Obscenity, Cable Television and the First Amendment: Will FCC Regulation Impair the Marketplace of Ideas

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I. INTRODUCTION

The nationwide explosion of the cable television industry over the last decade has provided viewers with a wide variety of program choices.\(^1\) Cable TV, with its diverse entertainment, information, and public access capabilities, has been lauded as an alternative to the bland, ratings-oriented programming of the three major networks.\(^2\) Unfortunately, due to restrictions imposed at the fed-

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\(^1\) The 1981 Broadcasting Yearbook reported that there were 4,400 operating cable systems in the United States. These cable systems were subscribed to by 17.2 million people and were viewed by an estimated 48 million people (22% of the nation's television households). The total revenues received by cable television system operators in the United States during 1980 were approximately $1.8 billion. Pay cable television (also known as subscription television) is available on 2,500 cable systems and reaches over 5 million subscribers. M. HAMBURG, ALL ABOUT CABLE vii (rev. ed. 1981). The average growth rate of cable systems over the past 28 years has been approximately 29%. \(\text{Id. at A-386 app.}\)

One recent study revealed that over 60% of all TV households subscribe to a cable service in 14 of the top 100 TV markets. Further, 20 markets were found to have cable systems penetrating over 50% of television viewing homes. The 10 leading markets for cable households are: New York, Los Angeles, San Francisco, Philadelphia, Pittsburgh, San Diego, Wilkes-Barre, Seattle, Cleveland, and Boston. \(\text{Id.}\)

Although cable systems originated as small, individually owned companies, there has been a recent trend toward consolidation. \(\text{Id.}\)

\(^2\) About 9% of cable systems have 30 or more channels, 20% of cable systems have 13-29 channels, and 67% of the systems have between 6 and 12 channels. This larger number of channels has produced diverse and revolutionary programming. Unlike commercial network programming, which is directed towards the "lowest common denominator audience" (i.e., programming which appeals to the greatest number of viewers while offending the least), cable programming is more specialized and appeals to audiences with specific interests. Today, the typical cable television service includes signals of the three major television networks, independent and educational networks, FM radio stations, Associated Press and United Press International wire services, sports networks, news and public affairs programming, video music stations, children's stations, religious networks, and pay entertainment services. M. HAMBURG, supra note 1, at A-388-90 app. The advent of satellite transmission has facilitated the growth of pay TV and independent stations such as Ted Turner's Atlanta "superstation" WTBS, which reaches over 14.5 million subscribers and is free with most cable services. M. HAMBURG, supra note 1, at A-386 app.

In addition to the vast satellite-delivered services, most cable operators also produce local programs to satisfy public access requirements. A 1979-1980 survey conducted by the National Cable Television Association (NCTA) found that 819 cable systems out of 1187 responding offered some form of locally originated programming. The NCTA survey found 260 cable systems offering educational programming, 218 systems producing local sports coverage, and 200 systems originating public affairs programming. NATIONAL CABLE TV
eral, state, and local level, the full potential of cable TV to provide an unlimited flow of communication has not been realized.\(^3\)

In no area has this stranglehold on the rights of cable operators and viewers been exemplified better than with the Federal Communication Commission (FCC) and its restrictions on program content which is deemed obscene, indecent, or profane.\(^4\) The FCC, believing that direct governmental action must be taken in combating the broadcasting of obscene or indecent speech, has determined that electronic broadcasting should have the most limited first amendment protections. The Commission believes that the unique attributes of the broadcasting media justify prohibiting speech which ordinarily would be allowed were it printed in a newspaper or magazine. Moreover, in the landmark case of \textit{FCC v. Pacifica Foundation},\(^5\) the United States Supreme Court upheld the FCC's power to impose sanctions on broadcasters of speech which fell within the "indecent or profane" standard, yet which was not obscene speech under the Court's own definition.\(^6\) Thus, the Supreme Court, in affirming the more restrictive regulation of radio and television broadcasting, has decided that the FCC is not bound by the test of obscenity which applies to the rest of the nation.\(^7\)

The \textit{Pacifica} Court justified its decision by emphasizing the per-

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\(^3\) \textit{ASS'N REPORT TO SENATOR PACKWOOD}, 4 app. B (1981) [hereinafter cited as NCTA REPORT].

\(^4\) Finally, the most revolutionary appeal of cable TV is its two-way communications capacity, which has created new opportunities for home security systems and electronic games, and which one day may even allow subscribers to do their banking and shopping by cable. The most popular two way interactive design is Warner-Amex Cable Communications, Inc.'s QUBE system. M. HAMBURG, \textit{supra} note 1, at A-386 app.


\(^7\) 438 U.S. 726 (1978).

\(^8\) \textit{Id.} at 738-41.

\(^9\) \textit{Id.} at 748-50.
vasive presence of radio and television in American life and upheld the FCC's statutory authority to regulate broadcasting in the "public interest, convenience, and necessity." This reasoning seems dubious, especially in light of the supremacy of a constitutional standard over a statutory one. Nevertheless, it is clear that the FCC has the power to regulate the program content of broadcasting. What remains to be clarified is whether the FCC's authority to regulate the program content of broadcasting extends to cable TV.

Although cable TV is no doubt a medium of expression, it is distinct from commercial television in that it does not have a limited spectrum of channels, nor is it supported solely by advertising revenue. To provide provocative information and to expand the dimensions of entertainment, cable TV must be free from the excessive burdens imposed by governmental regulation. The ability of cable TV to transcend the "cultural wasteland" of network TV will be drastically halted if cable operations are regulated under the same FCC standards as commercial broadcasters.

It is the conclusion of this comment that cable TV should be afforded the same first amendment protection as newspapers, magazines, and other non-broadcast media. The cable TV operator clearly resembles a newspaper publisher in that he provides information and entertainment only to those who affirmatively pay for such specific material. Unlike commercial network television, which is supported solely by advertising, cable TV programming, including X-rated adult movies, does not invade the privacy of one's home unless the viewer chooses to subscribe to such programs.

This comment will examine the fundamental policies underlying the FCC's regulation of cable television, especially in light of the *Pacifica* decision. In evaluating the regulation of cable TV, it will first be necessary to examine the development of governmental

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8. Id. at 749-50.
9. Id. at 737-38. The Communications Act of 1934, 47 U.S.C. § 303 (1976), provides: "[T]he Commission from time to time, as public convenience, interest, or necessity requires shall—. . . (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." Id.
10. U.S. Const. art. VI, cl. 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Id.
11. See Note, supra note 4, at 135-36.
12. Id. at 146.
regulation of electronic broadcasting and explain how cable television, due to its distinct technical features, fails to fit within this structure. Focus will then shift to a critical review of the Supreme Court's landmark obscenity cases, followed by an analysis of the *Pacifica* decision and how it contradicts the Court's prior adherence to protecting the first amendment rights of the press. Finally, this comment will conclude by providing the reader with a brief overview of cable TV's potential for improving the range of communication in America and how this potential will never be realized unless the FCC maintains a "hands off" approach toward cable TV program content.

II. HISTORY AND DEVELOPMENT OF TELEVISION REGULATION

In 1934, Congress promulgated the Communications Act,\(^\text{13}\) which was the first legislation regulating telecommunications in the United States, and which superseded the Radio Act of 1927.\(^\text{14}\) The Communications Act gave birth to the Federal Communications Commission, which consists of seven members appointed by the President with the consent of the Senate for seven year terms.\(^\text{15}\) Congress, in creating the Act, declared that its primary goal was "to make available, so far as possible, to all people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."\(^\text{16}\) Not only was the FCC granted the power to supervise the rates and services provided by communication common carriers,\(^\text{17}\) it was also given the authority to regulate broadcast licenses.\(^\text{18}\)

With the advent of television came the problem of allocating the limited number of channels to the numerous applicants for licenses. The FCC, perplexed by this allocation problem, placed a freeze on the authorization of new television licenses from 1948 to 1952.\(^\text{19}\) This freeze ended when the FCC issued its *Sixth Report*

15. 47 U.S.C. § 154(b) (1976) states that both major political parties must have at least three members appointed to the FCC and the Chairman may belong to the political party of the President.
19. See M. Hamburger, *supra* note 1, § 1.01, at 1-3.
Regulation of Cable Television

and Order, which announced a television frequency allocation plan that assigned approximately 2,000 television stations to serve 1,291 communities.

As the FCC’s freeze on television licenses ended, the establishment of Very High Frequency (VHF) stations boomed in the major TV markets. However, those in rural areas suffered, as did Ultra High Frequency (UHF) stations in general, a fact which was attributed to their inferior technology. Several VHF stations in smaller markets were losing money and many VHF allocations, particularly those in the western and north-central states, remained unclaimed by 1960. The main problem facing the television stations, whether VHF or UHF, was the extensive amount of money required to operate them. The competition from mass-produced network programming or “syndicated” programming made locally produced and less expensive programming unfeasible.

Because the FCC’s allocation plan of 1952 created several unprofitable television markets, many channels remained unissued and many areas of the country had no network affiliates. An FCC study indicated that fifty percent of the thirty four million homes having television in 1956 could not receive three network signals. Moreover, the study indicated that twenty percent of the popula-

21. See id. at 220-652. The FCC's plan set out five basic goals, mentioned in order of priority:
   (1) To provide at least one television service to all parts of the United States.
   (2) To provide each community with at least one television broadcast station.
   (3) To provide a choice of at least two television services to all parts of the United States.
   (4) To provide each community with at least two television broadcast stations.
   (5) [To reassign any channels remaining after accomplishment of the above goals on a basis of community need.]

Id. at 167. See also M. HAMBURG supra note 1, § 1.01, at 1-4.
22. VHF stations consist of a band of frequencies extending from 30 MHz to 300 MHz and are assigned to channels 2-13. See R. LE Duc, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL 238 (1973).
23. M. HAMBURG, supra note 1, § 1.01, at 1-5.
24. UHF stations are assigned to channels 14-70 and operate on frequencies ranging from approximately 470 MHz to 800 MHz. See LeDuc, supra note 22, at 238.
25. M. HAMBURG, supra note 1, § 1.01, at 1-5.
26. Id.
27. Id.
28. Id. In Wyoming, Nevada, Montana, and North Dakota, it was impossible for a station licensee to operate successfully due to the audience allocation. New Jersey lacks a commercial VHF station because the FCC allocation plan designates that New York City stations cover that area.
29. Id.
tion could not receive any television signal without some form of additional reception device. Thus, outlying and rural communities recognized the need for a new, low cost form of technology which would pick up television broadcast signals and disseminate them to local viewers.

III. CABLE TELEVISION REGULATION

A. The Birth of Cable Technology

Cable television began in 1950 with the establishment of a community antenna in Lansford, Pennsylvania, which picked up conventional television signals and retransmitted them to community viewers. Soon after, cable systems began to flourish around the country as a method of delivering broadcast signals to rural homes that failed to receive adequate reception by conventional means. The FCC initially viewed cable TV as merely a novel device used to retransmit broadcast signals and did not see any need for special regulation. In Frontier Broadcasting Co. v. Collier, the FCC was asked to assert jurisdiction over cable as a common carrier. Weighing the administrative burdens against the possibility that cable operators might be designated as common carriers, the Commission concluded that cable operators were not common carriers and rejected jurisdiction over cable.

In Carter Mountain Transmission Corp. v. FCC, the Commis-
sion denied an application for a Wyoming cable system because it would economically destroy the local television station, KWRB-TV.\textsuperscript{37} On appeal, the Circuit Court of Appeals for the District of Columbia upheld the Commission, stating that the community would be "deprived of free television service if the local station failed."\textsuperscript{38} In 1965, the FCC continued its trend toward protecting local TV stations by issuing its \textit{First Report and Order},\textsuperscript{39} which required all CATV systems to carry, upon request, the signals of local TV stations. Further, the FCC ruled that a CATV system could not transmit any programs that were carried by local stations within fifteen days.\textsuperscript{40} On March 4, 1966, the FCC, in its \textit{Second Report and Order},\textsuperscript{41} increased its control over cable TV programming by banning the importation of distant signals into the top 100 markets.\textsuperscript{42} This ban would only last until 1972.

In 1968, an important question presented by the rising complaints regarding distant signal importation was whether cable operators were required to pay royalties for the transmission of copyrighted programs without the owner's consent.\textsuperscript{43} Ultimately, the issue of cable television and copyright law was resolved by the Supreme Court in \textit{Fortnightly Corp. v. United Artists Television, Inc.},\textsuperscript{44} where it was determined that the retransmission of programs by cable does not constitute copyright infringement.\textsuperscript{45}

Later in 1968, the Supreme Court, in \textit{United States v. Southwestern Cable Co.},\textsuperscript{46} was presented with the difficult question of

\begin{itemize}
\item 37. \textit{Id.} at 464-65.
\item 38. 321 F.2d at 365.
\item 39. 38 F.C.C. 683 (1965).
\item 40. \textit{Id.} at 721-22.
\item 41. 2 F.C.C.2d 725 (1966).
\item 42. \textit{Id.} at 749, 782. Although the FCC contended that the distant signal ban would ensure the growth of UHF stations, in reality these regulations damaged UHF stations as well as cable systems. Cable television without the importation of distant signals was less appealing to audiences and since UHF stations depended on cable systems to amplify their signals, the distant signal ban hampered the development of UHF stations. \textit{See} LeDuc, \textit{supra} note 22, at 159-60.
\item 43. \textit{See} M. HAMBURG, \textit{supra} note 1, § 1.10, at 1-20.
\item 45. 392 U.S. at 401-02. However, Congress recently amended copyright laws to require cable operators to pay royalty fees whenever they retransmit copyrighted programs. \textit{See} Copyright Revision Act of 1976, 17 U.S.C. § 101-18 (1976). On March 15, 1983, these copyright fees were increased, thus forcing several cable operators to cutback distant signal programming. The National Cable Television Association predicts that as a result of these increased fees, over six million homes will lose some distant signal programming. \textit{Pittsburgh Press}, Mar. 25, 1983, at C13, col. 2.
\item 46. 392 U.S. 157 (1968). In \textit{Southwestern Cable}, a cable operator sought to import Los
whether the FCC had any authority whatsoever to regulate cable TV. Justice Harlan, writing for the Court, upheld the Commission's authority to regulate cable TV under the Communications Act, and emphasized that broadcasting is the principal source of information and entertainment for a great deal of the nation. He concluded that the FCC's regulation is "restricted" to that reasonably ancillary to the Commission's various responsibilities for the regulation of television broadcasting. The Court went on to hold that the FCC has authority over cable TV because it has authority over "all interstate . . . communication by wire or radio."

B. 1972 Cable Rules

In 1972, the FCC issued its 1972 Cable Television Report and Order, which imposed mandatory access equipment and channel capacity requirements on cable systems. Although these rules were somewhat refined and softened by the Commission's 1976 Cable Television Report and Order, they are the rules by which cable television is presently regulated. Foremost among the changes brought about by the 1972 rules was the end to the ban on distant signal importation. The new rules also increased local citizen involvement with the cable franchises and provided requirements for local programming and public access.

C. The Midwest Video Decisions

That same year, in United States v. Midwest Video Corp. (Midwest Video I), the Supreme Court affirmed the FCC's authority to require the local origination of programming by cable systems with 3,500 or more subscribers. Midwest Video challenged these

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47. 392 U.S. at 177.
48. Id. at 178.
49. Id.
50. 36 F.C.C.2d 143 (1972).
52. 36 F.C.C.2d at 181.
54. 406 U.S. at 659-60.
requirements on the basis that they were not "reasonably ancillary" to the Commission's responsibilities in the broadcasting industry, and the Eighth Circuit Court of Appeals ruled in Midwest's favor, indicating that the regulations failed to serve the public interest. However, the Supreme Court reversed, holding that the regulations were "reasonably ancillary" to the FCC's jurisdiction over broadcast services since the regulations assure that in "the transmission of broadcast signals, viewers are provided suitably diversified programming," thus fulfilling the FCC's responsibility under the Communications Act "to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities." Justice Brennan noted that because Congress had been silent on the issue of cable regulation, the Commission must be allowed wide latitude in regulating the industry. The Court, although disappointed in the failure of Congress to enact legislation regarding this matter, held that the local origination regulation was within the Commission's power under the Communications Act of 1934. Justice Brennan reached this decision by emphasizing that cable is dependent upon television broadcasting and therefore is a link in the overall television communications system. Justice Douglas vehemently dissented, arguing that only Congress could determine whether cable systems should be subjected to a regulation requiring them to originate programs, and since Congress had failed to act, the FCC was powerless to impose such a regulation.

In 1978, Midwest Video again challenged the FCC's authority over cable TV access requirements and the Eighth Circuit held, in Midwest Video Corp. v. FCC (Midwest Video II), that the relaxed regulations of the 1976 Cable Television Report and Order

55. 441 F.2d 1322 (8th Cir. 1971), rev'd, 406 U.S. 649 (1972).
56. 406 U.S. at 669.
57. Id.
58. Id. at 670.
59. Id. at 660-62, 669-70.
60. Id. at 669.
61. Id. at 670.
62. Id. at 677 (Douglas, J., dissenting). Justice Douglas was joined by Justices Stewart, Powell and Rehnquist.
63. Id. In discussing how only Congress could impose a regulation which would force cable companies to require new equipment, new investment, and new personnel, Justice Douglas stated that "there is not the slightest suggestion in the Act or in its history that a carrier can be bludgeoned into becoming a broadcaster." Id. at 680 (Douglas, J., dissenting).
64. 571 F.2d 1025 (8th Cir. 1978).
still exceeded the FCC’s jurisdiction. The Supreme Court changed the position it had taken in Midwest Video I and affirmed the circuit court’s decision. The new majority held that cable operators cannot be “deprived of all discretion regarding who may exploit their access channels and what may be transmitted over such channels.” Moreover, the Court noted that such access rules shift the control of program content from the cable operator to the public, thus transforming the cable company into a common carrier. Such a result, the Court pointed out, goes beyond the scope of the Communications Act and only could be compelled by Congress.

D. Recent Developments

On July 22, 1980, the FCC, in a Report and Order, began deregulating the cable TV industry by removing the distant signal importation restriction. The Commission also did away with the syndicated program exclusivity rule, which previously gave local stations power to force cable companies to delete programs which the local stations had exclusive rights to, irrespective of whether the program would ever be broadcast locally. The FCC order concluded that the best protection of consumers is gained not by protecting particular industries but by increasing consumer choice. Recently, the FCC’s removal of distant signal importation and program exclusivity restrictions was challenged in Malrite T.V. v. FCC. The United States Court of Appeals for the Second Circuit affirmed the FCC’s deregulation policy, concluding that such deregulation does not threaten the television industry but rather will help boost the cable industry, which possesses the “best possibility

65. Id. at 1063.
67. Id. at 693.
68. Id. at 708-09.
69. 79 F.C.C.2d 652 (1980).
70. Id. at 813-15.
71. Id. at 667-70.
72. Id. at 813-14. This deregulatory trend is consistent with the government’s current position regarding the airlines, banking, health services, natural gas, oil, telephone, and trucking industries. For a thorough discussion of the deregulation of the above industries, see Managing the Transition to Deregulation, 44 LAW AND CONTEMP. PROB. 1 (1981). See also Comment, The FCC’s New Equation for Radio Programming: Consumer Wants = Public Interest, 19 Duq. L. Rev. 507, 523 (1981).
73. 652 F.2d 1140 (1981).
for special interest programming.”

Although the cable industry is being deregulated by the recent policies of the FCC, many areas are still governed by the FCC’s Rules and Regulations. Furthermore, states and municipalities have begun regulating cable systems in areas which previously were under FCC authority. One of the most significant and growing problems in regulating the cable industry, regardless of whether one is at the federal, state, or local level, concerns the cablecasting of material which is “obscene or indecent.” How the current trend toward deregulation will affect cable TV program content remains to be seen. However, the FCC’s present policy regarding “obscene or indecent” speech on cable TV is certain to impede its potential for diverse, challenging programming and overlooks the intrinsic characteristics of cable TV which distinguish it from traditional television broadcasting. Before scrutinizing the FCC’s questionable justification for subjecting cable TV to the same restrictive obscenity standard as commercial radio and television, one must review the development of obscenity law in this country.

IV. LANDMARK SUPREME COURT OBSCENITY CASES

A. The Definitional Problem

Any discussion of obscenity must begin with a definition of the term. However simple this may sound, defining obscenity has perplexed judges, lawyers, and legal scholars and has been one of the Supreme Court’s major post-World War II preoccupations. Due to the various public attitudes and beliefs toward sexual expression, any attempt to legally define obscenity in rigid technical terms is futile. Perhaps, obscenity is too complex and nebulous for

74. Id. at 1151.
75. Some of the more important areas still federally regulated are the carriage of local broadcast signals, network program nonduplication protection, sports program blackouts, cross-ownership, equal employment opportunity, origination cablecasting, pole attachments, copyrights, technical standards, and record-keeping. See M. HAMBURG, supra note 1, § 2.01, at 2-3.
76. For a thorough discussion of local regulation of cable television, see Note, Cable Television: The Practical Implications of Local Regulation and Control, 27 Drake L. Rev. 391 (1978).
77. See infra note 176.
78. Webster’s derives its definition of obscenity from the Latin “ob” meaning against and “caenum” meaning filth. WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1557 (1965).
79. For an analysis of obscenity and the Supreme Court’s difficulty in defining it, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16 (1978).
the law to define, and like beauty, can only be defined by the beholder. Justice Stewart gave credence to this view when, after struggling for a concrete definition, he stated: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard core pornography]; and perhaps I could never succeed in intelligently doing so. But I know it when I see it."

Although this may be the realist's perception of defining obscenity, the first amendment requires more than an emotional reaction to determine if material is legally obscene. Because any obscenity test must first pass constitutional muster, the Supreme Court has spent the last quarter-century attempting to devise some standard capable of separating obscenity from the much broader group of protected, sexually explicit expression. The following review of Supreme Court obscenity decisions is intended to illustrate the dominant weight accorded first amendment rights pertaining to sexual expression when balanced against the interests served by local obscenity regulations.

The first of the modern landmark obscenity cases was the 1957 decision of Roth v. United States, in which the Supreme Court held that there is no first amendment protection for material which is deemed obscene. In reaching this conclusion, the Court announced a new test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to the prurient interest." Justice Douglas wrote a harsh dissent in Roth which criticized the test whereby the legality of a publication turned on the purity of thought which it instills in the mind of the reader.

81. 354 U.S. 476 (1957). Before the Roth decision, courts applied a broad obscenity test which turned on the effect of isolated portions of the material on persons particularly susceptible to lustful thoughts. This standard, known as the Hicklin test, was traced to the early English case of Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868). See L. Tribe, supra note 79, § 12-16, at 658-59.
82. 354 U.S. at 485. Sixteen years later, this failure to concretely define obscenity led Justice Brennan, who authored the Roth opinion, to reject Roth's guidelines in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (Brennan, J., dissenting). While the Roth Court established the broad principle that obscenity was not constitutionally protected speech, it failed to formulate a definition capable of assisting juries in determining what material is obscene. See Marcus, Zoning Obscenity: Or, the Moral Politics of Porn, 27 Buffalo L. Rev. 1, 24 (1978). Thus, in later cases, the problem became one of defining the terms: "average person," "community standards," "prurient interests," and "dominant theme." See L. Tribe, supra note 79, § 12-16, at 660.
83. 354 U.S. at 489.
and not on whether such material permeated into antisocial conduct. Justice Douglas believed that the arousing of sexual thoughts and desires was happenstance in the daily lives of normal people and he warned that any legal standard allowing judges or juries to suppress literature which incites lustful thoughts is dangerous because "the test that suppresses a cheap tract today can suppress a literary gem tomorrow."86

Nine years after the Roth decision, the Court again became dissatisfied with the obscenity test in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts.87 A plurality of the Court added the requirement that to constitute obscenity, an expression must be "utterly without redeeming social value."88 This test proved to be extremely frustrating to anti-obscenity groups, police departments and prosecutors because the defendant was only required to establish through expert testimony that the work had some redeeming social value.89 Thus, the pornographer was protected as long as he did not "pander" his material90 or sell it to minors.91

Controversy, criticism, and frustration engulfed the members of the Court as they found it virtually impossible to agree upon what constituted obscene speech and what speech deserved first amendment protection. From the Roth decision in 1957 until 1973, at least thirty one obscenity cases were decided without any clarification of the matter.92 This lack of consistency forced lower courts into a quagmire, since they had no concrete obscenity guidelines to apply.

84. Id. at 508-511 (Douglas, J., dissenting).
85. Id. at 514 (Douglas, J., dissenting).
87. Id. at 418.
89. Ginzburg v. United States, 383 U.S. 463 (1966). In Ginzburg, the Court held that an advertiser's pandering of his material (i.e., promoting it in a sexually titillating way), was conclusive evidence of its obscenity, even though the material itself was not legally obscene. Id. at 474-76. Id. But see Butler v. Michigan, 352 U.S. 380 (1957) (where the Court warned of the "chilling effect" of a regulation which purports to protect children from sexual material, but which also reduces the adult population's access to such material).
90. Ginsberg v. New York, 390 U.S. 629 (1968). In Ginsberg, the defendant was convicted under a state statute for knowingly selling two "girlie" magazines to a 16 year old. The Court acknowledged that these magazines were not obscene for adults, but affirmed the conviction, emphasizing that a determination of obscenity varies with the age of the viewer and that it is within the state's police power to restrict the exposure of minors to these materials. Id. at 637-43.
B. The Miller Test

Finally, in the 1973 case of Miller v. California,92 a new majority93 of the Court articulated what has become the closest thing to a definitive obscenity test, and which consequently remains the current standard.94 Miller reaffirmed Roth's holding that obscenity is not protected by the first amendment, but modified the guidelines used by the trier of fact.95 To find speech unprotected because obscene, the Miller Court adopted its well-known three prong test:

(a) [W]hether "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.96

The Miller Court made it easier to deem material obscene by substituting for the "utterly without redeeming social value" test the more liberal requirement that material is obscene only if it "lacks serious, literary, artistic, political or scientific value."97 In redefining obscenity, the Miller Court required that a state obscenity statute, either by its language or by judicial interpretation, specifically describe what sexual acts lead to a finding that a material is obscene.98 Finally, the Miller Court held that local or state standards are to be used in determining whether material is obscene, in addition to the above quoted legal standards.99

An analysis of these rulings clearly indicates the monumental

92. 413 U.S. 15 (1973). In Miller, the defendant was convicted of violating a state obscenity statute for distributing "pictures and drawings very explicitly depicting . . . a variety of sexual activities, with genitals often prominently display." Id. at 18. In the companion case of Paris Adult Theatre I v. Slaton, decided the same day as Miller, the Court held that states could enjoin the exhibition of hardcore pornographic motion pictures under the Miller test, even when the exhibitor attempts to limit the audience to consenting adults. Id.

93. The new majority consisted of four Nixon appointees, Chief Justice Warren Burger, and Justices Blackman, Powell, and Rehnquist, along with Justice White, a Kennedy appointee.


95. 413 U.S. at 24.

96. Id. (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

97. Id.

98. Id.

99. Id. at 25.
task faced by the land's highest court in attempting to formulate a functional test for regulating obscenity. On one hand, the delicate protections of the first amendment must be met; on the other, society demands protection from obscene material, especially that which threatens the welfare of its youth. Unlike most offenses, where the harm committed is clearly discernible, obscenity is a "victimless crime" which punishes behavior that does no more than offend the moral sensibilities of the observer. Due to its relatively harmless nature, the Supreme Court has taken careful measures to devise a test which regulates obscenity without infringing upon first amendment rights.

The test adopted in Miller was the culmination of years of searching by the Court for a formula that equitably balanced the constitutional right of free speech against the forces in society seeking to prohibit certain types of sexual expression. Implicit in any effective application of the Miller test is the notion that it be adhered to as the central, if not uniform, standard to judge obscenity; the only recognized deviation being instances when children are exposed to harmful material.100 However, as noted previously, the FCC has the authority to regulate broadcasting which falls within the grey area of "indecency," even though it fails to cross the obscenity threshold. This FCC power raises serious first amendment questions concerning the constitutional limitations on the FCC's regulation of broadcasting and demands an examination of the FCC's justifications for applying a tougher obscenity standard to broadcasting than that espoused by the Supreme Court's Miller guidelines.

V. FCC Authority to Regulate Radio and Television Program Content

A. Statutory Authority

Radio and television, because of their unique characteristics and massive exposure and influence, have required more regulation to safeguard the public's interest in programming than has the print media.101 The FCC, pursuant to its goal of protecting the public's

100. See supra notes 89-90 and accompanying text.

101. Red Lion Broadcasting Co. v. FCC, 395 U.S. 267, 286 (1969). The Red Lion Court sustained the FCC's fairness doctrine, which requires television and radio stations to provide equal time to persons with views opposed to those aired. In reaching its decision, the Court emphasized the uniqueness of radio as a medium of communication. Id. at 400. See also Omega Satellite Prods. v. City of Indianapolis, 536 F. Supp. 371, 379 (1982) (cable television programming is protected speech; however, the nature and degree of protection
interest, has the power to regulate broadcasting under the "public convenience, interest or necessity" standard. While the Communications Act does not give the FCC authority to censor programs, the FCC can in effect do so under its broad authority to regulate in the public interest. By its licensing authority, the FCC can exercise great influence over broadcast programming. Since a broadcast license has great monetary value, the FCC's renewal process is an effective method of regulation in that the Commission can grant only a short term license renewal to bring an uncooperative licensee under control. When more serious violations occur, which are rare, the FCC can deny renewal, or even revoke a license.

Another source of FCC authority over program content comes from section 1464 of the federal Criminal Code, which provides: "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." A violation of section 1464 is open to a wide range of additional sanctions, the most serious of which is the Commission's power to deny license renewal on the grounds that a licensee who violates the obscenity statute is not serving the public interest.

One of the most perplexing questions raised by section 1464 is what is "indecent" or "profane" language, and how does it differ from the Supreme Court's definition of obscenity? Since there existed no judicial definition of "indecent," the FCC developed its own interpretation in *In re WUHY-FM, Eastern Educational Radio,* which defined a broadcast to be "indecent" when it contains speech which is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value." Thus, the FCC's standard for indecent speech made no mention of prurient interest or judging the material as a whole.

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102. See supra note 9 and accompanying text.
104. See supra note 9. See also Toohey, supra note 88, at 91.
109. 24 F.C.C.2d 408 (1970). In Eastern Educational Radio, the FCC issued sanctions under § 1464 against WUHY-FM because it broadcast a pre-recorded interview with rock star Jerry Garcia in which Mr. Garcia frequently used vulgar language, regardless of the fact that no listeners filed any complaints. Id. at 409 n.2.
110. Id. at 412.
Regulation of Cable Television

Five years later, in *Illinois Citizens Committee for Broadcasting v. FCC,* the FCC's assessment of a forfeiture of a license against a radio station for broadcasting material having prurient appeal was upheld. The Commission found the program to be both obscene under *Miller* and indecent under *Eastern Educational Radio.* The Court of Appeals for the District of Columbia affirmed the FCC's decision solely on the basis that the broadcast was obscene under the *Miller* standard and, unfortunately, failed to determine the constitutionality of the FCC's definition of indecency.

Section 1464 is contained with four other sections in the "obscenity" chapter of the federal Criminal Code. All five of these sections use the terms obscene and indecent in the conjunctive form with other adjectives. In the 1974 case of *Hamling v. United States,* the Supreme Court interpreted the terms in section 1461, which prohibits the mailing of "obscene, lewd, lascivious, filthy or vile" articles, to be limited to the type of material which is obscene under the *Miller* test. In reaching its decision, the *Hamling* Court thought that this restrictive construction was imperative since the statute otherwise would be overbroad. The interpretation of "indecent" in section 1464 has been discussed in several circuit court cases with conflicting results. The most recent federal court of appeals decision involving the interpretation of section 1464 was *United States v. Simpson,* where the court held that the terms "obscene" and "indecent" apply only if the material appeals to the prurient interest, since both terms are to be read as part of a single proscription.

FCC authority over program content also stems from the FCC's own cable television rules, which specifically prohibit the presentation of obscene or indecent programs on origination channels. A
1976 FCC ruling holds cable operators to a standard of reasonableness and withholds responsibility for occasional violations which the operator had no reason to anticipate.\textsuperscript{120} If such reason exists, then the cable operator would be held responsible for failing to take appropriate action to remove the offensive programming.

Notwithstanding the FCC's statutory authority or its "ancillary" theory of jurisdiction to regulate cable television, the debate over whether the Commission can constitutionally suppress indecent but non-obscene speech continues. The Supreme Court has confronted the issue only once, in \textit{FCC v. Pacifica Foundation}.\textsuperscript{121} Unfortunately, the \textit{Pacifica} holding has not resolved the controversy, but has only exacerbated it.

\textbf{B. The Pacifica Case}

On October 30, 1973, at approximately 2:00 p.m., WBAI-FM a New York radio station (owned by the non-commercial Pacifica Foundation) broadcast the George Carlin monologue "Filthy Words," a comedy routine about offensive words.\textsuperscript{122} After broadcasting the Carlin recording, the FCC received a complaint from a father who heard the broadcast over his car radio with his fifteen-year old son.\textsuperscript{123} This was the only complaint the FCC received concerning the WBAI broadcast; nevertheless, the Commission issued a declaratory order ruling "that language depicting sexual or excretory activities and organs and patently offensive words" could be kept off the airwaves by section 1464 of the federal Criminal Code.\textsuperscript{124} The FCC order placed emphasis on keeping "indecent" broadcasts off the air at times when children may be in the

or indecent." \textit{Id.} at 238.

\textsuperscript{120} Clarification of Section 76.256 of the Commission's Rules and Regulations, 59 F.C.C.2d 984 (1976). This probably means the cable operator has to prescreen material to determine if it is offensive. \textit{See M. HAMBURG, supra} note 1, § 6.05[3], at 6-44.

\textsuperscript{121} 438 U.S. 726 (1978).

\textsuperscript{122} The recording lasted twelve minutes and was preceded by a warning that it included sensitive language which might offend some listeners. The recording was broadcast during a program about modern society's attitude toward language. \textit{Id.} at 730.

\textsuperscript{123} \textit{Id.} The complaint was filed by John R. Douglas, a national member of Morality In Media. \textit{See WBAI Ruling: Supreme Court Saves the Worst for the Last}, \textit{BROADCASTING}, July 10, 1978, at 20. In response to this lone complaint, the Pacifica Foundation compared Carlin to famous writers like Mark Twain and argued, "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." 438 U.S. at 730.

\textsuperscript{124} \textit{Id.} The FCC did not impose formal sanctions but did state that the order would be put in the station's renewal file in case of subsequent violations.
audience.\textsuperscript{125}

The Pacifica Foundation appealed the FCC's ruling to the United States Court of Appeals for the District of Columbia, which reversed\textsuperscript{126} the Commission's ruling on the basis of its being overbroad and nothing more than censorship, an activity in which the FCC is forbidden to engage.\textsuperscript{127} However, Judge Tamm, writing for the majority, ignored the central issue of whether section 1464 "indecent" speech was distinct from obscene speech.

The United States Supreme Court, in a narrow five to four decision, reversed the District of Columbia Circuit Court decision and upheld the FCC's power to regulate broadcasting more strictly than any other type of media.\textsuperscript{128} The Court adopted the position taken by Circuit Judge Leventhal's dissent and limited its review to the FCC's ruling that the Carlin monologue, as broadcast, was indecent under section 1464.\textsuperscript{129} The Court held that the Commission's actions did not constitute impermissible censorship and were mandated by Congress.\textsuperscript{130} Moreover, the Court upheld the FCC's position that "obscene" and "indecent" have separate meanings and that the Carlin monologue, even though not obscene, could be proscribed.\textsuperscript{131}

Justice Stevens, writing the majority opinion, noted that broadcasting has "a uniquely pervasive presence in the lives of all Americans" and that prior warnings alone will not prevent the listener, especially the child listener, from hearing such offensive program-

\textsuperscript{125} Id. at 750. See Palmetto Broadcasting Co., 33 F.C.C. 250 (1962) (denied license renewal because of station's broadcast of vulgar, offensive programs which children might hear). \textit{But see} Home Box Office, Inc. v. Wilkinson, 531 F.Supp. 986 (C.D. Utah 1982) (state statute regulating "indecent" cable TV program content overturned because it was unconstitutional and lacked provisions regarding the state's interest in protecting children from such material.)


\textsuperscript{127} Id. According to Judge Tamm, the FCC ruling violated 47 U.S.C. § 326 (1976), which prohibits any censorship by the FCC. In a concurring opinion, Chief Judge Bazelon agreed that the FCC ruling constituted censorship. However, Judge Bazelon also concluded that 18 U.S.C. § 1464 must be narrowly construed to cover only language that is obscene or otherwise unprotected by the first amendment. \textit{Id.} at 24-30 (Bazelon, C.J., concurring). In dissent, Judge Leventhal stated that the only issue was whether the FCC could regulate the language "as broadcast." \textit{Id.} at 31 (Leventhal, J., dissenting) (emphasis in original). Judge Leventhal emphasized the importance of protecting children from exposure to indecent language. \textit{Id.} at 37 (Leventhal, J., dissenting).


\textsuperscript{129} Id. at 741.

\textsuperscript{130} Id. at 750.

\textsuperscript{131} Id.
He went on to describe how broadcast media project their messages into the home, where people have the right to be left alone and unoffended by such an invasion of privacy. Justice Stevens proceeded to hold the Carlin monologue indecent, finding that Congress intended the words "obscene," "indecent," and "profane" in section 1464 each to have distinct meanings. He concluded that indecent simply means nonconformance with accepted standards of morality, regardless of prurient appeal. Finally, the *Pacifica* Court limited its holding to the specific context in which the Carlin monologue was broadcast and asserted that the time of day, content of the broadcast program, and *nature of the medium* are all relevant in any determination as to whether the FCC can regulate a specific broadcast's content.

Justice Brennan bitterly dissented, arguing that the majority's holding violated the first amendment rights of both the broadcast media and the people who want to hear such broadcasts. He stated that the individual himself chooses to allow the broadcast into his home, therefore he can protect his right to privacy by turning off any broadcast which he finds offensive. Moreover, Justice Brennan noted that "[t]he ability of government, consonant to the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." In the case of the citizen who voluntarily allows a broadcast into his home, there is no intolerable invasion of privacy, Justice Brennan wrote, because:  

> [W]hatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.

Justice Brennan also attacked the majority's rationale of regulating indecent broadcasts to protect young children from hearing them.

132. *Id.* at 748-50.  
133. *Id.* at 748.  
134. *Id.* at 739-40.  
135. *Id.* at 750.  
136. *Id.* at 762 (Brennan, J., dissenting).  
137. *Id.* at 765 (Brennan, J., dissenting).  
138. *Id.*  
139. *Id.* at 765-66 (Brennan, J., dissenting).
Such an approach, he argued, would enable the FCC to ban the broadcast of speech which is protected, including many great artistic and political works.\textsuperscript{140}

The implications of the \textit{Pacifica} case to the broadcast industry are potentially devastating.\textsuperscript{141} While the FCC contends its regulation of indecent speech does not constitute prior restraint or censorship, the direct result of \textit{Pacifica} is a chilling effect which will force broadcasters to avoid any controversial programming which may result in FCC sanctions. This type of government control over speech goes against the fundamental purpose of the first amendment: to encourage lively, robust debate in a free and democratic society.\textsuperscript{142}

\section*{VI. Pacifica's Implications to Cable Television}

The \textit{Pacifica} decision, while authorizing FCC control over "indecent" speech, was limited to radio broadcasting and has no applicability to cable television. As noted previously, \textit{Pacifica}'s holding was limited to one specific broadcast of the Carlin monologue by WBAI-FM. The \textit{Pacifica} Court emphasized that along with the time of day and content of the broadcast, the nature of the medium must be considered in determining whether the FCC should sanction a station for broadcasting certain material. The following discussion will illustrate how a literal application of \textit{Pacifica}'s holding would require the FCC to consider cable TV's unique nature in determining whether to proscribe any "indecent" speech. Moreover, this analysis will point out how \textit{Pacifica}'s holding is inconsistent with prior Supreme Court obscenity decisions and misperceives the privacy interests of individual viewers and listeners.

\subsection*{A. The Distinct Nature of Cable Television}

Each medium of communication presents different regulatory problems and must be assessed by first amendment standards.

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 770-71 (Brennan, J., dissenting). Taken to its logical extreme, the FCC could:
\begin{itemize}
\item Justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.
\end{itemize}
\end{itemize}

\begin{itemize}
\item \textsuperscript{141} \textit{Id.} at 771 (footnote omitted).
\end{itemize}
suited to its particular characteristics. Cable television is no exception to this general rule. However, the FCC has attempted to regulate cable TV in the same manner as conventional radio and television, totally ignoring the distinct technological and economic rationales that would prescribe regulating cable TV differently.

The most important reason for regulating conventional broadcasting is the fact that there is only a limited amount of channel airspace. Cable television, on the other hand, has an unlimited amount of channel space and does not realize any "spectrum scarcity." With cable technology, the public can receive an unlimited amount of channels or services. Additionally, cable television's unlimited channel space increases its potential for providing a forum for public access, thereby benefiting those without technical skills or deep pockets and those who support unpopular causes.

Another ground upon which FCC regulation over broadcasting has been upheld is that the airwaves are "owned" by the public with the broadcasters acting as trustees of the "property." This theory of regulation is totally inapplicable to cable TV, since the cables used to transmit programs are not "public" property; rather, these cables are owned and operated by the cable companies who installed them. Any regulation in this area is better left to the local franchise agreement, which provides specifications for the installation of cables, and not the FCC.

A further distinction between the nature of cable TV and conventional broadcasting media is sources of revenue. Conventional radio and television broadcasting garners its operating funds from advertising revenue. Due to the scarcity of channels, advertisers avoid sponsoring shows with controversial or offensive subject matter, in the hope that they will attract the largest possible audience. This economic pressure exerted by advertisers, which undoubtedly influences a broadcaster's programming decisions, justifies some FCC regulation. But once more, this argument fails when applied to cable TV because cable relies upon viewer subscription fees, not advertising, as its main source of income. Furthermore, cable TV's programming, instead of being geared to large audiences, is much more narrow and specialized. It is clear that cable TV pos-

143. See supra note 101.
145. Id. at 492.
146. Id. at 493-94.
147. Id. at 498.
sesses characteristics totally different from conventional broadcasting, and as the Court noted in *Pacifica*, this consideration of the nature of the medium is relevant in any attempt to regulate "indecent" speech. Thus, even under the *Pacifica* decision, the FCC lacks authority to proscribe non-obscene speech on cable television. Nevertheless, the reasoning of the *Pacifica* Court is legally unsound in that it misinterprets certain constitutional standards.

### B. *Pacifica* is Inconsistent with Prior Supreme Court Decisions

Certain types of speech, such as obscenity, are deemed outside the first amendment's protection and may be prohibited in any setting. The Supreme Court has consistently held that obscene material must appeal to a prurient interest in sex and must lack any serious literary, political, artistic, or scientific value. The *Pacifica* decision, however, mandates FCC regulation of broadcasts which fail to conform with accepted standards of morality, regardless of prurient interest. Thus, the Supreme Court, after finally settling on a uniform definition of obscenity in *Miller*, has again interjected confusion and uncertainty in this area by adopting a separate standard of "indecency" for the broadcast media. This standard is particularly inappropriate when applied to the medium of cable television.

While the Court has consistently applied a tougher obscenity standard to materials available to minors or materials which depict minors engaging in sexual activity, the Court should not apply this doctrine in a manner which would interfere with adults' access to materials that are not obscene to them. In *Erzorznik v.*

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148. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Chaplinsky Court held: There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words . . . . [S]uch utterances are no essential part of any exposition of ideas . . . . *Id.* at 571-72. *But see* Lewis v. City of New Orleans, 415 U.S. 130 (1974); Plummer v. City of Columbus, 414 U.S. 2 (1973) (per curiam); Gooding v. Wilson, 405 U.S. 518 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Cohen v. California, 403 U.S. 15 (1971). These later decisions held that offensive language is proscribable only when it threatens the "single tightly drawn interest in preventing a violent response by an average addressee." *See Comment, "Indecent" Language: A New Class of Prohibitable Speech?, 13 U. RICH. L. REV. 297, 298 (1979).*


152. Butler v. Michigan, 352 U.S. 380 (1975) (a statute which prohibited the sale of
City of Jacksonville, the Supreme Court held that a local ordinance which banned the public showing of films containing nudity at drive-in theaters was unconstititionally overbroad in that it prohibited the showing of "movies containing any nudity, however innocent or even educational." The FCC order which was upheld in Pacifica is similarly overbroad in that it has the potential to ban artistic and political works which merely contain some "offensive" words. Additionally, the FCC's use of the term "indecent," which has been subject to several contradictory definitions by appellate courts, adds the element of vagueness to the matter. Thus, the Supreme Court's decision in Pacifica restricts the first amendment rights of broadcasters who wish to transmit non-obscene broadcasts.

The Pacifica decision underscores another critical constitutional problem: the privacy rights of listeners and viewers. One of the FCC's justifications for protecting listeners and viewers from offensive language is that they are a captive audience and have the right to be left alone in their homes. However, the FCC is concerned only with that segment of society which is offended by such material while completely ignoring the rights of those individuals who want this type of programming. Implicit in any understanding of the scope of the first amendment is the freedom not only to speak or transmit ideas, but also the freedom to receive them.

In Rowan v. Post Office Department, the Court upheld a statute which permitted householders to request that mail advertisers materials which tend to corrupt minors was overbroad because it forced Michigan's adult population to read only what is fit for children).

154. Id. at 211. See also Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (a zoning ordinance which precluded all forms of live entertainment, including non-obscene nude dancing, violated the first amendment). But see Young v. American Mini Theatres, Inc., 427 U.S. 50, 62 (1976) (the Court upheld a zoning ordinance which restricted the location of new theatres showing sexually explicit adult movies).
155. Toohey, supra note 88, at 82.
156. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973) (in determining whether to require broadcasters to accept editorial advertisements the FCC is entitled to take into account that listeners and viewers constitute a "captive audience").
158. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Red Lion observed that: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." Id. at 390. See also J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 148-49 (1973).
stop sending them lewd or offensive materials and required that their names be removed from any mailing lists.\textsuperscript{160} Unlike the FCC's ban on indecent broadcasts, householder's who wished to receive the lewd or offensive materials in the mail were not prevented from doing so.\textsuperscript{161} A factor influencing first amendment concerns is that in \textit{Rowan} the freedom to receive offensive material was allowed to the individual, whereas in the realm of broadcasting the FCC has the power to determine what material is indecent and thereby prohibit it, even though an audience may exist that desires to receive such programming.\textsuperscript{162}

The Supreme Court has consistently upheld first amendment rights of individuals or those representing unpopular views over the temporary inconvenience to persons offended by such an expression. In \textit{Cohen v. California},\textsuperscript{163} the appellant was arrested under a California statute for wearing a jacket with the words "Fuck the Draft" inscribed on it.\textsuperscript{164} The Supreme Court overturned Cohen's conviction and held that the statute was unconstitutionally overbroad because it proscribed language which did not fall within the category of prohibited speech.\textsuperscript{165} In \textit{Cohen}, the Court ruled that public discourse could not be regulated simply to protect the sensibilities of listeners, but rather one had to show that "substantial privacy interests are being invaded in an essentially intolerable manner."\textsuperscript{166} The Court concluded that persons offended by Cohen's jacket could simply "avert their eyes,"\textsuperscript{167} since "the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."\textsuperscript{168} This view is sharply contrasted to regulation of obscenity in broadcasting. One is hard pressed to distinguish public places from public airwaves, and averting one's eyes would seem to require the same amount of effort as simply switching channels on a radio or television.

\begin{itemize}
\item 160. \textit{Id.} at 731-735.
\item 161. \textit{Id.}
\item 162. 438 U.S. at 766 (Brennan, J., dissenting).
\item 163. 403 U.S. 15 (1971).
\item 164. \textit{Id.} at 16.
\item 165. \textit{Id.} at 20. The Court noted that Cohen's expression was not obscene, since it lacked any erotic or prurient appeal. Also, it could not fall within the "fighting" words category of unprotected speech because it was not "directed to the person of the hearer" in a personally provocative fashion likely to provoke violent reaction. \textit{Id.}
\item 166. \textit{Id.} at 21.
\item 167. \textit{Id.}
\item 168. \textit{Id.} at 25.
\end{itemize}
The right to privacy encompasses the right to personal autonomy and sexual liberty which first appeared in *Griswold v. Connecticut*.\(^{169}\) In *Stanley v. Georgia*,\(^ {170}\) the Court extended this fundamental right to the viewing of pornography in one's own home.\(^ {171}\) One commentator, in discussing this "maturing constitutional freedom to engage in discreet sexual stimulation or gratification," has concluded that "[i]t must be that there is something special about erotic activity that entitles a person to protection from the law, unless the activity is being offensively thrust before members of the public."\(^ {172}\) This personal autonomy would clearly support an individual's freedom to allow any form of entertainment to be brought into his home through telecommunication.

The *Pacifica* decision, by giving the FCC the power to regulate broadcast program content, infringes on the individual listener or viewer's right to privately receive information—any information—within the confines of his home. This regulation undermines the "marketplace of ideas" and violates one of the basic beliefs upon which our country was founded: that the government should allow a wide range of discussion, with the individual able to freely select that by which he chooses to be persuaded. Further, the FCC's rationale for regulating indecent program content, because broadcasting *invades* the home, is tenuous and misconceives the specific privacy interest involved. By allowing a broadcast into his home, an individual must affirmatively turn on a radio or television. If one is offended by a broadcast, he simply may turn it off freely as he would stop reading an offensive newspaper or magazine article. This argument becomes even more persuasive with cable television, because to receive cable TV one must affirmatively subscribe to the service.

### C. The Future of FCC Regulation Over Cable TV

The future development of cable television as an alternative to the monopolization over programming existing in commercial television will liberate the American TV viewer and free him from the

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169. 381 U.S. 479 (1965) (held that the distribution of contraceptives to married persons cannot be prohibited, and established the fundamental constitutional right of privacy in personal heterosexual intimacies of the home). See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extended this right of "sexual privacy" to single persons).


171. *Id.* at 564-66.

vast wasteland of bland network programming. A competitive cable TV industry would also encourage more companies to invest in cable systems, resulting in less control by the three large networks over what information the American public receives.\textsuperscript{173} However, the promising capabilities of cable TV will go unrealized unless cable operators are granted the same degree of first amendment rights as are other media, such as newspapers.\textsuperscript{174} Any governmental control over program content of cable TV will reduce cable programming to the same bland nature as that of network programs. The FCC must learn from its experience with conventional television broadcasting that governmental control over communications does not lead to more diversity or better quality, but rather forces broadcasters to develop homogenized programming which does not attempt to present bold, provocative and challenging new forms of entertainment and information. If the FCC has a duty to regulate broadcasting in the "public interest," then it must realize that it is in the public's interest to have a competitive cable TV industry. This result will never occur, however, unless the FCC continues to deregulate cable television.\textsuperscript{175}

VII. Conclusion

Cable television is just one phase in the modern communications revolution. With the advent of satellite technology, direct broadcast systems (DBS), video cassettes, low-power television systems, and two-way interactive communication systems, the whole American communications industry is changing. In time, cable technology will assist in such daily chores as banking and shopping. The growing impact of cable TV justifies some FCC regulation in certain technical areas such as channel capacities and rate regulations. The FCC, however, must maintain a "laissez-faire" approach to program content regulation of cable television.

\textsuperscript{173} By 1973, 84% of all prime-time television programming was selected and prepared by the three major networks. Long, Antitrust and the Television Networks: Restructuring Via Cable TV, 6 Antitrust L. & Econ. Rev. 99, 102 (1973). See M. Hamburg, supra note 1, § 6.06.

\textsuperscript{174} NCTA REPORT, supra note 2, at 20-22. See also R. Labinski, The First Amendment Under Siege 6-23 (1981).

\textsuperscript{175} In a recent speech, FCC Chairman Mark Fowler urged Congress, the courts, and regulated firms to help deregulate the telecommunications industry. Pittsburgh Press, Jan. 31, 1983, at 11, col. 5. For an excellent and up-to-date review of cable TV deregulation, see Besen & Crandall, The Deregulation of Cable Television, 44 LAW AND CONTEMP. PROB. 77 (1981). See also Emerging Shape of Reagan FCC Comes in View, Broadcasting, Feb. 2, 1981, at 23.
Cable television’s technological and economic structure distinguishes it from all other forms of broadcasting. While the commercial networks have failed to explore new frontiers of programming, cable TV has provided a plethora of alternatives, some of which feature nudity, sexual activity, and foul language. However, cable viewers have also been provided with programming in movies, music, art, sports and community access unavailable on network television. One of the distinguishing features of cable television is that you must pay a subscription fee in order to receive cablecasts into your home. Before any “adult programs” are shown, cable operators issue warnings, thereby enabling the viewer who does not approve of the content of the program to choose not to pay for it or to switch channels. There is no discernible difference between this situation and when someone decides not to attend an “X-rated” movie. In both instances, the ultimate decision is made by the individual. Another feature of cable TV which allows parents to control what programming is available to their children is that cable systems can be equipped with a lock device that restricts the viewing of certain channels. Thus, the overwhelming concern of protecting children from exposure to “indecent” programming, which the Court stressed in *Pacifica*, is not present with cable TV, due to its distinct technological features and nature.

If cable TV programming is to be determined obscene, it should be judged by the Supreme Court’s *Miller* guidelines, which apply to newspapers, magazines, books, motion pictures, and various other sources of information, not the more restrictive *Pacifica* standards which apply to conventional broadcasting. The *Miller* standard should apply not only at the federal level, but also at the state and local levels—since more and more communities are attempting to impose severe program content restrictions on cable franchises. The ability of cable television to be an alternative to

176. In January, 1983, United States District Judge Bruce Jenkins struck down a Roy, Utah ordinance barring “pornographic or indecent material from being shown on cable television,” which included R-rated movies shown by cable networks like Home Box Office. Community Television v. Roy City, No. NC 82-01221. (N.D. Utah Jan. 6, 1983) (available April 16, 1983, on LEXIS, Genfed Library, Dist. file). Judge Jenkins held that the ordinance was an abusive exercise of the City’s power that violated the first amendment guarantee of free speech, and rejected the city’s contention that cable television was an “all-pervasive” medium, as the United States Supreme Court held radio to be in the 1978 *Pacifica* case. In reaching this conclusion, Judge Jenkins placed great emphasis on the dissimilar characteristics of cable television and broadcast television. *Id.*

One year earlier, in the related case of Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 986 (C.D. Utah 1982), Judge Jenkins overturned a Utah statute making it a crime to distribute “indecent” material on cable television systems, emphasizing that the statute was
the shallow and stagnant programming of network TV depends significantly on the FCC continuing its deregulatory mood. Any other approach would deny cable operators their first amendment rights and would undermine society's interest in a diverse marketplace of ideas, uninhibited by the fear of governmental suppression, interference or control.

George P. Faines

unconstitutionally overbroad in that it attempted to bar the cablecasting of materials which were non-obscene. Judge Jenkins held that states are prohibited from going beyond the Miller standard in prescribing criminal penalties for the distribution of sexually oriented materials. Id. at 994. Moreover, Judge Jenkins held that HBO and other national and local cable television distributors or franchisees must abide by the Miller guidelines when making a decision pertaining to program content. Id. at 994-95.