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The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements

By MICHAEL I. MEYERSON*

Cable television is in the forefront of America's "communications revolution."¹ In the words of Justice Brennan, "The potential of [t]he new industry to augment communication services now available is . . . phenomenal."² One of the most significant services which cable technology can offer is the institution of public access channels. Such channels, available on a nondiscriminatory basis for the use of the general public, present the possibility of a diverse, pluralistic medium, one through which members of a community can communicate effectively with one another.

The Federal Communications Commission promulgated rules mandating that all but the smallest cable companies set aside channels for public access.³ The Court of Appeals for the Eighth Circuit struck down this requirement on the ground that the Commission lacked the statutory authority to issue the rules.⁴ The court added that, had it been necessary to decide the constitutionality of the rules, they would have been found violative of both the First Amendment⁵ guarantee of free speech and the Fifth Amendment⁶ due process clause.⁷ The Supreme Court affirmed the lower court's decision that the

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1. See *Miami Herald Publishing Co. v. Tornillo*, 481 U.S. 241, 248-49 (1974).

2. *United States v. Midwest Video Corp.*, 406 U.S. 649, 651 (1972) (plurality opinion) (hereinafter referred to as *Midwest I*).

3. Report and Order, Docket 20508, 59 F.C.C.2d 294 (1976).

4. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (hereinafter referred to as *Midwest II*).

5. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

6. "No person shall be . . . deprived of life, liberty, or property, without due process of law; or shall private property be taken for public use, without just compensation." U.S. CONST. amend V.

7. *Midwest II*, 571 F.2d at 1056.

rules exceeded the Commission's authority, but did not address the issue of their constitutionality, except to say that the question was "not frivolous."⁸

The unresolved issue of the constitutionality of government-mandated access to cable television systems must still be faced. Even if the federal government does not reimpose the rules,⁹ several states have already enacted their own access requirements.¹⁰ This article will examine whether such requirements by a state violate the First Amendment rights of the cable television operator.¹¹

Many commentators have assumed that the primary focus of such an analysis must be a determination of whether cable television is "like" a newspaper or "like" a television broadcaster, followed by a routine application of the appropriate constitutional standard.¹² This approach is both simplistic and needlessly subjective. The proper inquiry must be whether a cable access rule, "abridges expression that the First Amendment was meant to protect."¹³ Accordingly, the effect of an access requirement on the various interests served by the First Amendment will be examined. It will be demonstrated that those interests are furthered substantially by such a requirement, and in a manner which is not inconsistent with the Constitution.¹⁴

8. *Midwest II*, 440 U.S. at 709 n.19.

9. The Supreme Court stated that the question of "whether less intrusive access regulation might fall within the Commission's jurisdiction . . . is not presently before this Court." *Id.* at 705 n.14.

10. *E.g.*, CONN. GEN. STAT. § 16-333(c) (Supp. 1981); MINN. STAT. ANN. § 238.05(b) (West Supp. 1981). California permits cable companies to be free from rate regulation only if certain criteria are met, one of which is provision of public access channels. CAL. GOV'T CODE § 53066.1 (West Supp. 1981). For an excellent discussion of current state cable access requirements, see Harrison, *Access and Pay Cable Rates: Off-Limits to Regulators After Midwest Video II?*, 16 COLUM. J.L. & SOC. PROB. 591, 619-30 (1981).

11. The question of whether access requirements violate the due process clause is beyond the scope of this article.

12. See, *e.g.*, B. SCHMIDT, FREEDOM OF THE PRESS VS PUBLIC ACCESS, 199-216 (1976); Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515, 525-32 (1975); Ross, *The First Amendment: A New Interpretation Needed for Cable*, CABLEVISION, May 18, 1981, at 120; Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 146-47 (1976); Note, *Midwest Video Corp. v. FCC: The First Amendment Implications of Cable Television Access*, 54 IND. L.J. 109, 120 (1978). See also National Cable Television Association, *Cable Television, Government Regulation, and the First Amendment*, 3 COMM/ENT L.J. 577.

13. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). See text accompanying notes 215-17, *infra*.

14. See text accompanying notes 217-76, *infra*.

To determine the appropriate constitutional test to be utilized, this article will also explore the different possible classifications of the access requirement: as local regulation of a locality's public streets; as regulation of a scarce communications medium; as a time, place, or manner restriction; as an attempt to encourage diversity in mass communications, and as an incidental restriction on the rights of the cable television operator. Cable television access requirements will be shown to fulfill the standards for each of these classifications, whether a "reasonableness" test or that of a narrowly drawn measure to further important governmental interests unrelated to the suppression of speech is applied.¹⁵

I

An Introduction to Cable Television

Cable television¹⁶ is basically a system for carrying television and other broadcast signals into the home by wire rather than through the air.¹⁷ The wire is usually a coaxial cable,¹⁸ capable of carrying many different signals without interference.¹⁹ There are several different sources for the signals. Television stations, both local and distant, send out signals that can be captured by antennae.²⁰ These signals are carried to the "headend," where they are amplified and sent along the cable distribution system.

Once cable systems are established, cable television operators can also transmit their own programs directly over the

15. See text accompanying notes 277-445, *infra*.

16. The original term "community antenna television" or "CATV" described systems that received and redistributed television broadcast signals. Because of the broader range of services now offered, see text accompanying notes 79-98, *infra*, the term "cable television" is now used, *Midwest II*, 440 U.S. at 697 n.6.

17. For a brief history of the development of cable television, see generally M. HAMBURG, *ALL ABOUT CABLE* 1-20 (1979).

18. A coaxial cable is a "copper or copper coated aluminum wire surrounded by an insulating layer of air or plastic foam . . . The insulating layer is covered with tubular shielding composed of tiny strands of braided copper wire, or a seamless aluminum sheath, and protective outer jacket." NEW YORK STATE COMMISSION ON CABLE TELEVISION, *CABLE COMMUNICATIONS IN NEW YORK STATE* 265 (1981). Some cable companies use glass fiber instead of coaxial cables to carry the signals. One fiber, the width of a human hair, can replace a 3/4 inch cable and carry more channels for a longer distance. See Brown, *TV's Use of Fiber Transmission Begins*, N.Y. Times, July 9, 1976, at A1, col. 3.

19. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-62 (1968); see also W. BAER, *CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING* 3-4 (1973).

20. See text accompanying notes 71-72, *infra*.

cables and onto unused channels.²¹ In the 1970's, accessible communications satellites made it possible for a single communications source to transmit programs simultaneously to cable television systems all over the country.²² This marked the birth of so-called "pay television."

With the advances in technology and the concomitant increase in the services provided by cable television, there has been an explosive growth in the number of cable television systems and subscribers.²³ In 1952, there were 70 cable systems serving 70,000 subscribers.²⁴ By 1975 there were over 3,400 systems serving 9.8 million subscribers.²⁵ In 1981 there were over 4,400 systems serving 17.2 million subscribers, more than one-fifth of all television households.²⁶ Current estimates are that by 1990 more than 60% of all United States television households, over 57 million households, will be cable television subscribers.²⁷

A. Economics of Cable Television

The construction of a modern cable television system, particularly in urban areas, is an extremely expensive undertaking. The most costly aspect is the distribution system: the cables which carry the signals from the headend antennae to the individual subscribers. Cost for the distribution systems vary widely.²⁸ In suburbs where cables can be strung overground on existing utility and telephone poles, the cost can range from \$4,500 to \$14,000 a mile.²⁹ If the cables must be laid under-

21. See text accompanying notes 79-82, *infra*.

22. See *United States v. Columbia Pictures Industries*, 507 F. Supp. 412, 415 (S.D.N.Y. 1980), *aff'd*, 7 Media. L. Rptr. 1342 (2d Cir. 1981) (not formal opinion of court of appeals). See also text accompanying notes 83-92, *infra*.

23. In *Midwest I*, Chief Justice Burger referred to the "almost explosive development of CATV." 406 U.S. at 676 (concurring opinion). See also *Southwestern Cable Co.*, 392 U.S. at 162-63.

24. Taylor, *In Scramble to Bring Cable TV to Your Area*, U.S. NEWS AND WORLD REPORT, Oct. 6, 1980, at 48.

25. *Home Box Office Inc. v. FCC*, 567 F.2d 9, 24 (D.C. Cir. 1977).

26. BROADCASTING/CABLE YEARBOOK, G3 (1981).

27. *Cable Stats*, CABLEVISION, Jan. 4, 1982, at 55.

28. "This variation results not from the cost of cable and electronics, but because of the almost infinite construction possibilities." Cable Television Information Center, *Cable Economics* 11 (1972) (hereinafter *Cable Economics*).

29. See, e.g., W. BAER, *supra* note 19, at 47; Taylor, *supra* note 24, at 48; BROADCASTING/CABLE YEARBOOK, G3 (1981). Rates for pole attachment are now set by the Federal Communications Commission pursuant to 47 U.S.C. § 224 (1981).

ground, the cost is far higher.³⁰ While in sparsely populated areas it might cost less than \$10,000 a mile to put down underground cable,³¹ in the heavily populated urban areas the cost can be \$25,000 to \$50,000 or more.³² In parts of San Francisco, for example, it costs \$100,000 a mile to put in the cables while avoiding the city's sewer system.³³

There are other major elements of a cable television company's initial capital investment in addition to the distribution system. The headend equipment, including construction of tower, antenna, and processing equipment, can cost well over \$100,000.³⁴ There are also costs directly related to the number of subscribers. These include drop lines into each home and subscriber terminals.³⁵

The considerable start-up costs have led to a change in the structure of the cable television industry. Where once the typical cable operators were small "mom-and-pop" businesses, most cable systems today are not individually owned.³⁶ Additionally, many smaller systems are being acquired by larger companies.³⁷ As of December, 1980, 50 of the largest multiple systems operators (M.S.O.'s) owned 75% of the nation's cable television systems.³⁸

Another facet of the economics of cable television is that most of the cable operator's investment is for equipment and facilities shared by the subscribers. The marginal cost attributable to any additional subscriber is relatively small.³⁹ Therefore, costs-per-subscriber decrease as the number of

30. Costs for placing underground cables can increase dramatically, depending on soil and ground conditions, number of cables, whether existing conduits may be used or whether they must be relocated. See *Cable Economics*, *supra* note 28, at 11.

31. W. BAER, *supra* note 19, at 47; BROADCASTING/CABLE YEARBOOK, G3 (1981).

32. Taylor, *supra* note 24, at 48.

33. *Cable TV: The Race to Plug In*, BUSINESS WEEK, Dec. 8, 1980, at 67.

34. *Cable Economics*, *supra* note 28, at 11.

35. See *Inquiry into the Economic Relationship between Television Broadcasting and Cable Television*, 71 F.C.C.2d 632, 666 (1979) (hereinafter *Economic Inquiry*).

36. "This isn't a 'mom and pop' industry that needs protection anymore. Mom and pop are now playing golf in Palm Springs with the money they made selling their cable system to a conglomerate." Shenon, *Cable TV's Benefactor Comes under Fire*, N.Y. Times, Aug. 9, 1981, 3, at 6, col. 1 (quoting David Ladd, U.S. Register of Copyrights). See also Gits, *Media Concentration: Conglomerates Take Cable's Bait*, CABLEVISION, Dec. 15, 1980, at 128-50; *How Cable Works*, N.Y. Times, July 5, 1981, at 25, col. 3.

37. See *Cable TV: The Race to Plug In*, *supra* note 33, at 68.

38. *Id.*

39. *Economic Inquiry*, *supra* note 35, at 667; W. BAER, *supra* note 19, at 52.

subscribers increases.⁴⁰

It is the number of subscribers that determines the financial success or failure of a cable system.⁴¹ The degree of penetration—the percentage of homes potentially serviced by the cable system that sign up for the service—necessary for a system's success will vary according to the amount of necessary capital investment and the number of homes per square mile. Estimates of the penetration necessary for a system to break even range from 20% to 40%.⁴²

A 1979 study by the Federal Communications Commission⁴³ concluded that in areas where there is adequate over-the-air reception of television broadcast signals,⁴⁴ the ultimate penetration rate for cable television systems is significantly limited.⁴⁵ The maximum penetration rates in the urban areas of the 100 largest television markets⁴⁶ were predicted to reach between 20% and 40%.⁴⁷ The F.C.C. concluded that with a ceiling of 40% penetration in the largest cities, "the total number of cable subscribers in all markets will not be greater than about forty-eight percent of the total number of television households within the foreseeable future. . . ."⁴⁸

Both the economics of scale and the limited potential for penetration have created a situation where most cable operators face no direct competition from other cable companies within their own franchised area. In over 99.9% of the localities wired for cable television, there is only one cable company.⁴⁹

B. The Question of Natural Monopoly

Much of the early discussion of the proper role of government regulation of the cable television industry assumed that the distribution function of a cable television system was a "natural monopoly" in the area which it served.⁵⁰ Some courts

40. See W. BAER, *supra* note 19, at 50.

41. *Cable Economics*, *supra* note 28, at 11.

42. See W. BAER, *supra* note 19, at 41-42; Kennedy, *Small Towns Join Forces to Get Cable T.V.*, N.Y. Times, Mar. 2, 1969, at B1, col. 2.

43. *Economic Inquiry*, *supra* note 35; 71 F.C.C.2d 632 (1979).

44. Adequate over-the-air reception means both availability of more than a few broadcast signals and strong quality reception. *Id.* at 669.

45. *Id.* at 662.

46. 47 C.F.R. § 76.51 (1980).

47. *Economic Inquiry*, *supra* note 35, at 669.

48. *Id.* at 672.

49. See text accompanying note 59, *infra*.

50. See, e.g., *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd without*

have held that, to the contrary, because it may be physically possible for more than one cable television company to serve a community, cable television, unlike either broadcast television stations or utilities providing electrical service, is not a natural monopoly.⁵¹

Professor Richard Posner has defined "natural monopoly" as the condition which occurs when it is less expensive for the first firm in an area to supply service or products to additional customers than for a new entrant in the area, "not because the firm is more efficient in the sense that its cost curve lies below those of other firms . . . but because one firm can supply the entire output demanded at a lower cost than could more than one firm."⁵² According to Professor Posner, this condition arises when fixed costs, those not affected by changes in the amount of goods or services produced, are very large in relation to the amount of consumer demand: "If the fixed costs can be spread over the entire output of the market, a firm supplying that output may have a lower average cost of production than, say, two firms, each of which incurs the same fixed costs but spreads them over only one half the output."⁵³

Cable television appears to meet this definition of a natural monopoly.⁵⁴ The largest portion of a cable company's ex-

opinion, 396 U.S. 556 (1970); *The Cabinet Committee on Cable Television*, CABLE 20 (1974) (hereinafter *Cabinet Committee*); THE SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE 5 (1971) (hereinafter SLOAN COMMISSION). Cf. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969) ("[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee").

51. See, e.g., *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 657 (N.D. Ohio 1968), *aff'd sub nom. Wonderland Ventures, Inc. v. City of Sandusky*, 423 F.2d 548 (6th Cir. 1970); *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1039-40 (D. Colo.), *rev'd*, 630 F.2d 704 (8th Cir. 1980), *rev'd*, 50 U.S.L.W. 4144 (1982) (hereinafter *Boulder I*).

52. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 139-49 (1978).

53. *Id.* at 140.

54. There are no current adequate substitutes for cable television. In *United States v. E.I. DuPont De Nemours & Co.*, 351 U.S. 377, 404 (1956), the Supreme Court said that to determine the components of a single product market, one must examine, "products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." Over-the-air broadcast television is not interchangeable with cable; not only are the number of broadcast channels often either limited in number or poorly received by a community, see text accompanying notes 71-72, *infra*, but the current channel capacity of cable, see text accompanying notes 76-78, *infra*, offers far more variety than over-the-air broadcasting. See Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548, 642-43 (1969). Movies and live theater are much more expensive for a family to view than cable and they require

penses, such as the headend and distribution system, are fixed costs.⁵⁵ These costs are both extremely high and independent of the number of subscribers to the cable system.⁵⁶ Additionally, having competing cable companies is economically inefficient since each company would have to duplicate the cables and equipment of the others.⁵⁷

Cable television has indeed developed as a monopoly industry throughout the country.⁵⁸ Of the 4,200 cable television systems currently operating, there are an estimated eight instances of so-called "overbuilds"—two cable companies competing for the same subscribers.⁵⁹ Historically, overbuilds have been eliminated by one company buying out the other,⁶⁰ though occasionally other agreements are reached, such as dividing the locality among the competing cable companies with the understanding that no company will go into another's "priority service area" unless that company has clearly failed to meet its commitments in its priority area.⁶¹

the family to leave its home. The new technologies, such as direct broadcast satellites, multipoint distribution service, and subscription television, while potentially competitive with cable television, see Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Technologies*, 25 N.Y.L. SCH. L. REV. 863, 880-82 (1980), are currently significantly more expensive, less accessible, and able only to offer considerably less diversified programming than cable. See MAJORITY STAFF OF HOUSE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION AND FINANCE, TELECOMMUNICATIONS IN TRANSITION (1981), excerpted in *Emerging Competition*, CABLEVISION, Dec. 7, 1981, at 285. See also National League of Cities, *supra* note 12, at 22.

55. See text accompanying notes 28-34, *infra*.

56. See text accompanying notes 38-40, *infra*; see also *Economic Inquiry*, *supra* note 35, at 666-67; *Cabinet Committee*, *supra* note 50, at 10.

57. R. POSNER, *CABLE TELEVISION: THE PROBLEM OF LOCAL MONOPOLY* 1 (1970).

58. Although many states require that cable franchises be "non-exclusive," e.g., HAW. REV. STAT. § 440G-8(d) (Supp. 1979); MINN. STAT. ANN. § 238.05(6) (West Supp. 1981), that non-exclusivity is not used to create competition but only to permit a community to award a second franchise if the first company does not perform properly. E.g., Dawson, *How Safe Is Cable's Natural Monopoly?*, CABLEVISION, June 1, 1981, at 343. Cable companies also generally are reluctant to enter a community which has already been wired: "[i]n reality, if one operator has 'built' a city, another cable operator isn't going to build another system." *Courts Ponder Status of Cable TV to Rule Legality of Regulation*, Wall St. J., Dec. 29, 1980, at 11, col. 1 (quoting James Ewalt, an attorney with the National Cable Television Association).

59. Dawson, *supra* note 58, at 340.

60. *Id.* at 333-34.

61. *Id.* at 334. This is how the "problem" of overbuilds was resolved in Allentown, Pennsylvania. The solution avoid changing the original non-exclusive franchise permits into an exclusive franchise agreement, yet created a situation where, "as long as performance is up to standards, nobody has to worry about someone else encroaching on his turf." *Id.* at 339.

There does appear to be merit, however, in the argument that some competition is possible among cable television systems. While at least one court has mistakenly assumed that the large number of channels which can be carried through a cable eliminates the danger of monopoly control of all those channels,⁶² other courts have argued, more to the point, that current technology permits more than one distribution system to exist in a given area.⁶³ In *Community Communications Co. v. City of Boulder*, the trial judge found that there could be more than one cable company using the same poles.⁶⁴ This capability, according to the court, would permit between two and four cable companies to compete for the same subscribers.⁶⁵

The city of Phoenix, Arizona has actually authorized direct competition among cable companies.⁶⁶ After complaints surfaced that the first franchised company was not wiring the city quickly enough, other companies requested the opportunity to operate in the city. The city council awarded franchises to three other companies. Phoenix was divided into sections and companies now must get permits to wire any section. After two companies have obtained permits for a section, however,

62. *Greater Fremont*, 302 F. Supp. at 657 n.5; see also *Home Box Office*, 567 F.2d at 44-45. The court in *Greater Fremont* stated that since, "a cable with 12 wires can in theory carry 132 messages at the same time," therefore, "132 CATV systems, each entirely independent of all the others, could in theory be carried in a cable the size of one's thumb." 302 F. Supp. at 657 n.5. The court ignored the fact that as long as only one cable company controlled the cable, there was, rather than a multitude of systems, only one CATV system:

The private power of the cable system operator is potentially great, because of the local monopoly characteristics of cable. Unless restrained in some manner, the system operator could control all of the channels on his cable system, which could constitute the bulk of the channels of electronic communications in a particular locale.

Cabinet Committee, *supra* note 50, at 19.

63. See, e.g., *Home Box Office*, 567 F.2d at 46; *Boulder I*, 485 F. Supp. at 1039-40; *Community Communications Co. v. City of Boulder*, 496 F. Supp. 823 (D. Colo. 1980), *rev'd*, 7 Media L. Rptr. 1649 (10th Cir. 1981) (hereinafter *Boulder II*). *Boulder I* and *Boulder II* dealt with the right of a city to bar a cable company from wiring a part of the city so it could award franchises to competing companies. In *Boulder I*, the Supreme Court ruled that cities were not immune from antitrust liability and remanded the case for a determination of whether there had been a violation of the antitrust laws. 50 U.S.L.W. at 4148. In *Boulder II*, decided by the court of appeals before the Supreme Court's *Boulder I* decision, the court of appeals held that the prohibition did not violate the cable company's First Amendment rights. 7 Media L. Rptr. at 1996-2000.

64. 485 F. Supp. at 1040. See note 63, *supra*, discussion of *Boulder II*.

65. *Id.* See *Boulder I*, 630 F.2d at 712 (Markey, J., dissenting).

66. Dawson, *supra* note 58, at 358-59.

the only way a third company can obtain a permit for that section is by demonstrating that it has the support of a majority of the residents of that section because inadequate service is being provided by either one or both of the companies already in the area.⁶⁷

It appears that while cable television has many of the characteristics of a natural monopoly, some competition is possible within a given area. However, there is no evidence that such competition can ever involve more than an extremely limited number of competitors. The trial court in *Boulder I* did not envision more than a handful of cable companies,⁶⁸ and there is no instance anywhere in the country today of more than two companies competing directly.⁶⁹ Thus it does not appear possible for there to be a "wide variety of competitors vying for the public's attention."⁷⁰ Because of the greater competition among operators, it may be more accurate to term cable television not a "natural monopoly" but, rather, a "natural oligopoly."

C. Services Offered by Cable Television

The first commercial cable television systems built in the 1950's served rural communities having poor or nonexistent over-the-air reception of television broadcast signals.⁷¹ These systems provided either or both of two services: supplementing local broadcasting by improving the reception of local stations, and importing distant signals into communities that were far away from the broadcasting station.⁷²

The next systems were built to bring a greater variety of programming into communities which already had adequate over-the-air television reception. In 1961, viewers in San Diego who already received three local channels were given the opportunity to see all of the Los Angeles channels as well. The cable system offered four new independent stations which presented

67. *Id.* at 359.

68. See text accompanying notes 63-65, *supra*.

69. *E.g.*, Dawson, *supra* note 58, at 359.

70. *Cabinet Committee*, *supra* note 50, at 20.

71. See M. HAMBURG, *supra* note 17, at 5. The first commercial community antenna system was constructed in the town of Landsford, Pennsylvania. The system offered reception of three broadcast television channels to subscribers who paid an installation charge and monthly fee. *Id.*

72. See *id.* at 7; *Southwestern Cable*, 392 U.S. at 163; *Columbia Pictures*, 507 F. Supp. at 415.

sports, old movies, and reruns of old shows plus the local programming shown by the three network affiliates.⁷³ Today, the San Diego system is the largest in the country, with 209,000 subscribers.⁷⁴

In most other large cities, however, the possible availability of distant signals was not enough to attract sufficient subscribers to make construction of cable systems economically viable. Additional programming was necessary both to bring in more subscribers and to raise more revenue from those who did become subscribers.⁷⁵

As technology advanced, cable systems developed the capacity to offer an increasing number of channels. Whereas the earliest cable systems offered three or four channels,⁷⁶ and the systems constructed during most of the 1960's and 1970's carried 12 channels,⁷⁷ the current "state of the art" can offer 35 channels and some systems are being built to offer 50 channels or more.⁷⁸

1. *Local Origination.* The first way in which cable television companies utilized channel capacity which was not being used for carrying television broadcast programming was through "cablecasting,"⁷⁹ the transmission to subscribers of programs which the cable companies themselves had originated.⁸⁰ Much of this cablecasting is of a very simple nature. For example, a video camera will scan back and forth over time and weather measuring instruments.⁸¹ Other systems present a full range of programming, including both live and videotape offerings.⁸²

73. M. HAMBURG, *supra* note 17, at 25.

74. *Cable Stats*, CABLEVISION, December 21, 1981 at 152.

75. *See Columbia Pictures*, 507 F. Supp. at 415.

76. *See* text accompanying notes 71, *supra*.

77. *See Columbia Pictures*, 507 F. Supp. at 422. *See generally* Spillman, *Multiplay: A Case of Diminishing Returns*, CABLEVISION, June 1, 1981, at 137-43.

78. *See Home Box Office*, 567 F.2d at 22; *Boulder I*, 485 F. Supp. at 1036; *Columbia Pictures*, 507 F. Supp. at 422. The franchise agreement for New Orleans calls for 108 channels on its cable system; for Cincinnati, the agreement is for 86 channels. Panero, *The Winning Combinations: What it Took to Win in Eight Big Cities*, CABLEVISION, June 1, 1981, at 310-14.

79. "Cablecasting" refers to programming distributed on the cable system which is, "subject to the exclusive control of the cable operator." *Midwest I*, 406 U.S. at 653 n.6 (citing 47 C.F.R. § 76.5(w)).

80. CABLE TELEVISION INFORMATION CENTER, *THE USES OF CABLE COMMUNICATIONS* 9 (1973) (hereinafter *USES OF CABLE*). As of 1981, about 3,080 cable systems cablecasted programs. BROADCASTING/CABLE YEARBOOK, G3 (1981).

81. *USES OF CABLE*, *supra* note 80, at 9.

82. *Id.*

2. *Pay Television.* From 1972 on, pay television has offered cable television stations a means to fill unused channels, attract more subscribers, and sell more services to existing subscribers. Generally, cable systems lease a channel to one of the pay networks in exchange for royalties based on the number of subscribers who sign up for the additional charge.⁸³ What the subscribers usually receive are recent movies, sports, and some programming produced by the pay network itself.⁸⁴

Pay television has proved to be extremely popular. In 1980, over 8 million households had pay television;⁸⁵ it is estimated that by 1985 there will be between 16 million and 25 million pay television subscribers.⁸⁶ As the Court of Appeals for the Second Circuit has said, "The popularity of this medium has grown so rapidly that it is not impossible that, by the end of the century, it will be the prime method for viewing motion pictures."⁸⁷

3. *Public Access.* With more channels available on a cable television system than were needed to carry local and distant television broadcast signals, interest turned toward the utilization of some of the excess channels to present programming by those not affiliated with the cable television company, broadcast television systems, or other traditional program producers. The concept of "public access" channels, to be available on a "first-come, first-served" basis to anyone in the community served by the cable television company,⁸⁸ was seen as one of the greatest advantages which the new cable technology

83. For example, cable systems pay Home Box Office, the largest program producer, four dollars a month for every H.B.O. subscriber plus a percentage of any amount above seven dollars the system charges the subscriber for the pay service. *January Date Set for HBO Rate Hike*, CABLEVISION, July 13, 1981, at 33. Suppliers of basic programming service, that for which the cable operator does not charge subscribers an extra fee, charge the operator 5c-15c per subscriber per month. See Howard, *Satisfying Cable's Vast Appetite for Programming*, DUN'S BUSINESS MONTH, Nov. 1981, at 84.

84. The rates subscribers are charged for pay services are unregulated. The Federal Communications Commission has both declined to regulate rates and prohibited states from imposing such regulation. See Notice of Inquiry in Docket 20767, 58 F.C.C.2d 915 (1976), upheld in *Brookhaven Cable TV v. Kelly*, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979).

85. *Columbia Pictures*, 507 F. Supp. at 416.

86. *Id.*

87. *Id.* at 415.

88. For a description of how a public access system can be established, see W. BAER, *supra* note 19, at 134-37; Buske, *Improving Local Community Access Programming*, PUBLIC MANAGEMENT, June, 1980, at 12-14.

could offer.⁸⁹

In 1971, the Sloan Commission on Cable Communications issued a report on the development of cable television.⁹⁰ One of the Commission's recommendations was the establishment of public access channels.⁹¹ The Commission saw public access as a means through which individual members of a community could communicate with the community at large:

There is a need, in every community, for the expression of common notions, for the expression of artistic and cultural endeavors; a need to serve the elderly, the deaf, the very young; a need for an audience that finds a resolution in more affluent areas, in the creation of Little Theater Groups and similar associations. There is the need to express oneself in forms that can be carried across boundaries to similar communities elsewhere, and indeed to dissimilar communities which might profit from the expression of unfamiliar views. There is a pervasive need, in short, to be heard.⁹²

The Cabinet Committee on Cable Television's Report to The President in 1974 also endorsed the idea of public access channels.⁹³ The Cabinet Committee regarded access as essential if cable television was to be a "constructive force in our national life".⁹⁴

We believe that cable development has the potential of creating an electronic medium of communications more diverse, more pluralistic, and more open, more like the print and film media than our present broadcast system. It could provide minority groups, ethnic groups, the aged, the young, or people living in the same neighborhood an opportunity to express, and to see expressed, their own views. Yet it would also enable all of these groups to be exposed to the views of others, free of the homogeneity which characterizes contemporary television programming. Cable offers countless Americans a chance to speak for themselves and among themselves in their own way, and a chance to share with one another their experiences, their

89. See, e.g., W. BAER, *supra* note 19, at 137; Barnette, *State, Federal and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685, 737-38, 789-92 (1972); Bazelon, *The First Amendment and the "New Media"*—*New Directions in Regulating Telecommunications*, 31 F.C.C. L.J. 201, 210 (1979); Botein, *Access to Cable Television*, 57 CORN. L. REV. 414, 438 (1972); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1035-37 (1971).

90. SLOAN COMMISSION, *supra* note 50.

91. *Id.* at 125.

92. *Id.* at 124-25.

93. Cabinet Committee, *supra* note 50, at 44 n.9.

94. *Id.* at 19.

opinions, their frustrations, and their hopes. Rather than increase the alienation of individual from individual and group from group, cable could combine the shared experience of national television with a type of active participation in the political and social process that was common in the days before urbanization eroded the opportunity for personal involvement in events that affected the community.⁹⁵

It is this potential for personal involvement within each community that makes public access particularly important. Not only can local town meetings be broadcast throughout the community, but individuals and groups can comment on and respond to the issues addressed by the local governing body.⁹⁶ In fact, public access permits the raising of issues which otherwise would not be discussed in the local media at all.⁹⁷

In addition to the opportunity to increase discussion of political issues, public access provides a medium for offering important services to narrow audiences, too small to be served by current mass electronic media. Some examples of such programming include shows in sign language for the deaf, programming for the elderly, and religious programming.⁹⁸

95. *Id.* at 15.

96. See Bell, *A Different Kind of Television*, PUBLIC MANAGEMENT, June, 1980, at 5-7.

97. See W. BAER, *supra* note 19, at 2:

Citizens may speak on any subject they choose. After using portable cameras, all sorts of groups—churches, Boy Scouts, minority groups, high school classes, crusaders for causes—can create and show their own programs. With public access, cable can become a medium for local action instead of a distributor of pre-packaged mass consumption programs to a passive audience.

98. See O'Connor, *Reviews of Major Cable Services Available in the Tri-State Area*, N.Y. Times, July 12, 1981, 2, at 25, col. 1:

The variety of access fare in Manhattan verges on the bewildering. In the past few weeks, the persistent browser could have visited a black Baptist church in Brooklyn, a Jewish Passover seder, and a small Roman Catholic seminar on the subject of "Future Wars in the Secrets of Dogma." These represented only a fraction of the religious programming. For balance of a sort, there was the "American Atheist New Forum," featuring the always militant Madelyn Murray O'Hare, who was claiming to detect "an extraordinary curiosity about atheism out there." Elsewhere, there were yoga lessons with a lot of inhaling and exhaling, weight-control lectures ("the 4 S's of a gluttonous fat person are silver, slice, slab, and slob"), and a number of psychics, including one who recently used tarot cards to conclude that a gentleman on the telephone was "very concerned with money."

Access can be serious. "Communications Update" recently offered a report on the Woodhull Medical Center in Brooklyn and the reasons for its still postpone opening. On "Building for Tomorrow," a group of black persons discussed the weapon of rent strikes.

Other cities and systems may offer more uplifting, more purely informational

D. The Federal Communications Commission Access Rules

In May, 1976, the Federal Communications Commission promulgated rules mandating that cable television systems with over 3,500 subscribers make available channels for various types of access programming.⁹⁹ The rules required cable companies to provide from their available channels a public access channel, an education access channel, a local government access channel and a leased access channel.¹⁰⁰ If there was not sufficient demand by programmers for all of those channels, cable operators were permitted to combine one or more channels.¹⁰¹ Sufficient demand was defined as access channel use, "80 percent of the weekdays (Monday—Friday) for 80% of the time during any consecutive three-hour period for six consecutive weeks. . . ."¹⁰²

The number of available channels in a cable television system was to be calculated by subtracting from the total number of channels the number of channels carrying television broadcast signals and already carrying pay programming.¹⁰³ Channels being used for local origination which were offered to subscribers at no charge were deemed to be "available" for access.¹⁰⁴ The rules also prohibited a cable television company from using a channel which was currently available for access to provide new pay programming.¹⁰⁵

The public access channel was required to be made available for service on a first-come first-served, nondiscriminatory basis.¹⁰⁶ Apart from enforcement of the Commission's prohibition against advertising and obscene or indecent programming, there was to be no control by the cable television operator of the content of the programs on the access channel.¹⁰⁷ There

forms of access content, but somehow the crazy, unpredictable mix to be found in Manhattan manages to capture a fairly accurate reflection of the area's perhaps unique diversity.

See also *USES OF CABLE*, *supra* note 80, at 22.

99. These rules appear in Report and Order, Docket 20508, 59 F.C.C.2d 294 (1976) (hereinafter 1976 Report) and were deleted in 45 Fed. Reg. 76, 178 (1980) pursuant to the Supreme Court's ruling in *Midwest II*, see text accompanying notes 123-26 *infra*.

100. See 1976 Report, *supra* note 99, at 327 (citing 47 C.F.R. § 76.254(a) (1976)).

101. See *id.* at 327-28 (citing 47 C.F.R. § 76.254(b) (1976)).

102. *Id.* at 328 (citing 47 C.F.R. § 76.254(d) (1976)).

103. See *id.* at 315.

104. See *id.* at 315-16.

105. See *id.* at 316-17.

106. See *id.* at 328 (citing 47 C.F.R. § 76.256(d) (1976)).

107. See *id.* at 328 (citing 47 C.F.R. § 76.256(b) (1976)).

was to be at least one public access channel for use without charge.

In addition to providing the channel for access programming, the cable television company also had to provide a studio with "some inhouse capacity for members of the public to record programming. . . ." ¹⁰⁸ The cable company was permitted to make reasonable charges for equipment and production of the public access programs, but in no instance was a charge permitted for live public access programming if less than five minutes in length. ¹⁰⁹

The Commission concluded that while there were both direct costs and opportunity costs associated with the provision of access channels, these costs were outweighed by the public benefits. ¹¹⁰ The access channels, if used properly, would:

result in the opening of new outlets for local expression, aid in the promotion of diversity in television programming, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities. ¹¹¹

The Court of Appeals for the Eighth Circuit examined the constitutionality of the public access requirements in *Midwest Video Corporation v. FCC*. ¹¹² While striking down the rules as beyond the F.C.C.'s jurisdiction, the court said that, "Were it necessary to decide the issue, the present record would render the intrusion by the present rules constitutionally impermissible." ¹¹³

The court held that cablecasting was communication protected by the First Amendment freedom of speech and freedom of the press clauses. ¹¹⁴ Specifically, the court found no distinction between cable systems and newspapers in determining the government's power to require public access. ¹¹⁵ Relying on *Miami Herald Publishing Co. v. Tornillo*, ¹¹⁶ the court

108. *Id.* at 317, 328 (citing 47 C.F.R. § 76.256(a)(3) (1976)).

109. *See id.* at 328 (citing 47 C.F.R. § 76.256(c)(3) (1976)).

110. *See id.* at 296.

111. *Id.*

112. 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

113. *Id.* at 1056.

114. *Id.* at 1054 & n.70.

115. *Id.* at 1056.

116. 418 U.S. 241 (1974).

ruled that public access rules impermissibly require cable operators “who have invested substantially to create a private electronic ‘publication’—a means of disseminating information—, to open their ‘publications’ to all for use as *they* wish.”¹¹⁷ The Commission’s access rules were condemned because they removed all editorial discretion from the cable system owner both as to who could use the system and what programming material was shown.¹¹⁸

The court stated that even though there may be only one cable company in a community, such scarcity would not warrant the access requirements. Again relying on *Tornillo*, the court said,

[Scarcity] which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, . . . and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.¹¹⁹

The Federal Communications Commission was also faulted for failing to decide whether cable systems are public forums.¹²⁰ If the systems were not public forums, the court said, it would appear that access requirements would be unconstitutional: “Every individual’s right to speak, precious and paramount as it is, does not include every individual’s right to be given the possibility of an audience by government fiat, or to speak in a non-public forum like a newspaper, a magazine, or on the Senate floor.”¹²¹

The Supreme Court affirmed the Eighth Circuit’s decision voiding the public access rules, but based its holding entirely on a finding that the rules exceeded the Commission’s jurisdiction.¹²² The Court said that public access requirements imposed common carrier obligations on cable operators.¹²³ The

117. *Midwest Video Corp. v. FCC*, 571 F.2d at 1056. (emphasis in original).

118. *See id.* at 1055.

119. *Id.* (quoting *Home Box Office*, 567 F.2d at 46) (citations omitted).

120. *Midwest Video Corp. v. FCC*, 571 F.2d at 1054.

121. *Id.* The court also criticized the F.C.C. for not explaining why compelled access to cable facilities differed, in terms of First Amendment analysis, from compelled access to broadcast facilities. *Id.* at 1055. The court did not explain, however, either the relevance of the comparison or whether, in fact, compelled access to broadcast facilities would be *per se* unconstitutional. *Cf. CBS, Inc. v. FCC*, 453 U.S. 114, 101 S. Ct. 2813 (1981) (federal candidates have enforceable right of access to broadcast stations).

122. *See* 440 U.S. 689 (1979).

123. *See id.* at 700-702.

Communications Act of 1934,¹²⁴ the Court held, barred the Commission from compelling broadcasters, including cable operators, to act as common carriers, even for only a portion of their total services.¹²⁵

In reaching its decision, the Court did not discuss the merits of the Eighth Circuit First Amendment analysis. In a footnote, the Court said: "The court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute."¹²⁶

F. The Eighth Circuit's Mis-Analysis

The Eighth Circuit's analysis of the constitutionality of public access requirements for cable television systems was based on a misreading of *Tornillo* and a simplistic interpretation of First Amendment law. By relying solely on a decision concerning access to newspapers, the court violated the admonition given by Justice Stewart in a different access case, *Columbia Broadcasting System, Inc. v. Democratic National Committee*: "The problem before us . . . is too complex to admit of solution by simply analogizing to cases in very different areas."¹²⁷

The fundamental error made by the Eighth Circuit was in assuming that the rules governing the constitutionality of mandated access to newspapers applied *a fortiori* to public access on cable television. It is a settled principle of constitutional analysis that each medium of expression presents its own special First Amendment problems.¹²⁸ Newspapers,¹²⁹ movies,¹³⁰ television,¹³¹ radio,¹³² and billboards¹³³ each require a separate

124. 47 U.S.C. § 153(h).

125. See *Midwest II*, 440 U.S. at 705 & n.15.

126. *Id.* at 709 n.19.

127. 412 U.S. 94, 134 (1973) (concurring opinion).

128. See *Burstyn v. Wilson*, 343 U.S. 495, 503 (1952); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, (1975) *Red Lion Broadcasting Co. v. FCC*, 395 U.S., 367, 386.

129. See *Miami Publishing Co. v. Tornillo*, 418 U.S. at 254-58.

130. See *Burnstyn v. Wilson*, 343 U.S. at 503. In 1915, in fact, the Supreme Court ruled that movies were merely, "spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion." *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230, 245 (1915).

131. See *Red Lion*, 395 U.S. at 386.

and distinct set of First Amendment rules. While prior review by a government agency of movies might be constitutional,¹³⁴ such review of books is blatantly unconstitutional.¹³⁵ Although the First Amendment prevents newspaper publishers from being forced to print the replies of political candidates they criticize,¹³⁶ it permits a requirement that those who control television channels provide equal time to the candidates they criticize.¹³⁷ As Justice White stated in *Metromedia, Inc. v. City of San Diego*:¹³⁸ "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."¹³⁹

When the Supreme Court in *Tornillo* unanimously struck down the Florida law which required a newspaper to print the responses of political candidates to its attacks, the Court did not condemn all access requirements *per se*, but relied on the special history and characteristics of newspapers as a form of communication.¹⁴⁰ Indeed, the Court did not even mention its decision only five years earlier in *Red Lion Broadcasting Co. v. FCC*,¹⁴¹ which rejected a challenge to the equal time rules to which television broadcasters are subject. Justice White made clear in his concurrence in *Tornillo* that the blanket prohibition against access requirements is limited to newspapers: "According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between *government and the print media* so far as government tampering, in advance of publication, with news and editorial content is

132. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

133. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981).

134. See *Freedman v. Maryland*, 380 U.S. 51 (1965) (struck down law requiring prior review of movies because it did not provide for a sufficiently speedy review; *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) (ordinance requiring prior review of films is not *per se* unconstitutional).

135. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The Court distinguished *Bantam Books* from its *Times Film* decision by saying, "Furthermore, the holding was expressly confined to motion pictures." *Id.* at 70 n.10.

136. See *Miami Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

137. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

138. 453 U.S. 490 101, S. Ct. 2882 (1981) (Justice White wrote the opinion for a four-person plurality, striking down a city ban on some commercial and all noncommercial advertising on billboards).

139. *Id.* at 2889. (quoting Justice Jackson's concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). Justice Stevens joined this part of the plurality opinion, 101 S. Ct. at 2909; accordingly a majority of the Court supported this statement.

140. *Miami Publishing Co. v. Tornillo*, 418 U.S. at 254-58. See text accompanying notes 157-158, *infra*.

141. 395 U.S. 367 (1969).

concerned.”¹⁴²

The Supreme Court specifically refused to extend its *Tornillo* ruling to all access cases in *Pruneyard Shopping Center v. Robins*.¹⁴³ That case upheld a California constitutional provision which permitted individuals to exercise free speech and petition rights in a privately owned shopping center. The Court rejected the argument that *Tornillo* compelled a holding that the First Amendment rights of the owners of the shopping center were violated when the state required them to permit those with whom they disagreed to use their property as a pulpit:

[*Tornillo*] rests on the principle that the State cannot tell a newspaper what it must print. The Florida statute contravened this principle in that it, “enact[ed] a penalty on the basis of the content of a newspaper.” There was also a danger in *Tornillo* that the statute would “damp[en] the vigor and [limit] the variety of public debate” by deterring editors from publishing controversial political statements that might trigger the application of the statute. Thus, the statute was found to be an “intrusion into the function of editors.” These concerns obviously are not present here.¹⁴⁴

Those concerns also do not apply to cable television access rules. In requiring that a cable system set aside a separate channel for those who wish to publicize their views, there is no “penalty” assessed against the cable operator because of the content of any other programming shown on the cable system. Similarly, there is no danger that an access requirement will impair either the vigor or variety of debate on cable television since the requirement is not dependent on the cable operator exhibiting controversial programming.

To apply the holding in *Tornillo* to any question concerning cable television is particularly inapposite in light of the dispositive statement made at the end of that decision:

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. *A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.* The choice of material to go

142. 418 U.S. at 259 (emphasis added) (citations omitted).

143. 447 U.S. 74 (1980).

144. *Id.* at 88 (citations omitted).

into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.¹⁴⁵

While a newspaper is not a “passive receptacle or conduit,” the Supreme Court has ruled that a cable television system, at least in regard to its carriage of television broadcast signals, is a “nonperformer”¹⁴⁶ and a “passive beneficiary.”¹⁴⁷ In *Fortnightly Corp. v. United Artists Television, Inc.*,¹⁴⁸ the Court held that a cable television system did not infringe the copyright of movie producers whose films it transmitted to its subscribers when it carried a local television broadcast channel. The Court said that, unlike broadcasters who select the programs to be seen on their channels, cable television systems “simply carry, without editing, whatever programs they receive.”¹⁴⁹ Therefore, the Court concluded, cable television operators, “like viewers and unlike broadcasters, do not perform the programs that they receive and carry.”¹⁵⁰

The Court affirmed the essentially passive role of cable television systems in *Teleprompter Corp. v. Columbia Broadcast System, Inc.*¹⁵¹ In *Teleprompter*, creators and producers of copyrighted television programs argued that cable television operators became active performers when the operators decided which distant channels to carry and when the operators offered their own programming in addition to local broadcast signals. The Court rejected both arguments. The Court held that,

Even in exercising its limited freedom to choose among various broadcasting stations, a CATV operator simply cannot be viewed as ‘selecting,’ ‘procuring,’ and ‘propagating’ broadcast signals . . . An operator of a CATV system . . . makes a choice as to which broadcast signals to rechannel to its subscribers, and its creative function is then extinguished.¹⁵²

145. 418 U.S. at 258 (emphasis added).

146. *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394, 409 (1974).

147. *Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390, 399 (1968).

148. 392 U.S. 390 (1968).

149. *Id.* at 400.

150. *Id.* at 400-01.

151. 415 U.S. 394 (1974).

152. *Id.* at 410.

The Court held that the fact that a cable television operator produces and displays its own programming also does not transform the operator into a "performer" for the other programs it offers. Even though the operator-produced programming was sold as a package with the carriage of local broadcast signals, "they remain separate and different operations, and we cannot sensibly say that the system becomes a 'performer' of the broadcast programming when it offers both origination and reception services, but remains a nonperformer when it offers only the latter."¹⁵³

The Eighth Circuit also misinterpreted the *Tornillo* decision's holding as to the effect of "economic" scarcity rather than "physical" scarcity on First Amendment rights. The court stated that *Tornillo* held that scarcity resulting solely from economic conditions is insufficient to justify even limited government intrusion into the First Amendment rights of the "conventional press" and that cable television and newspapers were constitutionally indistinguishable on this point.¹⁵⁴

The *Tornillo* decision, however, did not enunciate a constitutional ruling of the irrelevance of economic scarcity. Rather, the Court held that the fact that economic conditions caused "newspaper monopolies"¹⁵⁵ to exist in many cities did not alter the First Amendment rights of newspapers: "If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."¹⁵⁶ In

153. *Id.* at 405 (quoting the lower court opinion, 476 F.2d 338, 347 (2nd Cir. 1973)). In *Midwest II*, the Supreme Court stated:

Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, "both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide." Report and Order in Docket No. 20829, 43 Fed. Reg. 53742 (1978).

440 U.S. at 707. The Court added that the discretion exercised by cable operators was not necessarily coextensive with that of broadcasters: "We do not suggest, nor do we find it necessary to conclude, that the discretion exercised by cable operators is of the same magnitude as that enjoyed by broadcasters." *Id.* at 707 n.17.

The Court in *Midwest II* did not reject the holdings in *Fortnightly* and *Teleprompter*; in fact, the Court did not even mention those decisions. Cable television, then, may be said to display traits in common with both passive and active media. Accordingly, the holding in *Tornillo*, based on the self-evident non-passive nature of newspapers, cannot apply *ipso facto* to cable television systems.

154. 571 F.2d at 1055. See text accompanying note 120, *supra*.

155. 418 U.S. at 253.

156. *Id.* at 254.

describing the “judicial gloss,” the Court limited its discussion, in large part, to cases detailing the First Amendment rights of newspapers, not of all media in general.¹⁵⁷

That economic scarcity can indeed be a factor in determining the permissible range of government regulation of a medium of communication was indicated by the Supreme Court in its *Red Lion* decision. In discussing the scarcity of the airwaves, the Court acknowledged that occasionally various wavelengths are left unused.¹⁵⁸ The Court held that this did not negate the governmental interest in regulating the broadcast media: “*The substantial capital investment* required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible.”¹⁵⁹

The Court also held that the fact that existing stations could conceivably face direct competition by a new station did not prevent the government from requiring a broadcaster to give equal time to opposing viewpoints. The Court stated that the existing stations would have a “substantial advantage” over a new station, including confirmed habits of listeners and viewers, network affiliation, and greater experience in broadcasting.¹⁶⁰ Because these advantages were “the fruit of a preferred position conferred by the Government,” the Court said the possibility of competition by new stations was insufficient “to render unconstitutional the Government’s effort to assure that a broadcaster’s programming ranges widely enough to serve

157. *Id.* at 254-57. The cases which the Court cited as creating this “judicial gloss” were: *Associated Press v. United States*, 326 U.S. 1 (1945) (which held that antitrust laws apply to newspapers); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (which held that the First Amendment does not give a newspaper reporter immunity from a grand jury subpoena); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (which prohibited the use of discriminatory classified advertising in a newspaper); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971) (which held that a newspaper cannot be forced to publish an advertisement without editorial control); and *Grosjean v. American Co.*, 297 U.S. 233 (1936) (which prohibited a tax on the gross receipts of newspapers with a large circulation). The only other cases cited were *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (which was cited for its position, “strongly adverse to any attempt to extend a right of access to newspapers,” 418 U.S. at 255; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (which was cited for its condemnation of government action which decreases the energy and variety of public debate); and *Mills v. Alabama*, 384 U.S. 214 (1966) (which was cited for its statement that a major purpose of the First Amendment was to protect discussion of governmental affairs in general, candidates in particular).

158. 395 U.S. at 398-400.

159. *Id.* at 399-400 (emphasis added).

160. *Id.* at 400.

the public interest.”¹⁶¹

The precise effect on First Amendment rights of different media due to scarcity caused by economic factors remains undecided. Nonetheless, it is incorrect to say that economic realities can never be considered in determining the constitutionality of a governmental attempt to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.”¹⁶²

The final error the Eighth Circuit made in its analysis of the constitutionality of the cable access rules was its arbitrary statement that unless cable systems were deemed to be “public forums” the rules could not pass constitutional muster.¹⁶³ While the Eighth Circuit was correct in its view that the First Amendment does not give every individual the right to use any private property or means of communication belonging to someone else without the owner’s permission,¹⁶⁴ it was incorrect to assume that all access decisions must rest on a determination of whether or not a medium is a “public forum.” In deciding the constitutionality of access requirements to radio and television, for example, the Supreme Court has utilized an entirely different categorization. Certain types of access may be permitted, the Court has held, because those who control those scarce frequencies are “proxies”¹⁶⁵ and “fiduciaries”¹⁶⁶ for the entire community: “A license permits broadcasting, but the licensee has no constitutional right to . . . monopolize a radio frequency to the exclusion of his fellow citizens.”¹⁶⁷

II

The First Amendment Characteristics of Cablecasting

Before beginning an analysis of whether access requirements infringe the First Amendment rights of cable television

161. *Id.*

162. *Id.* at 390.

163. *See* 571 F.2d at 1054.

164. *See* United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 101 S. Ct. 2676 (1981) (mailbox not a public forum); Lloyd v. Tanner, 407 U.S. 551 (1972) (private shopping center not a public forum).

165. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 394.

166. *Id.* at 389.

167. *Id.* *See* Columbia Broadcasting Systems v. FCC, 453 U.S. 367, 101 S. Ct. 2813, 2829 (1981).

operators,¹⁶⁸ it would be useful to determine the nature of those rights and whether they are coextensive with the rights of either of two media whose rights have been fairly well delineated by the Supreme Court: newspapers and television. However, while such a determination may help clarify the nature of the issue in question, it will not resolve the issue.

Some courts have specifically held that cable television is a speaker protected by the First Amendment.¹⁶⁹ The California Supreme Court ruled that a total ban on pay subscription television was an unconstitutional abridgement of freedom of expression.¹⁷⁰ Similarly, the Court of Appeals for the District of Columbia held that rules limiting the type and amount of pay programming on cable television violated cablecasters' First Amendment rights.¹⁷¹

Though cable television operators are undoubtedly involved in communications and thereby fall under the umbrella of the First Amendment,¹⁷² the relationship of the cable operator to the programs that are carried complicates the question of whether "cablecasting" is speech. In *Teleprompter*, the Supreme Court recognized the fundamental difference between different types of programming carried over the cables. The Court stated that while it was "undisputed" that cable television operators who originate their own programming "perform" that programming, the same cable operators are nonperformers of the off-the-air programming they receive from broadcasters.¹⁷³ The variation in the control held by the cable television operator over the different channels was acknowledged by the Court in *Midwest II*: "A cable system may operate as a common carrier with respect to a portion of its

168. The First Amendment guarantee for free speech is made applicable to the states by the Fourteenth Amendment. See *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 547; *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

169. See, e.g., *Weaver v. Jordan*, 64 Cal. 2d 235, 242, 411 P.2d 289, 294, cert. denied, 385 U.S. 844 (1966); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46; *Boulder II*, 496 F. Supp. at 828.

170. *Weaver v. Jordan*, 64 Cal. 2d at 249, 411 P.2d at 299.

171. *H.B.O.*, 567 F.2d at 49-50.

172. Cable television operators do not lose their first amendment rights either because they are regulated by the government, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 534 n.1 (1980), they exhibit, in large part, entertainment programming, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 2181 (1981), or their communication requires a great expenditure of money, *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

173. 415 U.S. at 404-05.

service only."¹⁷⁴

Cable television performs many different functions and there may be different constitutional protections for each of those different functions. A cable television operator who produces and exhibits his own programming is certainly entitled to the same protection as any other producer of programming. However, it is the cable operator's capacity as producer which is the source of that protection. It is the cable operator's role as distributor of programming which has yet to be defined.¹⁷⁵

A. Neither Newspaper Nor Broadcast Television

Newspapers and television broadcasters are both "distributors" of information, yet they are afforded quite different protection by the First Amendment. Although they have much in common, they are not in the same category in terms of the obligations imposed, or which could be imposed, by law.¹⁷⁶ Cable television possesses attributes which can be categorized as similar on the one hand to a newspaper, and on the other hand to a television broadcaster. However, neither analogy is complete enough to permit a wholesale transposition of constitutional protection of either medium to cable television.

Cable television shares with newspapers a capacity for presenting a wide variety of information and issues simultaneously.¹⁷⁷ Unlike traditional television broadcasters, a cable television operator has numerous channels at his disposal.¹⁷⁸ Like a newspaper, a cable television operator can present information of interest to relatively small sections of the population and not compel one subgroup to endure a discussion of a

174. 440 U.S. at 701 n.9. See *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976).

175. "[W]e have said that in our view cable systems 'are neither broadcasters nor common carriers within the meaning of the Communications Act' but rather that 'cable is a hybrid that receives identification and regulation as a separate force in communications.'" 1976 Report, *supra* note 99, at 299.

176. See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). See generally *Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 36 (1976) (this article took the position that the differing First Amendment protections furthered two distinct First Amendment goals: "access in a highly concentrated press and minimal governmental intervention.").

177. See generally *Note, supra* note 12, 51 N.Y.U. L. REV. at 146-47. See also *Boulder II*, 496 F. Supp. at 829-30.

178. See text accompanying note 78, *supra*.

matter of concern only to a different group.¹⁷⁹ Newspaper readers can turn the page to a different article; cable subscribers can switch the channel.¹⁸⁰

Cable television and newspapers are also not subject to the same physical limitation of the airwaves as are television and radio broadcasters. Government regulation originally was imposed on radio broadcasters because unregulated use of frequencies caused intolerable interference: "With everybody on the air, nobody could be heard."¹⁸¹ In contrast, the cables of a cable television distribution system are either strung on poles or placed in the ground, and two cables can lie side-by-side without causing the same type of interference.¹⁸²

However, there are important differences between cable television and newspapers which will affect the nature of the constitutional protection each medium is afforded. For example, cable television systems are not as "unlimited" as newspapers. First, there is a limit as to how many times a municipality will want its streets torn up,¹⁸³ and a limit as to how many cables a telephone pole will hold.¹⁸⁴ Second, because of its economic and technological structure, cable television may be inherently oligopolistic.¹⁸⁵ Finally, there is the enormous difference in cost of production.¹⁸⁶ Newspapers constitute just one segment of the written media; pamphlets, leaflets, and fliers can all be

179. See SLOAN COMMISSION, *supra* note 50, at 43-44.

180. See *id.*

181. National Broadcasting Co. v. United States, 319 U.S. 190, 212 (1943).

182. See *Boulder I*, 485 F. Supp. at 1038.

183. Even if overground cables are strung, there can be great difficulty with having more than one cable company. The town of East Greenbush, N.Y. awarded directly competing franchises to two cable television companies. The commencement of service was delayed while the companies tried to agree on the logistics of their wirings. Additionally, the use of two cables, rather than one, required that several utility poles be replaced. *Cable Competition Failing to Hasten Service in E.G.*, Greenbush Area News, March 16, 1977, at 1, col. 1. Today, there is only one cable company operating in East Greenbush, see New York State Commission on Cable Television, *supra* note 18, at 245.

184. The most commonly used poles are 35-40 feet long with a usable space of 11-16 feet. Cables use one foot of pole space and there must be at least 40 inches of "safety space" between the electric lines and the communications cable. See *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Docket 78-144, Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59, 68-70 (1979); Gillespie, *Pole Attachments: Still Listening For Joshua*, CABLEVISION, July 27, 1981 at 65. See also *Boulder I*, 485 F. Supp. at 1038.

185. See text accompanying notes 50-70, *supra*.

186. SLOAN COMMISSION, *supra* note 50, at 45-46.

produced without great expense.¹⁸⁷ While there may be only one general circulation newspaper in a city, there are numerous weekly newspapers, special interest newspapers, and magazines and journals available in the same city to compete with the newspaper.¹⁸⁸ Ownership of a cable television system, though, is out of reach of all but the wealthiest.¹⁸⁹ There is nothing in the cable television field comparable to the magazine or pamphlet.¹⁹⁰ While a program could be produced as inexpensively as a small publication, the distribution system is available to only a few. Journals can be mailed to subscribers for a few cents each. A cable program can only be distributed through an integrated cable system.

Another fundamental difference between cable television and newspapers is their relationship with the municipalities in which they operate.¹⁹¹ Because cable systems must use public streets, they must receive governmental approval before they begin to communicate with the public.¹⁹² Thus they are involved with government in a way in which newspapers are not.¹⁹³ By awarding only one franchise, or even by awarding a limited number of franchises, the government is protecting the cable company from competition.¹⁹⁴ The newspaper does not need official approval to publish, and must survive or perish in the open marketplace. Cable companies cannot cease service or transfer ownership unless permitted to do so by the local governing body.¹⁹⁵ With the exception of restrictions placed by antitrust laws,¹⁹⁶ newspapers are generally permitted to conduct business as they please. In short, cable television has a

187. See *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1970).

188. In 1974, when the Supreme Court in *Tornillo* discussed the problem of a newspaper monopoly in Miami, 418 U.S. at 248-50, there were three daily newspapers in the city in addition to the *Miami Herald* (the *News*, *Review*, and *Diario Las Americas*), 18 weekly, bi-weekly, or tri-weekly newspapers, and 24 monthly publications. See N.W. AYER DIRECTORY OF PUBLICATIONS, 240-42 (1974).

189. See text accompanying notes 28-38, *supra*.

190. SLOAN COMMISSION, *supra* note 50 at 93.

191. *Boulder II*, 7 Media L. Rptr. at 1999.

192. See, e.g., CONN. GEN. STAT. § 16-331(a) (West Supp. 1981); DEL. CODE ANN. tit. 26, § 601(a) (1980); KAN. STAT. ANN. § 12-2006 (Supp. 1975); VT. STAT. ANN. tit. 30, § 503(a) (Supp. 1981).

193. *Boulder II*, 7 Media L. Rptr. at 1998.

194. *Boulder II*, 496 F. Supp. at 829.

195. See, e.g., DEL. CODE ANN. tit. 26, § 609(A) (1980); MASS. GEN. LAWS ANN. ch. 166A § 7 (West, Supp. 1981); N.J. STAT. ANN. § 48:5A-43 (West Supp. 1980); N.Y. EXEC. LAW § 822 (McKinney Supp. 1981).

196. See *Associated Press*, 326 U.S. 1 (1945).

history of regulation by the government; conversely, there is a "virtually insurmountable barrier" between government and newspapers.¹⁹⁷

A third distinction between cable television and newspapers is that cable television is intimately connected with that other heavily regulated medium—broadcast television.¹⁹⁸ Cable television arose in large part due to a public demand for improved television broadcast service,¹⁹⁹ and cable systems use the broadcast signals as "the backbone of the service they provide."²⁰⁰ There is also an obvious facial similarity between cable and broadcast television. Cablecasted and broadcasted programs "look" the same and both are exhibited via the home television set.²⁰¹ Additionally, both cable and broadcast television share a relative scarcity of outlets in any given community and a resultant history of government regulation.²⁰²

197. *Tornillo*, 418 U.S. at 259 (White, J., concurring). While the Court in *Tornillo* struck down a law requiring newspapers to publish that which, "reason tells them should not be published," *id.* at 256, a Federal Communications Commission rule requiring cable operators to carry, upon a broadcaster's request, local television signals whenever the cable operator imported competing signals has been found to be constitutional, *see* *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968) (cited approvingly in *Midwest I*, 406 U.S. at 659 n.17 (plurality opinion)). The Court in *Midwest II* distinguished the rule from an access requirement because the signal carriage rule, "was limited to remedying a specific perceived evil and thus involved a balance of considerations not addressed by [the access rules]." 440 U.S. at 706 n.16. This distinction, which led to a finding that the FCC lacked authority to promulgate the access rules, was based on a finding, not that access rules did not remedy any evil, but rather that these rules did not remedy an evil which the Commission had jurisdiction to combat. By contrast, the signal carriage rule, whose purpose was to prevent the impairment of service offered by television broadcasters, was "reasonably ancillary" to the Commission's responsibilities for regulating broadcast television. *Id.* at 697.

198. *See Midwest I*, 406 U.S. at 664-65.

199. *Id.* at 665. *See* Second Report and Order, Docket 14895, 15233 and 15971, 2 F.C.C.2d 725, 745 (1966).

200. First Report and Order in Docket 18397, 20 F.C.C.2d 201, 222 (1969).

201. *See* *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.C. Cir. 1971), *summary aff'd sub nom.* *Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972). In upholding a ban on cigarette advertising on "any medium of electronic communication," the court said, "The unique characteristics of electronic communication make it especially subject to regulation in the public interest."

202. *Compare NBC*, 319 U.S. at 212 with text accompanying notes 50-70, *supra*. As Chief Justice (then Circuit Judge) Burger stated in *Office of Communications of the United Church of Christ*, 359 F.2d at 1003:

The argument that a broadcaster is not a public utility is beside the point.

True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency.

Similarly, cable television is not a "purely" private enterprise. *See* text accompanying notes 193-198, *supra*.

There are, however, numerous differences between the two media which may have constitutional significance. First, the interest of the federal government in regulating the airwaves is not identical to the interest of the municipal government in regulating its streets. The airwaves, used for communication, must be distributed so as to serve "the public interest."²⁰³ A municipality has a more limited, or, in the words of one court, "parochial," interest in keeping its streets and alleyways open for travel by its inhabitants.²⁰⁴

Second, the economics of the two media differ. Broadcast television operators have only one channel at their disposal and cannot appeal to specialized audiences; by appealing to minority tastes, the broadcaster risks losing the larger audience composed of many specialized, minority audiences.²⁰⁵ But the cable operator, with several channels to program and with revenue directly tied to the number of subscribers, can offer a variety of programming: some "mainstream," and some with only a limited appeal.²⁰⁶ Hence, the economics of cable television can lead, at least in part, to greater diversity in programming than occurs in broadcast television.

The Court of Appeals for the District of Columbia in *Home Box Office, Inc. v. FCC*²⁰⁷, in deliniating the difference between cable and broadcast television, stressed that cable television lacked the "physical interference and scarcity requiring an umpiring role for government."²⁰⁸ The court stated there was not a problem of "physical scarcity of channels relative to the number of persons who may seek access to the cable system."²⁰⁹ The court also said that the only barrier to the number of cable operators was economic, as there was no "readily apparent barrier of physical or electrical interference to *operation of a number of cable systems* in a given locality."²¹⁰

It is incorrect to rely on the number of channels made avail-

203. *CBS, Inc. v. FCC*, 453 U.S. 367, 101 S. Ct. at 2830.

204. *Boulder II*, 496 F. Supp. 823, 828.

205. See *Banzhaf v. FCC*, 405 F.2d at 1100 n.76.

206. See Note, *supra* note 12, 51 N.Y.U. L. REV. at 135-37.

207. 567 F.2d 9 (D.C. Cir. 1977).

208. *Id.* at 45.

209. *Id.* This was also the hope of Justice Douglas: "Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 158 n.8 (concurring opinion).

210. 567 F.2d at 46 (emphasis added).

able by cable television to reach a conclusion that there is no problem with scarcity. If there is only one owner of all those channels, there is only one outlet for cable programming and only one operator deciding what will appear on cable television.²¹¹

The court of appeals also erred when it found that because there is no physical obstacle to operation of "a number" of cable systems, the only cause of a cable television scarcity is economic. Even if a limited number, that is, in excess of one cable company, is theoretically possible in a town, that is quite different from the physically unlimited number of newspapers, magazines, and pamphlets that theoretically can be distributed in a locality.²¹²

The court was correct, though, in its recognition that the physical scarcity of broadcast television is of a different nature than that of cable television.²¹³ That difference, along with the disparity in the type and amount of programming which can be offered on the two media, requires a distinct and separate analysis of First Amendment considerations for cable television.

B. Public Access and First Amendment Interests

The correct starting point for resolving the question of whether public access requirements for cable television systems are constitutional can be found in a case which raised the question of the First Amendment rights of another untraditional "speaker"—corporations. In *First National Bank of Boston v. Bellotti*,²¹⁴ the Supreme Court struck down as unconstitutional a Massachusetts law which prohibited corporations from making contributions or expenditures to influence the outcome of any election or referendum unless the referendum "materially" affected the corporation's business or assets. The Court said that the lower court had incorrectly framed the principal question whether, and to what extent, corporations have First Amendment rights:

The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper

211. Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 BELL J. ECON. & MGMT. SCI., 98, 107 (1972).

212. See text accompanying note 189, *supra*.

213. See text accompanying notes 182-183, *supra*.

214. 435 U.S. 765 (1978).

question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect.²¹⁵

Similarly, the principal question for determining the constitutionality of public access requirements is not whether cable television operators "have" First Amendment rights and, if so, whether they are coextensive with those of newspapers or broadcast television. Instead, the question must be whether public access requirements abridge expression that the First Amendment was meant to protect.

One of the primary purposes of the First Amendment is "informational"²¹⁶—to provide that all citizens understand the issues of the day so as to be fit to govern themselves under their own institutions.²¹⁷ Professor Thomas I. Emerson described freedom of expression as "the best process for advancing knowledge and discovering truth."²¹⁸ Accordingly, there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."²¹⁹

In order for the marketplace of ideas to function properly and for the free trade in thoughts and concepts to result in the attainment of truth,²²⁰ there must be available in the marketplace the full range of "goods," to wit, ideas. There is therefore a corollary to the informational purpose, a First Amendment goal of achieving a diversity of vendors of ideas.²²¹ As the

215. *Id.* at 776.

216. *Id.* at 782 n.18.

217. *Id.* at 776. (speech about public issues "is at the heart of the First Amendment's protection."); see *Consolidated Edison Co.*, 447 U.S. at 534 ("Freedom of speech is 'indispensable to the discovery and spread of political truth,' *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)"); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U.S. 476, 484 (1957)"); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 88-89 (1948).

218. T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 7 (1966).

219. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

220. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). R. POSNER, *supra* note 52, at 308.

221. See *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978); *Terminello v. Chicago*, 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes.").

Supreme Court stated in *Associated Press v. United States*,²²² the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . .”²²³

In *Buckley v. Valeo*,²²⁴ the Court upheld the constitutionality of Subtitle H of the Internal Revenue Code which provided for public financing of presidential elections. The Court said that while government must remain absolutely neutral in matters of religion, even to the point that government may not aid all religions, this principle of nonintervention is not carried over *in toto* to matters of free speech.²²⁵ Subtitle H did not violate the First Amendment because it was an “effort, not to abridge, restrict, or censor speech, but rather to use public money *to facilitate and enlarge public discussion and participation* in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values.”²²⁶

Public access requirements for cable television systems serve to further the informational function of the First Amendment.²²⁷ The marketplace of ideas is enhanced by the increase in the number of speakers and the variety of viewpoints they represent. As one commentator has pointed out:

The public access channel, for the first time, guarantees the right of community participation at the individual level, even by individuals without organizational ties or portfolio. The range of possible programming is limited only by production costs. Thus, a wider spectrum of subjects than on any other cable channel is possible.²²⁸

In *Bellotti*, the Court stated that “[the] individual’s interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, al-

222. 326 U.S. 1 (1945).

223. *Id.* at 20.

224. 424 U.S. 1 (1976).

225. *Id.* at 92.

226. *Id.* at 92-93 (emphasis added).

227. See *Cabinet Committee*, *supra* note 50, at 19:

If cable is to become a constructive force in our national life, it must be open to all Americans. There must be relatively easy access . . . for those who wish to promote their ideas, state their views, or sell their goods and services. . . . This unfettered flow of information is central to freedom of speech and freedom of the press which have been described correctly as the freedoms upon which all of our other rights depend.

228. *USES OF CABLE*, *supra* note 80, at 21.

though the two often converge."²²⁹ Professor Emerson has written that the right to freedom of expression is justified primarily as a method of assuring individual self-fulfillment, and that this right is based on two fundamental principles: first, that it is the purpose of society and government to promote the welfare of the individual; and second, that it "is the principle of equality, formulated as the proposition that every individual is entitled to equal opportunity to share in common decisions which affect him."²³⁰

To set aside one channel of a cable television system for public access use by definition furthers the individual's interest in self-expression. It permits many individuals for the first time to communicate with their communities through television.²³¹ Public access fulfills the "pervasive need" to be heard.

In addition to the individual's right to speak is the correlative right to receive information and ideas.²³² The Supreme Court has ruled, "[f]reedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."²³³

The cable television subscriber's interest in receiving information and ideas is advanced by the creation of a public access channel. Public access programming, since it is created by a broad cross-section of the community, can reflect community-held interests and values.²³⁴ It creates an alternative to programs of more general interest which are offered on other cable channels.

229. 435 U.S. at 777 n.12. *Accord Consolidated Edison Co.*, 447 U.S. at 534 n.2. Of course, this is not an unlimited right; the First Amendment does not provide "that people who want to propagandize their protests or views have a constitutional right to do so whenever and however they please." *Council of Greenburg Civic Associations*, — U.S. —, 101 S. Ct. at 2686-87 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976) and *Adderly v. Florida*, 385 U.S. 39, 48 (1966)).

230. T. EMERSON, *supra* note 219, at 4-5.

231. See W. BAER, *supra* note 19, at 134.

232. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976). *Accord CBS, Inc. v. FCC*, 101 S. Ct. at 2830; *Bellotti*, 435 U.S. at 783; *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

233. *Va. State Bd. of Pharmacy*, 425 U.S. at 756.

234. See Bell, *supra* note 96, at 5; Bond, *Regulation for Access*, PUBLIC MANAGEMENT, June, 1980, at 19. The Supreme Court has stressed the importance of encouraging communication on a local level, describing "the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests." *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936).

A final function served by the First Amendment guarantee of freedom of speech is that of protecting the peace within the community itself.²³⁵ The Supreme Court has recognized that the opportunity for free and open airing of contemporary issues, "to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."²³⁶

This theory of "social control" is premised on the principle that once all members of society have had the opportunity to express their positions on an issue and to attempt to persuade others to agree with them, those who fail to prevail on the issue will be more willing to accept the common judgment:

They will recognize that they have been treated fairly, in accordance with rational rules for social living. They will feel that they have done all within their power, and will understand that the only remaining alternative is to abandon the ground rules altogether through resort to force, a course of action upon which most individuals in a healthy society are unwilling to embark. In many circumstances they will retain the opportunity to try again and will hope in the end to persuade a majority to their position.²³⁷

The availability of a public access channel can further this goal and ease some of the tension that exists in many communities. Many people feel alienated from traditional broadcast television and believe that much, if not all, of the programming is unresponsive to their individual needs and the needs of their community.²³⁸ A public access channel permits community members to communicate effectively with one another.²³⁹ One observer explains that cable television presents a unique opportunity for residents of poor and disadvantaged neighborhoods in particular by "alleviating the profound feeling of voicelessness, through abundant channels and open access for the presentation of all views."²⁴⁰

Although cable access requirements further many of the

235. See T. EMERSON, *supra* note 219, at 11-13.

236. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

237. T. EMERSON, *supra* note 219, at 12-13.

238. See F. FRIENDLY, *DUE TO CIRCUMSTANCES BEYOND OUR CONTROL* . . . 266-300 (1968); N. JOHNSON, *HOW TO TALK BACK TO YOUR TELEVISION SET* 152 (1970); Bazelon, *supra* note 89, at 209.

239. See SLOAN COMMISSION, *supra* note 50, at 126.

240. *Parting Words*, *CABLEVISION*, Dec. 15, 1980, at 264 (quoting Ralph Lee Smith).

purposes of the First Amendment, those rules may not advance those objectives in a manner inconsistent with the Constitution.²⁴¹ One question which access requirements appear to raise concerns the First Amendment right of cable operators to refrain from speaking.²⁴² In *West Virginia State Board of Education v. Barnette*²⁴³ and in *Wooley v. Maynard*,²⁴⁴ the Supreme Court struck down state laws which required private individuals to either affirm or disseminate the advancement of ideas with which they disagreed. *Barnette* involved a compulsory flag salute in public schools, and *Wooley* dealt with a New Hampshire law which required state license plates to carry the slogan "Live Free or Die." These decisions rested on the fundamental principle that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."²⁴⁵

The holdings in these cases, however, do not require a finding that cable access rules would be unconstitutional as well. The Supreme Court, in *Pruneyard Shopping Center v. Robins*,²⁴⁶ pointed out the differences between these "right to refrain from speaking" decisions and a state law designating a private shopping center as a forum for the speech of others. Those differences make *Barnette* and *Wooley* inapplicable to both the shopping center case and any analysis of the constitutionality of a law designating a cable television channel as a forum for the speech of others.

The first difference was that the law in *Wooley* required that a message be displayed on personal property that was used as part of the protesting individual's daily life. Both a shopping center and a cable television system, by contrast, are "not limited to the personal use" of their owners.²⁴⁷ A shopping center is open to the public to come and go as it pleases. A cable system carries signals from broadcast television stations and may offer programming from independent pay television networks

241. See *Carey v. Brown*, 447 U.S. 455, 471 (1980).

242. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943).

243. 319 U.S. 624 (1943).

244. 430 U.S. 705 (1977).

245. *Wooley*, 430 U.S. at 714 (citations omitted).

246. 447 U.S. 74 (1980).

247. *Id.* at 87. The Court termed this the "most important" distinguishing factor between *Pruneyard* and *Wooley*, *id.*.

as well.²⁴⁸

Second, both *Wooley* and *Barnette* involved private affirmation of a governmentally prescribed position or message.²⁴⁹ Neither *Pruneyard* nor public access cable requirements involve recitation of a state-dictated point of view.²⁵⁰ There is thus no danger of "governmental discrimination for or against a particular message."²⁵¹

Finally, both the owner of the shopping center and the cable television operator remain free to "expressly disavow any connection" with the position expressed.²⁵² The shopping center owner can post a sign, the cable operator can publish in the contract with subscribers or any channel guide distributed by the operator, or can transmit on the access channel itself, a statement disclaiming sponsorship of the message and explaining that, by state law, the communication is prohibited from being restricted.²⁵³

A second stricture which cable access rules must not violate if they are to be constitutionally valid is the "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."²⁵⁴ That principle means that the government may not "[set] the agenda of public discus-

248. See text accompanying notes 71-72, 83-87, *supra*.

249. *Pruneyard*, 447 U.S. at 87-88.

250. *Id.* at 87.

251. *Id.*

252. *Id.*

253. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), which struck down a requirement that government employees pay, in their union dues, to support causes with which they disagreed, was not discussed in *Pruneyard*. However the crucial distinction between the right of a private individual to remain silent and the rights of a business entity, the use of which are not limited to that of its owners, is not contradicted by *Abood*. Additionally, *Abood* specifically relied on the statement in *Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Abood*, 431 U.S. at 235 (quoting *Barnette*, 319 U.S. at 642).

Public access requirements, though, do not favor one ideological or philosophical position over another; they permit all members of a community to speak on all sides of an issue. Accordingly, cable access rules do not present the danger that a government official will force citizens or even cable operators, "to confess by word" faith in an officially prescribed orthodoxy.

254. *FCC v. Pacifica Foundation*, 438 U.S. at 745-46 (plurality opinion). See *Wooley*, 430 U.S. at 717; *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The government must step in, however, when there are conflicting demands by competing speakers for use of the same forum, for the purpose of "protecting individuals or groups from nongovernmental interference in the exercise of their rights; and in eliminating obstacles to the effective functioning of the system." T. EMERSON, *supra* note

sion,"²⁵⁵ and that any government regulation which involves speech must operate "in a manner consistent with the command of the Equal Protection Clause."²⁵⁶

Requiring the setting aside of one cable channel for public access on a first-come, first-served basis does not offend this principle of neutrality. First, access rules do not serve to disseminate a State ideology; there is no concern of government transmission of objectionable propaganda.²⁵⁷ Second, the access rules, by their very nature, permit discussion by people possessing opinions on all sides of an issue.²⁵⁸ Thus, there is no danger of the government giving "one side of a debatable public question an advantage in expressing its views to the people"²⁵⁹ And, because users of the public access channel can discuss whatever issue they desire, there is no risk that government will determine the subjects for permissible debate.²⁶⁰

Cable access requirements also do no violate the equal protection clause.²⁶¹ All speakers who so desire are given equal opportunities to use the cable system.²⁶² Additionally, cable television operators are not being discriminated against unconstitutionally just because other owners of different media are not subject to the same requirements: "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."²⁶³

Another fundamental principle of the First Amendment is that government is prohibited from, "limiting the stock of information from which members of the public may draw."²⁶⁴ In

219 at 29. See, *Mosley*, 408 U.S. at 98; *Barnette*, 319 U.S. at 630; *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

255. *E.g.*, *Metromedia, Inc.*, 101 S. Ct. at 2922 (Burger, C.J., dissenting).

256. *Carey v. Brown*, 447 U.S. at 471.

257. See text accompanying notes 251-252 *supra*.

258. See text accompanying notes 228-229 *supra*.

259. *Bellotti*, 435 U.S. at 785.

260. "To allow a government the choice of permissible subjects for public debate would be to allow the government control over the search for political truth." *Consolidated Edison Co.*, 447 U.S. at 538. See *Carey v. Brown*, 447 U.S. at 462 n.6; *Mosley*, 408 U.S. at 95; *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring in part).

261. See *Carey*, 447 U.S. at 461-62; *Mosley*, 408 U.S. at 96.

262. See text accompanying note 229, *supra*.

263. *Southeastern Promotions, Ltd.*, 420 U.S. at 557. See also cases discussed in note 129, *supra*.

264. *Bellotti*, 435 U.S. at 783. See *Grosjean v. American Press Co.*, 297 U.S. 233 (1963). In *Grosjean*, the Court struck down a tax on newspapers, "because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated

Buckley v. Valeo,²⁶⁵ the Supreme Court upheld a limitation on the amount an individual could contribute to a political campaign but ruled that any government limitation on the amount that candidates could spend on their own campaigns, or the amount that private individuals could spend independently from a campaign, violated the First Amendment. The Court ruled that it was improper to attempt to equalize the relative ability of one group of speakers by limiting the speech of other speakers: "The concept that government may restrict the speech of some elements of our society in order to enhance the *relative* voice of others is wholly foreign to the First Amendment. . . ."²⁶⁶

This prescription, however, does not lead to the invalidation of cable television access rules. The *Buckley* decision stated that such restriction was constitutionally impermissible because the First Amendment was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered exchange of ideas for the bringing about of political and social change desired by the people.²⁶⁷ In fact, the Court specifically noted that the difference between the campaign expenditure law and the F.C.C.'s equal time provisions was that the effect of the spending limitation was to suppress the amount of speech while the effect of the fairness doctrine is one of "enhancing the volume and quality of coverage of public issues."²⁶⁸ A public access channel, like the equal time rule and unlike the limitation on campaign spending, will increase the stock of information from which a community may draw and improve the coverage of public issues by permitting speakers from all sides of an issue to present their case.²⁶⁹

Additionally, the speech of a cable television operator is not limited in the same way as either a candidate or independent commentator would have been by the restrictions struck down in *Buckley*. Those restrictions sharply curtailed the right of an

device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250.

265. 424 U.S. 1 (1976).

266. *Id.* at 48-49 (emphasis added).

267. *Id.* at 49. (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 266 & 269, *United States v. Associated Press*, 326 U.S. at 20, and *Roth v. United States*, 354 U.S. 476, 484 (1957)).

268. *Buckley v. Valeo*, 424 U.S. at 49 n.55 (quoting *Red Lion*, 395 U.S. at 393).

269. See text accompanying note 229, *supra*.

individual to engage in "vigorous advocacy"²⁷⁰ and the right of a candidate "to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates."²⁷¹ To the contrary, cable television operators remain free to discuss any and all issues as vigorously as they wish.²⁷² While they are losing control of one channel,²⁷³ they retain the power to use the remaining channels to express their positions.²⁷⁴ And those cable television operators who do not have any channels remaining for their own use can continue to communicate their ideas both through taking their turn on the public access channel and through utilization of any other medium of communication.²⁷⁵

III

The Constitutional Classification of Public Access Requirements

That public access requirements for cable television further fundamental First Amendment goals does not, by itself, establish the constitutionality of those requirements. The nature of the restriction imposed on the cable television operator must be classified so that the proper constitutional test may be applied. There are a variety of ways by which access requirements arguably can be classified. Each of these would lead to the conclusion that imposition of access requirements would not infringe unconstitutionally on a cable operator's First Amendment rights.

270. *Buckley v. Valeo*, 424 U.S. at 48 (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 269).

271. *Id.* at 52.

272. See *Metromedia, Inc.*, — U.S. —, 101 S. Ct. at 2921 (Burger, C.J., dissenting) ("These same messages can reach an equally large audience through a variety of other media: newspapers, television, radio, magazines, direct mail, pamphlets, etc. . . . It borders on the frivolous to suggest that the [ban on billboard advertising] infringes on freedom of expression, given the wide range of alternative means available.").

273. In some instances, in fact, that channel will be unused. See Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. CAL. L. REV. 1001, 1033-39 (1981).

274. See text accompanying notes 79-82, *supra*.

275. Even if it were slightly more convenient for a cable operator to express his views in the absence of an access requirement, that ease would only be the result of monopoly control of a means of communication otherwise closed to all. Cf. *Red Lion*, 395 U.S. at 389 ("[T]he licensee has no constitutional right to . . . monopolize a radio frequency to the exclusion of his fellow citizens.").

A. Local Regulation of a Community's Streets

Because cable television systems must use municipal rights-of-way to construct their distribution systems, the state and the locality can require the operator to obtain a franchise from the locality before beginning construction of the system.²⁷⁶ The use of the public streets traditionally gives the local government the power and authority to regulate a business using those streets.²⁷⁷ The general principle is that "reasonable conditions can be attached to a grant for the use of streets."²⁷⁸

Cable television companies in many states thus are subject to numerous restrictions. The rates they can charge subscribers are regulated and limited.²⁷⁹ They can neither curtail service nor transfer ownership of their business without official approval.²⁸⁰ They must supply safe and adequate service and they must wire every part of their franchise area, even in those areas where it will be uneconomical to do so.²⁸¹

Public access requirements constitute a similar "reasonable" condition that can be imposed in exchange for a cable company's right to use the public ways. They serve valid state interests in permitting members of the community to utilize this limited means of communication and in increasing the presen-

276. See *Boulder I*, 630 F.2d at 707. See generally W. BAER, *supra* note 19, at 4; Rice, *The Communications Pipeline*, PUBLIC MANAGEMENT, June 1980, at 2-4. While one court has stated that cable is not sufficiently affected with a public interest to permit regulation on that basis, *Greater Fremont, Inc.*, 302 F. Supp. at 665 ("The public has about as much real need for the services of a CATV system as it does for hand carved ivory back-scratchers."), it is generally acknowledged that cable systems, by providing access to a complete offering of diverse television communications, are affected with an important public interest. See, e.g., *Connecticut Television v. Public Utilities Commission*, 159 Conn. 317, 296 A.2d 276 (1970); *Borough of Scottsdale v. National Cable Television Corp.*, 381 A.2d 859 (1977); R. SMITH, *THE WIRED NATION* 91 (1972). This has also been the specific determination of several states as the basis for their regulation of cable television; KAN. STAT. ANN. § 12-2006 (Supp. 1975); MINN. STAT. ANN. § 238.01 (West Supp. 1981); NEV. REV. STAT. § 711.080 (1979); N.J. STAT. ANN. § 48:5A-2(a) (West Supp. 1980); N.Y. EXEC. LAWS § 811 (McKinney Supp. 1981).

277. See KAN. STAT. ANN. § 12-2006 (Supp. 1975); MINN. STAT. ANN. § 238.01 (West Supp. 1981); N.Y. EXEC. LAW § 811 (McKinney Supp. 1981).

278. *Borough of Scottsdale*, 381 A.2d at 862. See *Cablevision, Inc. v. City of Sedalia*, 518 S.W.2d 48, 54 (Mo. 1974). This type of regulation is also within the state's inherent police power, see text accompanying notes 442-444, *infra*.

279. See, e.g., CONN. GEN. STAT. § 16-333d (Supp. 1981); KAN. STAT. § 12-2008 (Supp. 1975); N.J. STAT. ANN. §§ 48:5A-11, 48:5A-28 (West Supp. 1981).

280. See, e.g., MINN. STAT. ANN. § 238.05 (West Supp. 1981); N.J. STAT. ANN. §§ 48:5A-37, 48:5A-43 (West Supp. 1980); N.Y. EXEC. LAW §§ 826, 827 (McKinney Supp. 1981).

281. See, e.g., MASS. GEN. LAWS ANN. ch. 166A §§ 5(n), 8 (West 1981); N.J. STAT. ANN. §§ 48:5A-36, 48:5A-39 (West Supp. 1980); N.Y. EXEC. LAW § 824 (McKinney Supp. 1981).

tation of local issues and opinions on the local media.²⁸²

Although some expense may be necessary for a cable television company to comply with a public access requirement, this would not invalidate the regulation.²⁸³ The Supreme Court has held that "[a] reasonable fixing of the amount of the fee" charged by a locality for use of its public streets is valid.²⁸⁴ The Court similarly has upheld the imposition of a fee for use of a privately owned mailbox.²⁸⁵ The Court stated that the requirement that postage must be paid on all letters placed in a mailbox was not unconstitutional even though it was the recipient of the letters who paid for the "physical components" of the mailbox.²⁸⁶ Justice White, in his concurring opinion, stated that the governmental interest in defraying operating expenses and minimizing the stuffing of a mailbox with unstamped material was sufficient to justify the fee, even if it "will totally prevent the putative user from communicating with his intended correspondents."²⁸⁷

The requirement that a cable television company set aside a channel for public access programming and help establish a studio for such programming can be viewed as a "reasonable fee" imposed on the cable company in exchange for the company's access to the locality's streets. Even if cable operators were to be restricted somewhat in their ability to exhibit their own programming on the cable system, such a rule would still

282. See text accompanying notes 228-229 and 232, *supra*.

283. Equipment for a small black and white production unit can cost as little as \$30,000. BROADCAST/CABLE YEARBOOK, G3 (1981). See *Midwest I*, 406 U.S. at 671 (plurality opinion); USES OF CABLE, *supra* note 80, at 23.

284. *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941). The Court held that a law requiring a license fee for parades or processions, "not a revenue tax, but one to meet the expense incident to the administration of the [law] and to the maintenance of public order in the matter licensed," was permissible. *Id.* A public access requirement for cable television, likewise, is not promulgated to raise revenue but to ensure that the private business which has obtained either the exclusive right, or one of a limited number of rights-of-way, to the public streets is operated in the public interest.

285. *Council of Greenburgh Civil Associations*, 101 S. Ct. 2676 (1981).

286. *Id.* at 2684. Just as a mailbox which is constructed or purchased by a private individual becomes an, "essential part of the . . . nationwide system for the delivery and receipt of mail" and thus subject to the Postal Service's regulations, *id.*, the privately constructed cable system, which uses the public streets in laying down the distribution network, and the public airwaves as the "backbone" of its program offering, becomes an essential part of the local electronic communications service, and accordingly is subject to reasonable regulation, see text accompanying notes 199-201 and 277-279, *supra*.

287. 101 S. Ct. at 2691.

be valid as a reasonable obligation imposed on those who use the public ways.

B. Regulation of a Scarce Electronic Communications Medium

The regulation of radio and television by the federal government has been held to be constitutional by the Supreme Court because the "broadcast spectrum simply is not large enough to accommodate everybody."²⁸⁸ Because of the problems of interference between broadcast signals, only a limited number of frequencies can be used. The number of persons who want to broadcast far exceeds that limited number.²⁸⁹

However, the government is not restricted in its power to regulate broadcast frequencies solely to "traffic control."²⁹⁰ Not only may Congress prevent interference between broadcast stations, it is permitted to regulate the broadcast media "in the public interest."²⁹¹ This broad authority for governmental regulation is due to the scarcity of the broadcast frequencies, the necessity for government to allocate those frequencies, and "the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views."²⁹²

The power of government to require, consistent with the First Amendment, broadcasters to permit others to use their frequencies was delineated by the Supreme Court in three cases, *Red Lion Broadcasting Co. v. FCC*,²⁹³ *CBS v. Democratic National Committee*,²⁹⁴ and *CBS v. FCC*.²⁹⁵ In *Red Lion*, the Court upheld two requirements of the fairness doctrine. The first was that whenever a broadcaster endorses a political candidate, the opposing candidates must be offered time to reply

288. *NBC*, 319 U.S. at 213. See also *Red Lion*, 395 U.S. at 396-401. Other reasons that have been given for regulating radio and television include: "their uniquely pervasive presence in the lives of all Americans," *FCC v. Pacifica Foundation*, 438 U.S. at 748; the fact that broadcasting is "uniquely accessible to children," *id.* at 744; and that broadcast listeners and viewers are a "captive audience," that is they may only avoid messages by performing some affirmative physical act, *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 127, *Banzhaf*, 405 F.2d at 1100. It is noteworthy that all of these concerns, even the "unique" factors, apply to cable television as well as broadcasting.

289. *National Citizens Committee for Broadcasting*, 436 U.S. at 799.

290. *Red Lion*, 395 U.S. at 395; *NBC*, 319 U.S. at 217-18.

291. *National Citizens Committee for Broadcasting*, 436 U.S. at 795.

292. *Red Lion*, 395 U.S. at 400-01.

293. 395 U.S. 367 (1969).

294. 412 U.S. 94 (1973).

295. 101 S. Ct. 2813 (1981).

either personally or through a representative.²⁹⁶ The second requirement was that whenever a personal attack is made on an individual involved in a public issue, that individual must be offered an opportunity to respond personally.²⁹⁷ The Court stated that because only a tiny fraction of those with the resources and know-how could hope to communicate through broadcast frequencies,²⁹⁸ "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."²⁹⁹

The Court outlined some characteristics of the broadcast medium which distinguish it from the print medium. For example, licenses to broadcast do not confer ownership of broadcast frequencies, only the temporary privilege of using those frequencies.³⁰⁰ But the most important distinction is that because there are "substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."³⁰¹ Accordingly, the Court held, "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."³⁰²

The Court said that in evaluating the constitutionality of the fairness doctrine, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."³⁰³ And the public's right includes the right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."³⁰⁴

To further this public right, the Court said, conflicting views and opinions must be aired. The Court noted the informational value in permitting those who disagree with the broadcaster to state their own position rather than be forced to rely on the

296. See *Red Lion*, 395 U.S. at 374-75. This rule is now located at 47 C.F.R. 73.1930 (1980).

297. *Red Lion*, 395 U.S. at 373-74. The current rule is located at 47 C.F.R. 73.1920 (1980).

298. *Red Lion*, 395 U.S. at 387-88.

299. *Id.* at 390.

300. *Id.* at 394 (citing 47 U.S.C. §§ 301, 307(d)).

301. *Red Lion*, 395 U.S. at 388.

302. *Id.* at 392. The Court also quoted its statement in *Associated Press*, 326 U.S. at 20, "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." 395 U.S. at 392.

303. *Red Lion*, 395 U.S. at 390.

304. *Id.* at 390.

same broadcaster's restatement and interpretation of their views:

The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them."³⁰⁵

In *CBS v. Democratic National Committee*, the Court rejected an argument that the policy of a television station to refuse to sell time for any political or editorial advertising violated the First Amendment. First, the Court said, the Federal Communications Commission was not required to order stations to sell advertising time because "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth."³⁰⁶ Even if the fairness doctrine were applied to political advertisements so as to require stations to make equal time available free-of-charge for those who disagree with the paid political advertisements, the Court stated that the wealthy would still be able to determine the issues to be discussed.³⁰⁷

The second problem the Court foresaw was that Federal Communications Commission regulation of political advertising would create a risk of enlargement of governmental control of debate of public issues on the airwaves.³⁰⁸ The Court said that "[t]he Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-

305. *Id.* at 392 n.18 (quoting, *J. MILL, ON LIBERTY* 32 (R. McCallum ed. 1947)). The Court stated:

[I]t is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

Id. at 379.

306. *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 123.

307. *Id.*

308. *Id.* at 126.

case determination of who should be heard and when.”³⁰⁹

The Court distinguished this case from those which prohibited the government from banning some protected speech from a public area while permitting other speech in the same area.³¹⁰ The Court said that those cases were inapplicable to a case concerning a private right of access to the broadcast media because:

*In none of those cases did the forum sought for expression have an affirmative and independent statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on all broadcast licensees. In short, there is no “discrimination” against controversial speech present in this case. The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when.*³¹¹

The Supreme Court did uphold a right of access to the broadcast media in *CBS v. FCC*. The Court ruled that a Federal Communications Commission requirement that broadcast stations make time available for sale, upon request, to legally qualified candidates for federal elective office³¹² was constitutional. While acknowledging that it “has never approved a *general* right of access to the media,” the Court stated that this case only involved “a *limited* right to ‘reasonable’ access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced.”³¹³

Justice White, in his dissent, argued that this right of access encroached upon the discretion of the broadcaster: “Instead of adhering to this traditional approach, the Court has laid the foundation for the unilateral right of candidates to demand and receive a ‘reasonable’ amount of time a candidate determines to be necessary to execute a particular campaign strategy.”³¹⁴ The Court ruled that regardless of such assertions, “the statutory right of access . . . properly balances the First Amend-

309. *Id.* at 127.

310. *E.g., Mosley*, 408 U.S. 92 (1972); *Cox v. Louisiana*, 379 U.S. 536 (1965).

311. *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 129-30 (emphasis added).

312. This requirement enforced the statutory mandate of 47 U.S.C. § 312(a)(7) (1981).

313. *CBS, Inc. v. FCC*, 101 S. Ct. at 2830.

314. *Id.* at 2839.

ment rights of federal candidates, the public, and broadcasters.”³¹⁵

Cable television, like radio or television, is a scarce communications resource.³¹⁶ The physical limitation of pole space,³¹⁷ the reasonable desire of a city or town to limit the number of times its public streets are torn up in order to lay down a cable,³¹⁸ the public policy reasons for granting an exclusive franchise,³¹⁹ and the unique economic characteristics of the cable television industry³²⁰ serve to limit the number of persons who can operate a cable television system in any community. As is true of the broadcast media, “all who possess the financial resources and the desire to communicate” by cable television “cannot be satisfactorily accommodated.”³²¹

If the federal government is permitted to regulate the scarce broadcast frequencies to assure diversity of opinion, then the state government should be permitted to regulate the inherently and inevitably limited cable television medium to “preserve an uninhibited marketplace of ideas.”³²² A public access requirement serves just such a purpose.

The argument that regulation of cable television as a “scarce” resource is impermissible because there can be more than one cable television system in a locality³²³ must fail. Regulation of broadcast television due to its scarcity is still constitutional even though in most areas of the country there is more than one television station which can be received.³²⁴ In those localities there is no “monopoly” control of the airwaves, since, as Professor Posner has pointed out, “different frequencies

315. *Id.* at 2830.

316. *E.g., Boulder II*, 7 Media L. Rptr. at 1999. The court of appeals held that government was permitted to deal with the effects of cable television’s “medium scarcity.” *Id.*

317. See text accompanying notes 63-65 *supra*.

318. See note 184 *supra*.

319. The reasons include ease of regulation, *e.g., Multiple Queens Cable Licenses Urged*, N.Y. Times, Apr. 14, 1980, at C18, col. 4, and the encouragement to wire unprofitable areas, see text accompanying notes 282, *supra*.

320. See text accompanying notes 50-70, *supra*.

321. *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 101. See text accompanying note 406, *infra*.

322. *Red Lion*, 395 U.S. at 390.

323. See Posner, *supra* note 212, at 111.

324. 99.8% of television households can receive at least two over-the-air stations, 90.26% can receive at least four stations. Office of Plans and Policy, Federal Communications Commission, *FCC Policy on Cable Ownership* 22 (1981).

are, within a range, perfect substitutes for one another."³²⁵ Thus, it is not a monopolistic characteristic of the broadcast media which permits government regulation, but an "oligopolistic" nature. The same should hold true for cable television.³²⁶

Similarly, although the scarcity of cable television systems in a given area may be due, in large part, to governmental policy,³²⁷ this does not defeat the right of local government to regulate cable television in the public interest. Much of the scarcity of television broadcast frequencies is due to a decision by the Federal Communications Commission to encourage the concept that localities should have at least one "local" television station whenever possible.³²⁸ This local-station concept permitted the operation of fewer television stations than physically possible because of the need to avoid interference with all the local signals.³²⁹ Again to quote Professor Posner: "The scarcity of television channels differs from the scarcity of other natural resources only in the fact that it is to a significant extent the product of deliberate governmental policies."³³⁰

Another similarity between cable television and the broadcast media is that control of cable television systems, radio stations, and broadcast television channels is of a transitive nature. With both cable and broadcast television, as well as radio, although one can own the physical equipment necessary for communication (studios, antennae, or distribution systems) one does not "own" the right to communicate.³³¹ Television and radio broadcast licenses are limited to three years' duration and need not be renewed.³³² Similarly, cable television franchises typically are limited to ten or 15 years.³³³ At

325. R. POSNER, *supra* note 52, at 313.

326. See text accompanying notes 52-70, *supra*.

327. *E.g.*, Posner, *supra* note 212, at 111.

328. *E.g.*, In the Matter of Amendment of Section 3.606 of the Commission's Rules and Regulations (Sixth Report and Order), 41 F.C.C. 148, 171-72 (1952). See generally Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 880 (1981).

329. Posner, *supra* note 212, at 125 & n.54. See also Schuessler, *supra* note 329, at 988-91.

330. R. POSNER, *supra* note 52, at 313.

331. See also *Associates and Aldrich Co.*, 440 F.2d at 136 ("Unlike broadcasting, the publication of a newspaper is not a government conferred privilege.").

332. 47 U.S.C. § 307(d) (1981).

333. *E.g.*, DEL. CODE tit. 26 § 604 (1980); HAW. REV. STAT. § 440G-10 (Supp. 1979); KAN. STAT. § 12-2007 (Supp. 1975).

the end of that period, the municipality is free to decide not to renew the franchise agreement and to select another cable company.³³⁴ Additionally, broadcast licenses and many cable franchises can be revoked during the license or franchise period due to serious misconduct or failure to abide by the terms of the licensing or franchise agreements.³³⁵

There is one distinction between cable television and the broadcast media which would, in fact, seem to indicate a greater likelihood that an access requirement for cable television be held to be constitutional than would a similar requirement for the broadcast media. Broadcast television and radio licensees have an affirmative duty to present "full and fair coverage of important public issues."³³⁶ The obligation imposed by the federal government on cable television operators, in contrast, is much less rigid: if, and only if, they produce programs, operators must "afford reasonable opportunity for discussion of conflicting views on issues of public importance."³³⁷ Not only does this duty not call for "full and fair coverage," it applies solely to programming produced by the cable operator. It does not apply to programming on channels leased to third parties by the operator,³³⁸ even though it is the operator, in most cases, who has selected the lease channel program producer.³³⁹ Additionally, there is no obligation for the operators who do not produce their own programming either to cover

334. See generally *The New Era: Refranchising Comes of Age*, CABLEVISION, Dec. 7, 1981, at 115-57.

335. Compare 47 U.S.C. § 312(a) (1981) with DEL. CODE tit. 26, § 606 (Supp. 1980); NEV. REV. STAT. § 711, 130 (1979) and R.I. GEN. LAWS § 39-19-8 (1981).

336. See *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 129.

337. 47 C.F.R. 76.209 (1980). See generally Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515 (1975). The enforcement of this duty by the Federal Communications Commission is much weaker, as well. Unlike broadcasters whose licenses must be renewed every three years by the Commission every three years, and who must prove each time that their obligations have been fulfilled, cable operators are franchised by the state or locality, see text accompanying notes 193 and 333, *supra*. The only policymaking authority the Commission has is the power to revoke the registration statement the operator has filed with the Commission. 47 C.F.R. §§ 76.9, 76.12 (1980). In the research for this article, not a single case of the Commission revoking a cable operator's registration statement (or the statement's predecessor, the certificate of compliance) for non-compliance with this obligation was discovered.

338. See text accompanying notes 83-87, *supra*.

339. The exceptions being those instances where the franchise agreement itself requires that channels be made available to specific programmers, as was done in Pittsburgh where one channel was set aside for programming by the Christian Associates of Western Pennsylvania. Panero, *supra* note 78, at 332.

fairly, or to cover at all, important local issues. Thus, while there may not be "discrimination" against controversial speech if broadcast licensees are permitted journalistic discretion in determining the manner for discussion of public issues,³⁴⁰ without statutory or regulatory safeguards there would be a grave question of "whether there is to be discussion of controversial issues of public importance"³⁴¹ on cable television.³⁴²

A public access cable television requirement can encourage such discussion far more effectively than the fairness doctrine. The public access channel operates as an open forum; it is not triggered by speech presented by the cable television operator.³⁴³ Thus, the access channel does not discourage the cable operator from exhibiting controversial programming.

But the fairness doctrine, because it only requires that free time be supplied in response to the broadcast of a controversial position, provides a powerful incentive for timidity and avoidance of controversy.³⁴⁴ This, in effect, leads to a "self-cen-

340. *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 130.

341. *Id.*

342. Another similarity between broadcast and cable television is that, rather than being parcelled out to a limited number of licensees and franchisees, both media could have been made available to the general public as common carriers. In *Red Lion*, the Court said that Congress, to protect the public interest in receiving information and opinions from diverse sources, could have devised a system other than the present licensing scheme:

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.

395 U.S. at 390-91. Similarly, ownership of the cable distribution system could have been separated entirely from the selection of the programming to be carried by that system:

The only way to avoid the broadcast regulatory model and allow cable to develop as a medium of communications open and available in a manner similar to the print or film media is to preclude the vertical integration of the programming and distribution functions in cable. In this way, the cable operator's distribution monopoly would not produce any concentration of power over free expression in the use of cable channels and would offer no pretext for Government control of programming or other information distributed by cable.

Cabinet Committee, *supra* note 50, at 25. See also *R. SMITH*, *supra* note 277, at 89-92.

343. See text accompanying note 88, *supra*.

344. *E.g.*, *SLOAN COMMISSION*, *supra* note 50, at 93-94. The Court in *Red Lion*, while upholding the fairness doctrine acknowledged the possibility of this danger:

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship

sorship”³⁴⁵ by broadcasters which thereby “dampens the vigor and limits the variety of public debate.”³⁴⁶ The advantage of a public access requirement is that it assures, rather than discourages, the presentation of, and full debate on, the important controversial issues of the day.

A public access requirement for cable television is not subject to the same criticism as the proposal that broadcasters be required to accept editorial advertising. While that proposal only opened the broadcast media to the “financially affluent or those with access to wealth,”³⁴⁷ a cable access channel permits all to present their views.³⁴⁸ The wealthy would not be able to either monopolize the channel or dictate the issues to be discussed.

A second constitutional infirmity of the editorial advertising proposal, enlarged government involvement in determining the content of public debate, also does not apply to a cable access requirement. Under a right-to-purchase-advertising rule, the Federal Communications Commission would have been required “to oversee far more of the day-to-day operations of broadcasters’ conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired.”³⁴⁹ The cable access rule would only require “content-neutral” government supervision, to assure that the cable company operates its public access channel on a nondiscriminatory basis.³⁵⁰ The government, accordingly, would not be involved in the substance of the “editorial

and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purpose of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative.

395 U.S. at 392-93.

345. *New York Times Co. v. Sullivan*, 376 U.S. at 279.

346. *Tornillo*, 418 U.S. at 257 (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 279). See R. POSNER, *supra* note 52, at 313 (“But the fairness doctrine is not calculated to increase the broadcaster’s output of ideas. On the contrary, it penalizes him for presenting controversial ideas by requiring him to present all sides of a controversy.”). See also Bazelon, *supra* note 89, at 205-06.

347. *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 123.

348. See text accompanying notes 88-89, *supra*.

349. *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 124-26.

350. See text accompanying note 88, *supra*.

process.”³⁵¹

A cable access rule would, without causing the problems warned of in *CBS v. Democratic National Committee*, serve the same purposes as the rules upheld in *Red Lion* and *CBS v. FCC*. As the fairness doctrine requires a licensee to share in the frequency with non-licensees,³⁵² an access rule would require a franchised cable company to share one channel with those without such a franchise. Each duty would lead to the presentation of “those views and voices which are representative of the community and which would otherwise, by necessity, be barred from the airwaves”³⁵³ or the cable system.

The Supreme Court, in *CBS v. FCC*, recognized three separate sectors of the population with First Amendment interests: broadcasters, federal candidates, and the viewers and listeners.³⁵⁴ The Court said that requiring broadcasters to sell advertising time to candidates, made a “significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”³⁵⁵ While this decision only granted a “limited” right of access for federal candidates to the broadcast media,³⁵⁶ the reasoning used by the Court could support a requirement of an access channel for cable television. The First Amendment protection of freedom of expression is not limited to a discussion of the merits of various candidates: “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”³⁵⁷ Even in *CBS v. FCC*, the Court acknowledged, “speech concerning public affairs is . . . the essence of self-government.”³⁵⁸ Thus a cable access rule would significantly contribute to freedom of expression by improving the ability of a wide range of speakers to present, and viewers to receive, im-

351. See *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 124-26.

352. *Red Lion*, 395 U.S. at 389.

353. *Id.*

354. *CBS, Inc. v. FCC*, — U.S. —, 101 S. Ct. at 2830.

355. *Id.*

356. *Id.*

357. *Bellotti*, 435 U.S. at 776 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)).

358. *CBS, Inc. v. FCC*, — U.S. —, 101 S. Ct. at 2830.

portant, relevant information.³⁵⁹ Just as the Commission's rule did not "impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming,"³⁶⁰ a cable access rule would permit cable operators to continue to present their views and choice of programming on the remaining channels.³⁶¹ As the Commission's rule "properly balances the first amendment rights of federal candidates, the public, and broadcasters,"³⁶² a cable access rule, setting aside one channel for use on a first-come, first-served basis, properly balances the First Amendment rights of those in the community who wish to express their views via the cable system, the members of the community who receive information through the cable system, and the cable television operators.

C. Time, Place, and Manner Regulation

A local requirement that cable television operators set aside one channel for public access programming can also be viewed as a reasonable "time, place, and manner" regulation.³⁶³ Specifically, an access requirement would be a restriction on the place and manner of a cable operator's communication. Time, place, and manner restrictions are constitutionally valid if they can be justified without reference to the restricted speech's content, serve a significant governmental interest, and leave ample alternative channels for communication.³⁶⁴

The "constitutional touchstone" of "time, place, and manner" regulation is that it be based on neither the content nor subject matter of the regulated speech.³⁶⁵ The Supreme Court held that a rule forbidding a public utility from including in its monthly billing envelope inserts discussing issues of public policy, while permitting inserts discussing noncontroversial matters, was not a time, place, or manner regulation because it was not "content-neutral."³⁶⁶

A regulation that restricted the distribution and sale of religious material at a state fair to assigned booths, however, was

359. See text accompanying notes 228-229, *supra*.

360. *CBS, Inc. v. FCC*, 101 S. Ct. at 2830.

361. See text accompanying notes 274-276, *supra*.

362. *CBS, Inc. v. FCC*, 101 S. Ct. at 2830.

363. See *Kovacs*, 336 U.S. at 85-86.

364. See *Va. State Bd. of Pharmacy*, 425 U.S. at 771; *Consolidated Edison Co.*, 447 U.S. at 535-36.

365. *Brown v. Glines*, 444 U.S. 348, 364 n.6 (1980) (Brennan, J., dissenting).

366. *Consolidated Edison Co.*, 447 U.S. at 537.

upheld as a valid time, place, and manner restriction in *Heffron v. International Society for Krishna Consciousness, Inc.*³⁶⁷ The Court said that this rule was unrelated to the content or subject matter of the restricted speech since it "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes."³⁶⁸

A cable access rule is similarly content-neutral. It is unrelated to either the content or subject matter of the cable television operator's speech.³⁶⁹ It applies evenhandedly to all with a cable franchise and is not based on governmental disapproval of the cable operator's views.³⁷⁰

A second requirement for time, place, and manner restrictions is that they further a "significant governmental interest."³⁷¹ Governmental interests which have been held to be significant include maintaining the orderly movement of a crowd at a state fair,³⁷² regulating traffic,³⁷³ ensuring that simultaneous parades do not prevent all speakers from being heard,³⁷⁴ and improving the aesthetic quality of a municipality.³⁷⁵ A public access channel furthers many substantial governmental interests including: increasing the diversity of speakers and topics presented through the cable system;³⁷⁶ enhancing the individual's interest in self-expression³⁷⁷ and the subscriber's interest in receiving a broad range of programming and options;³⁷⁸ and protecting the peace within a community by permitting the free and open exchange of ideas.³⁷⁹

The third criterion for time, place, and manner regulation is that there remain adequate alternate channels of communication.³⁸⁰ The Court struck down a prohibition of the use of "For

367. 101 S. Ct. 2559 (1981).

368. *Id.* at 2564.

369. See text accompanying notes 344-346, *supra*.

370. See text accompanying notes 258-261, *supra*.

371. See *Heffron*, 101 S. Ct. at 2565; *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

372. *Heffron*, 101 S. Ct. at 2565.

373. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

374. *Id.* at 576.

375. *Metromedia, Inc.*, 101 S. Ct. at 2892 (plurality opinion).

376. See text accompanying notes 228-229, *supra*.

377. See text accompanying note 232, *supra*.

378. See text accompanying note 235, *supra*.

379. See text accompanying notes 239-41, *supra*.

380. See *Metromedia, Inc.*, 101 S. Ct. at 2896-97 (plurality opinion); *Linmark Associ-*

Sale” signs on the lawns in front of houses because the options left for the sellers, newspaper advertising and listing with real estate brokers, were more expensive and less effective than the signs.³⁸¹ The Court concluded that the aforementioned alternatives were “far from satisfactory.”³⁸² In a more recent case, newspaper, radio, and television advertising was determined to be an unsatisfactory substitute for billboard advertising because those alternatives were “insufficient, inappropriate, and prohibitively expensive.”³⁸³

In *Heffron*, the Supreme Court found that restricting the distribution of leaflets at a state fair to an assigned booth left adequate forums for distribution of the material. First, the Court pointed out that leaflets could be distributed anywhere outside the fairgrounds.³⁸⁴ Second, and “more importantly” the Court said that this rule “has not been shown to deny access within the forum in question.”³⁸⁵ The Court held that, for purposes of constitutional analysis, the fairgrounds should not be separated into two sections, open areas and booths. Instead, because the booths were located within a major section of the fair and not “secreted away in some nonaccessible location,” the relevant forum was the entire fairground.³⁸⁶

Even if one channel is dedicated to use by the public, the cable television operator will have adequate alternate means for communicating desired information. First, the cable operators are free to utilize both their turn on the access channel and any or all of the existing alternative media to display their

ates, Inc., 431 U.S. at 93; *Va. State Bd. of Pharmacy*, 425 U.S. at 771. If a regulation is content-based, it cannot be justified by the fact that there may be alternate means of communication available. *Consolidated Edison Co.*, 447 U.S. at 541 n.10; *Va. State Bd. of Pharmacy*, 425 U.S. at 757 n.15; *Southeastern Promotions Ltd.*, 420 U.S. at 556; *Schneider v. State*, 308 U.S. 147, 163 (1939). *But see* *Young v. American Mini Theatres*, 427 U.S. 50, 62 (1976) (upholding a requirement that adult movie theaters not be located near each other because, “the market for this commodity is essentially unrestrained.”). Because a public access requirement is not based on the cable operator’s speech, see notes 344-346, *supra*, and accompanying text, it would not be a content-based regulation; accordingly, the availability of alternate means of communication for the cable operator is relevant.

381. *Linmark Associates, Inc.*, 431 U.S. at 93.

382. *Id.*

383. *Metromedia, Inc.*, 101 S. Ct. at 2897 (plurality opinion) (quoting a stipulation of both parties, Joint Stipulation No. 28.).

384. *Heffron*, 101 S. Ct. at 2567.

385. *Id.*

386. *Id.* at 2568 n.16.

messages.³⁸⁷ Second, many cable operators have several channels available for programming; even if one channel is reserved for public access, the cable operator may communicate through the remaining channels.³⁸⁸ As the *Heffron* decision makes clear, the relevant forum for constitutional analysis is not the individual access channel by itself but the full panoply of channels which are available to the cable operator.³⁸⁹ Thus, if the cable operator can communicate on any channel, there remains an adequate alternate channel for the operator's communication.

With cable access requirements, as with time, place, and manner regulations which have been upheld by the Supreme Court, "the net effect of the regulation on free expression would not be adverse."³⁹⁰ The Court has delineated the difference between regulations which limit the "manner" of communication and those which impose "direct quantity restrictions" on the amount of permissible communications:³⁹¹ "The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'"³⁹² A rule establishing a cable access channel would facilitate, rather than inhibit, the exchange of information, ideas, and impressions. The total amount of communication permitted the cable operator is not limited.³⁹³

In *Red Lion*, the Court analogized the fairness doctrine to traditional time, place, and manner regulations:

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.³⁹⁴

Similarly, the government may limit the use of cable equipment by establishing a public access channel. The right of free speech of a cable operator does not extend to a right to "snuff

387. See text accompanying note 276, *supra*.

388. See text accompanying notes 274-275, *supra*.

389. See text accompanying notes 387-388, *supra*.

390. *Metromedia, Inc.*, 101 S. Ct. at 2913 (Stevens, J., dissenting).

391. *Buckley*, 424 U.S. at 18 & n.17 (emphasis omitted).

392. *Heffron*, 101 S. Ct. at 2567-68 (quoting *Kovacs*, 336 U.S. at 87).

393. See text accompanying notes 274-276, *supra*.

394. 3905 U.S. at 387.

out the free speech of others,"³⁹⁵ and the preservation of one channel for public use is a valid governmental regulation to protect the right of free speech of all members of the community.

D. Promoting Diversity: The FCC versus the N.C.C.B. Model

In *FCC v. National Citizens Committee for Broadcasting*,³⁹⁶ the Supreme Court analyzed the constitutionality of regulations designed to encourage diversity in mass communications. The rules prohibited cross-ownership of newspapers and either radio or television stations in the same community.³⁹⁷ The goal of these regulations was to diversify ownership of these means of communications to "enhance the possibility of achieving greater diversity of viewpoints."³⁹⁸ The Court upheld the rule, stating that "given the absence of persuasive countervailing considerations, 'even a small gain in diversity' was 'worth pursuing.'"³⁹⁹ The standard the Court utilized in determining the constitutionality of the rules is particularly noteworthy, as it indicates the Court's recognition of the importance of encouraging the presentation of a diversity of viewpoints: "The regulations are *a reasonable means of promoting the public interest in diversified mass communications*; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them."⁴⁰⁰

A cable television access requirement is also a "reasonable means" for promoting "diversified mass communications." The establishment of a channel for all members of a community to state their opinions would undoubtedly lead to the presentation of a greater diversity of viewpoints than would otherwise be available.⁴⁰¹ Not only would there be more voices under an access requirement, these additional voices would be local voices, expressing local viewpoints and raising local con-

395. *Id.* See note 255, *supra*.

396. 436 U.S. 775 (1978).

397. *Id.* at 785 n.8 (citing 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976)). The rules permitted most instances of then-existing cross-ownership to continue. 436 U.S. at 779.

398. 436 U.S. at 796.

399. *Id.* at 786 (quoting Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, 1076, 1080 n.30 (1975)).

400. *National Citizens Committee for Broadcasting*, 436 U.S. at 802 (emphasis added).

401. See text accompanying notes 228-229, *supra*.

cerns.⁴⁰² As the Court pointed out, it is in the public interest to encourage programming for a community by those who reside in the community.⁴⁰³

Because the *N.C.C.B.* ruling concerned the broadcast media, it is unclear whether the same "reasonable means" test would be applied to cable television. One indication that the standard would be applied to cable arises from the Court's further explanation of the applicability of the reasonableness test to the F.C.C.'s rules: "Being forced to 'choose among applicants for the same facilities,' the Commission has chosen on a 'sensible basis,' one designed to further, rather than contravene, 'the system of freedom of expression.'"⁴⁰⁴ As a community must also select its cable television company from among several competing applicants,⁴⁰⁵ it should be permitted to establish "sensible" ground rules for promoting freedom of expression on the cable system.⁴⁰⁶

402. See text accompanying note 235, *supra*.

403. *National Citizens Committee for Broadcasting*, 436 U.S. at 804, 808.

404. *Id.* at 802 (quoting, T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 663 (1970)).

405. For example, there were nine applicants for the New Orleans franchise, seven for Fort Worth, Panero, *supra* note 78, at 306-10.

406. The Court in *National Citizens Committee for Broadcasting* rejected two arguments in opposition to the rules as inapplicable to a proposal to limit cross-ownership. The Court's analysis indicates that similar arguments also would not be relevant to cable access rules.

The first claim was that the FCC rules unconstitutionally conditioned a benefit (ownership of a broadcast station) on forfeiture of a constitutional right (ownership of a newspaper). The Court distinguished *Speiser v. Randall*, 357 U.S. 513 (1958) and *Elrod v. Burns*, 427 U.S. 347 (1976), which voided the denial of public benefits due to refusal to take a loyalty oath and affiliation with a particular political organization, respectively, because the denial of benefits in those cases was based on the content of constitutionally protected speech and therefore had the effect of abridging freedom of expression. The Court said that the FCC rules, in contrast, "are not content related; moreover, their purpose and effect is to promote free speech, not to restrict it." 436 U.S. at 801.

Similarly, cable access rules are not content-related and serve to promote freedom of expression. Thus any claim that a locality is unconstitutionally conditioning the benefit of a cable franchise on the forfeiture of the cable operator's right to speak on, and control, the access channel, *see* Ross, *supra* note 12, at 156, must be dismissed.

A second argument the Court in *National Citizens Committee for Broadcasting* rejected was that the FCC had unfairly "singled out" newspaper owners in a fashion similar to the law struck down in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which imposed a tax only on newspapers. One of the controlling distinctions between the FCC rules and the tax, was that the tax had the effect of limiting the circulation of information, "an effect inconsistent with the protection conferred on the press by the First Amendment," 436 U.S. at 801. Conversely, the FCC rules were designed, "to en-

E. An Incidental Restriction on First Amendment Rights

Even if it is assumed that cable television operators have a First Amendment right to control the programming on all of a system's channels and that access requirements limit their ability to exercise that right, and it is further assumed that none of the earlier discussed classifications apply to cable access rules, such requirements would not automatically be invalid.

First Amendment rights are not absolute.⁴⁰⁷ The right of free speech has never been held to include a right for people to present their opinions "whenever and however and wherever they please."⁴⁰⁸ The First Amendment "*does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech.*"⁴⁰⁹

The Supreme Court has recognized the significance of the difference between regulation designed to abridge freedom of expression⁴¹⁰ and regulation which imposes "incidental restrictions on First Amendment liberties by governmental action in furtherance of legitimate and substantial state interest other than suppression of expression."⁴¹¹ Governmental action of

hance the diversity of information hearing by the public. . . ." *Id.* at 801 (quoting the lower court decision, 555 F.2d 938, 954 (D.C. Cir. 1977)).

An argument that access rules unfairly single out cable operators, *see Midwest II*, 571 F.2d at 1055, would likewise be rejected because the rules also increase the diversity of information available to the public, see text accompanying notes 228-235, *supra*, and are thus consistent with First Amendment goals. Additionally, because of the unique characteristics of cable television, both its intimate relationship with the community and its ability to offer a great number of channels, see text accompanying notes 78 and 193-198, *supra*, it is reasonable for a locality to impose access requirements solely on cable television operators.

407. *Stromberg v. California*, 283 U.S. 359, 368 (1930). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. at 570.

408. *Greer v. Spock*, 424 U.S. 828, 836 (1976). *See also Cox v. Louisiana*, 379 U.S. at 554.

409. A. MEIKLEJOHN, *supra* note 218, at 19. *See also Metromedia, Inc., v. City of San Diego*, 101 S. Ct. at 2920 ("But to say the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*." (Burger, C.J., dissenting) (emphasis in original)); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) ("Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here.").

410. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 535; *First National Bank of Boston v. Bellotti*, 435 U.S. at 784-85.

411. *Procunier v. Martinez*, 416 U.S. 396, 411-12 (1974). *See also A. MEIKLEJOHN, supra* note 218, at 16-17 ("[L]et it be noted that . . . Congress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it.").

the first kind is held to the strictest scrutiny.⁴¹² The latter form of regulation is constitutionally permissible if it meets a two-part test: first, it must further an important governmental interest unrelated to suppression of freedom of speech and, second, the limitation on First Amendment rights must be no greater than is necessary to further that interest.⁴¹³

In *United States v. O'Brien*,⁴¹⁴ the Court upheld a federal statute prohibiting the destruction of Selective Service registration certificates. The Court cited a number of substantial governmental interests in ensuring the continuing availability of draft cards which were unrelated to the communicative impact of the destruction of the cards,⁴¹⁵ and found that the statute was an "appropriately narrow" means to further those interests.⁴¹⁶

Cable access requirements also serve substantial and important governmental interests which are unrelated to the suppression of freedom of expression: encouraging discussion of public issues by all members of a community,⁴¹⁷ increasing the amount and variety of information on local issues available through the cable system,⁴¹⁸ and maintaining order in the community by permitting all members of the community to voice their concerns effectively, and feel, accordingly, that they have

412. If a statute's purpose is the "prohibition of the 'exposition of ideas,'" the state must show both a compelling subordinate interest and that the state used means narrowly drawn to avoid necessary abridgement of speech. *Bellotti v. First Nat'l Bank of Boston*, 435 U.S. at 786. See also *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 540; *Buckley v. Valeo*, 424 U.S. at 25. Cable access rules would not be subject to this test because their purpose is to enhance the extent and quality of public discussion, not to suppress speech, see text accompanying notes 268-276, *supra*. A cable access rule also does need to overcome the "special protection" which has been established against prior restraints, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 556. See *Near v. Minnesota ex rel Olson*, 283 U.S. 697 (1931). The Supreme Court has defined a "prior" restraint as an order to "prohibit the publication or broadcast of particular information commentary. . . ." *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 556 (emphasis added). A requirement that cable operators set aside one channel for public access does not bar the dissemination of any particular information.

413. See *Procunier*, 416 U.S. at 413-14. See also *Brown v. Glines*, 444 U.S. 348, 354-56 (1980).

414. 391 U.S. 367 (1968).

415. The interests included: maintaining proof that an individual had registered for the draft, facilitating communication between registrants and the draft boards, reminding registrants to notify their draft board of a change in address, and prohibiting forgery. *Id.* at 379-80.

416. *Id.* at 382.

417. See text accompanying note 232, *supra*.

418. See text accompanying notes 228-229, *supra*.

had a fair chance to influence local decision-making.⁴¹⁹

A requirement that a cable television operator set aside one channel for public access is an "appropriately narrow" method of furthering those interests. The scope of such a rule is limited, establishing a forum for free speech without unnecessarily restricting the right or ability of cable operators to express their views.⁴²⁰

There is a specific attribute of cable television which significantly decreases the extent of First Amendment protection for the cable operator. Virtually every cable system offers programming produced by a source other than local broadcasters or the system operator itself. Systems provide channels for distant broadcast signals⁴²¹ and lease channels to pay entertainment or other programmers.⁴²² Thus the "speech" on those channels is not that of the cable operator but rather that of a third party. In *Buckley v. Valeo*,⁴²³ the Supreme Court recognized the difference between a direct limitation on a person's speech and one on the right of a person to support the speech of another. While striking down a limit on the amount of money one could spend to express support for a candidate,⁴²⁴ the Court upheld a limitation on the amount a person could contribute to a candidate's campaign.⁴²⁵ The difference between the two limitations, according to the Court, was that the contribution limitation

entails only a marginal restriction upon the contributor's ability to engage in free communication While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by some-

419. See text accompanying notes 236-238, *supra*.

420. See text accompanying notes 272-276, *supra*.

421. The Federal Communication Commission's Rules limiting the number of distant stations a cable system could carry were deleted in 1980. 45 Fed. Reg. 60186, 60299 (1980) (amending 47 C.F.R. §§ 76.5, 76.7, 76.57, 76.59, 76.61, 76.63, 76.65, 76.151-161, 76.305). The Commission's change in those rules was upheld in *Malrite TV v. FCC*, 7 Media L. Rptr. 1649 (2d Cir. 1981).

422. As of June 1, 1981, 3954 out of approximately 4400 cable systems offered pay channels. Spillman, *Multiplay: A Case of Diminishing Returns?*, CABLEVISION, June 1, 1981, at 137. Additionally, many systems offer satellite-fed channels as part of their basic services. As of October 1, 1981, for example, 3633 systems offered WTBS (an Atlanta broadcast station) and 2900 offered CBN (Christian Broadcast Network). See *Cable Stats*, CABLEVISION, Nov. 23, 1981, at 191.

423. 424 U.S. 1 (1976).

424. *Id.* at 39-51.

425. *Id.* at 23-35.

one other than the contributor.⁴²⁶

In *Capital Broadcasting Co. v. Mitchell*,⁴²⁷ which upheld a statute barring cigarette advertising from the "electronic media,"⁴²⁸ the district court held that a prohibition on a certain type of advertising had "no substantial effect on the exercise of broadcasters' First Amendment rights: "Even assuming that loss of revenue from cigarette advertisements affects [broadcasters] with sufficient first amendment interest, [broadcasters], themselves, have lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages."⁴²⁹

Similarly, a requirement that a cable operator reserve a channel for public access rather than providing or leasing that channel to a third party restricts marginally, if at all, the right of free speech of the cable operator. The speech which is limited is not that of the cable operator but of the other programmer. Therefore, in those circumstances where an access channel replaces a third-party-programmed channel, the "incidental restriction" on the First Amendment rights of the cable television operator will be negligible.

If the cable operator were to decide not to lease any of the available channels, but instead to use them for the operator's own programming, there would be a substantial problem of monopolization of a communications medium. Except for the print media,⁴³⁰ the Supreme Court has rejected a First Amendment value in such total control. As the Court declared in *Red*

426. *Id.* at 20-21. See *California Medical Assoc. v. FEC*, — U.S. —, 101 S. Ct. 2712, 2722-23 (1981) (plurality opinion). Cf. *Brown v. Glines*, 444 U.S. 348 (1980). The Court ruled that a law protecting servicemen's right to communicate with members of Congress did not apply to petitions, thus rejecting Justice Stewart's dissent that, "it seems clear that a serviceman 'communicates' with his Congressman just as much when he signs a letter drafted by a third person as when he writes and signs that letter himself." *Id.* at 375.

The Court struck down a local law limiting contributions to committees formed to support or oppose ballot initiatives in *Citizens Against Rent Control v. City of Berkeley*, — U.S. —, 102 S. Ct. 434 (1981). The Court held the law unconstitutional because it both restrained freedom of association and impermissibly limited freedom of expression because "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Id.* at 4073-74. Neither of these rationales are applicable to a cable access requirement.

427. 333 F. Supp. 582 (D.C. Cir. 1971), *summary aff'd sub nom.* *Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972).

428. Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1980).

429. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. at 584.

430. *Tornillo*, 418 U.S. at 254-258.

Lion, "the First Amendment confers . . . no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use."⁴³¹

While that decision dealt only with broadcast licensees, the same concern for monopoly control of a scarce resource applies to cable television. The report of the Cabinet Committee on Cable Television stated:

The private power of the cable system operator is potentially great, because of the local monopoly characteristics of cable. Unless restrained in some manner, the system operator could control all of the channels on his system, which would constitute the bulk of the channels of electronic communications in a particular locale.⁴³²

Similarly, the Sloan Commission on Cable Communications also warned of the danger that, left unregulated, a cable television operator could limit the diversity of available opinions and viewpoints:

Questions of ownership and control of cable installations are also relevant to questions of fairness. If the mass of individual cable installations, throughout the country, were to be owned or controlled by a few large corporate enterprises, as networks are today controlled, the spectre of monopoly opinion would arise in quite a different form.⁴³³

While the Supreme Court has yet to uphold the constitutionality of a general right of access as a remedy for monopolization of a communications medium,⁴³⁴ the Court has indicated its support for such a right of access under certain circumstances. In *Consolidated Edison Co. v. Public Service Commission*,⁴³⁵ the Supreme Court was faced with the problem of one

431. 395 U.S. at 391. See *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 104:

One of the earliest and most frequently quoted statements of this dilemma is that of Herbert Hoover, when he was Secretary of Commerce. While his Department was making exploratory attempts to deal with the infant broadcasting industry in the early 1920's, he testified before a House Committee: "We cannot allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material." *Hearings on H.R. 7357 before the House Committee on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess., 8 (1924).

See also *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 296 (1966).

432. *Cabinet Committee*, *supra* note 50, at 19-20.

433. Sloan Commission, *supra* note 50, at 94. See generally Posner, *supra* note 212, at 106-09.

434. See *CBS, Inc. v. FCC*, — U.S. —, 101 S. Ct. at 2830.

435. 447 U.S. 530 (1980).

entity, a utility company, controlling access to an effective means of communication, the billing envelope. While the Court struck down a ban on the utility's mailing of inserts discussing issues of public policy, the Court pointed out that there were other ways the billing envelope could have been regulated which would have been constitutional: "the Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison *might be ordered lawfully to include* in the billing envelope."⁴³⁶ Thus, the Court recognized that the utility could have been required to include in its envelope inserts containing opposing views.⁴³⁷

When the Court ruled that a television station's refusal to sell time for any political advertising did not violate the First Amendment,⁴³⁸ its decision pointed favorably at access rules for cable television as potentially "both practicable and desirable. Indeed, the [Federal Communications] Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues."⁴³⁹

Finally, the Supreme Court has ruled that a state may utilize its inherent "police power or its sovereign right to adopt . . . individual liberties more expansive than those conferred by

436. *Id.* at 543 (emphasis added).

437. In fact, this was the remedy the Public Service Commission had originally been requested to order. *Id.* at 532.

In *Buckley*, Chief Justice Burger dissented from the Court's ruling that public financing of presidential elections was constitutional:

I would, however, fault the Court for not adequately analyzing and meeting head on the issue whether public financial assistance to the private political activity of individual citizens and parties is a legitimate expenditure of public funds. The public monies at issue here are not being employed simply to police the integrity of the electoral process *or to provide a forum for the use of all participants in the political dialogue, as would, for example, be the case if free broadcast time were granted.*

424 U.S. at 248 (emphasis added). See also *Banzhaf*, 405 F.2d at 1102. In upholding a requirement that broadcast stations which carried cigarette advertising devote a significant amount of time to advertisements in opposition to cigarette smoking, the court stated:

[N]ot all free speakers have equally loud voices, and success in the marketplace of ideas may go the advocate who can shout the loudest or most often. Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.

438. *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

439. *Id.* at 131.

the Federal Constitution.”⁴⁴⁰ In *Pruneyard Shopping Center v. Robins*,⁴⁴¹ the Court upheld the constitutionality of a California constitutional provision giving all individuals the right of free speech in privately owned shopping centers. The Court stated:

Although appellants contend there are adequate alternative avenues of communication available for appellees, it does not violate the United States Constitution for the State Supreme Court to conclude that access to appellants’ property in the manner required here is necessary to the promotion of state-protected rights of free speech and petition.⁴⁴²

If a state imposes the requirement that a public access channel be established on its cable television systems, the state will be making a decision on the importance of the access channel in fulfilling First Amendment goals. Accordingly, it would not violate the United States Constitution if a state concluded that a cable television public access requirement “is necessary to the promotion of state-protected rights of free speech and petition.”⁴⁴³

IV Conclusion

The question of whether public access requirements unconstitutionally infringe on the First Amendment rights of cable television operators cannot be answered by simple analogy to the constitutional rights of either newspaper owners or television broadcasters. A proper analysis cannot “mechanically apply the doctrines developed in other contexts The unique situation presented . . . calls . . . for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression.”⁴⁴⁴

Such an inquiry reveals that in the context of cable access

440. *Pruneyard Shopping Center v. Robins*, 447 U.S. at 81.

441. *Id.* at 74.

442. *Id.* at 85 n.8. That a state statute, as well as a state constitutional provision, can adopt more expansive state free speech protection than granted by the United States Constitution was made manifest by the Court’s discussion of *Lloyd Corp. Ltd v. Tanner*, 407 U.S. 551 (1972) (which held that the federal Constitution did not prohibit the owner of a shopping center from banning distribution of handbills on the property of the shopping center). The Court stated in *Pruneyard* that in *Lloyd*, “there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers” 444 U.S. at 81 (emphasis added).

443. *Pruneyard Shopping Center v. Robins*, 447 U.S. at 85 n.8.

444. *Young v. American Mini theaters*, 427 U.S. at 76 (Powell, J., concurring).

requirements, those concerns are not competing but are in fact in accordance. There are both State and First Amendment interests in ensuring a diversity of speakers, protecting the individual's right to speak and to receive information, and promoting peace within a community. Cable access rules further all of these goals.⁴⁴⁵ Access rules are unrelated to the content of the cable operator's speech, and permit the government to remain neutral in the marketplace of ideas.⁴⁴⁶ The net effect of such a requirement would be an increase in the extent, variety, and vigor of public debate.⁴⁴⁷

There are several different ways in which access rules can be classified. Because they further substantial government interests which are not only unrelated to the suppression of speech but which actually further freedom of expression, and leave adequate alternate means for cable operators to communicate their messages, the rules meet the constitutional requirement of each classification.⁴⁴⁸

The Federal Communications Commission in promulgating its rules said that an access channel could restore a sense of community to a disparate population, increase public participation in the democratic process, and improve the scope and quality of information shared by a locality.⁴⁴⁹ With the F.C.C. barred from imposing its rule, it rests with each state to confer these benefits upon its communities.

445. See text accompanying notes 218-241, *supra*.

446. See text accompanying notes 255-261, *supra*.

447. See text accompanying notes 228-235, *supra*.

448. See text accompanying notes 277-445, *supra*.

449. See text accompanying note 112, *supra*.