CABLE TELEVISION'S FIGHT FOR FIRST AMENDMENT RIGHTS

by Mark L. Abrell

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Throughout history the governmental units of civilized societies have engaged in some form of regulation regarding the free expression of ideas. Originally, actual speaking and printed or written literature received the scrutiny of this regulation. With the advent of other forms of communication, such as radio and television, this regulation was expanded to include these new methods of expression.

In this country, the right to freely express ideas is enumerated in the First Amendment of the Constitution. However, the judicial branch, in the form of the Supreme Court's judicial review powers, has determined that this right is not absolute. Currently, only public expressions which fall under the definition of obscene, as expounded by the high court in *Miller v. California*, 93 S.Ct. 2607 (1973), can be prohibited at all times.

In *Miller*, the Court created a carefully constructed test for establishing the boundaries within regulation of expression was permissible. The Court found that:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 93 S.Ct. at 2614 (citations omitted).

The *Miller* standard is the result of years of dealing with the problem of regulation of expression. It provides a national standard, but through the contemporary community standards provision it provides the flexibility to accommodate the differing norms of specific communities. It also has the virtue of almost universal application to all forms of communication. These qualities will probably let it stand the test of time.

Aside from expressions falling under the definition of obscene and a few
others under special circumstances, such as yelling "Fire!" in a crowded theater, all other expressions are permitted in some form or at some times or under certain circumstances. There are, however, certain types of communication which, because of their special characteristics, are believed to warrant more limited First Amendment protection. Radio and television are the primary focuses of this special consideration. One manifestation of this special treatment is the Federal Communications Commission which serves as a watchdog for prohibiting expressions from being broadcast over radio and television which fall under the protection of the First Amendment under any other medium of expression.

This paper will focus on the challenges made against the government's authority at the federal, state, and local levels to prohibit otherwise protected forms of expression from being expressed through the electronic media. In addition, it will try to show that the advent of new technology in the television industry, i.e. cable and pay systems, should finally enable these higher forms of electronic media to break the bonds of regulation currently restricting radio and airwave television.

The first significant challenge to the Federal Communications Commission's authority to regulate the contents of a radio broadcast was the case of Pacifica Foundation v. FCC, 556 F.2d 9(D.C. Cir. 1977), rev'd, 98 S.Ct. 3026, (1978). This case, known as "The Seven Dirty Words" case, established the FCC's authority to prohibit any broadcast which contained any of seven words which it described as indecent. It also set precedence for the FCC to expand these limits on broadcast freedom to the television industry.

The events which led to the adjudication of this case are as follows. On October 30, 1973, in the early afternoon, WBAI radio station of the New York
City area broadcast a monologue entitled "Filthy words" by comedian George Carlin. A warning was issued prior to the broadcast cautioning listeners to the possible offensive nature of the monologue. The broadcast was heard by a father and his young son while driving in the New York City area. The father lodged a complaint with the FCC, the only complaint received by the FCC concerning the broadcast, in which he referred to the monologue as "garbage" which was unsuitable to be aired during a time when children were obviously part of the listening audience. The FCC informed the radio station licensee, Pacifica Foundation, of the complaint and asked for a response.¹

In response, Pacifica explained the context in which the broadcast was aired. They asserted that it was part of an analysis of the use of language in our society. In particular, the monologue was "an incisive satirical view of the subject under discussion."

In February of 1975, the FCC issued a Declaratory Order² which was meant to clarify the standards it used to determine if a broadcast was indecent under the Criminal Code. The section referred to is 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. June 25, 1948, 62 Stat. 769.³

The FCC Order was meant to notify broadcasters of the circumstances in which the FCC would determine the indecent provision of the criminal code to be violated. Those circumstances include the broadcast of language which is patently offensive by contemporary community standards at times of day when there is a reasonable risk of children being in the audience.⁴ The FCC has the authority to grant broadcasters their licenses and revoke them for such a violation. While the FCC did not impose any of the available civil sanctions, it did place a letter of violation in the licensee's renewal file. In response, Pacifica sought
review of the order in the District of Columbia Circuit Courts of Appeals, thus challenging the FCC's authority to enforce the indecency provision of the Criminal Code.

Pacifica asserted that the order violated the no-censorship clause of the Communications Act and the rights to freedom of expression guaranteed by the First Amendment. It contended that the criminal code did not give the FCC the authority to prohibit non-obscene material from being broadcast just because it is "offensive". In addition, Pacifica argued that the Supreme Court's earlier decisions made it nearly impossible to establish a constitutionally acceptable definition for "indecent" which would not be synonymous with "obscene". Thus Pacifica claimed that the FCC's definition of "indecent" which left out an "appeal to the prurient interest" in addition to failing to consider the material's "literary, artistic, political, or social value," was overbroad and therefore unconstitutional.

Pacifica also argued that just because the broadcast medium is said to be more intrusive than other media, it is not so unique that it should be subjected to undue limits on basic First Amendment principles. They also challenged the contention that parents have less ability to supervise their children with regard to radio and television than with books and movies. Pacifica claimed that the FCC order "...would effectively empower a majority... to silence dissidents simply as a matter of personal predilections." Pacifica's next argument referred to the effect such language had on listeners. They asserted that the FCC's reason for wishing to prohibit such language was not because they believed it had a harmful effect on listeners (as is suggested with the broadcast of material containing violence), but merely because it received complaints from a minority of listeners. Pacifica also
claimed that the list of "forbidden words" could easily begin to expand to include a number of words and ideas which represent controversial views on any range of subjects which are offensive enough to some listeners as to warrant complaints. Indeed, though the FCC order seemed to allow for the broadcast of such words and ideas at times which would avoid children in the listening audience, two of its commissioners would have banned these words from the airwaves completely.

Pacifica attacked the FCC’s definition of indecent as being so broad as to include certain words even when the context in which they are used eliminates any sexual or excretory connotations. In addition, Pacifica contended that the definition is impractical since uncensored public news events as well as great literary works could fall under the definition and therefore be prohibited from broadcast. Used in this context, Pacifica claimed, the order would discriminate against minorities and subcultures in our society whose views of acceptable language and ideas were outside the conventional mainstream.

The FCC's main argument for the order was that under its responsibility "to promote the larger and more effective use of radio in the public interest" as provided for in the Communications Act, it was responsible for keeping traditionally adult language from reaching the ears of children. In taking this responsibility upon itself the FCC made several assumptions. It assumed that by stopping this language at its source it was serving the public interest. It assumed that parents don't wish their children to hear such language regardless of the context in which it is used. It assumed that parents don't have the ability to prevent their children from listening to radio or television. Lastly, it assumed that the public interest served by prohibiting this language outweighs the First Amendment rights of the broadcaster and the adult listeners
rights to have programming made available to them which is not just suitable for children.

Pacifica challenged all of these assumptions. In addition, it stated its concern that if the FCC is allowed to protect children from offensive language the door is left open to them to try to protect children from offensive political and religious beliefs. Ultimately, if the FCC could protect children under certain circumstances then it became possible for them to attempt to protect anyone in the name of the public interest.

The FCC, in addition to arguing the validity of its assumptions, contended that the physical characteristics associated with radio communication were so different from other media as to warrant special First Amendment considerations. The FCC attempted to support this contention stating that "the passive act of listening to the radio is different, practically, socially, and physically from obtaining literature or gaining admission to a movie theatre." In addition to the fact that children can be excluded from theatres and bookstores, the FCC asserted that parents can regulate their children's access to movies and literature easily, while young radio and television audiences are usually devoid of parental supervision. They provided no scientific or statistical base for this contention. At trial they urged the court "not to allow the tastes of a small minority of radio listeners to displace the judgment of society at large that there be restrictions—narrow, specific, and focused on a particular objective—to protect the sensibilities of the great majority about what language may be shared with children." In light of the fact that only one complaint was received concerning the broadcast the FCC's statement would seem more suitable coming from Pacifica.

The Court of Appeals reversed the FCC's order by a two-to-one margin. The
majority opinion stated that; "Without deciding the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected, we find that the challenged ruling is overbroad and carries the FCC beyond the protection of the public interest into the forbidden realm of censorship." The court went on to criticize the ambiguity of the order, agreeing with Pacifica that under its original construction it would effectively prohibit uncensored versions of Shakespearian plays and portions of the Bible. The court went on to criticize the order because of its failure to even attempt to define children. Does a nineteen-year-old require the same protection as a seven-year-old?

The court rejected the FCC's assumption that without such regulation the airwaves would become overburden with filth. Instead it felt that the FCC, as it had done in previous cases, should leave decisions of community interests and taste to the licensee. The court explained that: "To whatever extent we err, or the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste."

With regard to one of the FCC's main contentions, that parents are unable to supervise their children's access to radio and television, the court, in addition to challenging this assumption, went beyond this argument and questioned whether most parents would consider the mention of the "forbidden words" under all circumstances as unsuitable for their children. The court agreed with Pacifica that, if the FCC is allowed to act in the parents behalf with respect to offensive language it could do the same with regard to any controversial topic. In addition, the court recognized that First Amendment rights are also
extended to children. Thus, while it avoided the actual question of whether the
FCC had the authority to regulate non-obscene language it did recognize and as­
sert that the problems created by such an attempt to control the airwaves were
greater than those perceived to occur by letting such materials have the benefit
of the doubt.

In a narrow five-to-four decision the Supreme court reversed the Circuit
court decision and found for the FCC. The majority narrowed the effect of
its judgment considerably in this case. Pacifica had raised issues concerning
the effect which the FCC's order would have on other types of broadcasts. Yet,
the Court refused to consider this particular case in any hypothetical manner.
Thus, it underlined the fact that the order in question was only being
considered for the specific circumstances for which it was issued, the broadcast
of the Carlin monologue.

As to Pacifica's claim that section 326 of the Communications Act, the
section forbidding censorship, limits the FCC's authority to prohibit the
content of a broadcast, the Court disagreed, citing numerous previous cases
which held that censorship was editing a proposed broadcast in advance, and that
the censorship ban did not limit the FCC's power to review the content of
completed broadcasts. The Court, in answering the question concerning the
effect of this power being self-censorship, cited the FCC's indication that it
would not impose sanctions without warning in cases in which the applicability
of the law was unclear. Thus indicating that broadcasters, as with the
Pacifica case, would receive one warning when they started using indecent
language over the air.

The next argument which the Court dispelled was Pacifica's contention that
"indecent", as provided for by the Court in Hamling v. United States, 94 S.Ct.
2887, (1974) could not be construed to be anything but synonymous with the court's definition of "obscene" as provided in Miller. The Court stated that Pacifica was in error in applying the Court's analysis in Hamling, which only applied to material which was contained in sealed envelopes, to section 1464 of the Criminal Code which concerns material which is broadcast over the airwaves. This indicates the Court's special treatment of the broadcast medium. The Court agreed with the FCC's contentions concerning the reasons that broadcasts must be given special consideration. Due to the intrusive nature and accessibility to children which dominate the broadcast medium, the Court found that Congress had intended that non-obscene material which was indecent, or nonconforming with accepted standards of morality, was to be prohibited from being broadcast over the public airwaves.

The Court then went on to back the FCC's definition of "indecent" as it applied to the factual setting. The Court indicated that in determining whether a particular broadcast fell under the term "indecent" its content as well as context must be examined. In such an examination the Court found that there was no disagreement between the parties as to the content part of the definition, Carlin's monologue definitely contained material which was patently offensive. However, concerning the context part of the definition, the Court found that, although the monologue as broadcast possibly had serious value, because of its contents it was not required to be afforded the same First Amendment rights as unoffensive language. In so doing the Court found that in such a case the context in which the material was represented must be considered. The Court in examining the context of the broadcast, found that even though there was prior warning as to its possible offensiveness, because it occurred at a time in which children were obviously part of the listening audience, the monologue
could not be afforded First Amendment rights. The Court, after making these considerations, ruled that, given the unique characteristics of the broadcast medium in conjunction with the circumstances of the broadcast in question, the FCC was within its authority to rule this particular broadcast as indecent under the section 1464 of the Criminal Code.

The significance which this decision holds for the cable television industry lies in the power which it conveys upon the FCC and the creation of an additional type of regulable material. This case effectively empowered the FCC to review the content of materials aired by broadcasters. This became possibly more applicable to cable television after the Supreme Court's decision the following year in *United States v. Midwest Video Corp.*, 99 S.Ct. 1435, (1979) in which it found that cable television systems are broadcasters, not common carriers. This connection, however, is unclear because in Midwest the Court was referring to the FCC's rules which treated cable systems as common carriers for the purpose of forcing them to provide public access channels. The second part of the decision is important because it establishes a new class of expression which is open to regulation if used within the broadcast industry. Thus, it reinforced the special First Amendment limitations which the broadcast medium receives.

The main question left to be answered is whether the noted narrowness of the decision includes cable television broadcasters. The Court itself stated that its decision did not necessarily include broadcast media other than radio. In addition, the FCC, in proposing legislation which addressed the problem of obscenity on cable television, found that as currently construed cable television does not fall under "radio communication" as used in the Criminal Code. Still, the question of whether the special characteristics of cable
televisi on, i.e. that broadcasts are transmitted through privately owned wires or cables and that the broadcasts are made specifically to subscribers who pay for the service, eliminated its applicability to the Court's reasoning for why broadcasting receives limited First Amendment protection had yet to be answered.

The first attempt to regulate the broadcast of "indecent" material by means of cable television occurred in the Utah state legislature. Specifically, a law had been passed which prohibited cable television systems from broadcasting "indecent" materials to its subscribers. The pertinent sections of the statute are as follows:

(1) No person, including a franchisee, shall knowingly distribute by wire or cable any pornographic or indecent material to its subscribers.

(2) For purposes of this section "material" means any visual display shown on a cable television system, whether or not accompanied by sound, or any sound recording played on a cable television system.

(4) For purposes of this section "indecent material" means any material described in section 76-10-1227.

(5) For purposes of this section "distribute" means to send, transmit, retransmit, or otherwise pass through a cable television system.

Violation of this law was a class A misdemeanor. Action against violators of the law was to be initiated by the attorney general or any county or city attorney of an interested political subdivision. The statute was to go into effect on May 11, 1981.

On May 1, 1981, Home Box Office Inc. (HBO), in conjunction with several other cable television systems, commenced an action in the U.S. District Court against the Attorney general of the state of Utah individually and as a representative of the class of all persons empowered to prosecute violations of the statute in question, Home Box Office, Inc. v. Wilkinson, 531 F.Supp 986, (1982). HBO sought injunctive relief against the statute.
The Court granted a temporary restraining order which by agreement of the parties would remain in effect until the Court reached a decision concerning the statute's constitutionality. After hearing arguments the Court found in favor of the plaintiffs. The Court asserted that the statute was unconstitutional on its face because of overbreadth. The defendants did not appeal.

The Court, in the person of District Judge Jenkins, explained the rationale for its decision. When establishing the constitutionality of a state statute which attempts to regulate the expression of ideas, it is necessary to first delineate the constitutional bounds of protected and unprotected expression. Then it must be determined if the statute is, on its face, overbroad and seeks to go beyond the established boundaries of permissible regulation of unprotected expression. If it is determined that the statute is facially overbroad then a final determination must be made to establish whether a limiting construction may be placed on it to narrow its effects to within constitutional boundaries. In addition, the Court may also find that abstention is justified by the likelihood that a state court will make the necessary narrowing of the statute's construction during proceedings initiated at some future time.

In the case at hand, the Court determined that the permissible areas of state regulation of expression are defined in Miller through reference to local community standards. Through the use of the Miller test regulation of expression is limited to material which the average person applying contemporary community standards would find, taken as a whole, appeals to the pruient interest, and depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether that material taken as a whole, lacks serious, literary, artistic, political, or scientific value. Therefore, states may only regulate materials which fall under this
definition of obscenity.

When the statute at hand is examined, it is obvious that its intent is to regulate materials which go beyond Miller.\textsuperscript{20} It attempts to prohibit materials which fall under the state's definition of "indecent". The state defines "indecent material" as follows:

For purposes of this act:
(1) "Description or depictions of illicit sex or sexual immorality means:
   (a) Human genitals in a state of sexual stimulation or arousal;
   (b) Act of human masturbation, sexual intercourse, or sodomy; or
   (c) Fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.
(2) "Nude or partially denuded figures" means:
   (a) Less than completely and opaquely covered:
       (i) Human genitals;
       (ii) Pubic regions;
       (iii) Buttock; and
       (iv) Female breast below a point immediately above the top of the areola; and
   (b) Human male genitals in a discernibly turgid state, even if completely covered.\textsuperscript{21}

Section (2) of the definition includes mere nudity to be indecent. It has been established by the Supreme Court in Jenkins v. Georgia, 94 S.Ct. 2750, (1974), that nudity falls well within the protection provided by the First Amendment. The Utah statute attempts to regulate material which clearly falls under the protection of the First Amendment and it does so without the safeguards which examine the value of the material.\textsuperscript{22} Therefore, the Utah statute is facially overbroad. Counsel for the state attempted to justify the overbreadth by relying on the state's interests in children. However, the court found that even if this argument were accepted the statute would still be overbroad. The statute fails to even mention children and by its terms it applies to materials reaching homes which have no children. The Supreme Court made it clear in Butler v. Michigan, 77 S.Ct. 524, (1957), that material cannot be prohibited...
from adults in the name of hypothetical children.

The Court, after making the overbreadth determination, felt that a narrowing construction, given the language of the statute, was improper. Thus, the Court felt that the overbreadth was so severe that a narrowing construction would only serve to change the intent of the statute and limit its terms out of existence. Judge Jenkins expressed the opinion that the state's pornography statute was adequate to encompass all the materials broadcast via cable television which fell within the permissible boundaries of state regulation.

This decision, while a victory for cable television systems, still failed to adequately answer if regulation that was properly constructed could effectively limit broadcasts of "indecent" material through cable television systems. While the Court did address the issue, its primary focus was with the construction of the statute. Since the question was never raised, due to the inadequacy of the statute's construction, this case did not let the court express the inherent differences between cable and regular broadcast television which make it immune to the regulation presently placed on regular television.

The Court had the chance to more adequately address the effect that the special characteristics of cable television had on such attempts at regulation in a case adjudicated not long after the HBO decision. This time the Court was asked to consider the constitutionality of an ordinance passed by the City of Roy, Utah prohibiting the distribution by cable of any "indecent" material.

In this case, Community Television of Utah Inc. v. Roy City, 555 F.Supp. 1164, (1982), the Roy City Council enacted a city ordinance which prohibited the transmission, by means of cable television, of any materials which fell under the definition of "indecent" as defined in the Roy City Ordinance, Title 17 concerning licenses. The Roy definition reads as follows:
"Indecent Material" shall mean material which is a representation or verbal description of:

(a) An erotic human sexual or excretory organ or function; or
(b) Erotic nudity; or
(c) Erotic ultimate sexual acts, normal or perverted, actual or simulated; or
(d) Erotic masturbation;

which under contemporary community standards is patently offensive.

"Erotic" shall mean tending to arouse sexual feelings or desires.

Several residents of Roy and the aforementioned cable system filed this action to avoid the enforcement of said ordinance on the grounds that it was unconstitutionally overbroad. The Court found in favor of the plaintiffs and declared the ordinance overbroad.

The pertinent issues raised in this case relate to the differences between television which is received over the public airwaves and television which is transmitted by means of privately owned cables or wires. The defendants relied heavily upon the Pacifica case and attempted to make analogies between the power of the city to regulate with that of the F.C.C., the widespread use of cable service within the community to the pervasive nature of regular television, and the duty of the city to improve the morals of its citizens to the protection of the "public interest." The Court, in rejecting these analogies, provided a list of the important differences between cable and broadcast television.

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<th>Cable</th>
<th>Broadcast</th>
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<td>1. User needs to subscribe.</td>
<td>User need not subscribe.</td>
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<td>2. User holds power to cancel subscriptions.</td>
<td>User holds no power to cancel.</td>
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<td>May complain to FCC, station, network or sponsor.</td>
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<td>3. Limited advertising.</td>
<td>Extensive advertising.</td>
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<td>4. Transmittal through wires.</td>
<td>Transmittal through airwaves.</td>
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6. User pays a fee. User does not pay a fee.


8. Distributor or distributee may add services and expanded spectrum of channels. Neither distributor nor distributee may add services or channels.

9. Wires are privately owned. Airwaves are not privately owned but are publicly controlled.

These differences listed above make analogies with the Pacifica case nearly impossible. Pacifica dealt with "broadcasting," even the F.C.C. no longer holds cable transmission to be broadcasting. Neither the Court nor the city of Roy use the Supreme Court's holding in Midwest, apparently because its application would seem to be rather tenuous. In the Pacifica case, the Supreme Court emphasized the narrowness of its decision saying that the "decision rested entirely on a nuisance rationale under which context is all-important." The Roy City ordinance makes no mention of the context in which the materials are presented in its definition of indecent. Therefore, even without the aforementioned differences between cable and broadcast television, the city of Roy's reliance on the Pacifica case is unjustified.

The city, in trying to apply the concept of pervasiveness, contends that the widespread use of the cable system's services within the community give the local cable television a pervasive quality. The Court disagreed with this contention. The literal meaning of pervasiveness is ever-present. While broadcasting, which is accomplished by transmitting into the air signals which can be received by anyone, may be construed to have this quality, cable transmission, which sends signals to specific people by wire, cannot be.

The only doctrine, so far, that allows a regulating body to go beyond Miller with regard to the regulation of expression is when the regulating unit
has a duty to act in the "public interest."Using the broadcast industry as an example Judge Jenkins explained, "[b]ecause of the limited number of broadcasters, their use of the publicly controlled airways and their favored economic opportunity in using a limited public resource, broadcasters are charged to act 'in the public interest.'" Such a responsibility does not exist for cable television systems merely because they do not use a resource which is either publicly controlled or limited, for all practical purposes. Even if it could be construed that the cable system had a duty to act "in the public interest" and that the city of Roy had the authority to act as a watchdog for the fulfillment of that duty, it seems rather unfair to the cable system that the ordinance fails to mention any public interest to be served (such as protecting children from adult materials). The F.C.C., in the case which Roy relies, at least implied the protection of children in its Declaratory Order which prohibited indecent language "when there is a reasonable risk that children may be in the audience." Thus, the city of Roy's ordinance fails to qualify for extended regulatory power under the "public interest" doctrine.

Roy City provides an extensive analysis of the differences between cable and airwave television. It highlights the reasons that make the FCC's reasoning inapplicable to cable television regulation. The Utah District Court's decision in Roy City was reaffirmed less than a year later by a Florida District Court in Cruz v. Ferre, 571 F.Supp. 125 (1983).

In Cruz, the circumstances were very similar to the Roy City case. The city of Miami had passed an ordinance prohibiting the transmission by cable of "indecent material." The ordinance was to be enforced by the city manager who, in that capacity, acted as "complainant, jury, judge, and executioner." The Court found that the ordinance was facially overbroad and unsalvageable by any narrowing of its construction.
A few differences between **Cruz** and **Roy City** make it worth further elaboration. In **Cruz**, the city had, in its franchise agreement with Miami Cablevision, stated that "[i]n accepting this license, the licensee acknowledges that its privileges hereunder are subject to the police power of the city...and the licensee...agrees to comply with all applicable general laws, resolutions and ordinances presently in force or subsequently enacted by the city pursuant to such power."³⁴ Thereby, the city attempted to do by contract or license what it could not normally do by law. This attempt was subsequently rejected.

The Court also rejected the city's definition of indecent, which, aside from not making the risk to children a provision, was very similar to the FCC's definition in **Pacifica**.³⁵ Though in leaving out a plausible reason for its action, i.e. the protection of children, and in failing to take into account the context of the questionable material, the Miami definition could not hope to rely so heavily upon **Pacifica**, which it asserted was the authority on its case.

A small but interesting difference also occurs in this case. The local cable system, Miami Cablevision, was not one of the plaintiffs in this case. Rather, they, because of their perceived contractual obligations to the city, intervened as a defendant. Though they later filed a motion to withdraw from the case, it was denied. This is significant in that the Court gave standing to a subscriber even when the cable system which would be directly affected by the ordinance was willing to comply with the regulation. This would seem to indicate that a subscriber has a right to receive unregulated materials through their cable system regardless of whether that cable system is willing to exercise its rights to freedom of expression.

These cases, **HBO**, **Roy City**, and **Cruz**, all seem to support the view that cable television is, through its special characteristics, to be afforded full
First Amendment considerations. Yet, these are only District Court decisions. The Supreme Court has yet to deal directly with the question of cable television regulation. It is also worth noting that thus far none of the regulation attempted has been constructed in such a way, i.e. taking into account the context of the material and the risk of its exposure to children, that would make *Pacifica* applicable.36

The likelihood of this occurring is becoming ever greater. With the increase in cable availability and the new types of entertainment which it may supply, has come increased attention to the possible programming that is fast becoming available. Congress has already had a bill introduced by Senator Dennis DeConcini (D-Ariz.) which would have prohibited questionably protected materials from appearing on our television sets. However, the bill died in committee. It may be reintroduced in the new Congress.37

There are an increasing number of special interest groups and religious organizations appearing which are lobbying for such laws on the federal level and pushing for and helping construct such laws on the state and local levels. One such group, Morality in Media, is already offering a "model law" to groups, cities, and state legislatures. The president of Morality in Media, Reverend Morton A. Hill S.J., has been urging his audiences at dinners and meetings, designed to make the public aware that there is a "porn-problem" on cable television, to write letters to President Reagan urging him to instruct the justice department to enforce existing anti-pornography laws. Such is the fight for control of the media.38

Even though the courts have so far made it clear in the aforementioned cases that local governmental entities have no business trying to regulate the content of cable transmissions, there is a hidden aspect which may end up having
the same effect on the cable systems as if the regulation attempts had not been overturned. This hidden aspect is probably why Miami Cablevision was on the city's side of Cruz. It probably is responsible for the fact that the actual number of occurrences of questionable material being transmitted through cable systems is still very small. This hidden aspect is called refranchising. Since the cable systems must inevitably return to those who would regulate their transmissions to beg and plead for their livelihoods to be renewed, it does not seem surprising that not much in the way of controversial programming has appeared on cable.39

So while the courts may be saying that cable systems can transmit anything, barring material prohibited by Miller, the cities can simply sit back and wait until it comes time for licenses to be renewed. Who can blame the cable systems for running scared? There is still money to be made if they can just keep their franchise. This does not, however, seem like a very good atmosphere to exercise one's First Amendment rights to freedom of speech. No matter what the courts say, until their authority to grant and regrant franchises is taken away, local governments will still exercise an invisible hand in the cable programming process. Yet, until that time comes the cable industry may at least take victories in the courts, as steps in the right direction.

The Supreme Court will inevitably get its chance to answer the question of whether cable television and the content of its programming are subject to any regulation beyond Miller. The only questions which must be made clear are whether the fact that cable transmissions are paid for by the subscriber qualifies them as being invited into the subscriber's home. And most importantly the court must answer as to whether cable systems have a duty to act in the public interest. These are the main differences which must be resolved if Pacifica is
to become applicable to cable television. I believe the Court will determine that cable television's special characteristics make it a private business with no special duty to act in the public interest and therefore make *Pacifica* inapplicable. In this way I believe the court will show support for Judge Jenkin's analysis of the importance of our First Amendment rights to freedom of expression. As he stated in *Roy City*, referring to the reason questionable material must be allowed to exist, "[w]e tolerate the ideas of others and the communications which frame those ideas because we want others to tolerate us, our ideas, our points or view. A monolithic social structure which is tolerant of nothing but approved ideas or points of view is too much akin to the horror of the German Reich." It is imperative that the dissent receive a voice. The freedom to disagree with the government and the mainstream ideas of our society is one of the greatest virtues of this country. Yet, if those who disagree are unable to attain a platform for their ideas, then the freedom to disagree and be different becomes very hollow. Therefore, it would be a great wrong to let the government, in one form or another, gain control of yet another medium of communication and further shut out the dissenting voices and controversial ideas as it has already done through the FCC with radio and airwave television. Cable television offers a practically unlimited amount of space to express any and all ideas and viewpoints on an unlimited number of subjects, but unless it is free from the control of government it will become flooded with and limited to the homogenized appeals to the mainstream of our society which currently plague conventional television.
NOTES

2 Ibid.
7 Pacifica Foundation v. FCC, 556 F.2d 8 (D.C. Cir. 1977).
8 Id., 556 F.2d at 9, 10.
9 Id., 556 F.2d at 18.
12 Pacifica Foundation v. FCC, 98 S.Ct. at 3034.
13 Pacifica Foundation v. FCC, 556 F.2d at 7.
16 Ibid.
18 Id., 531 F.Supp. at 991-992.
21 Utah Code Ann. § 76-10-1227.
22 Miller v. California, 93 S.Ct. at 2622-2627.
23 Roy City Ordinance, § 17-3-6, (1982).
25 Id., 555 F.Supp. at 1167.


28 Pacifica Foundation v. FCC, 98 S.Ct. at 3034.


30 Pacifica Foundation v. FCC, 98 S.Ct. at 3040.

31 Community Television, Inc. v. Roy City, 555 F.Supp. at 1169.


34 City of Miami Ordinance No. 9332, §203(a), (1981).

35 Pacifica Foundation v. FCC, 98 S.Ct. at 3031.

36 Ibid.


38 Ibid.

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