The Growing Pains of Cable Television

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COMMENT

THE GROWING PAINS OF CABLE TELEVISION

I. INTRODUCTION

Cable television has come into its own in the 1980's. Diversification of programming, made available by this new technology, has attracted more than 25 million subscribers to date. However, this technological advancement, providing numerous program options to home viewers, has created some concern. "X-rated" films, as today's society has come to know the term, are now readily available for viewing within the home. To an ever increasing number of communities, this new industry has provided yet another vehicle for the promotion of obscene and indecent materials and the destruction of Man's traditional understanding of human sexuality. Communities in the states of Utah, Florida and Wisconsin have made efforts to stop this promotion through local regulation. Closer to home the cities of Durham, Chapel Hill, and Raleigh are seriously considering action at the local level in this regard.

However, the first amendment has been an obstacle to several of these regulations. Those parties opposed to any restrictions have argued successfully that the regulations are unconstitutional in so far as the language has prohibited obscene as well as indecent

1. Television and Cable Factbook 1560 (A. Warren ed., 82-83 ed.).
2. Escapade/Playboy channel; Twin County Trans-Video (Allentown, PA); Warner Amex's Qube System (Columbus, OH); Quality Cable Network. See T. Baldwin and D. McVoy, Cable Communications, 134-36 (1983); N. Y. Times, Sept. 13; 1981, § 6 (Magazine), at 4; Broadcasting, Feb. 22, 1982 at 56.
3. Roy City, Utah, Ordinance 552 (April 6, 1982).
5. MILWAUKEE CODE OF ORDINANCE § 99-13(12).
6. Raleigh News and Observer, July 26, 1984, at 1C.
speech.⁸ Indecent speech, they contend, is within the protection of the first amendment and outside the obscenity standard as defined by the Supreme Court in Miller v. California.⁹ The fight continues whether a new standard should be developed to take away this first amendment protection surrounding indecent speech.

Although the first amendment has been a powerful tool to thwart attempts to regulate cable content at the local level, a recent Supreme Court case has provided yet another weapon—federal preemption. In Capital Cities Cable Inc. v. Crisp,¹⁰ the Supreme Court spoke on what has been described as cable content regulation. As the Associated Press reported, this Supreme Court decision “marked its first ruling on governmental control over content of cable television programs...” barring the states generally from censoring the content of programs originating outside their borders.¹¹ The Supreme Court’s ruling in this Oklahoma case held that a comprehensive regulatory program by the Federal Communications Commission (FCC) existed which governed signal carriage by cable television systems. Specifically, the Court held that the State of Oklahoma had exceeded its limited jurisdiction and had interfered with the federally preempted area of cable signal carriage by attempting to require cable television operators to delete all commercial advertisements of alcoholic beverages contained in out-of-state signals carried by cable and retransmitted into the home.¹² “[T]he FCC has unambiguously expressed its intent to pre-empt any state or local regulation of this entire array of signals carried by cable television systems.”¹³

Though the Capital Cities decision did not specifically discuss cable obscenity regulation, the question arises whether state and local authorities are free to exercise their police power in this area without running the risk that litigation may wipe out their efforts, not on first amendment grounds, but rather on the grounds of unconstitutional interference with federal law.

This comment will reveal the limited application of the Capital Cities’ decision with a discussion of FCC regulation of cable signal carriage and the Commission’s reaction to cable content regulation. Recent challenges to local cable content regulation on the

⁸ Id.
¹¹ Raleigh News and Observer, June 19, 1984 at 5D.
¹² 104 S. Ct. at 2703.
¹³ Id. at 2701.
basis of first amendment concerns, as opposed to federal preemp-
tion, will also be highlighted.

II. FCC Regulation

A. Broadcasting v. Cable

Cable systems have increased program diversification in the
area of communications. These systems have enough channels to
retransmit local and distant broadcast television shows, originate
(also known as cablecast) their own programs such as weather and
stock exchange reports and make available pay cable programs.14
Television broadcasting, on the other hand, operates primarily
through three national networks. These networks purchase their
network programming from independent producers and contract
out these programs with their local station affiliates.15 Unaffiliated
independent television broadcasting stations purchase program-
ming through the syndicated market. The programs purchased in-
clude previously broadcast and newly produced programs.16

Cable and broadcasting have operational differences. An an-
tenna is used by the cable system to pick up local and distant
broadcast signals while underground or overhead cables transmit
these signals or cablecast signals into the home.17 Often times, a
cable system will employ microwave companies to relay signals
from longer distances.18 On the other hand, broadcasting functions
by use of the electromagnetic frequency—the airwaves.19 VHF, the
very high frequency representing a superior quality signal is the
most popular among broadcasters.20 UHF, the ultra high frequency
channel, is less popular because of its inferior reception.21 This dif-
ference in operations between cable and broadcasting is significant
to demonstrate how the regulatory system has developed in the
communications field.

With the passage of the Communications Act of 1934, Con-
gress established a regulatory system of radio communications and created the Federal Communications Commission to enforce these provisions.\(^\text{22}\) This action was prompted by congested airwaves, interference, and the need to limit the number of wavelengths available for transmission.\(^\text{23}\) The Communications Act, under Title II, delegated authority to the newly established agency to regulate "common carriers" of communications by wire or radio.\(^\text{24}\) In addition, under Title III of the Act, "broadcasters using channels of radio transmission" were subject to the Commission's authority.\(^\text{25}\) Even the "transmission by radio of pictures"—broadcast television—was brought within the scope of the Act and the FCC's responsibilities.\(^\text{26}\) Notwithstanding its broad authority under the Act to protect development in the communications area, the Commission was expected to be "guided by public interest considerations" when exercising its power over these entities.\(^\text{27}\)

Congress did not include cable television\(^\text{28}\) among those entities subject to the federal statute or the Commission's enforcement power. During its early years of the 1940's, cable's purpose was limited to providing better television reception in areas where broadcast signals were poor.\(^\text{29}\) In addition, cable's operation was restricted geographically because of its reliance primarily on underground cables.\(^\text{30}\) Rather than competing with the broadcasting industry, cable complemented it.\(^\text{31}\)

The FCC, initially, denied regulatory authority over cable.\(^\text{32}\) The FCC found that cable systems did not fall under the "common carrier" status of Title II\(^\text{33}\) nor the "broadcasting" definition of Title III of the Communications Act.\(^\text{34}\) Because the cable operator

\(^{23}\) National Broadcasting Co. v. United States, 319 U.S. 190 (1943).
\(^{24}\) Title II, 47 U.S.C. §§ 201-224 (1982).
\(^{27}\) Id. at §§ 303, 307(a), 307(d), 309(a) (1970).
\(^{28}\) Cable Television Report & Order, 36 F.C.C.2d 143, 144 n. 9 (1972). Cable was known at this time as CATV—Community Antenna Television. In 1972 the FCC began calling it cable television.
\(^{29}\) 31 Rutgers L. Rev. at 241.
\(^{30}\) Id. at 242.
\(^{31}\) Id. at 241.
\(^{33}\) Id. (aff'd Report & Order on Inquiring Into Impact of Community Antenna Systems, 26 F.C.C. 403, 441 (1959)).
\(^{34}\) 24 F.C.C. at 255-56.
could choose which signal or program to carry, cable was considered outside the "common carrier" status. In denying the "broadcasting" definition to cable, the Commission recognized the difference between the two forms of communications and reasoned that "no plenary power [existed] to regulate an industry just because that industry may have an impact on broadcasting, over which it did have jurisdiction." Even the FCC's attempts in 1959 to persuade Congress to provide it with full licensing authority over cable met with failure. Proposed cable regulation by the Commission before the 87th Congress was also unsuccessful, receiving no legislative action. Further attempts by the FCC in 1965 and 1966 to get a Congressional response concerning the proper scope of its authority in the area of cable went unanswered.

B. Cable Signal Carriage Regulation

Despite the lack of Congressional direction, the FCC took a somewhat indirect approach in 1962 to regulate cable. In Carter Mountain Transmission Corp., the Commission denied a request submitted by a common carrier for a permit to install microwave relays to carry signals for a cable system. This denial was based on the agency's belief that such a permit would adversely affect the economic operations of a local broadcasting station.

In 1968, the first substantial regulations of a broad nature were imposed on cable systems by the FCC. These rules were upheld by the Supreme Court in United States v. Southwestern

35. Id. at 254-55. Common carrier status has two elements: (1) service is available to the entire public indiscriminately and, (2) their customers may transmit programs of their own design and choosing as long as the material is not objectional. Id. at 254.
36. 571 F.2d at 1030.
41. 32 F.C.C. at 465.
42. Id. at 463-65.
The Commission had imposed restraints on cable’s importation and simultaneous retransmission of distant broadcast signals into the top 100 markets. These rules were the Commission’s response to fears by television broadcasters of their unrestricted competitor—cable. The Court supported the regulations as efforts to prevent fragmentation of audiences, loss of advertising revenues and termination of local broadcast station services to the public due to competing cable systems bringing distant broadcast signals into the local market.

The Court, construing the Communications Act, held that in some circumstances, the FCC was allowed to regulate cable system operations when such restrictions were “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.” The Court reasoned that a narrow construction of the Act would defeat the desires of Congress “to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.” Though the Supreme Court upheld the FCC’s initial efforts at cable regulation, the agency’s authority over cable was not carte blanche. Regulations had to be justified by reasons properly of the concern of the FCC.

Early FCC regulations of cable signal carriage sought to protect broadcasters in two ways: restrict distant signal carriage and impose syndicated program exclusivity restrictions on cable retransmissions. First, with its distant signal regulation, the Commission required cable operators to carry all local broadcasting signals within 35 miles of the cable community while limiting the number of retransmissions of distant broadcast signals according to the market. For example, in the top 50 markets, cable opera-

43. United States v. Southwestern Cable Co., 392 U.S. 157 (1968). The Commission was concerned regarding the availability of Los Angeles programs in the San Diego area.
45. Id.
46. 571 F.2d at 1037.
47. 392 U.S. at 178.
48. Id. at 172 (quoting, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).
49. 567 F.2d at 26.
50. Id.
51. 652 F.2d at 1144.
52. 47 C.F.R. §§ 76.59(b-e), 76.61(b-f), 76.63 (1980).
53. 652 F.2d at 1144.
tors were limited to carrying distant signals of only three network stations and three independent stations. In the second 50 markets, the independent station distant signals were reduced to two. And, only one distant signal of an independent station was allowed to be retransmitted in all other market areas.

Second, with its syndicated program exclusivity rules, the FCC enabled those local broadcasting stations, who had purchased "exclusive exhibition rights" to certain programs, to demand deletion of these programs being shown simultaneously by way of distant signals retransmitted by cable systems. These rules were available against the cable operator even where the local broadcasting station was not planning to air the program at all. These regulations were also enforceable by copyright holders.

A cable operator's non-liability under copyright law for programs retransmitted, appeared to be an underlying basis for these regulations. As the copyright laws stood at this time, creators of works were entitled to compensation for the use of their materials in money-making ventures. However, cable operators, in *Fortnightly Corp. v. United Artists Television, Inc.* were found to be outside these laws when the Supreme Court interpreted copyright provisions as applicable only to parties, such as television broadcasters, who "perform" the copyrighted works. Therefore, the imposition of the distant signal and exclusivity rules by the FCC "served, in effect, as proxies for the copyright liability the courts had refused to impose, by restricting cable systems in their use of copyrighted works."

In 1976, the copyright laws were revised to impose partial liability on cable through a compulsory licensing scheme. Cable operators were permitted to retransmit signals without first obtaining consent or negotiating license fees with the copyright holders.

54. Id.
55. Id.
56. Id.
58. 652 F.2d at 1145.
59. Id.
60. Id.
63. Id. at 397-400.
64. 652 F.2d at 1146.
65. Id.
Such permission was conditioned on the cable operator's payment of a prescribed royalty fee based on the number of distant signals carried and his gross revenues. After the passage of the new legislation, two FCC staff reports came out recommending the elimination of both the distant signal and syndicated exclusivity rules.

The FCC's concern over "siphoning" brought on regulation of pay cable by restricting transmissions of current sports events and movies. Claiming authority under the public interest theory of the Communications Act, the Commission regulated on the basis that when a cable operator purchased a sports program or feature film, a segment of the American people—those not served by cable or too poor to afford it—could receive delayed access or be denied access completely. In other words, pay cable would siphon off most of the popular programs.

A pay cable operator, in opposition to the agency's regulations, brought suit in Home Box Office, Inc. v. FCC. Home Box Office (HBO) argued that program diversity, supposedly an FCC goal, would be diminished if cable operators were prevented from showing programs "most likely to be the financial backbone of a successful cable operation." The D.C. Circuit Court of Appeals agreed with the cable operator pointing out that the Commission had always allowed cable systems wide discretion in the area of entertainment programming and such discretion was consistent with the Communications Act and the public interest in programming diversification. In addition, the court noted that no evidence of harm [siphoning] which the regulations sought to remedy, was presented.

The FCC ventured into another area of cable regulation be-
Beyond signal carriage. Commission intervention in the cable industry took the form of mandatory access and origination regulations.\(^{76}\) However, as it will be seen, the FCC's expansion beyond signal carriage, into this other area of cable, was found to be outside the agency's statutory authority.

The Commission's 1969 Report required systems in major markets to set aside "access channels" in order to: 1) enable the public to rent time to produce and transmit their own shows, and 2) provide channels for governmental and educational use.\(^{77}\) The Supreme Court, in considering the Commission's authority to enforce these new rules in *United States v. Midwest Video Corp.*,\(^{78}\) sustained the regulations. The Court held that under the *Southwestern* test the rules were "reasonably ancillary" to the FCC's responsibilities to broadcast television.\(^{79}\) The Court found the agency's authority existed pursuant to § 303(g) of the Communications Act which provided that the Commission could make "experimental uses of frequencies, and ... encourage ... more effective use of radio in the public interest..."\(^{80}\) The Court reasoned that these requirements would further FCC policies designed to enhance local service and provide diversification of television and cable programs.\(^{81}\)

These mandatory access rules were redefined in the 1972 Report of the Commission. Cable systems in the largest 100 markets were required to build a 20-channel capacity service, reserving three access channels for free use by the public, educational, and governmental bodies in addition to a fourth channel for leased access.\(^{82}\) Those operators affected were to comply by the March 31, 1977, deadline.\(^{83}\) However, in response to the cable industry's complaints of the heavy burdens placed upon it, the Commission, on its own initiative, relaxed these regulations, repealing the mandatory nature of the origination rule,\(^{84}\) curtailing access standards by requiring only one access channel instead of four in the areas where operators had over 3500 subscribers, and extending

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77. Id. at 206-07.
79. Id. at 662-63.
81. 406 U.S. at 668-69.
82. 36 F.C.C.2d at 240-41 (1972).
83. Id. at 242.
the March 31, 1977 compliance deadline.\(^8\)

In a second suit brought by Midwest Video Corporation\(^6\) to oppose these restrictions, the cable operator argued that revenues were insufficient to comply with even the 1976 rules because they required an $133 - $430 million investment.\(^7\) The Eighth Circuit Court of Appeals, after reviewing the Commission’s 1976 Report, found that the “mandatory access, channel construction, and equipment availability rules burst through the outer limits of the Commission’s delegated jurisdiction.”\(^8\) According to the court, nowhere was it stated or argued that

these rules were created and applied to cable systems to protect a broadcasting station’s ‘contour’. . .; or to protect the growth of broadcast television; or to protect the public interest in continued broadcast television services; or to govern an activity involving the airwaves; or to protect broadcasting against ‘unfair competition’ from cable; or to allow the Commission ‘to perform with appropriate effectiveness’ (footnote and citations omitted) its responsibilities for broadcast television.\(^9\)

The Supreme Court affirmed the Eighth Circuit Court of Appeals’ decision declaring the rules of access channels to be beyond the scope of the Commission’s authority under the Communications Act.\(^10\) These access rules, were officially rescinded by the FCC in 1980.\(^1\)

Though the FCC regulated the area of cable signal carriage at this time, it did recognize local authority to grant franchise rights to operators. In its 1972 Report, the FCC recognized the “local nature” of cable for the simple reason that cable operations were dependent upon underground cables being placed above or below the streets of the community to be served.\(^2\) No federal preemption by the FCC was intended in the franchising area, “[r]ather, we view our role as one of cooperating with local franchising authorities and State regulatory commissions to the maximum extent possible. . . .”\(^3\)

86. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978).
87. Id. at 1032.
88. Id. at 1038.
89. Id.
93. CATV, Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d
Franchising responsibility was placed in the hands of the states, with such authority to be delegated to the local governments if desired.\textsuperscript{94} Local authority included overseeing local incidents of cable operations such as defining franchise areas, regulating facility construction and maintaining right of ways.\textsuperscript{95} The Commission still maintained its control regarding signal carriage of cable through its certificate of compliance.\textsuperscript{96} This Certificate set forth conditions that localities “may impose” on cable enterprises seeking a franchise.\textsuperscript{97} For example, franchising authorities could not require a prospective cable operator to delete certain signals;\textsuperscript{98} localities could only require operators to carry “all signals.”\textsuperscript{99} In addition, state and local governments could not regulate rates\textsuperscript{100} because such action would be “premature” and would “have a chilling effect on the anticipated development.”\textsuperscript{101}

The FCC’s reaction to the cable systems of the 1980’s evidences an easing of regulation regarding the importation of distant television broadcasting signals.\textsuperscript{102} Unrestricted importation of distant broadcast signals is in effect, grounded in the belief that “[m]illions of households may be afforded not only increased viewing options, but also access to a diversity of services from cable television that presently is unavailable in their communities.”\textsuperscript{103} As the Second Circuit Court of Appeals recently held, the Commission was “shifting its policy toward a more favorable regulatory climate. . . .”\textsuperscript{104}

C. Cable Content Regulation

Historically, FCC regulation of cable signal carriage has been upheld only when the restrictions were within the scope of the Commission’s authority under the Communications Act of 1934. In

\begin{itemize}
  \item 453, 466 (1965).
  \item 94. Cable Television Report and Order, 36 F.C.C.2d 143, 207 (1972).
  \item 95. Id.
  \item 96. E. Foster, \textit{supra} note 61, at 360.
  \item 97. 47 C.F.R. § 76.11 and § 76.31 (1965).
  \item 98. Clarification of Cable Television Rules, 46 F.C.C.2d 175, 178 (1974).
  \item 99. Id.
  \item 100. 46 F.C.C.2d at 199-200.
  \item 101. Id.
  \item 102. Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 664 (1980).
  \item 103. Id. at 746.
  \item 104. Malrite T.V. of New York v. FCC, 652 F.2d 1140, 1151 (2d Cir. 1981).
\end{itemize}
the area of content regulation, the Communications Act is also the source enabling FCC action. However the extent of this power extends to broadcasting and does not include cable.

Prior to 1948, the Communications Act contained a provision prohibiting against obscene, indecent or profane broadcasting.\(^{105}\) This provision was removed from the Communications Act and a similar provision was reenacted under 18 U.S.C. § 1464, when the Criminal Code was revised in 1948.\(^{106}\) This section provides that "[w]hoever 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."\(^{107}\) Enforcement of this statute is shared by the Justice Department and the FCC.\(^{108}\)

The language of this criminal statute, specifically "radio communication," has been interpreted to include radio and television broadcasts and not cable.\(^{109}\) The United States Justice Department has stated that this section is "not understood to apply to the transmission of obscene material over cable television."\(^{110}\) The FCC is of a similar opinion. The Commission has imposed fines for violation of this statute only in cases involving radio licensees, and it acknowledges that no cases have arisen in this regard involving television programs.\(^{111}\) Some authorities have reasoned that "[t]he fact that Congress has declined to vest the FCC with complete authority over cable... demonstrates an analytical distinction between 'broadcasting' and 'cablecasting'" and since § 1464 applies to broadcasts, "it may not necessarily govern material which is transmitted by cable."\(^{112}\)

In 1972, in its adoption of mandatory access rules, the FCC prohibited cablecasting of obscene or indecent material on educational, public or leased channels. However, as a result of the sec-

\(^{105}\) Hofbauer, "Cableporn" and the First Amendment: Perspectives on Content Regulation of Cable Television, 35 FED. COM. L.J. 139, 163-64 (1983).

\(^{106}\) Id.

\(^{107}\) Id. at 164.


\(^{112}\) 35 FED. COM. L.J. at 165.
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In the Midwest Video case, the access rules were rescinded along with these corresponding obscenity and indecent prohibitions.\(^{113}\) Only regulations prohibiting obscene or indecent transmissions where a cable operator originates his own programs remain in force.\(^{114}\)

The Commission has attempted an indirect approach to regulate obscenity in this area by urging licensees to exercise self-restraint.\(^{115}\) In 1976, the FCC sought to clarify through legislation its authority in the cable obscenity area.\(^{116}\) However, Congress did not enact the proposed bill. The head of the Commission has gone so far as to say that he has "serious reservations as to the extent the Commission should have a role in this area [obscene content regulation]."\(^{117}\) He reasoned that the Commission would be "ill-equipped" because of the Supreme Court's requirement of using a local community standard\(^{118}\) in determining what is "legally obscene or indecent."\(^{119}\)

Despite its power under the Communications Act to control broadcast content, the FCC has shown reluctance even to exercise this authority. For example, in 1978, an organization known as the Massachusetts Morality in Media (MMM) filed a petition with the Commission asking that a local broadcaster be denied license renewal.\(^{120}\) The organization contended that such action was appropriate because the station was "consistently broadcasting offensive, vulgar and otherwise material harmful to children without adequate supervision or parental warnings."\(^{121}\) The Commission, denying MMM's petition, responded that its consideration was to review "whether the licensee's overall programming served its service area, and not whether any particular program is 'appropriate' for broadcast."\(^{122}\)

Also, in 1981, though Congress failed to act, the Commission

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113. See supra note 91.
115. 35 FED. COM. L.J. at 169.
121. Id. at 1250.
122. Id. at 1251.
presented proposed legislation to delete provisions of the Communications Act which applied to obscenity and indecency in order that enforcement of § 1464 would be left up to the "Justice Department or local officials who can make judgments as to [the Supreme Court's obscenity requirement of] local community standards." 123

Thus, in the area of obscene content transmitted by cable the FCC is limited in its authority. First, where cable retransmits programs of a television broadcaster and that program is determined to be obscene, the Commission has the authority under the Communications Act to go after the broadcasting entity for violation of § 1464 of the Criminal Code. Second, where a cable operator originates his own program for transmission to his subscribers, the FCC has authority under its own regulations to act. However, when obscene programs come from any other source, as occurs with pay cable, the FCC is without authority.

III. State and Local Regulation of Cable Content

Before the Capital Cities decision, several state and local governments responded to public concern over cable obscenity through state legislation or city ordinance. This local response appeared to comply with the Supreme Court's "community standard" formula124 as the appropriate means for defining obscene speech. However, several of these newly enacted local laws pertaining to cable content were challenged in the courts, specifically in Utah and Florida. These courts addressed first amendment concerns with no mention of any federal preemption conflict as the Supreme Court would discuss in Capital Cities. Of the three suits brought challenging these local laws, all held the laws unconstitutional. The courts found the laws overbroad in that the language of the statutes prohibiting not only obscene speech but also indecent speech which fell beyond the Miller standard.

In Home Box Office, Inc. v. Wilkinson125 the state of Utah attempted to invoke criminal punishment on any person, including a franchisee, who "shall knowingly distribute by wire or cable any pornographic or indecent material to its subscribers."126 The cable

124. 413 U.S. at 24.
television distributors in their complaint alleged that the statute, by its terms, was unconstitutionally overbroad, “reaching forms of expression that are protected by the First Amendment.”127 The State, on the other hand, justified its actions on the basis that “materials accessible to children should be governed by standards more strict than the Miller standards.”128 The court, in its decision, cited the Miller v. California standard,

State statutes designed to regulate obscene materials must be carefully limited. . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, . . . . A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.129

Furthermore, the Utah court held that “states may not go beyond Miller in prescribing criminal penalties for distribution of sexually oriented materials.”130

Applying this Miller standard to the indecent definition laid out in the state statute, the court pointed out its defectiveness. First, in § 76-10-1227(2) prohibiting “nude or partially denuded figures”, the court emphasized that nudity fell within the protection of the first amendment according to the Supreme Court’s decision in Jenkins v. Georgia131 and the high Court’s more recent 1981 ruling Schad v. Mt. Ephraim132.

Second, in § 76-10-1227(1) prohibiting “descriptions or depictions of illicit sex or sexual immorality” the court pointed out that the Supreme Court had held in Roth v. United States133 that sex and obscenity “are not synonymous.”134 By footnote, the court noted that Utah’s newly enacted statute and its definitions would make criminal the presentation of “a number of Academy Award-winning films such as The Godfather, Being There, Coming Home,

127. 531 F. Supp. at 991.
128. Id. at 996.
129. Id. at 993 (emphasis deleted).
130. Id.
134. Id. at 487.
Finally, the court responded to the State's claim that it had an interest in protecting children. The court stated that the statute made no reference to children and cited an earlier the Supreme Court decision *Butler v. Michigan* in which the Court overruled laws forbidding distribution of reading material to adults "in the name of protecting hypothetical minors."  

Less than a year following the defeat of the Utah's statute, another suit was brought, this time against a Utah city ordinance. The Plaintiffs, cable television distributors and several home viewers, opposed an amendment to a Roy City ordinance prohibiting the distribution of any pornographic or indecent material by any franchisee or business licensee operating within its boundaries.

Roy City contended that their power to restrict in this manner was based on their authority to improve morals, to control the streets and to franchise and license. In addition the City justified its ordinance under its duty to protect children, citing *FCC v. Pacifica Foundation*. Plaintiffs, on the other hand, argued a first amendment violation on the grounds that the ordinance was overbroad according to the *Miller* boundaries and the recent holding in *Wilkinson*.

In *Pacifica* the Supreme Court had held that the FCC had the power to control the airways when seven dirty words—"patently offensive material"—were broadcast over radio at a time available to children and subject to audience surprise. However, the Utah court found *Pacifica* inapplicable to Roy City's argument in that *Pacifica* applied to broadcasting and not cable. The court held that the difference between broadcasting dirty words and "sending over private wires [cable] non-pornographic material on request"

135. 531 F. Supp. at 996 n.18.
137. *Id.* at 383-84.
139. *Id.* at 1174.
142. *UTAH CODE ANN.* § 10-8-4 and § 10-8-80 (1973).
144. 555 F. Supp. at 1166.
145. 438 U.S. 726.
146. *Id.*
was in the levels of choice available with cable transmissions as opposed to broadcasting. The following is the laundry list compiled by the court to support its denial of Pacifica’s applicability to the Utah ordinance:

CABLE:

1. User needs to subscribe.
2. User holds power to cancel subscriptions.
3. Limited advertising.
4. Transmittal through wires.
5. User receives signal on private cable.
6. User pays a fee.
7. User receives previews of coming attractions.
8. Distributor or distributees may add services and expanded spectrum of signals, channels or choices.
9. Wires are privately owned.

BROADCAST:

User need not subscribe.
User holds no power to cancel.
Extensive advertising.
Transmittal through public airwaves.
User appropriates signal from the public airwaves.
User does not pay a fee.
User receives daily and weekly listing in public press or commercial guide.
Neither distributor nor distributees may add services or signals or choices.
Airwaves are not privately owned but are publicly controlled.

Rather than finding Pacifica to be the controlling case regarding cable content, the Utah court found the Miller standard to be appropriate authority. Specifically, § 17-3-6(6) of the ordinance, which defined indecent material as “a representation or verbal description: An erotic human sexual or excretory organ or function; or Erotic nudity; or Erotic ultimate sexual acts, normal or perverted, actual or simulated; or Erotic masturbation; which under contemporary community standards is patently offensive,” was found to be “facially beyond Miller.” Also, the court stated that the ordinance interfered with individual responsibility, particularly “the responsibility of a parent to oversee the development of

147. 555 F. Supp. at 1168.
148. Id. at 1167.
149. Id. at 1171.
Within a month following the Roy City decision, the City of Miami enacted a similar cable ordinance. This ordinance provided for regulation of indecent and obscene material on cable television. However, this regulation did not apply to broadcast television, moviehouses, over-the-air microwave transmissions, or subscription television. The ordinance defined indecent material as any "representation or description of a human sexual or excretory organ or function which the average person, applying contemporary community standards, would find to be patently offensive." Despite Miami's efforts to incorporate Miller language in its ordinance, the ordinance was challenged on first amendment grounds by a cable subscriber and Home Box Office, Inc.

In response to this challenge, a Florida federal court held that the scope of permissible obscenity regulation had been carefully defined in Miller and indecent speech should be accorded some first amendment protection since it did not fall within the Miller definition. Despite the City's argument that indecent speech was subject to regulation according to Pacifica, the court was not persuaded noting that the ordinance's prohibition was "wholesale" and lacked "a host of variables" considered in the Pacifica decision. The missing variables included "time of day . . ., the content of the program in which the language is used . . . and differences between radio, television and perhaps closed-circuit transmission. . . ." Also in support of its decision, the Florida court incorporated the laundry list created by the Roy City court. Once again a court had concluded that Miller, rather than Pacifica, established the limits of content regulation and, that indecent material exceeded Miller's strict boundaries.

As these three cases reveal, the first amendment has been an effective weapon against state and local cable content regulations. In addition to this powerful first amendment argument, a new weapon, federal preemption, has been made available as a result of

150. Id. at 1172.
153. Id. at 127.
154. Id. at 129, 130.
155. Id. at 132.
156. Id. at 131.
157. Id.
158. Id. at 132.
the *Capital Cities* decision. The ramifications of the *Capital Cities* decision have sparked Congressional action. Senate bill 66, entitled "An Act to Amend the Communications Act of 1984,"\(^\text{159}\) seeks to clarify all misunderstandings pertaining to cable content regulation. The bill provides that the FCC does not have exclusive jurisdiction to regulate cable television content and that state and local authorities are free to exercise their powers in this area.\(^\text{160}\)

IV. **CAPITAL CITIES CABLE, INC. v. CRISP**

A. The Case

Oklahoma had prohibited\(^\text{161}\) advertising of alcoholic beverages in the state\(^\text{162}\), except by use of a premises sign. Entities affected by this proscription have included television stations in the State broadcasting alcoholic beverage commercials locally. The prohibition also required these local stations to block out advertising carried nationally.\(^\text{163}\) This ban on alcoholic advertising did not apply to ads in newspapers, magazines, any publication printed outside the State but sold within the Oklahoma borders, nor to the State's cable operators retransmitting out-of-state broadcast signals to Oklahoma residents.\(^\text{164}\)

However, in March of 1980, cable operators were brought under the State's restrictions. According to the Oklahoma Attorney General, criminal prosecution would result when any cable operator retransmitted locally out-of-state broadcast signals containing alcoholic ads in violation of both the State's constitutional and

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161. OKLA. STAT. ANN., tit. 37, § 516. (West Supp. 1982). OKLA. CONST. art. XXVII, § 5 provides in part: "It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'"

162. "Alcoholic beverage" is defined by statute, OKLA. STAT. ANN., tit. 37, § 506(2) (West Supp. 1982) as "alcohol, spirits, beer and wine." "Beer" includes only those beverages that contain more than 3.2% of alcohol by weight. OKLA. STAT. ANN., tit. 37, § 506(3) (West Supp. 1982). However, because beer often contains less than the above stated content, Oklahoma has permitted beer commercials. 104 S. Ct. at 2695, n.3.


164. 104 S. Ct. at 2698.
statutory provisions. Enforcement of these provisions was placed in the hands of the Oklahoma Alcoholic Beverage Control Board.

In response to the Attorney General's ruling, operators of several cable television systems alleged that this state regulation violated both the commerce and supremacy clauses, the first amendment and the fourteenth amendment's equal protection clause. These operators brought suit in federal court pursuant to 28 U.S.C. § 2201 seeking declaratory and injunctive relief. In defense, the Oklahoma Board contended that the twenty-first amendment, granting power to the states to regulate liquor, was superior to the first amendment claims of the cable operators.

The district court held that "Oklahoma's laws only indirectly advanced the stated governmental interest in reducing alcohol consumption and its related problems, and were more extensive than necessary to serve that interest." In addition, the court reasoned that cable operators were prohibited by federal law from altering or modifying, in any way, out-of-state signals. Therefore, the district court entered a declaratory judgment in favor of the cable operators and a permanent injunction against the State's Alcoholic Beverage Control Board.

On appeal, the Tenth Circuit Court of Appeals reversed, finding the ban to be a valid restriction on commercial speech. The court held that the prohibitions were within Oklahoma's authority under the twenty-first amendment. In addition, the court reasoned that the State had a legitimate and substantial governmental interest "to reduce the sale and consumption of liquor, and thereby reduce the problems associated with alcohol abuse." However, in rendering its opinion the appellate court did not discuss the issue of whether the Oklahoma law as it applied to cable

166. Oklahoma Telecasters Assoc. v. Crisp, 699 F.2d 490, 492 (10th Cir. 1983). This case was overruled by the Capital Cities case.
167. Id. Petitioners also included the Oklahoma Telecasters Association who rebroadcast network programming that includes advertisements for wine.
168. Id. at 492-93.
169. Id. at 493.
170. Id.
172. 104 S. Ct. at 2699.
173. 699 F.2d at 493.
174. Id. at 498.
175. Id. at 500.
operators was preempted by federal regulations.\textsuperscript{176}

The issue of preemption by federal law of the cable area, as it applied to this case, was brought to the attention of the Supreme Court by the Solicitor General, appearing \textit{amicus curiae}, as a representative of the Federal Communications Commission.\textsuperscript{177} The Supreme Court reversed on the basis of federal preemption without considering the first amendment argument.\textsuperscript{178}

In arriving at its decision, the Court explored the historical development of FCC regulations pertaining to the cable area. According to the Court, the FCC's comprehensive scheme to regulate cable signals was justified indirectly under the Communications Act of 1934, 47 U.S.C. § 152(a), which granted the FCC "'broad responsibilities' to regulate all aspects of interstate communication by wire or radio. . . ."\textsuperscript{179} The Court noted its support of this initial regulation in its decision in \textit{United States v. Southwestern Cable Co.}\textsuperscript{180}

The Court found that the Commission had begun regulating all signals retransmitted by cable operators to ward off potential injury to services provided by the local television broadcaster because of cable's competitive nature, and to protect the viewer unable to receive cable services in his home.\textsuperscript{181} In addition, the Court noted that the FCC, since this early regulation, had come to retain "exclusive jurisdiction over all operational aspects of cable communication" which included signal carriage, technical standards regarding signal carriage, and non-broadcast (also known as pay cable) signal transmissions.\textsuperscript{182}

The Court also emphasized that the Oklahoma restriction conflicted with specific regulations—the "must carry" rules and federal copyright laws. The "must carry" rules require cable operators to transmit broadcast signals of local television stations in full without deletion\textsuperscript{183} where stations are within a 35 mile zone of the cable operator or where the station is "significantly viewed" in a

\begin{footnotesize}
\begin{enumerate}
\item[176.] 104 S. Ct. at 2699.
\item[177.] Id.
\item[178.] Id. at 2709.
\item[179.] 104 S. Ct. at 2701.
\item[180.] 392 U.S. 157 (1968).
\item[181.] 104 S. Ct. at 2701-02. \textit{See also CATV, Second Report and Order, 2 F.C.C.2d 725, 745-46, 781-82 (1966).}
\item[182.] 104 S. Ct. at 2702.
\item[183.] Id. at 2703-04. \textit{See also 47 C.F.R. § 76.55(b) (1972).}
\end{enumerate}
\end{footnotesize}
Federal copyright laws require cable operators to pay royalty fees to a fund for copyrighted programs retransmitted thereby eliminating any liability for copyright infringement. This licensing scheme also prevents "deleting or altering commercial advertising on the broadcast signals . . . transmit[ted]."

The Court concluded that to enforce the Oklahoma ban with these existing federal regulations would place the cable operator in an impossible position. By retransmitting out-of-state broadcast signals in full as required by federal law, cable operators would, at the same time, be subject to Oklahoma's criminal prosecution for failing to delete alcoholic commercials. In addition, to enforce the Oklahoma regulation would compel cable operators to abandon their carriage of distant broadcast and non-broadcast signals to prevent any risk of criminal prosecutions, action contrary to federal regulatory purpose of program diversity.

B. Inapplicable To Cable Content Regulation

Based on the historical development of cable regulation previously discussed as well as FCC attitude toward cable content regulation, the Capital Cities case can only be interpreted as limiting FCC jurisdiction to cable signal carriage, leaving local governmental bodies free to exercise their police power in the area of cable content regulation. Remember, for example, when the Commission ventured into other areas of cable regulation such as mandatory access rules, channel construction, and equipment availability, the courts found the agency had gone beyond its "delegated jurisdiction." Also recall the statement made by the head of the Commission that the agency was "ill-equipped" to handle cable content considered to be obscene.

Specific references are made throughout the Supreme Court's opinion which indicate that the decision was based, not on the Court's concern over what [the content] was being aired but, rather, on local interference with a pre-existing federal regulatory
scheme for signal carriage.

First, for example, when the Commission began its regulation of cable in the 1960s, the Court pointed out the FCC was "chiefly concerned" with the competitive effect of allowing cable "unlimited importation of distant broadcast signals into the service areas of local television broadcasting stations . . . ." The Commission's response was to promulgate rules requiring cable systems "to carry the signals of all local stations in their areas, to avoid duplication of the programs of local television stations carried on the system during the same day. . . ." 191

Second, the Supreme Court cited its earlier decision in United States v. Southwestern Cable Co. in which it had confirmed this "initial assertion of jurisdiction over cable signal carriage" because of the FCC's general authority under the Communications Act. Third, the Capital Cities decision noted the 1972 FCC regulations that "further refined and modified these rules governing the carriage of broadcast signals by cable systems . . . ." 192

Also, the Supreme Court's recognition that a "deliberately structured dualism" approach existed in which state and local authorities had responsibilities over franchising and "local incidents of cable operations" evidences that the Court was not speaking in terms of exclusive jurisdiction of the FCC over the entire cable field. 193 Finally, the Court emphasized that this preemption would promote certain objectives—"diversity of services" and "benefits from permitting the carriage of additional signals." 194 The Court recognized that without the preemption of cable signal carriage, these objectives would be "jeopardized if state and local authorities were . . . permitted to restrict substantially the ability of cable operators to provide these diverse services to their subscribers." 195

The Capital Cities decision did not even delve into FCC involvement in the area of obscene or indecent program content, whether it pertained to broadcasting or cable. As previously discussed, the FCC admits to only a limited authority in the area of

191. 104 S. Ct. at 2701.
192. Id. at 2701-02.
193. Id. at 2702.
194. Id.
195. Id.
196. Id.
197. Id. at 2703.
198. Id.
obscene or indecent broadcasting content, and, in fact, is hesitant to exercise such authority because it is in no position to determine a "local community standard" as required to resolve such an issue.

V. CONCLUSION

In the Capital Cities case the Supreme Court was concerned with upholding federal regulation of the cable signal carriage area. In its ruling against the Oklahoma laws regarding deletion of alcoholic commercials of out-of-state broadcast signals being retransmitted by cable operators, the Supreme Court was concerned with upholding a federal regulatory scheme whose purpose was to protect the television broadcasting industry. When the Court spoke of the exclusive jurisdiction of the FCC in the area of cable systems, it was referring not to an absolute jurisdiction of all matters associated with the industry, but rather to authority over cable signal carriage. The Court did not, nor did it intend, to venture into the area of obscene cable content regulation. Local authorities can be prevented from taking action using their police powers by means of local ordinances where the federal government has preempted the area. However, in the area of obscene or indecent cable content, local governments are free to regulate, subject not to federal preemption concerns but only first amendment issues.

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