broadcast communications, a government practice that would not be permitted with respect to the print media, for example, where there is no frequency/cacophony problem.

The FCC, however, went beyond simply licensing content; it wanted to control it. The agency interpreted this particular federal statute as going beyond obscenity and beyond what the Supreme Court said was not protected by the First Amendment. The FCC gave a separate definition for indecency which was one of the laundry list of words that had been interpreted in other similar statutes as simply a redundancy of obscenity.131

The definition the FCC used was the “patently offensive according to contemporary community standards” prong of the Supreme Court’s three-part obscenity test, as articulated in 1973 in Miller v. California.132 After Roth, the Supreme Court went through a period of trying to figure out what the definition of obscenity would be and it shifted back and forth.133 Finally, in 1973, the Court in Miller set out this three-part test,134 which most of you may know.

The government, in order to prove that material is constitutionally obscene and unprotected, has to prove all three parts of this test. First, the government must prove that the material, taken as a whole, lacks any serious literary, artistic, political or scientific value—the so-called “SLAPS” test.135 Second, the material, taken as a whole, must appeal to a prurient interest, which has subsequently been defined as a morbid or shameful, rather than a healthy interest in sexuality.136 Lastly, the material must depict sexual activities or organs as specifically enumerated under state law in a manner that is patently offensive according to contemporary com-

134. Miller, 413 U.S. at 24.
135. Id.
munity standards.\textsuperscript{137} In \textit{Miller}, the Court said, this "patently offensive" prong is determined by local standards because the country is too vast for there to be any identifiable national community standard of patent offensiveness.\textsuperscript{138}

The "patently offensive" prong of the \textit{Miller} test was bizarre from the very beginning. The Court has consistently said, in other contexts not related to this terrible subject of sex that seems to give American society so much nervousness, that offensiveness cannot be a standard for censoring speech.\textsuperscript{139} Quite to the contrary, the First Amendment is all about protecting the speech of minorities, the speech of dissenters, unpopular speech, and provocative speech.

The Court has said, for example, in cases involving racist speech and the most offensive kinds of deplorable ideas, that the First Amendment protects against majoritarian suppression of precisely those types of offensive speech.\textsuperscript{140} But when it comes to sex, the Supreme Court has failed not only to make that connection and see that you cannot start having censorship standards based on offensiveness; the Court has itself articulated an offensiveness standard which is a community standard, completely contrary to the most fundamental notions of what the First Amendment is all about.

So the \textit{Miller} decision started us down the road of permitting censorship based on "community standards" of "patent offensiveness." The FCC took the "patently offensive" prong of \textit{Miller} and said, for purposes of broadcasting—the content of which we can control much more than any other medium—we are going to require time channeling of all "indecent" language.\textsuperscript{141} This will pre-
vent broadcasting when minors are likely to be listening. We are not going to limit ourselves to obscenity by interpreting "indecent" to mean "obscene."

As Jim may have mentioned, this is not an absolute ban, but it is to "protect" children from indecent speech, which we acknowledge is constitutionally protected for adults. It does not satisfy the other two prongs of Miller. It can have serious literary value; indeed it can be the greatest masterpiece in the world. But if it is "patently offensive" and has to do with sex or excretory activities or organs, we can require time channeling, and we can punish companies that broadcast such speech during times when children are likely to be listening. We can threaten to deny them license renewal, fine them, and sanction them if they broadcast what we consider to be patently offensive sexual subject matter during all except late night hours.

Pacifica upheld the FCC's approach, at least as applied to the Carlin monologue. The Court rejected the argument that "indecent" for purposes of federal broadcasting must constitutionally be interpreted to mean "obscene." The Court never addressed the
question of whether this patent offensiveness standard meets the constitutional requirements of specificity, or, in other words, whether it is unconstitutionally vague. That, of course, is a major issue in the Alliance case that the Court will hear in a few weeks. 144

One saving grace of the Pacifica decision is that, at the time, the FCC was relatively specific that it was talking about words. If you ever went into a Pacifica station in the days after the Pacifica decision, you would see signs in the studio that said essentially: thou shalt not say the following seven words over the air or we’re going to get in trouble. They were your typical Anglo-Saxon 4-letter or 10-letter or 12-letter words. Thus, broadcasters knew they could address sexual subject matter. They could have music that was about sexuality. They could have humor. They simply had to stay away from these naughty words, because somehow they would harm children. But when the FCC expanded its application of its indecency rule to anything that it considered offensive, not just a list of dirty words, the standard became vague and freewheeling, subject to the shifting sensibilities and moral standards of FCC commissioners.

Pacifica opened a Pandora’s box in at least two ways. The first was when the FCC in the late 1980s decided greatly to expand application of its indecency standard, it could rely on Pacifica’s apparent approval of a “patent offensiveness” test for legal justification. 145 The second was that, as the Alliance case, and the 1996 Act demonstrate, Pacifica opened the door to regulation of speech about sexuality that does not meet the obscenity test. This has led—especially with the rise of religious fundamentalism and the right wing tilt in this country—to the culture wars, the increased sex panic that some of our sociologists have observed, and a real orgy of “indecency” legislation. 146 Congress loves it. Congress can now use this indecency standard, or thinks it can, to go well beyond the “harmful to minors” standard upheld in Ginsberg v.

144. See generally Brief for the Federal Respondents.
145. See Action for Children’s Television, 852 F.2d at 134.
New York,\textsuperscript{147} and well beyond the time channeling of "filthy words" approved in Pacifica. Congress has thus used the "indecency" standard to regulate dial-a-porn,\textsuperscript{148} cable,\textsuperscript{149} and now the Internet.\textsuperscript{150}

Let me explain the expansion point just for a minute. Under political pressure, which has been well-documented in a number of interesting law review articles,\textsuperscript{151} the FCC by 1987 decided it was going to interpret indecency to go beyond the "filthy" words to anything that it considered patently offensive. That would include double entendre, sexual innuendo and really anything that they were offended by.\textsuperscript{152}

So, by the late 1980s and early 1990s, the stations that carried Howard Stern, for example, were getting into a lot of trouble. This is because even if Stern did not use any of these seven words, he certainly had a lot of innuendo, and the FCC thought it was offensive.\textsuperscript{153} In three cases where the FCC imposed sanctions in the late 1980s, a coalition of broadcasters and free speech groups challenged the agency's expanded interpretation of indecency.\textsuperscript{154} Among other things, the challenge specifically asserted that the indecency standard was unconstitutionally vague. The D.C. Circuit in the first of those cases, in a decision written by now Associate Justice Ruth Ginsberg said, we think the Pacifica decision by infer-

\begin{footnotesize}
\begin{enumerate}
\item[147.] 390 U.S. 629 (1968).
\item[149.] 47 U.S.C. § 561(a).
\item[152.] See Levi, supra note 151, at 49.
\item[154.] See Action for Children’s Television, 852 F.2d 1332.
\end{enumerate}
\end{footnotesize}
ence held the FCC’s indecency definition—patently offensive by contemporary community standards—not to be vague, but if we’re wrong, we welcome correction from “Higher Authority.” She put the “Higher Authority” in capital letters to indicate with a touch of irony that she is talking about something like God.

Well, she is now, of course, a member of that “Higher Authority”; she’s now an associate god, so we are hoping she will reach the vagueness issue in the Alliance case.

The cases challenging the 1987 expansion of the FCC’s indecency enforcement were actually partial wins, although not on the vagueness issue. The D.C. Circuit did rule that the FCC had not shown that the specific time channeling regulations that it was imposing were justified by empirical facts reflecting the presence of minors in the audience during the broad swath of time when the FCC said “indecency” could not be aired. The court sent the agency’s time-channeling finding. But regarding the merits of the challenge to the use of the indecency standard as a burdensome regulation of what is clearly constitutionally protected speech that may have great literary or artistic value or other value, the D.C. Circuit felt it was bound by the Pacifica decision.

As for the second effect of Pacifica, the use of “indecency” as a censorship standard outside the broadcast context, I’ll try to touch on just a few points. As I mentioned, although the Supreme Court has said in a number of cases that Pacifica is an emphatically narrow decision, strictly limited to the broadcast context, Congress continues to rely on it. The Department of Justice (“DOJ”) similarly relies very heavily on Pacifica in its brief in the Alliance case. One of the most deplorable things about the Pacifica plurality decision is that it talks about speech on sexual subjects, or “patently offensive” use of four-letter words, as speech that has very little

155. Id. at 1339.
156. Id. at 1332.
157. Id. at 1339.
158. Sable, 492 U.S. at 127.
159. See Brief for Federal Respondents at 46.
First Amendment value. The government picks up on that and in its Alliance brief urges the Supreme Court to announce a very lenient standard of scrutiny for restrictions on "indecency"—certainly not the strict scrutiny ordinarily required of content-based restrictions on speech. Not even the intermediate O'Brien scrutiny that Jim mentioned, but a very lenient reasonableness standard of scrutiny for content-based regulation, where the content in question is indecency, because according to the government, it is not very high value First Amendment speech.

The government's brief, of course, ignores the fact that sexuality is a political subject in this country, and political speech has always been on the highest rung of constitutional protection as the Supreme Court has said this many times.

The 1992 Act which is challenged in the Alliance case uses the FCC's "patently offensive" indecency definition to do a couple of things. First, section 10(a) of the 1992 Act enables cable operators to censor a particular category of communication, defined by Congress, that Congress does not like. This category of so-called indecency or what the cable operator "reasonably believes" is indecent may be censored, but only on these access channels, which as Bob Perry pointed out, have been traditionally viewed as public fora where the cable operator acts simply as a conduit for the speech of the community.

So in addition to the vagueness problems inherent in terms like "patent offensiveness" and "contemporary community standards," we have an additional level of vagueness in that the cable operator may now censor anything it "reasonably believes" would be patent-ly offensive according to community standards.

Additionally, the 1992 Act is replete with self-certification requirements that, as the Supreme Court has recognized in the

161. See Brief for Federal Respondents at 29-32.
164. 47 U.S.C. § 532(h).
related context of loyalty oaths, have a natural chilling effect or a self censorship effect. If you, cable programmer, are required to certify that your programming is not indecent, you are going to steer far away and self-censor in order to make sure that the government, or in this case, the cable operator, does not disagree with your judgment because the penalties under the 1992 Act are pretty draconian. If you are a cable programmer and guess wrong about what the operator "reasonably believes" is patently offensive, you can get kicked off the air. So the certification is an additional problem.

Ever since the Miller decision, which in a sense is the source of all these woes, this concept of indecency has been a growing threat to freedom of speech in the very important area of human sexuality, related areas of gay and lesbian rights, censorship, and safe sex information. Until our nation is able to face up to this schizophrenic fear it has of speech about sex, and the corresponding standards of "offensiveness" that the courts have permitted as a censorship standard, we are going to be facing continuing threats to our freedom.

PROF. FRANZESE: Thank you, great. I'd like to introduce now, Mr. Stuart Gold.

MR. GOLD: Yes, I am the one person who may not have been happy about the granting of certiorari in the Alliance case. However, if the Supreme Court grants my motion to give me ten minutes to argue, I might change my opinion about that.

I represent Time Warner which manages and operates the cable systems in Manhattan, as well as several other boroughs in New York City, and across the country. Some of the questions that we are talking about here, with a more New York-based flavor, are why shouldn't Al Goldstein and Robin Byrd be able to put on sexually explicit programming on Time Warner Cable of New York

166. 1992 Act § 10(a)-(d); 47 U.S.C. 532(h), 532(j), 531, 558.
168. Miller, 413 U.S. at 15.
City’s cable systems? Aren’t their First Amendment rights being subjected to odious censorship? Why should Time Warner be able to put on and sell “The Smart-ass Delinquent,” and convince me to buy Screw magazine at the same time, while refusing Al Goldstein the right to show excerpts of the hardcore version of that same movie? Why should the government have any business regulating indecent programming as opposed to obscene programming?

Some of the answers may come with the Alliance case, but then again, maybe not because by the time we got to the 1992 Act, we were already hopelessly in an Alice in Wonderland world. Last night, I reread the 1996 Act, and it seems like the next round of litigation over indecent speech on cable is about to start before the curtain has been brought down on the first round of litigation.

Now the cable industry is often accused of wrapping itself too tightly in the First Amendment. But the Supreme Court from Midwest Video 169 in 1979 to the Turner 170 case in 1994, has made it clear that cable operators are publishers engaged in editorial activities, and that cable operators’ programming choices are fully entitled to protection under the First Amendment. 171

While the cable operators have a First Amendment garment in which to wrap themselves, the leased access programmers, certainly of indecent fare, are sporting the emperor’s new clothes. While leased access programmers certainly do have First Amendment rights to speak, and speak indecently if they choose, they do not have First Amendment rights to access my client’s cable system anymore than I can demand CNN to give me the slot that they have Larry King in so I can tap dance naked if I want.

Cable access is a statutory right that was granted by Congress in derogation of cable operators’ First Amendment rights to make their own programming choices. 172 To understand what is happening in the Alliance case, you really have to back up to the 1984

171. Midwest Video, 440 U.S. at 707; Turner, 114 S. Ct. at 2458.
Act. It is the 1984 Act where Congress took 10 percent to 15 percent of a cable operator's channels and gave them to leased access programmers. On those channels, a cable operator cannot put anybody on who is affiliated with it. These channels have to be openly available for leasing by programmers, and cable operators have no editorial control over these channels. Additionally, an unlimited percent of your capacity can be taken for public access programming by local franchise authorities as part of the price of gaining the franchise.

On public access channels, cable operators also do not exercise any editorial control, whether or not the franchising authority would give it any. This does not make any sense, because diversity of programming has never been a problem on any reasonably large cable system. You may not like anything that is on the 75 channels in New York, but it is diverse. I would take issue with anybody who says that there is not a diversity of programming on those channels, as was there before public access and before lease access.

While leased access and public access requirements are concededly infringing the cable operator's First Amendment rights—we do challenge the concept of leased access and public access, and Congress' right to insist on that access—this issue has split the lower courts. The Supreme Court has not yet decided. The most recent decision by Judge Jackson in the D.C. District Court upheld leased access and public access as constitutional. This was argued in the D.C. Circuit in November 1995, and a decision on that will come.

But even putting that to one side, it is a strange result, since Justice Kennedy in Lee seemed to agree that the First Amendment does not grant powers to Congress. The First Amendment does not empower Congress to legislate, even in the name of diversity.

173. Id.
174. Id.
176. Lee, 112 S. Ct. at 2716.
It limits their power. I came in on Bob Joffe’s talk where he was echoing many of these same comments. I do have one visual aid. It is a cartoon from, I believe it is the Daily News, that came out during a litigation that I’ve been involved in with Mr. Goldstein, Robin Byrd, and Ms. Heins who represents them in that case. They are wrapping themselves in the First Amendment, but as this makes clear, what they’re wearing says, “Congress shall make no law respecting an establishment of or abridging the freedom of speech.” They shall make no law.

Now the First Amendment may posit diversity as a value, but it achieves that value by forbidding government action, not by authorizing such action. But towards an obligation of full disclosure, I must say that although I rely on Justice Kennedy’s statement, he happens to have written the plurality opinion upholding the “must-carry” law which requires cable operators, as opposed to cable programmers, to give away up to one-third or more of their capacity for broadcast stations. Therefore, I am not sure where the Supreme Court goes as to the language of the First Amendment.

In 1992, Congress realized that one unexpected result of having taken all this capacity and prohibiting the cable operator from exercising editorial control was that there was a deluge on some systems of sexually explicit material. There was a lot of hardcore pornography usually kept just on the line between indecency and obscenity.

Many of the programmers, certainly in New York, love to play a game where they sneak obscene material into their programs to see whether the cable operator is screening or not, and whether they can get away with it. Even when they get caught, some of you who watch that may know about the famous blue dot that seems to jump around the screen to block certain material that might make what is on the screen obscene as opposed to indecent.

Congress’ solution for the most part was to pass section 10

177. See Panel I, supra note 22.
178. See Turner, 114 S.Ct. at 2445.
which gives back to the cable operator the right to promulgate a policy—this is section 10(a)—prohibiting or somehow restricting indecent programming on leased access.\textsuperscript{180} Those cable operators that do not have such a policy must then adhere to the blocking and access requirement of section 10(b)\textsuperscript{181} and the regulations thereunder if they maintain indecent programming on leased access. Subscribers must request that the channel be unblocked.

As you have heard, section 10 also says that the FCC should pass some regulations that allow the cable operator to prevent such programming on public access if the operator chooses.\textsuperscript{182} It then removes the immunity granted to cable operators, something that we are challenging ourselves, section 10(d).\textsuperscript{183} This is because it is bizarre that Congress can tell you to deal with these people and take their programming, but if you allow them to put on obscene programming, you may pay a price by being prosecuted for it.

In New York, Time Warner Cable actually announced a policy on leased access programming.\textsuperscript{184} It did not prohibit indecent programming, as it had the right to under section 10(a).\textsuperscript{185} In fact, a lot of subscribers desire to have access to this kind of programming.\textsuperscript{186} Also, leased access programmers, as opposed to public access programmers, pay for the time they use. This also generates revenue for the cable system. This policy said that on leased access, indecent programming was going to be programmed relatively late at night and in the early morning hours, generally 10:00 p.m. to 6:00 a.m. It is also scrambled, which means you cannot view it, unless a signal comes to your converter box to tell the equipment to unscramble the signal.

Channel 35 in New York is where most of the indecent leased

\textsuperscript{180} 1992 Act § 10(a), 47 U.S.C. § 532(h).
\textsuperscript{181} Id. § 10(b), 47 U.S.C. § 532(j).
\textsuperscript{182} Id. § 10(c), 47 U.S.C. § 531.
\textsuperscript{183} Id. § 10(d), 47 U.S.C. § 558.
\textsuperscript{184} Rich Brown, Fans of Blue Fare Speak Up; Manhattan Cable Say Twenty Percent of Its Subs Have Requested Leased-Access Sex Channels, 125 BROADCASTING & CABLE 46 (1995).
\textsuperscript{185} Id.
\textsuperscript{186} Id.
access programming is, but that channel also has a substantial amount of non-indecent programming. Because of this, Time Warner really did not want to scramble the whole signal, so it would be scrambled during those hours where there was indecent programming. If you desired to have it unscrambled, you were asked to respond to a mailing by sending back a preprinted card stating the subscriber's name, account number, that he or she is over 18, and that he or she desires access to all channel 35 programming. There was no indication on the card that you wanted indecent programming. Over 50,000 subscribers, including myself, sent back the card saying, we want all the programming.\textsuperscript{187}

Some argue that this return card is odious because it brands you, i.e. most people won't send it in because it will brand you as either a porno consumer or a pervert. I think that is really a gross overstatement, given that over 50,000 people sent those cards in. Every time you order an adult movie on a cable system, or subscribe to a channel that might have indecent material, there is a record made. It has to be kept private by law,\textsuperscript{188} and it does show up on your bill. If you go today into most video stores, the X-rated section of the neighborhood video store—not the XXX ones—most of them are usually out. You can see your neighbors renting the cassettes. I do not think there is anything to the notion that this card really constrains the audience.

Nonetheless, Al Goldstein, after making several statements that maybe he denies making, the \textit{Village Voice} and the \textit{Daily News} all quoted him as saying that he thought this was a good policy because "Time Warner has solved the kids problem for us so that no one can accuse us of reaching kids."\textsuperscript{189} He thought that this was a good policy, because he wants hard core adult viewers, not kids. Somehow between those statements and a month later, he did sue, and the policy was enjoined.

\textsuperscript{187} See Sex Channels Scrambling Blocked, CHI. TRIB., Sept. 21, 1995, News, at 1 (reporting that 50,000 of 290,000 subscribers had returned their cards); Brown, supra note 184, 186, at 46 (reporting that 60,000 of 300,000 subscribers returned their cards).

\textsuperscript{188} 47 U.S.C. § 551(c).

\textsuperscript{189} Alex Michelin, Sex Show Fans Gotten Scramble?, DAILY NEWS, July 18, 1995, at 6; Turn of the Screw Owner, VILLAGE VOICE, Aug. 15, 1995, at 38.
Now the big issue, and what is wrong with this whole picture, is that it is not the government who is censoring anybody. It is not censorship. It is the cable operator getting back his or her right to program their channels as they see fit. It is not censorship anymore than if I run a movie theater and I do not want to show Oona Z or Samantha Fox’s latest flick. I say I won’t show it. Congress has given editorial discretion back to the cable operator. Anytime that Congress is giving back a First Amendment right to a speaker, it enhances First Amendment values, not restricts them. Keep in mind that both the public and leased access programmers’ right to get on the systems is statutory, not constitutional.

Our position is that there is no need for the First Amendment analysis of sections 10(a) and 10(c). Section 10(a) returns to the cable operator the right to make its own editorial decisions, which are protected by the First Amendment. If there is no state action, there is no need for a First Amendment analysis. Some argue that there really is state action because the government has set it up. For instance, it is voluntary for leased access where section 10(a) says you can have a policy. If you do not have a policy, then you must under section 10(b) segregate this material, block it, and require the viewer to request access to it. There are some other elements under section 10(b) that require blocking. The programmer, to a large extent, may decide whether or not it thinks its material is indecent.

So Judge Wald in her dissent in the D.C. Circuit said this is really state action. This is because section 10(b), which is cumbersome and may be expensive, coerces cable operators to choose section 10(a) which requires censorship of material allowed under section 10(b).

191. See Brief for Amicus Curiae Time Warner Cable at 7-20.
195. Id.
196. See id.
197. Alliance, 56 F.3d at 130-34 (Wald, J., dissenting).
However, section 10(a) does not require a ban on such material. The FCC has interpreted section 10(a) to allow a cable operator to either ban it or put restrictions on it, as Time Warner chose to do. Moreover, there are really four choices that a cable operator has on leased access. You can issue a policy barring indecent programming. You can issue a policy restricting, as Time Warner did, indecent programming. You can move the programming off of leased access to non-access channels. If you do that, you will have total editorial control over those channels, except for the “must-carry” channels.

A lot of times the answer to that is nobody is going to move this stuff onto other channels. The Alliance petitioners in the Supreme Court, however, assert that there are many other indecent materials on non-access channels that are not being regulated, so by their own concession, there isn’t a terrible reluctance on the part of cable operators to program even indecent material under appropriate protections. Most indecent material on non-access channels like Playboy and Showtime are scrambled, and you have to order them specifically. They will put it on.

The real controversy arise because cable operators do not think Al Goldstein’s programming is that good, and they would prefer to have the pay-per-view movies or Showtime than Al Goldstein. If he was producing something that subscribers wanted in large numbers, maybe then they would get on non-access. The fourth option is that through choice or inertia, you do not do any of those things, and you leave indecent programming on, then you’re subject to section 10(b).

As to section 10(c), which is the public access section, the cable operator has the decision whether to prohibit this material or not. There is a claim that these public access channels are public fora. But public access channels are not public fora, they are not

198. Brief for Petitioner Alliance at 41-43.
public property, and I believe that the Supreme Court only supports the public forum doctrine with respect to public property.

The channels that become public access channels and leased access channels are not created as access channels. The cable operator designates which channels will fit this category. The channels start out as private property, and they remain private property. They are not created by the government. They are channels which have no identity before they are taken by the government, and the cable operator gets to choose them. They still have most of the indices of private property. Also the 1996 Act says that cable operators are not supposed to be regulated as common carriers.\(^{201}\)

There is also the claim by the adult programmers that they are disadvantaged over other access programmers and providers.\(^{202}\) First, the program provider does not lose his or her statutory claim to access. They only lose their absolute right to program indecent material. They are still in the favored position of being able to offer any other programming that they want on the cable system and preventing the cable operator from exercising editorial control.

Regarding indecent programming, it really assumes the status of most other programmers non-access channels. You have got to produce something that the cable company believes subscribers want badly enough so they will air it, because it will attract more subscribers and increase the revenue of the cable system.

We also argued to the Supreme Court that even if there is state action here, you cannot use the strict scrutiny test.\(^{203}\) We do not read *Pacifica* the way the government does. I will not today, and we do not in the Supreme Court, defend section 10(b) standing alone. When the government insists on something from a First Amendment speaker, you have got to prohibit it under certain circumstances. Since it is a First Amendment speaker that is making the decision, not the government, you cannot use the same test—is there a compelling interest, and is it the least restrictive alternative.

\(^{201}\) 47 U.S.C. § 541(c).

\(^{202}\) Brief for Petitioner Alliance at 28-29.

\(^{203}\) See Brief for *Amicus Curiae* Time Warner at 20-23.
In Establishment Clause cases, there is very often a fight between the Establishment Clause and the Free Exercise Clause, and the courts have balanced the two in order to come up with some kind of test to figure out where to draw the line. Here, again, it has to be nothing more than a reasonableness test, because you have a First Amendment speaker that is making the decisions. Even if adult programmers are found to be asserting First Amendment rights, it simply cannot be true that program providers and viewers desiring access to this programming through cable television have greater rights than cable operators and the subscribers who either want to reject the programming or limit it.

On New York's cable systems, notwithstanding converters which have locking mechanisms, the cable operators have been getting a very large number of complaints about the programming on leased access. In New York, the cable operator does not really administer the public access channels. While there is some amount of indecent programming there, we do not hear quite as many complaints, but we still occasionally get complaints about public access. The majority of the recent complaints concern leased access.

A lot of subscribers do not want unrestricted access. Not only because they are concerned about children, but also for unsuspecting adult viewers who find this material not to their liking and do not want to stumble upon it when they're channel surfing. Section 10 allows the cable operator to adopt an approach, such as Time Warner did in New York, that is reasonable in balancing the competing interests of its First Amendment rights with the interests of programmers and both groups of subscribers—those who want the programming and those who do not. Indeed, by placing the decision on indecent programming in the cable operator's hands, the government, in practical effect, has removed itself from the decision process. As far as government censorship, it is the least intrusive approach, or the least restrictive approach.

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205. 1992 Act § 10(a), (c), 47 U.S.C. §§ 532(h), 531.
Permitting the cable operator to refuse to telecast indecent programming altogether or to restrict it does not impede First Amendment rights. It merely recognizes them. If the cable operator somehow is unreasonable in its decision making, Congress has managed to leave a right of action under section 612(d) for the cable operator to sue over a decision on leased access where the cable operator restricted, for example, prohibited programming.\textsuperscript{206} If the leased access programmer believed that the cable operator was restricting programming Congress did not intend to restrict or ban, there may be an action under section 612(d), a federal claim, which I am sure at some point I will probably see.

The last very interesting thing that has me puzzled about the 1996 Act is that it again amends the public access and leased access sections of the other acts.\textsuperscript{207} The 1996 Act allows the cable operator to refuse to telecast any leased access program or portion of a leased access program that contains obscenity, indecency, or nudity. However, Congress did not repeal the section 10 amendments,\textsuperscript{208} so it is belt and suspenders, I guess, because there was one system that allowed cable operators to reject or restrict programming, and now there is another section. I assume that Congress is preparing for the possibility that section 10 will be struck down this June, which I trust it won't be.\textsuperscript{209} If it should be struck down, there will already be a new provision which provides for blocking mechanisms. It does not have section 10(b), but just returns absolute discretion to the cable operator.

My assumption is that it will not satisfy the adult program providers. Even if the \textit{Alliance} case holds that section 10 is unconstitutional, there will be a challenge to this section, and we'll have another forum about that in a couple of years.

\textbf{PROF. FRANZESE:} Thank you. I'm happy to introduce to you now, Mr. Andrew Schwartzman.

\begin{footnotesize}
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\item[206.] 47 U.S.C. § 532(d).
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\end{footnotesize}
MR. SCHWARTZMAN: You folks have been very patient and very attentive, and as time is moving on, I think I will compress my remarks a little bit.

I agree with everything that Jim Horwood said. And I agree with everything that Marjorie Heins said. I agree with everything that Bob Perry said, and I disagree with everything that Stuart Gold said. That is really all you need to know.

There has been a lot of law discussed here, so I am going to make a couple of policy observations to try to place this in some context, partially because it is a little bit unfair that we’re all ganging up on Stuart Gold here but I think I’ll wind up ganging up anyway.

My point is where we’re going and the danger of doing what I think Mr. Gold has just done, which is treating the First Amendment as a commercial weapon to censor, not a shield to protect speech.

The visual aid here quotes the First Amendment, Congress shall make no law respecting an establishment of or abridging the freedom of speech or of the press. The real question is whether a law which restricts speech is unconstitutional. Laws which promote speech are permissible and encouraged by the First Amendment, and that is really how I view section 10 of the 1992 Act.

Stuart Gold is correct. Time Warner is free to put on a program with him tap dancing naked, and I would pay to watch that. They would do it if it would make enough money. I suspect that there are other people tap dancing naked who would generate better revenue, Stuart, I’m sorry to say.

MR. GOLD: I concede that.

MR. SCHWARTZMAN: But, that is the point. The very same programming literally can and may appear on Time Warner’s own channels pursuant to the policies that they presently follow—if they can make good money at it—and they’re claiming the right to

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210. U.S. CONST. amend. I.
refuse to lease or refuse to permit that very same programming to be carried on access channels, subject to other people's editorial control.

I think it is fair to point out here that these channels, if they become effectively nullified and less well used, become additional profit centers for cable operators. The fewer people that are willing to lease gives more channels to the cable operators. Cable operators are free to put their own programming on access channels which are not being leased at a given moment or on PEG channels which are not being utilized at a given moment.

Stuart's diversity is not my diversity. Seventy channels selected by Time Warner is multiplicity, but it is not diversity. It is one editor. I would point out that Time Warner has interests or owns, among other things, HBO, Cinemax, TBS, TNT, CNN, CNN Headline News, and Court TV. That is not really the kind of diversity that we have contemplated. The objective of the First Amendment is to create a well informed electorate to enhance the dissemination of issues, ideas, and thoughts.

In erecting a very unfortunate scheme for cable television, Congress and the FCC did little. They insured that there would be a tiny opportunity for different voices to appear and that there would be room for civic discourse on public educational-governmental channels. We're talking about an electronic future which, through great efficiencies and the use of technology at reduced costs and increased responsiveness, brings the government closer to the people including instant voting, constant referenda, and electronic town meetings. However, this is not going to happen if it is all subjected to the editorial control of a single cable operator or, even more generally and truly threatening, a single telephone company or a single cable operator merged with a single telephone

212. See Bill Carey, Who Will Buy Gaylord Entertainment?, TULSA WORLD, Jan. 16, 1996, E6 (noting that Time Warner owns Cinemax and HBO and that if they merge with Turner Broadcasting, they will also own CNN, TBS, TNT, CNN and Headline News).
214. See e.g., Glenn H. Reynolds, Is Democracy Like Sex?, 48 VAND. L. REV. 1635, 1648 (1995) (comparing democracy to sex in order to understand the role of democracy in our constitutional system and the suggested reforms for that system).
company. The core of this then becomes Stuart Gold’s claim that this is somehow private property. Whose streets do these wires travel through? Whose rivers do these wires transgress? Whose telephone poles do they go on?

Any cable television signal that comes imported from anywhere—through the air, from a satellite, across a state line, through wire, or across a river—has federal jurisdiction, through the benefit of takings provisions that guarantee cable operators access to landlords’ homes. The cable operator’s preemption of local zoning for satellite dishes, a mass of additional preemption, is contained in the 1996 Act. There is state action all over the place here. This is public property that they’re using, and it was always public property. When cable franchises permitted cable operators to use the streets and to gain access to the homes, they conditioned the access, in most city cases, upon access channels as a condition of the award of the franchise. If you did not want to volunteer to apply for the franchise, you did not have to. If you volunteered to apply for the franchise, you had to agree to provide access channels.

So what happens when you assert this kind of property interest? What happens in a repressive environment where the federal government is looking to censor and Congress looking to censor even more? Here is what happens. The government says they think they are private property, but we can regulate private property. The government is going to regulate more private property. They say state action is not such a bad thing because we like that kind of state action and because we can use it to censor.

That is what the government did in the Alliance case. Stuart Gold alluded to the fact that he has requested ten minutes to argue this week. It is important to see why that happened. Although the government argued in the Court of Appeals in Alliance, vociferously, that there is no state action in sections 10(a) through (d) of the 1992 Act, the Solicitor General last week filed a brief which

says, well, we now agree section 10(b) is state action, and they said, we sort of agree that sections 10(a) and 10(c) are state action, although it is a little bit mealy-mouthed, it is sort of conceding a point they know they cannot win. They say, that is okay because this Court can and should extend the *Pacifica* decision, which presently applies only to broadcasting, to cover cable. I now incorporate, by reference, everything Marjorie Heins said.

Stuart Gold now needs his ten minutes to argue because he needs to convince the Supreme Court not to require a safe harbor from 10:00 p.m. to 6:00 a.m. on HBO, because Jesse Helms is ready to do that.  

What happens when you try to use the First Amendment as a commercial weapon is that you wind up having the flip side of the First Amendment thrown back at you which is dangerous, as a matter of policy.

Access channels are an important safety valve that enables cable operators to say diversity exists and that cable operators have no control. Instead, Congress is moving in to censor all of their channels. It is an unfortunate potential outcome, and if I were not confident that the Supreme Court was going to declare the whole thing unconstitutional, I would be even more worried than I am. Thank you.

PROF. FRANZESE: Are there questions for any of our panelists?

AUDIENCE MEMBER: My name is Professor Frank Ascan of Rutgers Law School in Newark. I would like to direct a question to the other panelists as to the relationship between the P and the G in PEG channels, which is becoming a particular problem as more and more local governing bodies, or political bodies, actually take over the operation of these PEG channels as the cable operator. In New Jersey, for example, it is becoming particularly prevalent. There is one PEG channel and a politically appointed body runs it. What are the priorities? How do we determine the priori-

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ties between P and G? Can this political body transform this public forum into basically a forum for governmental viewpoint? Can it restrict the public viewpoint by placing it at inconvenient hours and dominating prime time with a political viewpoint through the voice of government officials? What is the relationship between the P and G in PEG?

MR. HORWOOD: I guess I can open this. It is a problem and we have really been talking today about the public access rather than the educational and governmental access which can also be provided.

The way the 1992 Act is written, it does not require a community which mandates a government access channel to require a public access channel. I think there is a very serious constitutional problem if you have government access without public access. It has not been raised by the courts yet. I think there would be a very different issue on viewing the constitutionality where there is only government access. While permitting only government access may survive strict scrutiny, it is a much more problematic issue than where you also have public access.

I have a real problem from a policy standpoint of permitting the government to speak on a channel, and not providing a vehicle over the same medium for those who are critical of the government to speak also. I think defending the government from a constitutional standpoint regarding educational access is more difficult than from a public standpoint, because the public access is completely content neutral. Public access, particularly if it is found to be a public forum, cannot be limited. It must be on a first come first served basis, or a lottery basis, so as to not distinguish among speakers.

Once the channels are set up for the public to distinguish

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219. See 47 U.S.C. § 531(b) (allowing for a franchise authority to require channels to be set aside for public, educational, or governmental use).

among speakers, there is a very difficult First Amendment burden.221 There is a good challenge where a channel, managed by the government, favors the government in terms of time availability.

The public access channels are managed in different ways. Historically, many were managed by cable operators.222 There are fewer now. The best way of managing the public access channels is through a separate non-profit organization which is completely separate from the government.223 Occasionally access is successfully managed by government.224 Other times it is managed by a junior college or by a library.225 There are a variety of ways to manage public access channels.

The farther removed from the government a public access channel is, the less opportunity for mischief and the easier it is to defend the public access channel.226

MR. GOLD: In the D.C. Circuit argument, the panel of judges was pretty interested in the public access PEG issues.227 One of the points I tried to make was that the P may be a closer question as to whether there should be strict scrutiny. However, as to the educational and governmental, the government not only could run a general PEG channel, but the statutes require a governmental channel.228 Those two channels, educational and governmental, are clearly content based and require strict scrutiny. I would be sur-

221. See Turner, 114 S. Ct. at 2460-61 (finding that speakers were not distinguished based on content, but the manner in which the message was transmitted, therefore there was no presumption of First Amendment invalidity).
222. See Alliance, 10 F.3d at 821-22 (noting that traditionally, cable operators managed many of the public access channels).
223. See Wally Mueller, Controversial Programming on Cable Television’s Public Access Channels: The Limits of Governmental Response, 38 DePaul L. Rev. 1051, 1120 n.338 (stating that non-profit managers were more likely to promote use of public access channels).
224. Id. at 1105 (noting that access managers fall into three categories: (1) cable operator; (2) an arm of the local government; and (3) nonprofit access management corporations).
225. Id. at 1063.
226. Mueller, supra note 65, at 1120 n.338 ("Non-profit access managers are insulated from political pressures felt by municipal access managers.").
227. Alliance, 10 F.3d at 815-16.
prised if the Court went this way, but it is not impossible that the
court could strike down the educational and governmental elements
as not getting strict scrutiny and not surviving a compelling state
interest test, while having a closer issue on the public access.

My experience is based mostly in large cities which have public
access channels, even if they’re run by a governmental body. It is
mostly a first come, first served basis. Perhaps New Jersey has an
access channel and the government or appointed governmental
body runs it, but the best time probably goes to the city council
meetings and debates for certain politicians.

In most large cities, no matter who controls, there is a true
public access channel which is usually run on a first come, first
served basis.229

PROF. FRANZESE: Other questions or comments?

AUDIENCE MEMBER: This is a question for Mr. Gold. In
relation to section 10 and Time Warner’s decision to, in effect,
force people to ask for channel 35, how does that request square
with the right to privacy of individuals who, regardless of whether
they’re labeled a porn subscriber, simply do not want to tell Time
Warner, “this is what I want?” They should not have to do or say
anything in order to protect their right of privacy.

MR. GOLD: A couple of things. First, you send in the card
and your right to privacy is protected because by federal law there
are severe consequences if a cable operator allows disclosure of a
viewer’s choices on the system.230 Thus, there is a federal statute
that makes this a crime,231 and there are civil penalties232 and there
have been cases on point.233

Second, you have to make choices all the time. If you want to
get the Playboy channel, you have to tell us and the computer logs

229. See, e.g., Symposium, supra note 78, at 837.
233. See, e.g., Ripplinger v. Collins, 868 F.2d 1043 (9th Cir. 1989) (criminal and
civil liabilities); Texas v. Synchronal Corp., 800 F. Supp. 1456 (W.D. Tex. 1992) (civil
liability).
in that you have ordered the Playboy channel and your bill is going to show it. If you want to walk into the magazine store and buy Al Goldstein's Screw magazine, you have no right to say, "I don't want to have to pick up this magazine. I'm going to somehow get it surreptitiously." You have to make choices all the time. Beyond that, the card has to be protected. It just says you want channel 35 programming. I do not see how that in any way severely infringes on your right of privacy, especially since it is a commercial transaction. The cable company is not the government. The cable company is somebody supplying a service. Other subscribers have a problem, the company is trying to be responsive to that problem. They're trying to balance everyone's interests.

But I think the fact that over 50,000 sent the cards in shows that individuals are unlikely to feel this is an invasion of their privacy. The truth of the matter is that there are a lot of things on the cable system, as well as in your day to day work, that you have to order. A problem only occurs when the government asks you to register. I think this is very different. This is not like Lamont v. Postmaster General, where the government said, if you want communist propaganda send us a card saying that you want it, then we will let you have it.

AUDIENCE MEMBER: This question is for Mr. Schwartzman. It seems as though the cable operator is trying to compare itself to a newspaper or magazine in being able to exercise editorial discretion. You say there is a difference in that cable operators use public rights of way for their wires and telephone polls, etc. How do you respond to the answer that newspapers are sold in vending machines on public sidewalks and that magazines use the mails, even at reduced rates?

MR. SCHWARTZMAN: This is the old postal road argument. Anybody can start a newspaper and anybody can distribute a newspaper or a print publication essentially without restriction. People used to argue that to effectively create a daily newspaper there were economic restrictions and bars of just cost. But I do not see

234. 381 U.S. 301 (1965).
why the comparison must be made to a daily newspaper. Operation of a daily newspaper is wide open. Just as it is wide open to go out on the street corner and speak, subject to the normal time, place and matter restrictions for public nuisance and so forth.

Cable broadcasting is different. In order to operate a cable system through public rights of way or in order to transmit in the electromagnetic spectrum, you need governmental permission or right, which the government does not just confer on everybody. Many libertarians think that we should open up the electromagnetic spectrum. They say that we should let everybody have access and let the tort system handle any problems. The theory is if you jump on my property or interfere with my transmission, I'll sue you in tort.

The future of cyberspace law depends on whether you believe the proposition that no one owns cyberspace, which is Mr. Gold's proposition, or that everyone owns cyberspace, which is my proposition. Depending on which of those choices you make, you say that the First Amendment justifies actions to promote discussion, debate, create an informed electorate and to protect against suppression of speech, or you condone, encourage and create forms of private censorship.

PROF. FRANZESE: Thank you.

MR. HORWOOD: I would like to add a bit to Mr. Schwartzman's remarks. The debate over cable regulation as it has evolved started out with cable operators saying they were like newspapers and they ought to be treated like newspapers. Franchising authorities particularly say that cable operators are not like newspapers and that there is a scarcity in cable. They believe cable operators are like broadcasters and should be regulated as


236. See, e.g., Community Communication Co. v. Boulder, 660 F.2d 1370, 1375 (10th Cir. 1981) (noting that petitioners contend they are more like newspapers than wireless broadcasters).
such. The Supreme Court, first in *Los Angeles v. Preferred Communications Inc.*,\(^{237}\) and most recently in *Turner*, has said that cable is a different medium and it is going to have different rules found somewhere between newspapers and broadcast. There is some element of scarcity because you, as a speaker/programmer, cannot come in and say, "I want to speak and therefore I'm going to build a cable system." This is like printing a pamphlet.

Traditionally, there has been one monopoly cable operator. The 1992 Act was supposed to encourage more than one.\(^{238}\) The 1996 Act does.\(^{239}\)

If you do have more than one operator, and therefore competition, you are going to have two or three cable systems in a community, but not hundreds of cable operators. What we are going to have is majoritarian speech.

I think a vivid example of where public access was important as something different from majoritarian speech occurred during the Gulf War when the government position was being focused on and essentially promoted on all the networks as well as CNN and public broadcasting. The only program on television that was critical of the government position in the Gulf War was on public access channels.

As long as you're going to allow people to be editors who are going to look towards a majoritarian view, they are going to put on programming that will respond to people who criticize and are offended by the programming. Speakers will be excluded who may have something important to say. What would happen if you wound up with one or two organizations owning all the cable systems, and they've got to rely on tobacco companies for advertising? It is unlikely there will be programming critical of the tobacco industry.

MR. GOLD: I would like to add one thing. The Supreme Court has not seen the analogy between cable operators and news-

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papers, but much of the talk has been centered around the idea that in the print media you can publish a pamphlet or put out *Screw* magazine. In television, you cannot put your programming on unless you satisfy this one editor.

Back before leased access, a number of people in New York City wanted to do begin what was called Channel 1, but no broadcaster could under the standards. It was political, it was sexual, there were genitals everywhere, and it was very funny. Obviously they could not get on television, so they leased what was then known as Theater 4 on 4th Street in New York City's East Village. They had 125 to 150 seats, put in four television monitors, called it Channel 1, and sold tickets. It started out very small. Then they made more money and they had a third edition. Eventually Channel 1 became what was known as the *Groove Tube* which became a motion picture and was shown on lots of college campuses. It was the progenitor to *Kentucky Fried Movie*, which was John Landis' version of it. Even today, there are ways that you can get your message heard. You can have your say, even if the cable operator does not think it's subscribers want it.

MR. GOLD: We agree on something, all right.

AUDIENCE MEMBER: My question is for Mr. Schwartzman. Mr. Gold admitted that Time Warner, in fact, owns a lot of the cable channels or programs. You were discussing the idea of diversity, and I was just wondering whether this is a diversity of ownership idea? Is that what fosters the diversity for you, the diversity of the ownership, or is it in fact particular decisions about their programming that you feel inhibits the diversity?

MR. SCHWARTZMAN: Mr. Gold, I'm sure would say, and I agree, it is not a question of admitting ownership of channels. It's being proud of ownership of those channels, and that is important.

It is highly desirable that effective, well funded, technically adept, creative people have the resources of a company like Time-Warner to help produce interesting, important, imaginative, and generally mainstream programming. It is important to the economy, it is important to free speech, it is important to the marketplace
of ideas. But, if you simply view this as an anti-trust issue and an 
HHI index\textsuperscript{240} about technical ownership, you’re missing the First 
Amendment point.

The First Amendment point is that with ownership of the ex-
pressive means of communication comes an opportunity directly 
and indirectly to control the content.\textsuperscript{241} Examples abound and I do  
not want to get too far off on it. I think it is sufficient to point out 
that the means of insuring that there are different points of view is 
to use government to insure that different points of view are al-
lowed to be expressed.

One of the most important parts of the 1992 Act, which has not 
been touched by Congress, is section 19 which says that the verti-
cally integrated cable companies, like Time Warner, must make 
their programming available to competing video providers on a 
non-discriminatory basis.\textsuperscript{242} It was only after enactment of that 
provision that General Motors was willing to write the check and 
commit to launch the satellite which now gives us DirectTV, the 
new small dish competitor to cable that may give cable a run for 
its money and does give us some competition.\textsuperscript{243}

There is an interplay between economic regulation and structur-
al rules about ownership and content. I would simply observe that 
it is far more desirable to set up a structure on a content neutral 
basis to achieve diversity by allowing different voices to have ac-
cess than it is to impose after the fact content based intrusive mea-
sure to try to achieve the same kinds of objectives.

I’m a big advocate of the fairness doctrine, in something like the fairness doctrine for the future in a new multi-channel environ-

\begin{enumerate}
\item The Hefindahl-Hirschman Index is “calculated by summing the squares of the individual market shares of all the firms in [a] market. Markets with an HHI greater than 200 are highly concentrated.” United States v. Archer Daniels Midland Co., 781 F. Supp. 1400, 1413 (S.D. Iowa 1991).
\item Steele v. FCC, 770 F.2d 1192, 1201 (D.C. Cir. 1985) (Wald, J., dissenting) (noting that diversity of ownership is directly connected to diversity of ideas).
\item Barbara Rattle, \textit{Texas Firm to Begin Offering Digital Satellite TV Service in Two Utah Counties}, \textit{Enterprise}, May 2, 1994, § 1 (noting that DirectTV began in 1991 at the cost of $1 billion).
\end{enumerate}
I do think we should have structural measures to insure diversity.

PROF. FRANZESE: I'd like to thank all of our fine panelists.

244. The fairness doctrine, imposed by the FCC on radio and television broadcasters, required them to broadcast discussions of public issues. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 368 (1969). The doctrine required that broadcasters give adequate coverage to public issues and reflect all views. Id. at 377. In 1987, the FCC abolished the doctrine. 63 R.R.2d 541 (1987) (concluding that the fairness doctrine violated the First Amendment and contravened public policy).