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CONSTITUTIONAL LAW—FIRST AMENDMENT—A POST-SABLE LOOK AT INDECENT SPEECH ON THE AIRWAVES AND OVER THE TELEPHONE LINES

Theresa M. Sheehan

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INTRODUCTION

In recent years, Congress has attempted, with some difficulty, to regulate "indecent" speech disseminated through broadcast and recorded telephone messages. The telephone messages with which Congress has been concerned are generically referred to as "dial-a-porn."[1] Unlike obscene speech which receives no First Amendment protection,[2] and which, therefore can be regulated with impunity, indecent speech receives some First Amendment protection. The United States Supreme Court has specifically held that the First Amendment provides some protection for indecent dial-a-porn messages[3] and indecent radio and television broadcasts.[4] Thus, Congress has experienced some difficulty in attempting to regulate the dissemination of indecent broadcasts and telephone messages without imposing upon individuals' First Amendment rights.

This Note addresses the issue of whether recent regulations imposed by Congress and the FCC on the dial-a-porn and broadcast in-

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1. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 118 (1989).

2. Miller v. California, 413 U.S. 15, 24 (1973). The *Miller* test sets forth three criteria for determining whether or not material is obscene:

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

Id. at 24 (citations omitted).

For a further discussion of the evolution of the constitutional standard for obscenity and the obscene/indecent distinction see Jeffrey L. Reed, Recent Developments, *First Amendment Protected for Indecent Speech—Dial-A-Porn*, 57 TENN. L. REV. 339, 339-57 (1990), and George Koroghlian, Note, *Indecent Speech Relating to Commercial Telephone Messages Is Constitutionally Protected While Obscene Speech Is Not*—Sable Communications of California v. Federal Communications Commission, 20 SETON HALL L. REV. 547, 550-56 (1990).

3. *Sable*, 492 U.S. at 126 (holding that "[s]exual expression which is indecent but not obscene is protected by the First Amendment"); *see also* Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1296 (9th Cir. 1987) (stating that "[t]he First Amendment does not permit a flat-out ban of indecent as opposed to obscene speech"), *cert. denied*, 485 U.S. 1029 (1988).

4. FCC v. Pacifica Found., 438 U.S. 726, 743 (1978).

dustries comport with the First Amendment in light of the constitutional standard set forth in *Sable Communications, Inc. v. FCC*.[5] The *Sable* decision requires that the Government use the "least restrictive means" when it regulates indecent speech within the dial-a-porn medium to further the compelling interest of protecting children from gaining exposure to these messages.[6] The *Sable* test has recently been applied by two federal courts of appeals in reviewing dial-a-porn regulations[7] and by another federal court of appeals in reviewing a challenge directed at Congress' twenty-four hour ban on indecent radio and television broadcasts.[8]

The language of *Sable* indicates that lower courts should apply a strict scrutiny standard of review[9] to the regulation of indecent telephone messages. However, the two federal courts of appeals in the dial-a-porn cases upheld a regulatory scheme that was not the least restrictive means of regulating the speech and effectively applied a lower level of scrutiny to achieve this result.[10] On the other hand, the federal court of appeals that reviewed the regulation aimed at banning indecent broadcasts applied a strict scrutiny standard, and held that a total ban was not the least restrictive means.[11]

Section I of this Note discusses the distinction that the United States Supreme Court has drawn between indecent and obscene speech. This section also traces the legislative attempts at regulating indecent speech within both the broadcast and dial-a-porn mediums and examines the responses of the Supreme Court and other federal courts to these regulations.

Section II reviews three recent post-*Sable* federal courts of appeals cases that assess the constitutionality of the most recent attempts

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5. 492 U.S. 115 (1989).

6. *Id.* at 126. When the Court requires the "least restrictive means" be chosen to further a compelling interest, such language connotes a strict scrutiny standard. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 n.6 (1989).

7. Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992); Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

8. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("Act II"), *cert. denied*, 112 S. Ct. 1281-82 (1992).

9. The Court in Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989), stated, "[s]exual expression which is indecent but not obscene is protected by the First Amendment . . . . The Government may, however, regulate the content of constitutionally protected speech in order to promote a *compelling interest* if it chooses *the least restrictive means* to further the articulated interest." *Id.* (emphasis added); *see also supra* note 6.

10. *Dial Info. Servs. Corp.*, 938 F.2d at 1541-43 (2d Cir. 1991); *Information Providers' Coalition*, 928 F.2d at 879 (9th Cir. 1991).

11. *Act II*, 932 F.2d at 1509.

to regulate indecent material in both the broadcast and dial-a-porn mediums. This section focuses on the issue of whether the regulations imposed by Congress and the FCC are the least restrictive means to achieve the Government's compelling goal of protecting children from exposure to indecent speech.

Section III analyzes the three federal courts of appeals decisions, specifically focusing on the application of the *Sable* standard in each case. This Note addresses the issue of whether a strict scrutiny standard was the standard of review the United States Supreme Court intended to apply to the regulation of indecent speech in both the dial-a-porn and broadcast mediums and argues that the *Sable* test was incorrectly applied by the courts in the dial-a-porn cases,[12] and should not have been applied by the court in the broadcast case.[13] This Note further maintains that a proper application of the *Sable* test articulated as a strict scrutiny standard would have yielded a more speech-protective result in the two dial-a-porn cases. Finally, this Note suggests that Supreme Court precedent dictates that Congress' recent attempts to regulate the dissemination of indecent speech through the broadcast and dial-a-porn mediums violate the First Amendment.

I. BACKGROUND

A. *Indecent vs. Obscene Speech*

The recognition of the category of "indecent speech" is a recent development in First Amendment law. Although obscene speech is a category of speech that is not protected by the First Amendment,[14] the First Amendment does provide protection for sexually explicit non-obscene speech.[15] Congress has used the word "indecent" in its regu-

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12. *Dial Info. Servs. Corp.*, 938 F.2d at 1541; *Information Providers' Coalition*, 928 F.2d at 872.

13. *Act II*, 932 F.2d at 1508-09.

14. *See supra* note 2 and accompanying text.

15. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). *Renton* involved zoning ordinances aimed at controlling whether a movie theater could show sexually explicit adult movies depending upon its location. *Id.* at 43-44. The ordinances in *Renton* were challenged on the grounds that they violated the First Amendment because they were content-based regulations aimed at the suppression of protected speech and could not pass strict scrutiny. *Id.* at 47-48. The Court in *Renton* followed its earlier decision in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), and held in *Renton* that sexually explicit non-obscene speech of this nature is protected under the First Amendment. *Renton*, 475 U.S. at 46. However, the Court held that the ordinances were not content-based. *Id.* at 47. Rather, the Court found that the regulations were content-neutral. *Id.* at 47-50. It concluded that the Government was not concerned with the content of the films, but rather the secondary effects (i.e., prostitution, drugs, etc.) that a cluster of adult theaters might have on the surrounding community. *Id.* The Court found that because these ordinances

latory statutes as a separate category of language distinct from obscenity, the former being a category of protected speech.[16]

In *FCC v. Pacifica Foundation*,[17] the Court responded to an appeal by the FCC in which it claimed to have the power under title 18 section 1464 of the United States Code to regulate indecent language disseminated through the broadcast airwaves. While the FCC did not impose sanctions on the Pacifica Foundation for an afternoon broadcast of an allegedly indecent monologue,[18] the FCC found that the broadcast was indecent.[19] The Pacifica Foundation argued that the FCC could not regulate the airing of indecent broadcasts because indecent speech, unlike obscene speech, is protected by the First Amendment.[20]

The Court found that indecent speech has been distinguished from obscene speech based on the former's lack of prurient appeal.[21] The Court recognized that while prurient appeal is an element of ob-

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were unrelated to the suppression of free expression, they were correctly characterized as reasonable time, place, and manner restrictions to be reviewed under an intermediate scrutiny test. *Id.* at 46-47. The Court then found that the regulations passed intermediate scrutiny. *Id.* at 50-54. Additionally, in Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-18 (1975), the Court held that an ordinance forbidding a drive-in theater, visible to passersby, from airing movies containing nudity violated the First Amendment.

16. 18 U.S.C. § 1464 (1988). This statute reads as follows: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." *Id.*

Government control of broadcast content began with the Radio Act of 1927 which gave Congress control of the airwaves. Radio Act of 1927, ch. 169, 44 Stat. 1162.

17. 438 U.S. 726 (1978). See Reed, *supra* note 2, at 341 for a further discussion of the *Pacifica* case.

18. *Pacifica*, 438 U.S. at 730. A man was driving in the car with his son when the broadcast of George Carlin's monologue "Filthy Words" came on the radio. Angry that his son was exposed to this language, he filed a complaint with the FCC. *Id.*; *see also infra* notes 21, 32, 39 and accompanying text.

19. *Pacifica*, 438 U.S. at 741-42.

20. *Id.* at 742-47.

21. *Id.* at 739-41. Webster's New Universal Unabridged Dictionary defines prurient as "inclined or disposed to lewdness or lascivious thoughts . . . having lustful ideas or desires." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1451 (2d ed. 1983).

Pacifica argued that indecent speech is different from obscene speech based on the former's lack of prurient appeal in an attempt to make it as difficult to characterize language as indecent as it is to characterize it as obscene. Under the Court's analysis, if prurient appeal was an essential element for language to be indecent, the "Filthy Words" monologue would not have been indecent or obscene because it did not appeal to the prurient interest. *Pacifica*, 438 U.S. at 739-41. Rather, George Carlin's monologue merely listed "filthy" words and phrases throughout the broadcast. *Id.* at 751-55. Thus, if the Court agreed with Pacifica's interpretation, a radio station could not be sanctioned for the airing of such a broadcast because it would not be indecent or obscene within the meaning of 18 U.S.C. § 1464.

scene speech, it is not a characteristic of indecent speech,[22] which has been associated more with "nonconformance with the accepted standards of morality."[23]

In *Pacifica*, the Court held that indecent speech is entitled to constitutional protection.[24] Nevertheless, the Court concluded that such speech may be regulated to serve the compelling state interest of protecting children from exposure to indecent material.[25] According to the Court, it has long been recognized that there is a compelling state interest in protecting minors from offensive expressions of speech in an attempt to provide for their physical and psychological well-being.[26]

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22. Before *Pacifica*, the Court, in Hamling v. United States, 418 U.S. 87, 112-13 (1974), construed the term "indecent" as used in 18 U.S.C. § 1461 (the regulation forbidding the mailing of obscene materials) to be a synonym for obscene, as opposed to taking on a separate and distinct definition as it did in *Pacifica*. Section 1461, in relevant part, forbids the mailing of "obscene, lewd, lascivious, indecent, or vile" material. The statute at issue in *Pacifica*, 18 U.S.C. § 1464, contained similar language to § 1461, the provision at issue in *Hamling*. However, the *Pacifica* Court distinguished *Hamling's* interpretation of § 1461 from § 1464. The Court reasoned that the two statutes should be interpreted differently because one deals with printed materials sent through the mail and the other regulates the content of public broadcast, two areas that the Court has historically afforded different treatment. *Pacifica*, 438 U.S. at 741-42 & n.17. The Court found that because of the differences between the two mediums, one involving mail sent between individuals and one being more invasive, reaching many people at one time in the broadcast audience, Congress could not have intended to treat the regulation of the dissemination of offensive materials the same in each medium. *Id.*

The Court therefore concluded that the words "obscene, indecent, and profane" were to be read in the disjunctive, each having its own meaning. *Id.* at 739-40. This interpretation allowed the Court to dispose of the argument presented by Pacifica Foundation that "prurient appeal" is an essential component of indecent speech as is true for language to be characterized as obscene. *See also* Jay A. Gayoso, Comment, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871, 887 (1989).

23. *Pacifica*, 438 U.S. at 740; *see also* Reed, *supra* note 2, at 355.

24. *Pacifica*, 438 U.S. at 743, 748-49.

25. *Id.*

26. The courts have relied upon this compelling interest in determining that Congress and the FCC may regulate indecent speech disseminated through the broadcast medium as well as through interstate telephone communications. Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989); *Pacifica*, 438 U.S. at 748. Thus, Congress and the FCC have attempted to develop a regulatory scheme that would serve the compelling state interest of protecting children from gaining access to indecent speech while passing constitutional muster under the First Amendment by not infringing on adults' rights to hear indecent speech. The Court has been concerned that laws be sufficiently tailored so that adults will not be denied their free speech rights by limiting them to reading or hearing only those materials that are acceptable for children. *Sable*, 492 U.S. at 126-27 (citing Butler v. Michigan, 352 U.S. 380, 383-84 (1957)).

For cases discussing the proposition that harm to children is a compelling government interest see New York v. Ferber, 458 U.S. 747 (1982); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944).

B. *The Evolution of the Definition of "Indecent" Speech*

1. *Pacifica* and the Broadcast Definition of Indecency

The *Pacifica* case marks the only time the Supreme Court has addressed the issue of indecent broadcasts. However, in several cases before *Pacifica*, the FCC dealt with indecent broadcasts, in one case charging a station with violating title 18 section 1464 of the United States Code.[27] In that case, during a radio broadcast interview, Jerry Garcia, a member of the rock band the Grateful Dead, used the words "shit" and "fuck" in a repetitive manner.[28] The FCC fined the radio station one-hundred dollars.[29] This case set forth the first definition of indecency in broadcast as material that "is patently offensive by contemporary community standards" and without "redeeming social value."[30]

The FCC indecency standard upheld in *Pacifica* defined indecent broadcasts as those broadcasts that were "intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities" aired when children were likely to be in the audience.[31] The *Pacifica* Court then upheld the FCC's conclusion that the repetitive and deliberate use of the "Seven Dirty Words" as used in George Carlin's "Filthy Words" monologue[32] was indecent speech under this definition. Thus, the presence of the "Seven Dirty Words" in a broadcast became a key element in determining whether the broadcast was indecent.

In an effort to avoid airing potentially indecent broadcasts at a time when children may be in the audience, the FCC attempted to channel the airing of such broadcasts to the late evening hours. The FCC's channeling efforts were largely based on the law of nuisance. In

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27. *In re* WUHY-(FM), E. Educ. Radio, 24 F.C.C.2d 408, 412 (1970). For a more thorough discussion of FCC indecency cases before *Pacifica*, see Gayoso, *supra* note 22, at 891-92 n.138. For FCC cases post-*Pacifica* see Gayoso, *supra* note 22, at 896.

28. *Eastern Educ. Radio*, 24 F.C.C.2d at 412.

29. *Id.* at 415.

30. *Id.* at 410.

31. FCC v. Pacifica Found., 438 U.S. 726, 732 (1978); *see also In re* Citizens Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975) ("[T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.").

32. *In re* Citizens Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94 (1975). The Seven Dirty Words were; "shit," "fuck," "piss," "cunt," "cocksucker," "motherfucker," and "tits." *Id.* at 95. For the complete text of George Carlin's "Filthy Words" monologue, see *Pacifica*, 438 U.S. at 751-56.

certain contexts, the law of nuisance does not necessarily seek to prohibit an activity, but rather to regulate or control it by limiting it to certain times of the day or night in an effort to accommodate those who wish to engage in the activity, as well as those who are inconvenienced or disturbed by it.[33] Similarly, the FCC's goal was not to prohibit indecent broadcasts, but rather to "channel [them] to times of day when children most likely would not be exposed to [them]."[34] Thus, after *Pacifica*, the FCC concluded that indecent broadcasts could likely be aired in the late evening hours when children are probably not in the audience, as long as the program was accompanied by a warning.[35]

2. Post-*Pacifica*: The Generic Definition of Indecency

In April 1987, the FCC issued a public notice announcing a generic definition of broadcast indecency.[36] Previously, as part of its rulings in three broadcast cases,[37] the FCC had concluded that speech that is indecent must involve more than only the use of the "Seven Dirty Words." The FCC decided that the "Seven Dirty Words" indecency test provided a "very limited approach to enforcing the prohibition against indecent broadcasts."[38] Up to this point, the widespread view among broadcasters was that they could only be punished for indecent programming if it was very similar to George Carlin's monologue and was aired before 10:00 p.m.[39]

The generic standard announced by the FCC in the April 1987 public notice defined indecency as "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[40] In adopting this new test, the FCC recognized that the new generic test would be a more difficult approach than the

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33. *Pacifica*, 438 U.S. at 731-33.

34. *Id.* at 733.

35. *In re* Infinity Broadcasting Corp., 3 F.C.C.R. 930 (1987) (citing *In re* Citizens Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 100 (1975)).

36. Public Notice, New Indecency Enforcement Standards to Be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987).

37. *In re* Infinity Broadcasting Corp., 3 F.C.C.R. 930 (1987). There were two other broadcast cases reviewed with this case that involved complaints against Pacifica Foundation and Regents of University of California. While all three broadcasts by the FCC in these cases were found to be indecent, no sanctions were imposed upon any of these broadcast licensees. Rather, the FCC considered these rulings to be warnings to all licensees of what material would be considered indecent. *Id.* at 934.

38. *Infinity Broadcasting Corp.*, 3 F.C.C.R. at 930.

39. *Id.*

40. *Public Notice*, 2 F.C.C.R. at 2726.

"Seven Dirty Words" test because the FCC and broadcasters could no longer make determinations of indecency based on specific words.[41]

However, the FCC continued its reliance on the nuisance theory, concluding that broadcasts falling within the new definition of indecency would only be actionable at a time of day when there was "a reasonable risk that children may be in the audience."[42] The FCC concluded that this approach not only served the compelling Governmental interest in protecting children from indecent material, but also accommodated the interests of parents who might want their children to see or hear such broadcasts, broadcasters who want to air indecent material, and adults who would like to be able to listen to indecent, but non-obscene airings.[43] Finally, in October 1988, Congress passed legislation directing the FCC to enforce a twenty-four hour ban on indecent broadcasts.[44]

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41. *Infinity Broadcasting*, 3 F.C.C.R. at 930.

42. *Id.* The FCC found that there was evidence that significant numbers of children were still in the audience at 10:00 p.m. *Id.* at 930-31.

Subsequently, in December of 1987, the Commission issued a memorandum opinion and order in response to requests by several parties to clarify various aspects of its April 1987 rulings. In that opinion the FCC upheld the April 1987 rulings. *Id.* at 930. However, it was persuaded by the petitioners' argument that some specific hour must be established after which indecent broadcasts could safely be aired. *Id.* at 931. Accordingly, the Commission determined that 12:00 midnight was its "current thinking" as to when it was reasonable to expect that the number of children in the audience was minimized and parental supervision over children that remained in the viewing and listening audience was more likely. *Id.* at 937-38 n.47.

43. *Id.* at 937-38 n.47. In her concurring opinion, Commissioner Patricia Diaz Dennis posed the question of whether choosing 12:00 midnight over some earlier time (10:00 or 11:00 p.m.) was a reasonable time, place, and manner restriction or whether it was, in fact, reducing adult programming to a level fit only for children in contravention of the holding in Butler v. Michigan, 352 U.S. 380, 383 (1957). *Id.* at 938. She pointed to the fact that the Commission did not set forth any statistics, studies, or other specific information to support its conclusion that 12:00 midnight, as opposed to 10:00 or 11:00 p.m., was the appropriate time after which indecent material may be aired. *Id.* She argued that the Commission only stated in dicta that its "current thinking" was that 12:00 midnight is appropriate "based upon information currently available to the Commission," without ever clarifying what information it currently had. *Id.* at 938-39; *see also* Action for Children's Television v. FCC, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988) ("Act I") (rejecting the suggestion made in the FCC's 1987 Order that time channeling can be viewed as a valid time, place, and manner restriction). The court in *Act I* suggested that because time channeling is a content-based regulation of speech, it should be reviewed under strict scrutiny. *Act I*, 852 F.2d at 1343 n.18.

44. Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988). See *infra* notes 114-17 and accompanying text for a more thorough discussion of the twenty-four hour ban imposed on indecent broadcasts.

C. *The Dial-A-Porn Industry: Congress' Attempt to Regulate Indecent Telephone Messages*

The dial-a-porn industry emerged in 1983 and has been a tremendous financial success since its inception.[45] Dial-a-porn is the generic name given to recorded telephone messages which offer the listener a form of sexually explicit entertainment for a fee.[46] There have been several attempts to regulate this industry so as to protect minors from gaining access to these types of salacious messages.

1. Early Regulation of Dial-A-Porn

In response to the widespread opposition against the dial-a-porn industry, Congress began its first attempt to regulate dial-a-porn.[47] In 1983, Congress amended the Communications Act of 1934 to apply to dial-a-porn providers.[48] This amendment made it a crime to communicate directly, or by recording, any obscene or indecent message for commercial purposes to anyone under eighteen years of age.[49] Under this provision, a provider of obscene or indecent messages had a defense to prosecution if the provider restricted minors' access to its messages in accordance with FCC procedures.[50] The FCC then responded to the amendment by promulgating regulations that would function as "safe harbor defenses" for dial-a-porn providers.[51] Under this scheme, a provider was not criminally liable if it restricted access to indecent communication by either operating only between the hours of 9:00 p.m. and 8:00 a.m. or requiring payment by credit card before transmission of the messages.[52] The first restriction was intended to apply to recorded dial-a-porn messages, whereas the latter was intended to regulate sexually explicit live telephone messages.[53]

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45. Sable Communications, Inc. v. FCC, 492 U.S. 115, 120 n.3 (1989) (citing Carlin Communications, Inc. v. FCC, 787 F.2d 846, 848 (2d Cir. 1986) ("Carlin II")).

46. *Sable*, 492 U.S. at 118 n.1. (citing Elizabeth J. Mann, Comment, *Telephone, Sex, and the First Amendment*, 33 UCLA L. REV. 1221, 1223 (1986)). For further discussion and statistics on number of calls to dial-a-porn see Cindy L. Petersen, Note, *The Congressional Response to The Supreme Court's Treatment of Dial-a-Porn*, 78 GEO. L.J. 2025, 2026 (1990).

47. Federal Communication Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8 (a), 97 Stat. 1469, 1469-70 (current version at 47 U.S.C. § 223 (Supp. II 1990)).

48. *Id.*

49. *Id.*

50. *Id.* §§ 8(a)(3), 223(b)(2).

51. Enforcement of Prohibition Against the Use of Common Carriers for the Transmission of Indecent Material, 49 Fed. Reg. 24,996, 25,001-03 (1984) (to be codified at 47 C.F.R. § 64.201).

52. *Id.*

53. Carlin Communications, Inc. v. FCC, 749 F.2d 113, 117-19 (2d Cir. 1984)

2. The *Carlin* Trilogy

In three cases, Carlin Communications, Inc., at the time one of the largest and most lucrative dial-a-porn providers,[54] petitioned the Court of Appeals for the Second Circuit to review various statutes and regulations enacted by Congress and the FCC aimed at controlling the dissemination of indecent dial-a-porn messages.[55] In the *Carlin* trilogy, the Second Circuit set forth a constitutional standard by which dial-a-porn regulations should be reviewed.[56] The standard was first set forth in *Carlin I*[57] and was later upheld in *Carlin II*[58] and *Carlin III*.[59]

The Second Circuit Court of Appeals rejected the argument that an intermediate level of scrutiny should be applied when reviewing dial-a-porn regulations. It concluded that the regulations could not be reviewed under the intermediate scrutiny test applied to reasonable time, place, and manner restrictions[60] because that test may only be applied when the government regulation is content-neutral, specifically, when the Government's reasons for regulating the speech are

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("Carlin I"). Restrictions placed on live dial-a-porn messages have not been an issue since the *Carlin I* decision, when the Second Circuit upheld the FCC's regulation which required an individual to pay by credit card to hear these messages. *Id.* The *Carlin I* court noted that the payment by credit card requirement for live dial-a-porn providers would not work with recorded dial-a-porn messages because recorded messages presumably do not have a live operator available to take credit card numbers. *Id.* The court agreed with the FCC's reasoning that children were likely to be deterred from gaining access to the live message because children under 18 years of age would not be issued credit cards. *Id.* at 117.

54. Carlin Communications, Inc. v. FCC, 787 F.2d 846, 848 (2d Cir. 1986) ("Carlin II"). Carlin Communications received two cents for each call, local or long distance, and the remainder went to the telephone companies.

55. Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir.) ("Carlin III"), *cert. denied*, 488 U.S. 924 (1988); Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) ("Carlin II"); Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) ("Carlin I").

56. *Carlin I*, 749 F.2d at 121.

57. *Id.*

58. *Carlin II*, 787 F.2d at 855.

59. *Carlin III*, 837 F.2d at 555.

60. See Ward v. Rock Against Racism, 491 U.S. 781, 790, 798-802 (1989), for a discussion of reasonable time, place, manner restrictions. *See also* Armando O. Bonilla, Note, *Municipal Noise Ordinance Imposing Mandatory Adherence to Sound Amplification Guidelines Constitutes a Valid Time, Place, or Manner Restriction on Protected Speech—* Ward v. Rock Against Racism, 491 U.S. 781 (1989), 1 SETON HALL CONST. L.J. 451 (1991); Michael R. Manley, Note, Ward v. Rock Against Racism: *How Time, Place and Manner Further Restrict the Public Forum*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 151 (1991); Carney R. Shegerian, *A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions*, 25 LOY. L.A. L. REV. 453 (1992).

unrelated to the content of the speech.[61] Here, the court found that the regulations were content-based restrictions. The court maintained that the restrictions directed at regulating dial-a-porn were content-based because they did not apply to all "dial-it" services, but only those delivering indecent messages.[62] Therefore, the court concluded, a strict scrutiny standard of review was warranted. Under strict scrutiny review, the Government regulation can only be upheld if it is the "least restrictive means" to further a compelling goal such as the Government interest in protecting children.[63]

a. *Carlin I*

Arguing that the new regulatory scheme violated the First Amendment, Carlin Communications, Inc. challenged the first set of FCC regulations in *Carlin I*. The *Carlin I* court rejected time channeling as a constitutionally acceptable means of regulating dial-a-porn.[64] The court opined that time channeling did not further the Government's compelling interest because the regulations denied adults access to the service during certain hours, but the opportunity remained open for children to call these numbers during the hours in which access was available.[65]

Additionally, the court found that time channeling was not the least restrictive means available and instructed the FCC to explore other options such as blocking and access codes.[66] The court directed the FCC to examine these alternatives even though it agreed with the FCC that these alternatives might be technically and financially burdensome.[67] The court reasoned that such methods would avoid denying access to dial-a-porn for adults and would better serve the government's interest in preventing children from gaining access to

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61. Carlin Communications, Inc. v. FCC, 749 F.2d 113, 120-21 (2d Cir. 1984) ("Carlin I").

62. *Id.* at 121; *Carlin II*, 787 F.2d at 85; *Carlin III*, 837 F.2d at 555.

63. *Carlin I*, 749 F.2d at 121; *Carlin II*, 787 F.2d at 855; *Carlin III*, 837 F.2d at 555.

64. *Carlin I*, 749 F.2d at 123.

65. *Id.* at 121.

66. *Id.* at 122-23. Under a system of voluntary blocking, an individual can contact the telephone company and request that their household telephones have access blocked to all numbers with a certain three digit prefix, the same one which has been assigned by the telephone company to dial-a-porn providers. See *infra* notes 151-71 and accompanying text for a further discussion of blocking mechanisms. Under the access code method a dial-a-porn provider would issue a personal identification number or access code number to a customer upon verification that the individual seeking the access code is 18 years of age or older. *Id.* at 123.

67. *Id.*

these messages.[68]

b. *Carlin II*

In 1985, the Court of Appeals for the District of Columbia Circuit in *Carlin II* reviewed the constitutionality of the FCC's new regulatory scheme which the FCC developed as an alternative to time channeling.[69] Under the new scheme, an adult wishing to hear a dial-a-porn message had to obtain an access code by submitting a written application to the service provider or making payment by credit card before access could be granted.[70]

Applying the same strict scrutiny standard employed in *Carlin I*,[71] the court rejected the access code system, holding that it was not the least restrictive means to regulate the dial-a-porn industry in New York.[72] The court reasoned that because the local telephone company used a one-way transmission system, and a two-way transmission system was required to make the access code method a workable alternative, the access code system was not the least restrictive means available.[73] The court concluded that the access code method was not technologically feasible and might force the Carlin dial-a-porn providers out of business in New York.[74] Consequently, the court directed the FCC to further investigate the feasibility of a blocking system.[75]

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68. *Id.*

69. Carlin Communications, Inc. v. FCC, 787 F.2d 846, 847 (2d Cir. 1986) ("Carlin II").

70. Enforcement of Prohibition Against the Use of Common Carriers for the Transmission of Obscene Materials, 50 Fed. Reg. 42,699, 42,705, 42,706 (1985).

71. Carlin Communications, Inc. v. FCC, 749 F.2d at 121. The court used the strict scrutiny test announced in *Carlin I* as the standard of review for the regulations promulgated by the FCC on dial-a-porn because content-based restrictions are scrutinized more closely. The standard set forth by the court stated that "[t]he government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression." *Id.* at 121. See *infra* notes 125, 213 and accompanying text for a discussion of the application of strict scrutiny to content-based regulations.

72. *Carlin II*, 787 F.2d at 856.

73. *Id.* at 854-56.

74. *Id.* at 848.

75. *Id.* at 856. The Commission had also argued that a system of "scrambling" would be an effective means to regulate dial-a-porn. Under this scheme, the message would be scrambled and adults desiring to access the service would be required to install a decoding device on their phone that would unscramble the message. However, the court rejected this option because it found that such a system would impose an unfair burden on adults wishing to use dial-a-porn by requiring them to purchase descramblers at a cost of $15.00 to $20.00 each. The Commission recognized that the effect of such a regulatory scheme would impose a twenty-four hour restriction on individuals who want to hear these

c. *Carlin III*

Finally, in *Carlin III*,[76] the Second Circuit upheld the FCC's dial-a-porn regulatory scheme as set forth in its third report and order released in May 1987.[77] The new scheme had maintained the access code and credit card provisions, but was amended to include two additional defenses: message scrambling and billing notification.[78]

Carlin Communications challenged the FCC's third attempt at regulating the dial-a-porn industry. Carlin Communications argued that these regulations, in particular the requirement of a written application to obtain an access code, had a "chilling effect" on the First Amendment rights of adults.[79] Carlin Communications feared that many adults would forego the opportunity to exercise their First Amendment right to hear these messages because they would not want their identities disclosed by way of government subpoena power.[80] Despite the petitioner's protestations, the court found that these regulations did not unreasonably restrict adult access and that the compel-

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messages, but do not have the proper devices. *Id.* at 853. See *infra* notes 151-71 and accompanying text for a description of the blocking mechanisms.

76. Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir.) ("Carlin III"), *cert. denied*, 488 U.S. 924 (1988).

77. Enforcement of Prohibitions Against Use of Common Carriers For Transmission of Obscene Materials, 52 Fed. Reg. 17,760 (1987).

78. Billing notification is the process by which the message provider requests in writing to the carrier that calls to the message service be identified on a customer's bill as being made to an adult message service. Under this scheme, the dial-a-porn provider must comply with the billing notification requirement to be able to successfully assert any of the other safe harbor defenses to prosecution. *See In re* Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 F.C.C.R. 2714, 2721-22 (1987); *see also* 47 C.F.R. § 64.201(a)(5) (1992).

The FCC justified its retention of the access code system by pointing out that New York would soon have the two-way transmission capabilities required for implementation. *Carlin III*, 837 F.2d at 554 (citing *In re* Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 F.C.C.R. 2714, 2720 (1987)). Furthermore, neither the court nor the Commission was convinced by the argument that the plan was overly intrusive because adults were required to disclose their identity to obtain access codes for the provider. *See id.* at 557; *see also In re* Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 F.C.C.R. at 2724 n.24. The Commission also argued that its additional defense of scrambling "was less expensive than customer premises blocking" and suggested that "the message provider could use the sale of descramblers as an additional business opportunity." *Carlin III*, 837 F.2d at 554-55.

79. *Carlin III*, 837 F.2d at 557.

80. *Id.* In one instance, the United States Attorney for the District of Utah obtained indictments against Carlin Communication employees for violation of 47 U.S.C. § 223(a) and 18 U.S.C. §§ 1462, 1465. The indictments were eventually dismissed. The United States Attorney had attempted to subpoena Carlin Communications and the telephone company's list of individuals who had accessed the dial-a-porn numbers in the process of obtaining indictments. *Id.* at 557 n.4.

ling government interest in protecting minors could not, at this time, be served by a less restrictive means.[81] However, the court instructed the FCC to consider other possibly less restrictive means of regulating dial-a-porn, such as beep-tone devices[82] or blocking schemes, if and when they became technologically feasible.

3. The Telephone Decency Act: Congress' Total Ban on Indecent Dial-a-Porn Messages and the Supreme Court's Response in *Sable*[83]

In 1988, less than one year after the *Carlin III* decision, Congress amended the Communications Act of 1934 and superseded the regulations upheld in *Carlin III* with a new section 223 (Telephone Decency Act).[84] The new version of section 223 completely banned the dissemination of all indecent and obscene messages transmitted by interstate telephone for profit.[85]

The judicial response to Congress' actions initiating a total ban followed closely upon the new section's enactment. The United States District Court for the Southern District of New York was the first court to face a challenge to Congress' total ban. In *Roe v. Meese*,[86] the court, relying on *Carlin III*,[87] granted the plaintiffs' request to enjoin the defendant (United States Attorney General Meese) from enforcing section 223 as it related to indecent speech.[88] At the same time, Sable

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81. *Carlin III*, 837 F.2d at 557.

82. Beep-tone devices require that a beep-tone occur at the beginning of each sexually explicit recorded message. The customer would have a device installed at their premises which would detect the beep-tone and automatically terminate the call. *See In re* Enforcement of Prohibitions Against Use of Common Carriers for Transmission of Obscene Materials, 2 F.C.C.R. 2714, 2718 (1987) (discussing beep-tone devices as a way to reduce the number of children reaching dial-a-porn providers by phone).

83. Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989).

84. 47 U.S.C. § 223(b) (1988). The amended statute provided in relevant part:

> (b)(2) Whoever knowingly-
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> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for any activity prohibited by clause (i); shall be fined not more than $50,000 or imprisoned not more than six months or both.

Id.

85. School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 423 (1988) (codified as amended at 47 U.S.C. § 223 (1988)).

86. 689 F. Supp. 344 (S.D.N.Y. 1988).

87. Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir.) ("Carlin III"), *cert. denied*, 488 U.S. 924 (1988).

88. Roe v. Meese, 689 F. Supp. 344, 347-48 (S.D.N.Y. 1988). In *Roe*, the plaintiffs

Communications of California, a branch of Carlin Communications, Inc., was presenting its own challenge to the Telephone Decency Act in the United States District Court for the Central District of California.[89] Sable's First Amendment challenge to the constitutionality of the Telephone Decency Act was eventually heard by the United States Supreme Court.

In *Sable*,[90] the Supreme Court upheld section 223(b) as it applied to obscene speech, but struck it down as it pertained to indecent speech.[91] The Court held that indecent dial-a-porn messages are protected by the First Amendment and, therefore, a total ban of such messages was unconstitutional.[92] The Court, applying strict scrutiny, reasoned that the Government may regulate the content of constitutionally protected speech to serve a compelling interest if it chooses the least restrictive means available to achieve its goal.[93] The Court recognized that protecting minors from hearing these messages is a compelling government interest.[94] However, to withstand constitutional scrutiny, the Government must serve this interest " 'by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.' "[95] The Court concluded that a total ban was " 'legislation, [that was] not reasonably restricted to the evil with which it is said to deal.' "[96] Instead, the legislation had reduced what adults may hear to that which is appropriate for children in violation of their First Amendment free speech rights.[97] The Court went on to distinguish *Pacifica*[98] because it applied to broadcasts, which are a more invasive form of communication.[99] The Court further noted that the *Pacifica* Court was not faced with the issue of a total ban, but rather an attempt to channel the times at which indecent broadcasts could be aired.[100]

The Court found insufficient evidence in the congressional record

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were providers of sexually explicit, live telephone conversations paid for in advance by credit card. *Id.*

89. Sable Communications, Inc. v. FCC, 692 F. Supp. 1208 (C.D. Cal. 1988).
90. Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989).
91. *Id.* at 117.
92. *Id.* at 126.
93. *Id.*
94. *Id.*
95. *Id.* (citations omitted).
96. *Id.* at 127 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).
97. *Butler*, 352 U.S. at 383-84.
98. FCC v. Pacifica Found., 438 U.S. 726 (1978).
99. Sable Communications, Inc. v. FCC, 492 U.S. 115, 127 (1989).
100. *Id.*

to show that the FCC's most recent regulations were ineffective.[101] Rather, the Supreme Court found evidence in the record to support the FCC's conclusion that access codes, credit cards, and scrambled messages would be an effective means to achieve the Government's compelling interest if they were given an opportunity to work.[102] In fact, several interest groups offered testimony at a House hearing and expressed a desire to try out the FCC's most recent regulatory scheme.[103] The Supreme Court found this testimony quite persuasive.[104]

When the Supreme Court struck down the amendment instituting a total ban, the dial-a-porn industry was essentially left unregulated.[105] This is because the 1988 amendment to section 223(b) replaced the FCC regulations which were formerly part of that section. To comport with the standard set forth in *Sable*, Congress was now left with the task of drafting a statute that would serve its compelling interest of protecting children from indecent dial-a-porn messages while at the same time finding the least restrictive means to achieve this goal.

II. PRINCIPAL CASES

A. *Broadcast*: Action For Children's Television v. FCC ("Act II")[106]

In *Action for Children's Television v. FCC* ("*Act I*"),[107] several broadcasters petitioned the United States Court of Appeals for the District of Columbia for review of the FCC order that adopted a generic definition of indecency.[108] The petitioners alleged that the order was unconstitutionally vague and overbroad.[109] On appeal, the United States Court of Appeals for the District of Columbia upheld the Com-

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101. *Id.* at 130 n.8. See *infra* notes 114-17 and accompanying text for a discussion of the most recent regulations on broadcast indecency.

102. In *Sable*, the Court stated that in the hearings on H.R. 1786 (The Telephone Decency Act), "the Committee heard testimony from the FCC and other witnesses that the FCC rules would be effective and should be tried out in practice." *Id.* at 130 n.9.

103. *Telephone Decency Act of 1987: Hearing on H.R. 1786 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 100th Cong., 1st Sess. 129-30, 132-33, 195-96, 198-200, 230-31 (1987).

104. *Sable*, 492 U.S. at 130; *see also* Petersen, *supra* note 46, at 2041.

105. Petersen, *supra* note 46, at 2042.

106. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("Act II"), *cert. denied*, 112 S. Ct. 1281-82 (1992).

107. 852 F.2d 1332 (D.C. Cir. 1988) ("Act I").

108. *Id.* at 1332. See *supra* notes 27-44 and accompanying text for a discussion of the generic definition of indecency and a general discussion of the evolution of the definition of indecency.

109. *Act I*, 852 F.2d at 1334-35.

mission's generic definition of indecency.[110] However, it also found that the FCC did not give sufficient consideration as to what hours children were more likely to be in the broadcast audience when it established the time after which indecent broadcasts could be aired.[111] The court instructed the FCC to reconsider "after a full and fair hearing, . . . the times at which indecent material may be broadcast."[112] The court stated that the FCC had failed to adduce evidence sufficient to support its time channeling efforts, especially in light of the First Amendment interests involved.[113]

However, before the FCC could complete this task, Congress was successful in pursuing its own agenda for protecting the young from exposure to indecent broadcasts. On October 1, 1988, two months after the *Act I* decision, a rider was attached to the FCC's Budget Appropriations Bill demanding that the provisions of title 18 section 1464 of the United States Code, prohibiting indecent broadcasts, be enforced on a twenty-four hour-a-day basis.[114]

In accordance with the legislative mandate, the Commission abandoned its plans to create a thorough record to support its channeling efforts[115] and adopted a new rule banning indecent broadcasts on a twenty-four hour basis.[116] The District of Columbia Circuit stayed enforcement of the ban pending judicial review.[117]

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110. *Id.* at 1334.

111. Prior to the imposition of the twenty-four hour ban, the FCC determined that 12:00 midnight was the time when the risk of children being in the broadcast audience would be minimized. *See supra* note 42.

112. *Act I*, 852 F.2d at 1344.

113. *Id.* at 1335. The court also criticized the FCC's use of statistics for the age group of 12 to 17 for its channeling purposes because in the FCC's brief to the Supreme Court in *Pacifica*, it had cited the relevant age group as only including children under 12. *Id.* at 1341-42. The *Act I* court instructed the FCC that if it planned on changing the age group from "under twelve" to "twelve [through] seventeen," it should explain its reasons for so doing. *Id.* Additionally, the court stated that if the FCC intended to continue "under twelve" to be the age group of concern, it should obtain data and statistics reflecting the viewing or listening habits of that section of the population. *Id.*

114. Department of Commerce, Justice, and State, The Judiciary and Related Agencies Appropriation Act, 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988); *see also In re* Enforcement of Prohibition Against Broadcast Obscenity and Indecency, 65 Rad. Reg. 2d (P & F) 1038 (Dec. 23, 1988). See *supra* note 16 for language set forth in 18 U.S.C. § 1464.

115. Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464, 4 F.C.C.R. 457 (1988).

116. *Id.*; *see also* Department of Commerce, Justice, and State, The Judiciary and Related Agencies Appropriation Act 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

117. *See* Action for Children's Television v. FCC, No. 88-1916 (D.C. Cir. Sept. 13,

Action for Children's Television v. FCC ("*Act II*"),[118] presented a First Amendment challenge to the FCC's new Order, banning all indecent radio and television broadcasts.[119] The petitioners, a group of broadcasters, industries, and public interest groups, argued that Supreme Court and federal courts of appeals precedent dictated that a total ban on indecent speech in any medium is unconstitutional.[120] They further asserted that a total ban on indecent broadcasts would not satisfy the strict standard announced by the Supreme Court in *Sable*.[121] The District of Columbia Circuit, in *Act II*, agreed with the petitioners.

The *Act II* court held that neither Congress' nor the FCC's actions imposing a total ban on radio and television broadcasts could pass constitutional muster.[122] The court stated that it was not ignoring Congress' legislative authority to impose a total ban. However, because a total ban was unconstitutional, the court noted that Congress' actions could not prohibit the FCC from creating a "safe harbor" defense to the regulation of indecent broadcasts, such as

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1989); *In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 4 F.C.C.R. 8358 (1989).

Before briefing and oral argument on the merits of the ban, the Supreme Court rendered its decision in *Sable* which declared that a ban on indecent telephone messages was unconstitutional. Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989). The FCC sought and obtained a remand from the D.C. Circuit "in order to assemble data supporting a total ban." Action for Children's Television v. FCC, No. 88-1916 (D.C. Cir. Sept. 13, 1989); *see also In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 4 F.C.C.R. 8358 (1989). The FCC believed that the *Sable* decision left the door open for a twenty-four hour ban on indecent broadcasts if no alternative means could be found that would adequately shield minors from exposure to indecent broadcasts. Finally, the Commission solicited public comment on the validity of the twenty-four hour ban. *Id.* at 8364; *see also Act II*, 932 F.2d at 1507.

The Commission later issued a report concluding that a twenty-four hour ban was constitutional in light of the *Sable* decision because there was a "reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times." *Act II*, 932 F.2d at 1507 (citing *In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297 (1990)). Thus, the Commission concluded that there was no alternative that could effectively serve the Government's compelling interest of protecting children from seeing and hearing such material. *Id.*

118. 932 F.2d 1504 (D.C. Cir. 1991) ("Act II"), *cert. denied*, 112 S. Ct. 1281-82 (1992).

119. *Act II*, 932 F.2d at 1508; *see In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297 (1990).

120. *Act II*, 932 F.2d at 1508-09. The petitioners cited Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989), and Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("Act I"), in support of their argument that the Government may not completely suppress indecent speech in any medium, and therefore a total ban could not be justified.

121. *Act II*, 932 F.2d at 1508.

122. *Id.* at 1509.

providing a broadcaster with a defense to prosecution for the broadcast of indecent programming when indecent material is aired late at night when children are less likely to be in the audience.[123]

The *Act II* court stated that in *Act I* it held that indecent speech was protected by the First Amendment, and could be regulated by the FCC only if the regulation was made with respect for the value of free speech and peoples' rights to both say and hear what they choose.[124] In relying on the constitutional standards set forth in *Sable* and applied in *Act I*, the *Act II* court concluded that, because this was a content-based restriction, it should apply a strict constitutional standard.[125] Under this standard, the Government must choose the least restrictive means to serve its interest in protecting children.[126]

The court ruled that implicit in its holding in *Act I* was the notion that a total ban would not survive this level of scrutiny.[127] To further support its reliance on the reasoning of *Act I*, the court determined that the Supreme Court's decision in *Sable* bolstered "the precedential force of *Act I*,"[128] in that *Sable* struck down a total ban on indecent dial-a-porn messages, reaffirmed the protected status of indecent speech, and confirmed the necessity of applying a strict constitutional standard to government regulations aimed at the content of such speech.[129] The *Act II* court noted that the *Sable* Court had stated that " '[s]exual expression which is indecent but not obscene is protected by the First Amendment,' " and the Government may " 'regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the *least restrictive means* to further the articulated interest.' "[130]

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123. *Id.* at 1509-10. The Court stated, "just as the FCC may not ignore the dictates of the legislative branch, neither may the judiciary ignore its independent duty to check the constitutional excesses of Congress." *Id.*; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

124. *Act II*, 932 F.2d at 1508 (citing Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("*Act I*")).

125. *Id.* at 1509. When the Government regulates speech based on its content, the government must use the least restrictive means to further a compelling government interest. Here the regulations at issue are content-based because only indecent telephone messages are subject to the strict regulations. Other dial-it services are not subject to these regulations. See *infra* note 213 for a further discussion of strict scrutiny as applied to content-based regulations.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (emphasis added) (quoting Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989)).

Finally, the court pointed out that before Congress passed the appropriations rider, even the FCC had supported the court's position. It was the FCC's view in 1988 that to comport with First Amendment standards, title 18 section 1464 of the United States Code should not be interpreted to mean that indecent material could never be broadcast.[131]

Thus, the District of Columbia Circuit Court of Appeals, having struck down an act of Congress as unconstitutional, left the FCC in the same position it was in after *Act I* and before the passage of the appropriation's rider containing the instruction to the FCC to institute the twenty-four hour ban. Once again, the court instructed the FCC to resume the plan it had previously abandoned, which was to " 'redetermin[e], after a full and fair hearing, . . . the times at which indecent material may be broadcast.' "[132]

B. *The Helms Amendment: Congress' Attempt to Regulate Dial-a-Porn* [133]

After *Sable*, some members of Congress were anxious to "clamp down" on the dial-a-porn industry.[134] In 1989, President Bush signed into law an amendment to section 223 of the Communications Act of 1934 known as the Helms Amendment.[135] Section 223 is composed

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131. *Id.* (citing Memorandum Opinion and Order, 3 F.C.C.R. 930, 931 (1987)).

132. *Id.* at 1510 (quoting Action for Children's Television, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*Act I*")). Since the *Act II* decision, President Bush signed a bill (H.R. REP. No. 2977, 102nd Cong., 2d. Sess. (1992)) on August 26, 1992, directing the FCC to promulgate regulations to prohibit the broadcasting of indecent programming between the hours of 6:00 a.m. and 10:00 p.m. by any public radio station or public television station that goes off the air at or before midnight. For all other radio and television stations, the new law demands that they refrain from airing indecent programs between the hours of 6:00 a.m. and 12:00 midnight. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 106 Stat. 954 (1992).

In October of 1992, the FCC began to implement the congressional mandate. *See* FCC Proceeding to Implement Regulations To Restrict Broadcasting Of Indecent Programming, 1992 FCC Lexis 5392 (September 17, 1992). See also Gillett Communications of Atlanta, Inc. v. Becker, 807 F. Supp. 757 (N.D. Ga. 1992), for a case applying the new time channeling regulations to a television broadcast.

The *Act II* court also instructed the FCC to address other related concerns. For example, the court requested the FCC to more clearly define the following terms with respect to the definition of indecency: relevant age group, reasonable risk, children, and scope of Government interest. Action for Children's Television v. FCC, 932 F.2d 1504, 1510 (D.C. Cir. 1991) ("*Act II*"), *cert. denied*, 112 S. Ct. 1281-82 (1982).

133. 47 U.S.C. § 223(b), (c) (Supp. II 1990).

134. *See* H.R. REP. No. 247, 101st Cong., 1st Sess., pt. 4, at 585 (1989).

135. 47 U.S.C. § 223(b), (c) (Supp. II 1990). The amendment provided in relevant part

(b)(2) Whoever knowingly-

of two parts: a statutory section 223(c) promulgated by Congress and a regulatory section 223(b) promulgated by the FCC. The scheme embodied in the 1989 amendment to section 223(c) has been widely referred to as "reverse blocking." Reverse blocking is the process by which a telephone company will, at its central office, prevent calls from going through to specified exchanges or numbers unless the customer affirmatively requests access.[136] Under section 223(c), telephone companies are required to implement reverse blocking where technically feasible, only if they provide billing and collection services to indecent dial-a-porn providers.[137] Telephone companies are shielded from prosecution for allowing an individual under eighteen years of age to gain access to a dial-a-porn message under this statute if they have acted in good faith in determining whether or not to block or permit access to a dial-a-porn provider.[138]

If the dial-a-porn provider bills and collects through the telephone company, they must comply with the FCC regulations in section 223(b) and the reverse blocking requirement in section 223(c) in order to have a defense to prosecution.[139] The FCC has noted that compliance with the regulations in section 223(b) is necessary to effectuate the goal of the statutory scheme embodied in 223(c).[140]

(A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000, or imprisoned not more than six months, or both. . . .

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation. . . .

(c)(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) of this section from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

Id.

136. *In re* Regulations Concerning Indecent Communications by Telephone, 5 F.C.C.R. 4926, 4935 n.16 (1990).

137. 47 U.S.C. § 223(c) (Supp. II 1990). See *supra* note 135 for text of § 223(c)(1).

138. *Id.* § 223(c)(2)(A), (B).

139. *Id.* § 223(b).

140. *In re* Regulations Concerning Indecent Communications By Telephone, 5 F.C.C.R. 4926, 4926-34 (1990).

In its June 29, 1990 Report and Order, the FCC also responded to the *Sable* decision by implementing new regulations at the direction of Congress pursuant to section 223(b). These new regulations, promulgated by the FCC, are "safe harbor defenses" for dial-a-porn providers.[141] Under the FCC regulations, a dial-a-porn provider will avoid liability if it meets the following three requirements: (1) it has notified the carrier of its services that it offers sexually explicit messages, (2) it has requested the carrier to specifically identify these calls on the customer's bill, and (3) it has required the adult user of the services to pay by credit card, obtain an access code, or use a descrambler.[142] Both the statutory and the FCC defenses are available to those who " 'restrict access to persons under eighteen years of age.' "[143] Additionally, the FCC codified the legislature's "reverse blocking" requirement making it part of the regulatory scheme set forth in section 223, the creation of which was mandated by Congress.[144] The FCC did this in an attempt to make it clear that the mandatory blocking in section 223(c) is not an alternate defense to the FCC regulations, but must be complied with in addition to the FCC regulations unless the dial-a-porn provider engages in independent billing and collections, in which case, it would not be subject to reverse blocking.[145]

Almost two years after the *Sable* decision, and less than one year after the issuance of two FCC reports that supported various legislative and regulatory schemes designed to restrict the dissemination of indecent material,[146] two federal courts of appeals were confronted

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141. *Id.* at 4926. See the FCC regulations codified in 47 C.F.R. § 64.201 (1990).

142. 47 C.F.R. § 64.201 (1990); Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 871 (9th Cir. 1991).

143. *Information Providers' Coalition*, 928 F.2d at 872 (quoting 47 U.S.C. § 223(b)(3) (Supp. II 1990)).

144. *In re* Regulations Concerning Indecent Communications By Telephone, 5 F.C.C.R. 4926, 4932 (1990); *see also* 47 C.F.R. § 64.201(b) (1990).

145. 47 U.S.C. § 223(c) (Supp. II 1990). See *supra* note 135 for text of § 223(c). See also *infra* note 159 for a further discussion of how the reverse blocking requirement works in relation to the FCC regulations.

The legislative history is not clear as to why the dial-a-porn provider is not subject to reverse blocking if it bills the customer for its services directly. However, one possibility is that Senator Helms and others involved in sponsoring the legislation created this exemption for dial-a-porn providers in the spirit of compromise, knowing full well that independent billing and collections (i.e. through credit card sales) was much more costly than billing and collections through the telephone company. Therefore, dial-a-porn providers choosing to engage in independent billing mechanisms would lose customers since it would make calls more expensive and would exclude a whole group of callers, namely those individuals who are not credit card holders. Furthermore, at least one court has noted that the costs of independent billing would reduce the number of dial-a-porn providers. *See* American Info. Enters., Inc. v. Thornburgh, 742 F. Supp. 1255, 1264 (S.D.N.Y. 1990).

146. *In re* Regulations Concerning Indecent Communications by Telephone, 5

with First Amendment challenges launched against these restrictions. The attacks were directed toward regulations affecting the dial-a-porn industry. Specifically, several groups challenged the 1989 amendment to section 223 (the Helms Amendment) and the regulations accompanying it as promulgated by the FCC. The petitioners in these cases[147] argued, *inter alia*,[148] that these means were not the least restrictive available to serve the Government's compelling interest of protecting children from exposure to indecent speech as required under *Sable*.[149] Rather, they argued, there were more "speech-protective" alternatives that would serve the Government's compelling interest just as well.[150]

C. *Dial-A-Porn:* Information Providers' Coalition for Defense of the First Amendment v. FCC *and* Dial Information Services Corporation v. Thornburgh

1. *Information Providers' Coalition for Defense of the First Amendment v. FCC* [151]

In March of 1991, the United States Court of Appeals for the Ninth Circuit responded to an attack on the constitutionality of the 1989 Amendment to section 223 (the Helms Amendment) and the FCC regulations enacted thereunder. The petitioner, Information Providers' Coalition for Defense of the First Amendment ("the Coalition"), was an association consisting of individuals and companies.[152] The petitioners attacked the constitutionality of the Helms Amendment on several grounds.[153] However, the court primarily focused on the issue of whether "reverse blocking," as opposed to "voluntary blocking," of telephone access to indecent dial-a-porn messages was

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F.C.C.R. at 4926; *In re* Enforcement of Prohibition Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297 (1990).

147. Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992); Information Providers' Coalition for the Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

148. Generally the other arguments were attacks on the definition of indecency in addition to vagueness, overbreadth, and prior restraint challenges. *See infra* note 153.

149. Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

150. *Information Providers' Coalition*, 928 F.2d at 868-69; *Dial Info. Servs. Corp.*, 938 F.2d at 1538-39.

151. 928 F.2d 866 (9th Cir. 1991).

152. The intervenors included Ameritech operating companies, GTE Service Corporation, Southwestern Bell Telephone Company, and regional Bell operating companies. *Id.* at 869.

153. The petitioners raised vagueness challenges against the FCC's definition of indecency. They also argued that the reverse blocking requirement constituted a prior restraint on speech. *Id.* at 874-79.

narrowly tailored enough to pass First Amendment scrutiny.[154]

The petitioners argued that the Helms Amendment violated the First Amendment because the means used to achieve the compelling ends of protecting children from indecent dial-a-porn were not the least restrictive under the standard set forth in *Sable*.[155] Rather, they argued that voluntary, or central office, blocking[156] which provides access to all individuals unless they request that their lines be blocked, is not only effective, but is also the least restrictive of the two types of blocking. Therefore, the petitioners asserted that voluntary blocking is the only method of blocking that meets the strictures of the *Sable* test. The petitioners maintained that voluntary blocking, currently implemented in New York and twenty-nine other states, should be an alternative safe harbor under section 223 providing a defense to carriers in those areas where this option is feasible.[157]

The court found that it had jurisdiction to review the Commission's regulations[158] and proceeded to provide an interpretation of the reverse blocking provision as set forth in section 223. The court emphasized that reverse blocking is one of several layers of safe harbor defenses under section 223 and would only be a required restriction to access when the telephone carrier is responsible to the dial-a-porn provider for billing and collection services of the dial-a-porn provider. The court emphasized that no blocking is required under section 223 where the dial-a-porn provider (1) bills the customer directly and (2) accepts payment by credit card or requires access codes or descramblers.[159]

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154. *Id.* at 868-69.

155. *Id.* at 869.

156. Voluntary blocking is an "opt out" method, whereas reverse blocking is an "opt in" alternative. *See id.* See *supra* note 66 and accompanying text for a further description of voluntary blocking.

157. *Id.* at 872-73.

158. *Id.* at 869; *see* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1) (granting the United States District Courts power to review and/or enjoin FCC final regulations).

159. Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 872 (9th Cir. 1991). Under § 223, adults wishing to gain access to dial-a-porn services must first meet the statutory requirements by requesting in writing to the telephone company that the phone be unblocked. The individual must then comply with FCC regulations promulgated pursuant to § 223 by using a credit card to pre-pay for the call, obtaining an access code by request in writing, or using a descrambling device (which the individual must also request from the provider) before he or she is allowed to access the message. However, reverse blocking is not activated unless the dial-a-porn provider bills and collects through the telephone company. When the dial-a-porn provider bills the customer directly, reverse blocking is not mandated. However, even if the dial-a-porn provider bills the customer directly, it must still comply with the FCC regulations under § 223(b). This is evidenced by the clear language of subsection (b)(3) which provides that

In analyzing the issue presented, the court determined that before reaching the question of the constitutionality of the reverse blocking scheme under the First Amendment, it had to decide whether the Commission's findings that reverse blocking was technically feasible and that voluntary blocking was ineffective were supported by substantial evidence.[160] The court concluded that the Commission's findings were in fact supported by substantial evidence. In so doing, the court relied on the evidence adduced in the comments to the FCC which were provided by a variety of interested parties, including telephone companies familiar with telephone technologies, and religious organizations such as the Religious Alliance.[161]

In concluding that the Commission set forth substantial evidence to show voluntary blocking was an ineffective means to prevent children from gaining access to dial-a-porn messages, the court emphasized the comments of the Coalition itself in which it recognized that the voluntary blocking alternative it proposed had flaws.[162] For example, the Coalition noted that voluntary blocking in California would not block calls made by minors to dial-a-porn services in other states.[163] However, the Coalition attempted to discount this obstacle by pointing out that New York and Texas were the only other states that provided this service.[164] New York had an exchange that could not be accessed by out-of-state customers, and in Texas only a "handful of such calls [were] actually completed."[165]

"[i]t is a defense to prosecution . . . that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) *and* with such procedures as the commission may prescribe by regulation." 47 U.S.C. § 223 (b)(3) (Supp. II 1990) (emphasis added).

160. *Id.* at 869-70. Substantial evidence is the standard which must be met to uphold agency fact findings. *Id.*

> Judicial review of an agency fact finding regularly proceeds under the rubric of "substantial evidence" set forth in § 706(2)(E) of the APA [Administrative Procedure Act]. This does not mean a large or considerable amount of evidence, but rather only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Id. (quoting Pierce v. Underwood, 487 U.S. 552, 564-65 (1988)).

161. *Id.* at 872. In reaching its conclusion that the Commission's findings were supported by substantial evidence, the court cited evidence presented to the Commission by the Religious Alliance which stated that a substantial majority of all dial-a-porn calls were made by children between the ages of 10 and 16. *Id.* The court also deemed significant the comments from several state Attorney Generals who reaffirmed the importance of protecting children from exposure to indecent dial-a-porn messages and noted their support for the reverse blocking system incorporated in the Helms Amendment. *Id.* at 872-73.

162. *Id.* at 873-74.

163. *Id.* at 873.

164. *Id.*

165. *Id.* Additional evidence presented by Southwestern Bell Telephone Company

Additionally, the court found that voluntary blocking would be ineffective to the extent that it did not "completely bar or totally impede"[166] a minor's access to indecent telephone messages because voluntary blocking is often not requested until after a child has called the service and a parent has noticed it on a telephone bill.[167] The court concluded this remedy comes too late, after the physical and/or psychological damage has already been done to the child.[168]

Finally, the court examined the FCC's final conclusions set forth in its June 29, 1990 Report and Order.[169] In this report, the FCC found that the regulations set forth in the Helms Amendment comported with the least restrictive means test in *Sable*. Additionally, it concluded that as between the two types of blocking, voluntary and reverse, voluntary blocking was ineffective because ultimately only a small number of phones would be blocked. Therefore, a substantial number of minors would continue to have access to indecent dial-a-porn messages.[170] Furthermore, the Commission noted that voluntary blocking does not prevent access from unblocked phones or calls to dial-a-porn services outside the state.[171]

The court noted the Commission's conclusion that either type of blocking alone would not be a sufficient means to effectuate the Government's compelling interest in protecting children from gaining access to telephonic indecent messages.[172] Based upon this premise, the FCC had justified the need for the additional regulatory safe harbors to fulfill the statute's purpose.[173]

Upon completing its review, the court held that substantial evidence supported the Commission's findings that reverse blocking and the FCC regulations were technically feasible.[174] The court also found the regulations were narrowly and carefully tailored efforts designed to

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that voluntary blocking would be ineffective in preventing minors from gaining access to out-of-state dial-a-porn services also persuaded the court that voluntary blocking was ineffective. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *In re* Regulations Concerning Indecent Communications by Telephone, 5 F.C.C.R. 4926 (1990).

170. Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 873 (9th Cir. 1991); *see In re* Regulations Concerning Indecent Communications by Telephone, 5 F.C.C.R. 4926, 4928 (1990).

171. *Information Providers' Coalition*, 928 F.2d at 873.

172. *Id.*

173. See *supra* text accompanying notes 139-45 for a discussion of the FCC safe harbor regulations.

174. *Information Providers' Coalition*, 928 F.2d at 879.

achieve the Government's compelling goal, and voluntary blocking alone was an ineffective means to serve this goal.[175] Thus, the United States Court of Appeals for the Ninth Circuit concluded that the Helms Amendment comported with the constitutional standard set forth in *Sable* and did not violate the First Amendment.[176]

2. *Dial Information Services Corporation v. Thornburgh*[177]

In July, 1991, the United States Court of Appeals for the Second Circuit rendered a decision in which it, too, addressed the constitutionality of the Helms Amendment. The appeal to the Second Circuit arose from a preliminary injunction order entered in the United States District Court for the Southern District of New York. The order enjoined the enforcement of the Helms Amendment on a nationwide basis pending further order to the District Court by the Court of Appeals for the Second Circuit.[178]

The plaintiffs-appellees, a host of dial-a-porn providers, challenged the constitutionality of the statute based on, *inter alia*, its failure to use the least restrictive means of serving the Government's compelling interest.[179] They argued that this statutory method of regulating indecent speech violated the First Amendment. After holding an evidentiary hearing, the district court concluded that voluntary blocking, as opposed to reverse blocking[180] or independent billing and collection, was the least restrictive means to effectuate the Government's goal. The district court further found that the voluntary blocking method being used in New York at the time adequately protected children from exposure to indecent telephone messages.[181] The court emphasized the testimony of the president of Information Providers Association of California. He stated that voluntary blocking reduced the number of complaints by parents from one hundred monthly to one hundred annually.[182]

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175. *Id.* at 873-74, 879.

176. *Id.* at 879.

177. 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

178. *Id.* at 1536-37. The nationwide preliminary injunction was issued on the basis of the court's void for vagueness holding. The injunction was to be enforced only to the extent the restrictions imposed on "indecent" speech. *Id.*

179. *Id.*

180. The Court of Appeals for the Second Circuit and district court used the term "pre-subscription method," which essentially is the same as reverse blocking. Voluntary blocking was being used in New York when these cases were argued.

181. American Info. Enters., Inc. v. Thornburgh, 742 F. Supp. 1255, 1264 (S.D.N.Y. 1990).

182. *Id.* at 1266.

Additionally, the court was persuaded that under New York's voluntary blocking system, a call to a dial-a-porn service would appear on the customer's telephone bill, putting parents on notice. Yet, only four percent of 4.6 million households requested voluntary blocking.[183] Therefore, the court concluded, there was no substantial evidence of complaints from parents about their children gaining access to these numbers.[184] Furthermore, the court noted that many of the complaints received were from adults objecting generally to the content of these messages unaccompanied by allegations that a child had gained access.[185]

The district court also discounted the importance of statements given by Dr. Dietz, a member of the Attorney General's 1986 Pornography Commission. Dr. Dietz was an expert forensic psychologist. He testified that voluntary blocking would be an ineffective means of protecting children because a parent would not know a child has gained access to a dial-a-porn message until the call appears on a telephone bill, after the damage had already been done.[186] In response to Dr. Dietz' testimony, the district court stated that

> [S]uch testimony supports the Court's finding that the government has a compelling interest in protecting minors, but it does not show that more than "a few of the most enterprising and disobedient young people [can or are managing] to secure access to such [indecent telephone] messages," despite the presence of a voluntary blocking scheme.[187]

Moreover, the district court reasoned that the Supreme Court and federal courts of appeals have expressed the view that the primary responsibility for preventing children from gaining access to protected speech should rest on the parents.[188] Thus, the court maintained that voluntary blocking should not be abandoned just because the Government feared that some parents may not be properly supervising their children.

Finally, the district court agreed with the Government's expert witness that an independent billing scheme would not devastate the dial-a-porn industry. However, the court noted an independent bill-

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183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* (quoting Sable Communications, Inc. v. FCC, 492 U.S. 115, 130-31 (1989)).
188. *Id.* at 1265; (*see* Ginsberg v. New York, 390 U.S. 629, 639 (1968) and Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n., 896 F.2d 780, 788 (3d Cir. 1990) (citing Bolger v. Youngs Drug Prods., 463 U.S. 60, 73-74 (1983)).

ing requirement could increase the cost of the calls, reduce the number of providers, make calls more costly, and exclude callers.[189] Thus, the court determined that reverse blocking and independent billing and collections were more restrictive on information providers and callers than the voluntary blocking system. In addition, the court noted that to require reverse blocking could have the effect of causing a large reduction in the number of callers or forcing the dial-a-porn industry to change the content of its messages.[190] Moreover, there was a likelihood that the Government would not be able to meet its burden of showing that voluntary blocking is an ineffective means of protecting children. Accordingly, it concluded that there was a substantial likelihood that the Helms Amendment would violate the First Amendment because the Government did not, given all the technically feasible alternatives available, choose the least restrictive means to achieve its compelling goal.[191]

The United States Attorney General appealed to the Court of Appeals for the Second Circuit.[192] At the outset, the Second Circuit set forth its interpretation of the regulatory scheme embodied in section 223. The court found that section 223(c) required telephone companies to limit access to dial-a-porn messages by using a system of reverse blocking where technically feasible and providing access to such services only to adults who request in writing that their telephone lines be "unblocked."

Similar to the Ninth Circuit's interpretation in *Information Providers' Coalition*, under the *Dial Information Services* court's interpretation, the FCC regulations under section 223(b) provided a defense to dial-a-porn providers if they complied with the following three requirements: (1) restricted access to those eighteen years and older, (2) gave written notice to the carriers that they were providers of indecent messages, and (3) required the user to make payment by credit card before providing access, use a descrambler, or use an access code which could be obtained upon written request of the customer.[193] The *Dial Information Services* court noted that alternatively, the FCC regulations provided that the dial-a-porn provider could engage in in-

189. *Id.* at 1264.

190. *Id.* The court discussed the effect that reverse blocking had on the dial-a-porn industry in Pennsylvania, noting that although the businesses were not eliminated totally, many were in effect either driven out of business or forced to modify the content of their messages.

191. *Id.* at 1266.

192. Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

193. *Id.* at 1539.

dependent billing and collection services and it would not then be subject to the reverse blocking restriction set forth in section 223(c).[194]

The court acknowledged the long-standing proposition that the Government has a compelling interest in protecting children from indecent speech.[195] Next, the court applied the least restrictive means standard to determine whether the regulations embodied in the Helms Amendment could withstand strict constitutional scrutiny as set forth in *Sable*.[196] In applying the least restrictive means test announced in *Sable*, the *Dial Information Services* court, like the court in *Information Providers' Coalition*, limited its analysis to the issue of whether the reverse blocking requirement, as opposed to voluntary blocking, was the least restrictive means to achieve the Government's compelling goal.[197] In so doing, the court stated that it was not enough to show that the ends were compelling. Rather, the means chosen must also be carefully tailored to achieve the end. The court reasoned that before the plaintiffs-appellees could prevail under the *Sable* test they must show "that there are other approaches less restrictive than the Helms Amendment but just as effective in achieving its goal of denying access by minors to indecent dial-a-porn messages."[198]

After reviewing evidence adduced in the district court proceeding, the court examined the alternative of voluntary blocking and found that it paled in comparison to reverse blocking in its ability to eliminate access by children to dial-a-porn.[199] The court found support for this conclusion based on evidence suggesting that voluntary blocking was available for over two years in New York, but only a small percentage of households had requested it.[200] It also cited results from an "Awareness Study" concluding that only one half of the New York households were aware of the existence of dial-a-porn or blocking methods.[201] The Second Circuit also placed more significance than the district court on the testimony of Dr. Dietz, in which he expressed the opinion that a one-time exposure to dial-a-porn could psychologically or physically harm a child,[202] and concluded that voluntary blocking was not an effective means of preventing this harm

194. *Id.* See *supra* note 159 and accompanying text for a discussion of when a dial-a-porn provider is subject to the reverse blocking requirement and when it is not.
195. *Id.* at 1541.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 1542.
200. *Id.*
201. *Id.*
202. *Id.*

because a child is more likely to achieve this damaging one-time exposure under the voluntary blocking scheme.[203] The court reasoned that not only did this testimony strongly support the conclusion that voluntary blocking was an *ineffective* means of achieving Congress' compelling goal, it also showed the *effectiveness* of reverse blocking.[204]

The court then concluded that the district court incorrectly applied the *Sable* test by "focusing on [the] means" and not the "goals [of Congress] as well as [the] means."[205] The court reasoned that even if voluntary blocking was the least restrictive means, it was not as effective; and "simply [did] not do the job of shielding minors from dial-a-porn."[206] Therefore, the court held that the reverse blocking scheme of the Helms Amendment was " 'a law narrowly tailored to serve [a compelling] interest.' "[207] Thus, the Court of Appeals for the Second Circuit as well as the Court of Appeals for the Ninth Circuit, upheld the constitutionality of the Helms Amendment.

III. ANALYSIS

The constitutionality of the current regulations imposed on the dissemination of indecent speech in the broadcast and dial-a-porn mediums is still an unanswered question. This is especially true in light of the post-*Sable* decisions discussed in the previous section.

The federal courts of appeals in *Information Providers' Coalition* and *Dial Information Services* applied the strict scrutiny standard required by *Sable* and upheld the reverse blocking requirement of the Helms Amendment as the "least restrictive means" to achieve the Government's compelling goal of preventing children from gaining exposure to indecent dial-a-porn messages. The United States Courts of Appeals for the Ninth and Second Circuits did this despite the availability of other less restrictive methods, such as voluntary blocking, which they found was not as effective as reverse blocking. On the other hand, the United States Court of Appeals for the District of Columbia Circuit used *Sable*'s strict scrutiny standard for support and struck down the congressional ban on indecent broadcasts, holding that a total ban on the broadcast of protected speech did not pass constitutional muster under the First Amendment.

The attempts by the federal courts of appeals to apply the consti-

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203. *Id.*
204. *Id.* (emphasis added).
205. *Id.*
206. *Id.*
207. *Id.* at 1543 (quoting Boos v. Barry, 485 U.S. 312, 324 (1988)).

tutional standard set forth in *Sable* have added more confusion and created further unanswered questions as to what level of First Amendment scrutiny the courts should apply in reviewing regulations aimed at controlling the dissemination of indecent speech through the dial-a-porn and broadcast mediums, and whether both mediums should be subjected to the same level of scrutiny. Thus, the first issue this Note addresses is whether the *Sable* Court intended the test it set forth to review dial-a-porn regulations to be a strict scrutiny test. The second issue addressed is whether the Supreme Court intended the *Sable* standard to apply to indecent broadcasts as well as dial-a-porn messages. The final issue which this Note addresses is whether the federal courts of appeals in *Information Providers' Coalition*,[208] *Dial Information Services*,[209] and *Act II*[210] correctly applied that standard to the regulations at issue in the post-*Sable* cases.

A. *Is the* Sable *Standard a Strict Scrutiny Test?*

According to the United States Supreme Court, the constitutional standard announced in *Sable* is the standard by which regulations aimed at controlling the dissemination of indecent dial-a-porn messages are to be reviewed. In determining whether the *Sable* standard is a strict scrutiny test, it is important to examine the exact language used by the Court in setting forth the standard. In *Sable*, the Court set forth the following standard for reviewing dial-a-porn regulations:

> The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the *least restrictive means* to further the articulated interest . . . . The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. . . ." It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.[211]

The "least restrictive means" language and the "compelling interest"

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208. Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

209. Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

210. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("Act II"), *cert. denied*, 112 S. Ct. 1281-82 (1992).

211. Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (emphasis added) (citations omitted).

language of the *Sable* standard indicate that the Court applied a strict scrutiny standard to government regulation of indecent telephone messages because the regulation at issue was a content-based restriction on protected speech.[212] The Government, in enacting the amendment to section 223(b), was not attempting to ban all dial-it services, but rather sought only to ban the transmission of indecent and obscene telephone messages based on the content of these messages.

Content-based restrictions have historically been reviewed under an elevated level of scrutiny.[213] The United States Court of Appeals for the Second Circuit, in the *Carlin* trilogy, applied this same level of heightened scrutiny to its review of dial-a-porn regulations.[214] The one exception to this general rule occurs in cases in which the courts examine regulations singling out indecent speech when those regulations are not aimed at suppressing the indecent content of the speech. In such cases, courts apply an intermediate scrutiny standard instead of strict scrutiny review.[215]

For example, in *Renton v. Playtime Theatres, Inc.*,[216] the

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212. See *infra* note 258 for a discussion of the distinguishing language between intermediate and strict scrutiny. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12-3, 12-18 (2d ed. 1988).

213. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) ("[W]hen [a] regulation is based on the content of speech, Governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove [of] the speaker's views.' "); *see also* Boos v. Barry, 485 U.S. 312, 321 (1988) (stating that content-based restrictions on political speech get the most exacting scrutiny); and TRIBE, *supra* note 212, § 12-18, at 940. Professor Tribe stated that "once an expressive act is determined to be within the coverage of the [F]irst [A]mendment, its entitlement to protection must not vary with the viewpoint expressed, and all attempts to create content-based subcategories entail at least some risk that [the] government will in fact be discriminating against disfavored points of view." *Id.*

For a further discussion of content-based regulation of indecent speech see John C. Cleary, Note, *Telephone Pornography: First Amendment Constraints on Shielding Children from Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503, 540-43 (1985).

214. Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir.) ("Carlin III"), *cert. denied*, 488 U.S. 924 (1988); Carlin Communications, Inc. v. FCC, 787 F.2d 846, 855 (2d Cir. 1986) ("Carlin II"); Carlin Communications, Inc. v. FCC, 749 F.2d 113, 121 (2d Cir. 1984) ("Carlin I"). For a further discussion of the *Carlin* trilogy, and an argument that the court in *Carlin II* announced the strict scrutiny standard, but really applied a lower one to uphold the regulations, see Leah Murphy, Comment, *The Second Circuit and Dial-A-Porn: An Unsuccessful Balance Between Restricting Minors' Access and Protecting Adults' Rights*, 55 BROOK. L. REV. 685 (1989).

215. See *supra* note 15 and accompanying text for a discussion of *Renton v. Playtime Theatres*. For thorough discussions of the distinction between content-based and content-neutral regulations see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987), Geoffrey R. Stone, *Content Regulations and First Amendment*, 25 WM. & MARY L. REV. 189 (1983), and Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

216. 475 U.S. 41 (1986).

Supreme Court held that a zoning ordinance aimed at controlling whether a movie theater could air sexually explicit adult movies depending on its location, was not content-based in any meaningful sense and did not merit strict scrutiny review.[217] In contrast to *Sable*, the *Renton* Court found that the ordinance at issue was not aimed directly at suppressing the speech because of its content. Rather, the court found that the ordinance was aimed at controlling the secondary effects that adult movie theaters might have on a particular area.[218]

In *Sable*, the Government was not worried about the secondary effects of dial-a-porn messages. The regulation at issue in *Sable* was aimed at suppressing the dial-a-porn messages based strictly on the concern that their content would be harmful to children.[219] Thus, based on *Sable* and the *Carlin* trilogy,[220] it appears proper that the courts should apply strict scrutiny in reviewing content-based regulations aimed at controlling the dissemination of indecent dial-a-porn messages. However, the question of whether this same level of scrutiny should be applied in reviewing content-based regulations imposed on the airing of indecent broadcasts is not as clear.

B. *Should the* Sable *Standard Have Been Applied in* Act II?[221]

In reviewing the constitutionality of the twenty-four hour ban on indecent *broadcasts*, the United States Court of Appeals for the District of Columbia Circuit in *Act I* and *Act II* applied strict scrutiny in reviewing the twenty-four hour ban on indecent broadcasts.[222] The *Act II* court found support for its application of this elevated standard by noting that the Supreme Court in *Sable* reiterated that this strict standard must be applied to content-based restrictions on speech.[223]

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217. *Id.* at 47-50; *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

218. *Renton*, 475 U.S. at 47-50. The Court concluded that the Government was concerned with preventing the creation of an environment in which drugs and prostitution would be encouraged if clusters of theaters were allowed to show sexually explicit movies.

219. *See* Boos v. Barry, 485 U.S. 312, 320-21 (1988). In *Boos*, the respondents argued that the ordinance at issue (a regulation on placing offensive signs in the vicinity of foreign embassies) was aimed at regulating secondary effects, namely, the psychological or emotional effects the content of such a sign might have on its audience. *Id.* The Court rejected the respondents argument and distinguished *Renton*. The court stated that the emotive or psychological effect of speech on an individual is not a "secondary effect" within the meaning of *Renton*. *Id.* at 321.

220. See *supra* notes 54-82 and accompanying text for a discussion of the *Carlin* trilogy.

221. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("*Act II*"), *cert. denied*, 112 S. Ct. 1281-82 (1992).

222. See *supra* notes 106-132 for a discussion of *Act I* and *Act II*.

223. *Id.*

However, in the past, the Supreme Court has applied a lower level of scrutiny in reviewing content-based broadcast regulations.[224] In *FCC v. League of Women Voters*,[225] the Court reviewed a content-based regulation on broadcasts under an intermediate scrutiny standard.[226] In order to pass intermediate scrutiny, the Government must show that the regulation is narrowly tailored to further a substantial government interest.[227]

Thus, the question arises as to whether the strict standard announced in *Sable* was applied properly by the *Act II* court in its review of the twenty-four hour ban on indecent broadcasts or whether intermediate scrutiny should have been applied under *FCC v. League of Women Voters*. Arguably, the Court of Appeals for the District of Columbia Circuit was incorrect in reviewing the constitutionality of the twenty-four hour ban under strict scrutiny.

In reviewing the content-based regulation at issue in *Act II*, the Court of Appeals for the District of Columbia Circuit failed to consider the Supreme Court's decision in *FCC v. League of Women Voters*. Instead the court concluded that the regulation was content-based and applied the strict scrutiny standard for reviewing indecent dial-a-porn messages as announced in *Sable*.[228] However, the court did not address the differences between the dial-a-porn and broadcast mediums when it decided to follow *Sable* and apply strict scrutiny. One persuasive argument to support the application of intermediate scrutiny to content-based regulations on broadcasts, and not to dial-a-porn, is that because broadcast is a more invasive form of communication with a "captive audience" problem, it receives the most limited First Amendment protection of all mediums of communication.[229]

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224. FCC v. League of Women Voters, 468 U.S. 364 (1984); *see* Benjamin Marcus, Recent Developments, FCC v. League of Women Voters: *Conditions on Federal Funding that Inhibit Speech and Subject Matter Restrictions on Speech*, 71 CORNELL L. REV. 453 (1986); *see also* Gayoso, *supra* note 22, at 884-85.

225. 468 U.S. 364 (1984).

226. *League of Women Voters*, 468 U.S. at 398-99. The broadcast regulation at issue was a governmental prohibition on editorializing by public stations that received federal funding. *Id.* at 366.

227. *Id.* at 398-99; *see also infra* note 258.

228. 492 U.S. 115, 126 (1989).

229. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). "Captive audience" is a term of art used in First Amendment law to describe situations in which, because of the invasiveness of the speech, the individual is "forced" to listen to or see a message he or she may find offensive. *Id.* at 748-49 & n.27. The individual may only escape the message by averting his/her ears or eyes, or, in the case of television and radio, by turning it off. *Id.* For example, in *Pacifica*, the court found that radio listeners in the car and at home are a captive audience since they are constantly tuning in and out of particular stations and are unable to avoid hearing indecent broadcasts because they will often miss a prior warning

Since the broadcast medium is a more invasive form of communication than dial-a-porn it would be easier for a child to gain access to indecent programming. Therefore, more stringent regulation may be necessary in the broadcast medium to ensure the Government's interest in protecting children from exposure to indecent speech is furthered.

Based on the Supreme Court precedent in *FCC v. League of Women Voters*[230] and *Pacifica*,[231] the court in *Act II* should have distinguished *Sable* because of the differing abilities of the two mediums to reach child audiences and applied intermediate scrutiny in reviewing the twenty-four hour ban.[232] However, even under intermediate scrutiny, the twenty-four hour ban would not have passed constitutional muster for several reasons. First, it is important to note that although the Supreme Court in *FCC v. League of Women Voters* only applied intermediate scrutiny to the broadcast regulation at issue, the Court still struck it down as unconstitutional.[233] Thus, the intermediate scrutiny contemplated by the Court to be used in reviewing content-based broadcast regulations is not without "bite."

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concerning the offensive program content. *Id.* at 748-49. For several more examples of captive audience problems and a thorough discussion of the captive audience doctrine see Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991).

230. 468 U.S. 364 (1984).

231. FCC v. Pacifica Found., 438 U.S. 726 (1978).

232. There is, of course, an opposing argument that the *Act II* court was correct in applying strict scrutiny to review the twenty-four hour ban because the same constitutional standard should apply to all content-based restrictions on speech. The argument is that if indecent speech is a protected category of speech in one medium, it should be equally protected in another, despite the higher level of intrusiveness characteristic of one medium as compared to another. In its August 6, 1990 Report, the FCC rejected the argument that the broadcast indecency prohibition should be judged under an intermediate scrutiny standard. *In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297 (1990). It concluded that the more rigorous standard applied by the Supreme Court in *Sable* was the proper one for the lower courts to apply. *Id.* However, in applying this standard to the twenty-four hour ban, the FCC concluded that the ban on indecent broadcasts was not a violation of the First Amendment. *Id.* It rested this conclusion primarily on two grounds. First, based on Justice Scalia's concurring opinion in *Sable*, the FCC interpreted *Sable* to mean that a total ban would be upheld in the broadcast medium if there were no alternative restrictions that could effectuate the goal. *Id.* at 5302. Second, it argued that a total ban in the broadcast medium could survive strict scrutiny because that medium is a more invasive form of communication than the telephone. *Id.*

233. FCC v. League of Women Voters, 468 U.S. 364, 398-99 (1984). The Court held that the statute at issue "[was] not crafted with sufficient precision to remedy those dangers that may exist to justify the significant abridgment of speech worked by the provision's broad ban on editorializing. The statute is not narrowly tailored to address any of the Government's suggested goals." *Id.*

Second, a total ban on indecent broadcasts would likely be struck down under intermediate scrutiny review in light of the Supreme Court decisions in *Pacifica*[234] and *Renton*.[235] In *Pacifica*, the Court took the approach that channeling indecent broadcasts to times of the day at which they could safely be aired, as opposed to banning them, was the proper way to regulate them.[236] In *Renton*, the Court stated that an ordinance aimed at limiting the areas in which theaters could show adult movies passed intermediate scrutiny partly because it did not seek to ban adult movie theaters altogether.[237]

Applying intermediate scrutiny, the court in *Act II* could have correctly concluded that a total ban on indecent broadcasts violated the First Amendment because such a ban was not narrowly tailored to achieving the Government's interest in protecting children from exposure to indecent broadcasts. Although the *Sable* decision is not controlling in the realm of indecent broadcasts, it does provide some legal support for the proposition that a total ban on a protected category of speech is hardly ever acceptable in light of First Amendment freedoms.[238]

The *Sable* Court struck down a total ban on indecent dial-a-porn messages in part because the legislature did not produce sufficient evidence to show that the FCC's current restrictions were ineffective.[239] Similarly, in *Act II*, there was insufficient evidence to conclude that significant numbers of children are in the broadcast audience at all times of the day and night.

For example, time channeling, used by the FCC prior to the twenty-four hour ban, is an effective, but more narrowly tailored means than a total ban to protect children from gaining exposure to indecent broadcasts while at the same time protecting adults' First Amendment right to hear such programming. For example, a recent report issued by the Commission revealed that only one to four percent of the broadcast audience consists of children during the school day hours and the late evening hours.[240] These statistics gathered by the FCC further revealed that during the evening hours, eighty-eight percent of children were under parental supervision. During the hours

234. FCC v. Pacifica Found., 438 U.S. 726 (1978).

235. Renton v. Playtime Theatres, 475 U.S. 41 (1986).

236. *Pacifica*, 438 U.S. at 733.

237. *Renton*, 475 U.S. at 46-47.

238. Sable Communications, Inc. v. FCC, 492 U.S. 115, 130-31 (1989).

239. *Sable*, 492 U.S. at 128-30. See *supra* notes 132-40 and accompanying text for a discussion of the FCC's current restrictions on dial-a-porn.

240. *In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297, 5303 (1990).

between 10:00 p.m. and 6:00 a.m., ninety-three percent of the children in the broadcast audience were under parental supervision and ninety-nine percent were under adult supervision. Between the hours of 12 midnight and 6:00 a.m., over ninety-eight percent of the children were under parental supervision and ninety-nine percent were under adult supervision.[241]

Thus, the conclusion that nothing short of a total ban could satisfy the Government's interest in protecting children from indecent broadcasts because some children are in the audience twenty-four hours a day is erroneous. According to the *Sable* Court, the goal of protecting children from indecent speech may not include every child in the country because there may never be a fool-proof method of guaranteeing that a minor will never have access to indecent speech.[242] In fact, the Court recognized that the reality is some of "the most enterprising and disobedient young people would [always] manage to secure access to [indecent dial-a-porn]."[243] Thus, a regulation need not be one-hundred percent effective in stopping all children from gaining access to indecent speech in order to pass constitutional muster.[244] Therefore, time channeling rather than a total ban still furthers the Government interest of protecting children, yet it does so in a way that does the least damage to First Amendment freedoms.

Furthermore, in striking down Congress' twenty-four hour ban on dial-a-porn, the *Sable* Court noted that not only did Congress lack evidence to show that no less restrictive means were available, but Congress had not even given the FCC's regulations[245] a chance to work.[246] Similarly, in *Act I* the court instructed the FCC to solicit comments and conduct a full and fair hearing to determine the times at which indecent broadcasts could be aired, in addition to defining terms such as "children" and "reasonable risk."[247] However, before the FCC was able to act, Congress imposed a total ban on indecent broadcasts[248] without the benefit of the FCC's report. Thus, Congress and the FCC have not exerted sufficient effort in attempting to find a

241. *Id.* at 5304.

242. *Sable*, 492 U.S. at 130. But see *supra* notes 180-88 and accompanying text for a contrary argument.

243. *Id.*

244. *Id.*

245. See *supra* notes 139-44 for a discussion of the FCC regulations.

246. *Sable*, 492 U.S. at 130-31.

247. Action for Children's Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("Act I").

248. Action For Children's Television v. FCC, 932 F.2d 1504, 1507 (D.C. Cir. 1991) ("Act II"), *cert. denied*, 112 S. Ct. 1281-82 (1992).

workable means that is more narrowly tailored than a total ban. Rather, their efforts appear to be focused on trying to justify a total ban.

Additionally, the FCC's reliance on the Supreme Court's distinguishing of *Pacifica* in *Sable* to support the position that a total ban on indecent broadcasts could be upheld is misplaced. Indeed, the *Sable* Court did distinguish *Pacifica*, and pointed out the differences between the broadcast and telephone mediums.[249] However, it did not distinguish *Pacifica* and the broadcast industry to support the proposition that indecent broadcasts could be banned. Rather, it did so only to refute the FCC's argument that because *Pacifica* left unresolved the possibility of a total ban in broadcast,[250] it left open the same possibility in the dial-a-porn industry. Therefore, nothing in the *Sable* decision supports the argument that a total ban on indecent broadcasts could be upheld.

Furthermore, the FCC has always supported the position that a total ban on indecent broadcasts was an impermissible means to achieve the Government's compelling goal. For example, before Congress' imposition of a total ban, the FCC took the position that to totally prohibit the broadcast of indecent material would " 'run afoul of [the] constitutional premise' that the Commission 'may only do that which is necessary to restrict children's access to indecent broadcasts' and 'may not go further so as to preclude access by adults who are interested in seeing or hearing such material.' "[251] As far back as *Pacifica*, the FCC recognized that a total ban on indecent speech was an improper goal.[252] It was the FCC's position at that time not to prohibit indecent broadcasts, but to channel them to times during which it was reasonable to conclude that there would not be children in the audience, and if there were, parents or other guardians would likely be available to supervise.[253] Furthermore, a total ban on a protected area of speech is rarely, if ever, a constitutionally permissible

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249. *Sable*, 492 U.S. at 127-28.

250. *Id.* The FCC argued that the *Pacifica* Court's holding that the FCC has power to regulate indecent broadcasts, left open the possibility that the FCC could also ban indecent broadcasts in order to serve the compelling Government interest of protecting children from hearing indecent broadcasts if there was no other way to further that goal.

251. Action for Children's Television v. FCC, 932 F.2d 1504, 1509 (D.C. Cir. 1991) ("Act II") (quoting Reconsideration Order, 3 F.C.C.R. 930, 931 (1989)), *cert. denied*, 112 S. Ct. 1281-82 (1992).

252. FCC v. Pacifica Found., 438 U.S. 726, 732-33 (1978).

253. *Id.* (citing *In re* Petition For Clarification and Reconsideration of a Citizen's Complaint Against Pacifica Foundation, Station WBAI-(FM) New York, New York, 59 F.C.C.2d 892 (1976)).

means to accomplish the Government's compelling goals.[254]

Thus, while the *Act II* court did not apply the correct constitutional standard in reviewing the twenty-four hour ban on indecent broadcasts, it reached the proper result. This same result could have been reached by applying intermediate scrutiny as dictated by *FCC v. League of Women Voters*.[255]

C. *The Constitutionality of the 1989 Amendment: The* Sable *Standard as Applied in* Information Providers' Coalition *and* Dial Information Services Corporation

The *Sable* standard is, without question, the proper standard for the federal courts of appeals to apply in reviewing legislation aimed at the regulation of indecent dial-a-porn messages. However, the United States Courts of Appeals for the Ninth and Second Circuits in *Information Providers' Coalition*[256] and *Dial Information Services*[257] ignored, or at least undermined, the force of the "least restrictive means" language of the *Sable* standard and effectively applied a lower level of scrutiny[258] in judging the constitutionality of title 47 section 223(b) and (c) of the United States Code under the First Amendment. A better application of the *Sable* test by the Ninth and Second Circuit Courts of Appeals would have placed more emphasis on the "least

254. *See* Simon & Schuster, Inc. v. Members of the N.Y. Crime Victim Bd., 112 S. Ct. 501, 512-15 (1991) (Kennedy, J., concurring). In Justice Kennedy's concurring opinion in *Simon & Schuster*, he argued that based on precedent and tradition "no inference can be permissibly drawn that the state may censor speech whenever it believes it has a compelling interest to do so." *Id.* at 513. Furthermore, Justice O'Connor, delivering the opinion of the Court, noted that "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 509 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

255. 468 U.S. 364 (1984).

256. Information Providers' Coalition for the Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

257. Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

258. The difference between intermediate scrutiny and the higher level of scrutiny described in *Sable* lies within the requirement that the Government must use the "least restrictive means" to achieve a compelling goal. Under this heightened scrutiny, the Government is also required to show that the regulation is a narrowly and carefully tailored effort to achieve the Government's compelling interest. *See* United States v. O'Brien, 391 U.S. 367 (1968). The intermediate scrutiny test is usually described in similar terms. However, under intermediate scrutiny the Government is required to show that there was a narrowly and carefully tailored effort to serve a substantial Government interest as opposed to a compelling one. Additionally, the Government need not choose the least restrictive means. *Id.* See also Ward v. Rock Against Racism, 491 U.S. 781, 797-800 (1989), for a discussion of the differences between intermediate and strict scrutiny.

restrictive means" language to ensure that the government regulations aimed at the content of protected speech were subject to the heightened scrutiny mandated by *Sable*. To ignore the requirement of choosing the "least restrictive means" in effect reduces the level of scrutiny to an intermediate level, which allows a reviewing court to choose between two possible means without regard to restrictiveness. Under strict scrutiny, there is only one choice—the least restrictive means.

In *Information Providers' Coalition* and *Dial Information Services*, the courts' analyses of the constitutionality of the Helms Amendment were limited to the question of whether the statutory reverse blocking set forth in section 223(c), as opposed to voluntary or central office blocking, comported with the constitutional standard set forth in *Sable*. Both federal courts of appeals reached the same decision, specifically, that the reverse blocking or pre-subscription scheme set forth in section 223 comported with the standard set forth in *Sable*.[259] However, their respective analyses in reaching their respective conclusions warrant separate treatment.

1. *Information Providers' Coalition for Defense of the First Amendment v. FCC*

In *Information Providers' Coalition*, the United States Court of Appeals for the Ninth Circuit held that the reverse blocking scheme and the FCC regulations under section 223 were narrowly tailored regulations that were necessary to promote a compelling government interest.[260] However, the court also upheld the FCC's finding that voluntary blocking, as opposed to reverse blocking, was an ineffective means to achieve the goal of limiting minors' access to dial-a-porn services.[261] In comparing the two methods of blocking, the court stated that "[voluntary blocking] even where effective, does not completely bar or totally impede" a minor from gaining access to dial-a-porn.[262]

In its opinion, the court did not discuss which of the two is the least restrictive means. Instead, it focused its analysis on which method is the most effective in limiting the number of children who might gain access to indecent telephone messages. Arguably, the test employed in *Information Providers' Coalition* was not the strict scru-

259. *Information Providers' Coalition*, 928 F.2d at 879; *Dial Info. Servs. Corp.*, 938 F.2d at 1541-43.

260. *Information Providers' Coalition*, 928 F.2d at 879.

261. *Id.* at 874.

262. *Id.* at 873.

tiny standard set forth in *Sable* since the court's inquiry focused on the question of which method (voluntary or reverse blocking) was the more effective of the two without regard for which was the more restrictive. Since *Sable* mandates the application of strict scrutiny in reviewing dial-a-porn regulations, the court should have also considered what was the least restrictive means to further the compelling goal.

A better, more speech-protective application of the *Sable* standard would factor into the analysis the question of which is the less restrictive of the two effective means. If one is only slightly less effective than the other, but significantly less restrictive, and both methods further the compelling goal, the balance should tip in favor of First Amendment rights of adults to have access to indecent speech.[263]

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263. Several commentators support the position that where there are two means to further the Government's goal and one is slightly less effective than the other, but substantially less restrictive, the Government should be required to choose the less restrictive means in favor of protecting free expression under the First Amendment. *See, e.g.*, John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1340-41 (1970). Professor Ely states,

> [Sometimes] the interest[s] in effective expression [are] so important that [the] government must on occasion accept less than entirely effective vindication of its expression . . . . The interests served by the draft card destruction law, like the interest in clean streets, can obviously be served by alternative means of regulation. To note that they cannot be served as well by alternative means is not—as the Court seems to feel it is—the end of [the] analysis, but only the beginning.

Id.; *see also* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 466-69 (1969) [hereinafter *Less Drastic Means*].

In *Less Drastic Means*, the author states that even when the Government interest is urgent, "it must do its balancing at the margin—that is, it must balance no more than the state's interest in the added effectiveness of the chosen means against the individual interest in the use of less drastic ones." *Less Drastic Means*, *supra*, at 467-68. The author further explains that the analysis cannot require the *very* least restrictive means be chosen since that would imply absolute protection. However, he explains that the Justices should use some process to estimate how much less effective one means is as compared to another and the effects of each upon non-First Amendment social values. According to the author, these factors should then be balanced against the accompanying gains and losses to the freedom of expression. *Id.* at 468; *see also* TRIBE, *supra* note 212, § 12-23, at 977-86.

Professor Tribe suggests that in United States v. O'Brien, 391 U.S. 367 (1968), the Court should have insisted that the Government consider less restrictive alternatives that were *almost* as effective to prevent the Government from being able to show that the ban on draft card destruction was the least restrictive means capable of achieving its goal. *Id.*; *see also* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH §§ 2.05(B)(4), 2.06(A)(4) (Rodney A. Smolla ed., 1984 & Supp. 1992).

Professor Nimmer supports the use of a marginal gain versus marginal loss balancing test when employing the least restrictive means analysis in the context of the First Amendment. He states that in applying the least restrictive means analysis the court should balance the interest in using a more restrictive means that is only marginally more effective against the importance of protecting free speech rights. Thus, Professor Nimmer would support the view that the marginally less effective means should be chosen by the Govern-

Support for the view that the Government should be required to choose the least restrictive means to further the Government's goal even if the means are less effective than the alternate scheme proposed by the Government can be found in *Lamont v. Postmaster General*.[264] In *Lamont*, the Court struck down a federal statute that prevented individuals from receiving communist propaganda in the mail unless they notified the Post Office that they wanted the literature sent to their homes.[265] Specifically, under the statute, the addressee, in order to receive this type of mail, was required to request in writing that it be delivered. The Court held that the statute violated the First Amendment rights of those individuals who desired to receive the communist literature because it unnecessarily abridged their First Amendment freedoms by requiring them to take affirmative steps to receive this mail.[266]

The Government's alleged goal in enacting the statute was to protect those individuals who might be offended by communist propaganda from receiving it at their homes.[267] However, the Court found that there was a regulation already in existence that protected the unwilling recipient of communist propaganda.[268] The regulation provided that the Post Office must honor an individual's request to stop delivery of certain types of mail.[269] Thus, Justice Brennan, in his concurring opinion, noted that although the statute at issue in the *Lamont* case would be a better way of achieving the Government's goal, the Government, in the area of First Amendment freedoms, has the "duty to confine itself to the least intrusive regulations which are adequate for the purpose."[270] Justice Brennan further stated that the First Amendment prevents the Government from enacting not only statutes that *prohibit* protected speech, but also those statutes which, like the one at issue in *Lamont*, *inhibit* an individual from exercising First Amendment rights.[271]

The reverse blocking scheme upheld by the courts in *Dial Infor-*

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ment unless using the more restrictive, more effective means is so important that it justifies the burden on the protected communication.

264. 381 U.S. 301 (1965).

265. *Lamont*, 381 U.S. at 302-03.

266. *Id.* at 307.

267. *Id.* at 309 (Brennan, J., concurring).

268. *Lamont*, 381 U.S. at 310 (Brennan, J., concurring).

269. *Id.*

270. *Id.*

271. *Id.* at 309. Justice Douglas, in the Opinion of the Court, also supports this conclusion. *Id.* at 307.

mation Services[272] and *Information Providers' Coalition*[273] is similar to the statutory scheme struck down by the Court in *Lamont*. Like the statutory requirement in *Lamont* that an individual who wants to receive communist propaganda in the mail must affirmatively request it in writing, so too must an individual request in writing to have his or her phone unblocked so as to gain access to dial-a-porn messages under the reverse blocking scheme. Voluntary blocking, on the other hand, does not require a willing customer to take the same kind of potentially embarrassing and stigmatizing step. Therefore, in order to ensure protection of an individual's First Amendment right of access to dial-a-porn, the slightly less restrictive means of voluntary blocking should be chosen, provided it is still an effective means even if not the most effective means available.[274] This should be done especially if the difference in the level of effectiveness of each means is minimal. Under a voluntary blocking scheme, any comparative lack of effectiveness could be compensated for, not by the use of the stricter regulation of reverse blocking, but through encouragement of parental supervision and involvement.

The argument made by the FCC in *Information Providers' Coalition* that parents are not aware of voluntary blocking, and, therefore, will not request it, could be easily corrected by requiring a notice be included in each telephone bill making adults aware of the voluntary blocking option for indecent dial-a-porn. Arguably, not all people read notices enclosed in their telephone bills. Therefore, in addition to the notice, or as an alternative, a computerized message on the bill itself could effectively serve to make adults aware of the voluntary blocking option. By using this remedy, the many adults (with or without children) who wish to have access to indecent dial-a-porn would not need to take the extra step required with reverse blocking of requesting in writing that their phones be unblocked. Forcing adults who wish to have access to dial-a-porn to affirmatively request this service in writing inhibits individuals from exercising First Amendment rights as recognized in *Lamont*.[275]

One reason the United States Court of Appeals for the Ninth Circuit placed too much emphasis on the effectiveness of the regulations

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272. Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

273. Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

274. *See supra* note 263.

275. *Lamont*, 381 U.S. at 309 (Brennan, J., concurring); *see also supra* text accompanying notes 263-71.

and not on their restrictiveness can be attributed to how the court perceived the relationship between the means chosen and the Government's goal. The *Information Providers' Coalition* court, unlike the *Sable* Court, mistakenly assumed that the means chosen must be able to achieve the goal of "completely bar[ring] or totally imped[ing]"[276] children's access to dial-a-porn. Yet, the *Sable* Court specifically noted that there may not be a fool-proof method of limiting children's access to dial-a-porn.[277] Furthermore, since indecent speech has some protection under the First Amendment, a fool-proof method may not be a desirable goal. The *Sable* decision can also be read to mean that the compelling goal is to ensure that all but "the most enterprising and disobedient young people"[278] are prohibited from gaining access to indecent dial-a-porn. With a scheme of voluntary blocking plus the existing FCC regulations, it is likely that only these children would gain access.

2. *Dial Information Services Corporation v. Thornburgh*

The Court of Appeals for the Second Circuit also limited its review of the restrictions embodied in the Helms Amendment to the requirement that the provider either engage in independent billing and collection or be subject to the telephone company requirement of reverse blocking or written pre-subscription.[279] In applying the *Sable* standard to determine the constitutionality of reverse blocking as opposed to voluntary blocking, the court stated that in order for voluntary blocking proponents to prevail, "it must be determined that there are other approaches less restrictive than the Helms Amendment but just as effective in achieving its goal."[280] The court went on to find that even if voluntary blocking was the less restrictive means, it was not as effective as reverse blocking.[281]

While voluntary blocking may not be the most effective means, the *Sable* test does not appear to require that it be the most effective means.[282] Thus, the analysis should focus on both the effectiveness and the restrictiveness of the means chosen to further the compelling goal. Under *Sable*, regulations are required to be narrowly tailored so

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276. *Information Providers' Coalition*, 928 F.2d at 873.

277. Sable Communications, Inc. v. FCC, 492 U.S. 115, 130 (1989).

278. *Id.*

279. Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1536-37 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

280. *Id.* at 1541.

281. *Id.* at 1542.

282. *See supra* text accompanying notes 276-78.

as not to unnecessarily interfere with First Amendment freedoms.[283] The two-tiered legislative scheme under section 223 which includes the reverse blocking requirement and the current FCC regulations unnecessarily interferes with the First Amendment rights of adults wishing to hear indecent messages, when an alternative scheme of replacing reverse blocking with voluntary blocking would adequately serve the Government's compelling end.

3. The "Least Restrictive Means" Test Applied to the Entire Scheme Embodied in Section 223

In both *Information Providers' Coalition* and *Dial Information Services*, the United States Courts of Appeals for the Second and Ninth Circuits interpreted the Helms Amendment to mean that the statutory requirement of reverse blocking in section 223(c) and the FCC regulations promulgated under section 223(b)[284] must both be complied with where technically feasible.[285] This construction is consistent with the interpretation provided by the FCC. In its June 1990 Report and Order on Regulations Concerning Indecent Telephone Communications, the FCC noted that blocking alone was an insufficient means to prevent children from gaining access to dial-a-porn.[286] Consequently, it concluded that section 223(b) (FCC regulations) and section 223(c) (statutory requirement) were not to be read in the alternative, but were to be read together.[287]

Interestingly enough, although the FCC, *Dial Information Services* court, and *Information Providers' Coalition* court all adopted an interpretation of section 223 that requires compliance with both the current FCC regulations and the statutory reverse blocking scheme,

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283. Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

284. See *supra* notes 141-44 and accompanying text for the regulations under § 223.

285. Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1539 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992); Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 871-72 (9th Cir. 1991).

286. *In re* Regulations Concerning Indecent Communications by Telephone, 5 F.C.C.R. 4926, 4931-33 (1990).

287. *Id.* See *supra* notes 135-45 and accompanying text for the text of and discussion of the statute and FCC regulations contained in § 223(b) and (c). Other commentators have suggested that a narrow interpretation of § 223 requiring compliance with only reverse blocking where feasible, and with only the FCC regulations where reverse blocking is not feasible, would best reflect the intention of Congress. Petersen, *supra* note 46, at 2051-54. Petersen further suggested that under this interpretation, § 223 comports with the First Amendment because such a scheme would pass constitutional muster under the "least restrictive means test" announced in *Sable*. *Id.*; *see also*, Thomas J. Lo, *The Supreme Court's Recent Stand on Dial-a-Porn Regulations: "Honey I Shrunk the First Amendment!,"* 19 W. STATE UNIV. L. REV. 431 (1992).

the question of whether section 223 as a whole was the least restrictive means was not at issue in either dial-a-porn case. The federal courts of appeals should have applied the "least restrictive means" test to the entire scheme embodied in section 223, not just the statutory portion in subsection (c), which sets forth the reverse blocking requirement. The effectiveness of voluntary versus reverse blocking should be measured in light of how effective each one is when operating in conjunction with the FCC regulations that are to be enforced concurrently. Voluntary blocking coupled with the FCC regulations is not only effective, but is substantially less restrictive than the current scheme which requires reverse blocking in addition to compliance with the other statutory requirements and FCC regulations. If the *Dial Information Services* court had considered voluntary blocking and the FCC regulations as a whole, it may have found that voluntary blocking was sufficiently effective.[288] A regulatory scheme consisting of voluntary blocking plus the current FCC regulations, would likely pass constitutional muster under the First Amendment standard set forth in *Sable* since it is an effective and narrowly tailored means of achieving the goal of preventing children from gaining access to dial-a-porn messages.

CONCLUSION

The federal courts of appeals' applications of the *Sable* test have left many unanswered questions with respect to what level of scrutiny should be applied in the broadcast medium as compared to the dial-a-porn medium. The Supreme Court has denied certiorari in *Act II*.[289] In *Act II*, the court applied strict scrutiny relying on *Sable*, even though *Sable* involved dial-a-porn phone messages rather than broadcast. In doing so, the *Act II* court ignored the precedent set forth in *FCC v. League of Women Voters*[290] which adopted an intermediate scrutiny standard in reviewing broadcast regulations. The *Act II* court should have applied intermediate scrutiny in reviewing the twenty-four hour ban on indecent broadcasts and struck the ban down as unconstitutional based on that analysis rather than under strict scrutiny.

Additionally, the United States Courts of Appeals for the Ninth

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288. See *supra* notes 160-76, 199-206 and accompanying text for discussion of the *Information Providers' Coalition* and *Dial Info. Servs. Corp.* courts' rejection of voluntary blocking.

289. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("Act II"), *cert. denied*, 112 S. Ct. 1281-82 (1992).

290. 468 U.S. 364 (1984).

and Second Circuits' decisions in the dial-a-porn context indicate that there is some confusion as to how to apply the *Sable* standard to regulations aimed at indecent telephone messages. While the language of the *Sable* decision is indicative of a strict scrutiny standard, the Ninth and Second Circuit Courts of Appeals appear to have applied a lower level of scrutiny in reviewing the constitutionality of the Helms Amendment.

Based on the standard set forth in *Sable*, strict scrutiny should have been applied in reviewing the dial-a-porn regulations in *Dial Information Services* and *Information Providers' Coalition*. Under strict scrutiny, the reverse blocking requirement of the Helms Amendment could not pass constitutional muster under the First Amendment. Given the existence of the less restrictive means of voluntary blocking to achieve the Government's compelling goal of protecting children from gaining exposure to indecent speech over the telephone, reverse blocking is not the least restrictive alternative. The *Dial Information Services* court and the *Information Providers' Coalition* court should have read the *Sable* standard as requiring the least restrictive means to prevail even if it is a slightly less effective means.

Finally, the United States Courts of Appeals for the Ninth and Second Circuits should have evaluated the constitutionality of section 223 as a whole. If the courts had done this they would have found that a statutory voluntary blocking scheme coupled with the current FCC regulations was an extremely effective means to further the Government's goal of preventing minors from gaining access to indecent dial-a-porn messages.

Theresa M. Sheehan