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Regulating Cable Television*

By NICHOLAS P. MILLER**
ALAN BEALS***

The evolution of cable television from a community antenna television (CATV) system carrying only broadcast signals to a high capacity communications system carrying a wide variety of television and nonvideo services raises significant policy and legal questions about the role of government regulation of cable. Congress has recently considered legislation that would limit the ability of local governments to regulate the local cable franchise.¹ Such legislation and the trend of the Federal Communications Commission (FCC) to reduce federal regulation of electronic media underscore the need for a clear definition of the appropriate regulatory role for government. To determine the appropriate regulatory scheme for cable, its proper treatment under the first amendment of the Constitution must be resolved.

The National Cable Television Association (NCTA), the major

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¹ S. 898, 97th Cong., 1st Sess. (1981), as reported to the Senate floor would have prevented local governments from regulating cable rates and from requiring cable operators to lease channels to commercial users. The Senate, however, before passing the bill adopted an amendment sponsored by Senator Goldwater to delete all provisions relating to local regulation of cable from the bill. 127 CONG. REc. S11, 134-35 (daily ed. Oct. 6, 1981).
cable industry trade association, asserts in a report to Senator Packwood that cable is analogous to newspapers. The NCTA argues that a cable operator should be considered a newspaper publisher under the First Amendment and, as such, entitled to First Amendment protections accorded a newspaper publisher, such as total editorial discretion, "without conditions and without requirements of access or balance." This article disputes this position and argues that, due in part to cable's monopoly position, it is more analogous to the broadcast medium than it is to the press. Cable, however, in the final analysis is a unique communications medium and should be treated as such for regulatory and First Amendment purposes.

I. Background

A. The Evolving Nature of Cable

Cable television originated in mountainous or sparsely populated areas where over-the-air television reception was poor or very limited. These older systems usually carried up to twelve channels of over-the-air television broadcast signals received by well placed antennas (often located on a nearby mountain) and by microwave relay. In recent years cable has attracted significant attention in the larger cities where high quality television signals are readily available over the air.

This growth in interest in cable is the result of rapid technological developments in the cable industry. In the mid-seventies the launching of domestic communications satellites (and the FCC's authorizing their use for delivery of distant television signals)


3. NCTA Report, supra note 2, at 156.


5. In Southern Satellite Sys., 62 F.C.C.2d 153 (1976), the FCC granted initial authorization to a common carrier to use satellite rather than terrestrial microwave facilities to deliver a distant television station signal to cable systems. In American Broadcasting Cos., 62 F.C.C.2d 901 (1976), the FCC authorized installation of 4.5 meter receive-only satellite earth stations.
made distributing a television signal nationwide economically viable. Satellites distribute nationally the signals of a few independent broadcast stations (known as superstations) and other alternative television programming not available over the air to cable systems from existing nearby broadcast stations. Initially, this alternative programming was primarily movies. Now satellites deliver a wide variety of entertainment services created especially for a cable audience.

During this same period, the transmission capacity of cable systems has expanded significantly. Most state-of-the-art cable systems can carry fifty-two and some even 100 or more simultaneous television channels or other electronic information. This added transmission capacity permits a cable system to carry multiple distant broadcast signals, the new entertainment programming available on satellites, and a wide variety of additional, nonentertainment communications services.

Cable technology will continue to evolve and offer even greater service flexibility and transmission capacity. Within this decade, optical fiber cable will begin to replace traditional coaxial copper

6. A satellite normally offers the technical capacity to transmit a series of television signals simultaneously to every point in the continental United States equipped with a receive-only earth station. The number of signals is determined by the number of transponders on the satellite. To receive the signals, the earth stations must be tuned to that satellite transponders' transmission frequency and must also be pointed at that satellite. Ordinarily, a single earth station antenna cannot receive the signals from more than one satellite at a time.

7. At least 33 channels of television programming are currently available through satellite-to-cable systems. Satellites are not technically limited to entertainment programming. They can deliver any type of electronically formatted information. The FCC has eliminated its restrictions on using distant broadcast signals.

8. The FCC has eliminated its restrictions on using distant broadcast signals.

9. State-of-the-art cable systems can—and many do—offer other services in addition to broadcast and entertainment programming. Some examples of additional services now available are:

- television channels for public and government use;
- cable operator originated programming of local interest (origination cablecasting);
- channels for educational use;
- closed circuit channels which connect local public institutions;
- specialty information channels devoted solely to financial, consumer price, or weather information;
- all news channels;
- FM radio channels;
- children's, cultural, Spanish language, video music, or other channels devoted to special appeal audiences.

10. Optical fiber cables contain one or more optical fibers through which laser light, modulated to carry information, is transmitted.
cable. Fiber optic systems will have the capacity to carry hundreds of television (or equivalent) channels. This decade also should see development of meaningful two-way interactive services. By 1990 a predicted twenty-eight million homes will be wired for two-way service. Cable technology will offer the possibility of whole new classes of potential services. Which of these new services are actually offered over cable will depend on the marketplace.

B. Structure of Current Regulation

As interstate communications, cable is regulated by the FCC under the Communications Act of 1934. In 1968 the Supreme Court held that FCC regulation of cable is justified as "reasonably

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11. An interactive cable service involves transmitting information electronically in one direction followed by a response in the opposite direction. For example, meter reading may develop as an economically viable interactive cable service. The cable operator would transmit a signal to a device attached to a subscriber's meter asking for a reading. The device would then transmit the current reading in response.

Cable service development has concentrated to date on mass audience, one-way services. The typical cable system operates like a series of television stations. The operator picks entertainment programming packages which will appeal to the widest number of potential cable system subscribers. Few cable operators offer services which elicit any subscriber response other than paying their bill. The cable industry is beginning to experiment with mass appeal services that elicit a consumer response. Advertising is one example, since most cable channels have been free of commercials. Pay-per-view equipment and nonentertainment services such as electronic check writing and shop-by-cable are other examples of more direct audience involvement.

12. See CABLEVISION, June 1, 1981, at 158.

13. A few of the technical possibilities are:

- security monitoring (burglar, fire and police alarms);
- remote computer terminals providing access to a vast array of computer programs and data bases;
- medical monitoring;
- meter reading;
- energy management;
- transactional services, e.g., home shopping and banking;
- polling;
- new highway traffic management;
- accessing selected libraries of films or video tapes;
- text retrieval;
- electronic mail delivery.

Futurists envision a "wired city" in which all homes are connected to a cable system which provides all video services. See Young, The Wired City, NEW YORK MAGAZINE, May 25, 1981, at 28.

14. Some cable services, although technically feasible, may not enjoy a wide consumer demand. Electronic mail, for example, may remain too costly to compete with delivered mail.

15. 47 U.S.C. §§ 151-609 (1976 & Supp. III 1979). The FCC has authority to regulate cable systems whenever they transmit broadcast signals or other signals across state lines (e.g., by satellite).
ancillary” to its authority to regulate broadcasting. The FCC has extended broadcasting’s fairness doctrine and equal time requirements to cable. The FCC also required cable operators to dedicate some channels for public, governmental, educational, and leased access. The Supreme Court, however, held in FCC v. Midwest Video Corp. that these access requirements were outside of the FCC’s authority because they were not “reasonably ancillary” to regulating broadcasting.

Since the FCC no longer regulates many aspects of cable, state and local regulation has the greatest effect on cable operators, and is the regulation that they would most like to avoid. Some states regulate cable directly but most rely on local government to perform all nonfederal regulation. Typically a local government enacts a franchise ordinance establishing the basic framework for the community’s regulation and addressing local aspects of cable oper-

17. The fairness doctrine “requires broadcasters to devote time to issues of public importance and to present contrasting point of view.” NCTA Report, supra note 2, at 118.
18. The equal time requirement requires that if one political candidate uses a broadcasting station, that station must give other candidates for the same office an “equal opportunity to use the station.” Id.
19. 47 C.F.R. §§ 76.205, 76.31 (1980). Other FCC rules for cable include:
—television broadcast signals that a cable system must carry, 47 C.F.R. §§ 76.51-.63 (1980);
—maximum franchise fees local governments may charge, 47 C.F.R. § 76.31 (1980);
—nonduplication of certain television signals, 47 C.F.R. § 76.92 (1980);
—other rules analogous to broadcasting rules (personal attack, lotteries, obscenity). 47 C.F.R. §§ 76.209-.215 (1980);
—equal employment opportunity rules, 47 C.F.R. § 76.311 (1980);
—cross-ownership proscriptions on certain television broadcast and telephone company interests. 47 C.F.R. §§ 63.55, 76.501 (1980);
—technical operation standards for cable systems, 47 C.F.R. §§ 76.601-.617 (1980);
—sports blackout rules, 47 C.F.R. § 76.67 (1980).
The FCC also recommends some local franchising procedures and provisions. These include a maximum 15-year franchising period, prompt construction, consumer protection provisions, and a public franchising process affording due process. See 47 C.F.R. § 76.31 (1980).
20. 440 U.S. 689 (1979). The Court did not reach the question whether FCC regulation of cable violated cable operators’ First Amendment rights, but noted that the issue was “not frivolous.” Id. at 709 n.19.
21. See note 1 and accompanying text, supra.
22. In a few communities the cable system is actually owned and operated by the local government or its instrumentality. There are at least 28 municipally-owned cable systems. MacKenna, The Cabling of America: What about Municipal Ownership?, 70 NATIONAL CIVIL REV. 307, 310 (1981). San Bruno, California is the largest municipality operating a cable system. MacKenna advises municipalities to consider cable ownership as a source of revenue. He suggests, however, that small municipalities may be more successful cable system owners than large cities. Id. at 390.
Local governments usually require cable operators to set aside some channels for local use—local access programming—and for commercial leasing to cable programmers—leased access—as well as for other uses similar to those the FCC required before *Midwest Video.*

The issues being debated between the cable industry and the municipalities are threefold. First, given the increasing variety of services cable is offering to subscribers and to the community, which functions performed by cable raise issues of First Amendment rights? Are these individual functions analogous to newspapers, to broadcasting, or to something else? Second, do the cable operators' First Amendment rights preclude federal, state, and local regulation of content, as in the fairness doctrine, and of structure, as in access requirements? Do the First Amendment rights of other speakers and of the viewer support or require some government intervention? And third, are First Amendment rights of cable operators diminished or waived by their voluntary contractual agreements to provide services, such as local access, when they bid on and win a local cable franchise?

II. The First Amendment and Cable

Cable operators decide what information is transmitted over cable systems, which programmers and service providers may use the system, and what uses of the system may occur without the operator's consent. Only federal, state, and local regulations limit the operator's absolute control and ensure rights of access to the system for users other than the operator.

Government has two primary objectives in regulating cable: to

23. Franchise ordinances vary from community to community but most include:
—use of public right-of-way;
—maximum subscriber rates;
—franchise fees (normally three to five percent of the cable system's gross revenue);
—service areas;
—minimum number of channels;
—minimum signal carriage requirements;
—access channel requirements.

24. See NCTA Report, *supra* note 2, at 150 (Code of Good Cable Television Franchising Conduct urges cities to assure "local public, community, educational, municipal, and leased cable access").

protect the public interest and to facilitate the rapid development
of an increasing variety of valuable public communication services.
Developing an appropriate regulatory framework to meet these
objectives depends to a large degree on the status of cable under
the First Amendment. Cable's First Amendment status cannot be
defined until legislatures and courts develop answers to complex
policy questions. What are the First Amendment rights of cable
operators, subscribers, and the public? What First Amendment
values can regulating cable enhance positively or frustrate
inappropriately?

Two guiding principles underlie First Amendment standards.
First, the First Amendment preserves a free press in order to pro-
vide people with a robust and wide-ranging debate on public is-
suces. The Constitution does not preserve a free press for the eco-
nomic or psychological gratification of publishers and editors.
Under the Constitution the rights of the reader, listener, and
viewer are paramount, and the print and broadcast media must act
in ways not always consistent with the media's economic interest
when those interests conflict with the audience's interests. 26

Second, the First Amendment affects each communication me-
dium in a unique way. The Supreme Court has developed distinct
First Amendment standards for each communication medium that
take into account the unique characteristics of each medium. 27 As
Justice Jackson stated in Kovacs v. Cooper: "The moving picture
screen, the radio, the newspaper, the handbill, the sound truck and
the street corner orator have differing natures, values, abuses and
dangers. Each, in my view, is a law unto itself. . . ." 28 In the same
case, Justice Frankfurter criticized the use of loose analogies and
broad First Amendment theories:

Some of the arguments made in this case strikingly illustrate how
easy it is to fall into the ways of mechanical jurisprudence
through the use of oversimplified formulas. It is argued that the
Constitution protects freedom of speech: Freedom of speech
means the right to communicate, whatever the physical means for
so doing; sound trucks are one form of communication: ergo this

Simpson, The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment,
27. FCC v. Pacifica Foundation, 438 U.S. 736, 748 (1978); Southeastern Promotions, Ltd.
v. Conrad, 420 U.S. 546, 557 (1975); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386
form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories. The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. . . . Movies have created problems not presented by the circulation of books, pamphlets, or newspapers. . . . Broadcasting in turn has produced its brood of complicated problems hardly to be solved by an easy formula about the preferred position of free speech.29

Cable may now be added to Justice Frankfurter's list of media deserving finely tuned First Amendment standards rather than "oversimplified formulas."

A. The Functions of Cable

To understand how the First Amendment should affect the regulation of cable television, it is necessary to analyze cable's characteristics. This section will review cable's functional characteristics and compare them to the characteristics of other media.30 Subsequent sections will discuss the significance of these characteristics and distinctions in determining the proper First Amendment approach to cable.

1. Local Television Broadcast and Access Programming

One function a cable operator performs is to retransmit local television broadcast signals without changing the format or content of the broadcasts. FCC rules require this function.31 The cable operator also transmits local access programming32 without exercising any control over the programming. Franchise agreements with local governments often require this function. The operator's role is usually limited to plugging video tapes into playback recorders according to a prearranged schedule. The lack of editorial control in

29. Id. at 96 (concurring opinion) (citations omitted).
30. For purposes of analysis, NCTA's characterization of a newspaper operation as compared to a cable operation will be used: "The [cable] operator, like a newspaper editor, must exercise editorial judgment and control, deciding what is shown and what is not, and what editorial policies are appropriate." NCTA Report, supra note 2, at 114.
32. Local access programming includes programming provided by individuals or groups in the community, educational institutions, and governmental entities.
carrying out this function distinguishes the operator from a newspaper publisher. Instead, the operator's position is similar to that of a common carrier in that the operator has no control over the information transmitted, does not select it, and cannot discriminate among users eligible for access under the mandatory signal carriage and local access requirements.

2. Pay and Distant Signal Television Programming

Another category of service provided by cable systems is carrying distant television signals. Satellites currently transmit the signals of three television superstations to cable systems nationally and relay other signals regionally. Cable operators select these signals and retransmit them. Formerly, these distant signals were relayed to the cable headend by a microwave system. Satellite transmission services have opened a new class of nonbroadcast programming developed specifically for cable systems. Some of these programs are provided to cable operators free of charge, and at least one service pays operators to carry its signals. Other programs, known as pay television or pay cable, are sold to operators on a per cable subscriber basis.

The cable system operator exercises no content control over these distant television signals. The cable operator's role is limited to selecting the signal and assigning it a channel. Agreements to retransmit the distant signals typically prohibit the cable opera-

33. The cable headend is the cable system facility used to control and insert signals into the distribution cable. It typically includes an antenna for receiving over-the-air signals, microwave or satellite earth reception facilities, or both, and necessary system controls.

34. Services that are offered free to cable systems include religious broadcasting network signals and some services supported entirely by advertising. The ESPN network will compensate operators for carrying its signal. See ESPN to Compensate Operators, CABLEVISION, Aug. 3, 1981, at 14.

35. FCC rules require under certain circumstances that distant broadcast signals not simultaneously duplicate a local signal. See 47 C.F.R. §§ 76.92-.161 (1980). Therefore, certain portions of the distant signal may have to be excised by the cable operator. Local spot announcements may also be inserted by the operator. FCC rules treat imported nonbroadcast signals as cablecasting and subject them to the same broadcast type regulation as origination cablecasting under 47 C.F.R. §§ 76.205-.221 (1980). However, the FCC apparently did not anticipate applying such regulations to distant signals at the time it promulgated the rules; nor do the rules appear to serve any useful purpose due to the predominately entertainment nature of the programming and the practical lack of control by the local cable operator. See Cable Television Bureau, Federal Communications Commission, Cable Television and the Political Broadcasting Laws: The 1980 Election Experience and Proposals for Change (Jan. 1981)(unpublished report to Senator Goldwater).
tor from deleting or changing any portion of the programming provided. In contrast, newspaper publishers usually retain editorial control over the content of stories written by wire services, syndicated columnists, and even comic strips. As with local retransmission, distant signal carriage bears little relationship to the operation of a newspaper.

3. Informational Services

Other cable system channels provide textual information, such as time, weather, stock prices, grocery and other consumer price information, and news wire reports. A few advanced cable systems are experimenting with a new textual service which enables subscribers to access a large information library. These new informational channels bear a superficial resemblance to an electronic newspaper because they present text that reads like newspaper stories. Nevertheless, the functions of a cable operator in presenting this information and the functions of a newspaper publisher are not alike.

The publisher of a newspaper has editorial control over the newspaper's contents, aside from stock market reports and other similar information which represent a very small percentage of space in most newspapers. In comparison, the cable operator has almost no editorial control over the content of the information channels. The cable operator merely selects the category of information or service offered. The operator's role is limited to deciding which information source or service will be used. The operator does not control the content of even the new text services which are designed, assembled, edited, and maintained by service companies for direct sale to cable subscribers. The cable operator is merely a passive transmitter of this information.

If cable systems were to transmit the actual text of a newspaper, then the subscriber would receive an electronic newspaper. But the newspaper editors, not the cable operator, would still control the newspaper's content. The operator's role would be limited to deciding which newspaper(s) would have access to the system's subscribers and would not include control of the content of the text of

36. A few cable operators, especially those with very limited channel capacity, try to "cherry pick" or select programs from several nonpremium services. Programmers, especially those supported by advertising, discourage this practice if they cannot prohibit it contractually. See, e.g., ESPN to Compensate Operators, CABLEVISION, Aug. 3, 1981, at 14.
the transmitted newspapers. The cable operator’s first amendment status would be similar to that of a newsstand operator: the operator could choose what newspapers to transmit just as a newsstand operator can determine what newspapers to sell. Neither has control over the content of those they select.

Cable operators would take on the attributes of newspaper publishers only if they were to compose and edit their own electronic newspaper. Even then, such attributes would apply to the cable operators only for the newspaper channel, not the entire cable operation.

4. Origination Cablecasting

The cable operator has control over programming on channels that are not used for carrying local television broadcasting signals and local access programming. As discussed, the operator may select other packaged services for those channels. On some channels, however, the operator may have exclusive control over the programming. If the operator produces origination cablecast origination programming, the operator can assemble original news, entertainment, and other local programming, including editorials. In this origination cablecasting function the operator behaves like a local broadcaster and must comply with the fairness doctrine, personal attack, and equal time requirements and is subject to limitations on lotteries, obscenity, and sponsorship identification. The origination cablecaster has the same copyright interests in this programming as broadcasters have in their programs. The only real difference between origination cablecasting and broadcasting is how the programming is transmitted—the broadcaster uses the limited radio frequency spectrum while the cable operator uses the closed access coaxial cable. The origination cablecaster is not more like a newspaper than is a local television broadcaster.

B. Assessing Cable’s Unique First Amendment Status: Policy Aspects

Several major public policy issues establish the framework for assessing cable’s first amendment status. These include cable’s mo-

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37. Cablecasting is defined by the FCC rules as programming exclusive of broadcast signals. Origination cablecasting is defined as programming subject to the exclusive control of the cable operator, 47 C.F.R. § 76.5 (1980).
nopoly position in each community, concentration of cable system ownership, access rights for programmers and service providers other than the operator, content regulation, and cable's use of the public right-of-way.

Examining these issues is necessary because first amendment standards and obligations are not applied in a vacuum, but rather exist in the context of practical considerations. The limits on an individual's first amendment rights are generally those necessary to protect the rights of other individuals or important public concerns. For example, a person's free speech right does not entitle that person to publish obscene material or make libelous statements. Each of the public policy issues most relevant to cable is explained briefly in turn.

1. Cable's Monopoly Position

Although a cable operator rarely holds an exclusive franchise, competition between two systems in the same area is practically nonexistent. In only about six of more than 6,000 cable systems in the United States does one operator compete with another operator for the same subscribers. Once a system is built, a second operator normally will not build a separate system to serve the same subscribers because of the economics of cable. Typically, forty to forty-five percent of the homes passed by a cable system subscribe. Since this is only about ten percent more than the penetration rate usually considered the breakeven point for operating a system profitably, two systems can rarely survive in the same geographic area. Furthermore, financing a second system will be difficult because the operator of the existing system may be well enough established to reduce rates. Since the initial construction costs of a cable system are high, requiring heavy capital investment and

42. See Brief for Appellant at 10, Community Communications Co. v. City of Boulder, No. 80-1882 (10th Cir. Dec. 24, 1980). See also Mini Cable Systems in Dallas: Small Fish in a Big Pond, Cablevision, Aug. 3, 1981, at 23; New York May Experiment with Overbuilding in Boroughs, Cablevision, July 29, 1981, at 12; Dawson, How Safe is Cable's "Natural Monopoly?", Cablevision, June 1, 1981 at 333, 340; FCC Report, Cable Appendix, supra note 4, at 11.
43. See Cable Economic Inquiry, 79 F.C.C.2d 663, 686 (1980) (discussion of system breakeven penetration rates and demand for basic cable television service).
financing costs, this will force the second operator either to charge rates that are below these costs or to go out of business.

The cable operators’ monopoly is based on their control over the conduit into each home and business. Like the local telephone company, cable is a conduit for transmitting services into homes and businesses. But the two-way services offered by new technology will make it a conduit for transmitting communications from homes and businesses as well. Although a consumer may obtain many of the cable services from other sources, no other technology offers the bundle of communications services provided by cable. The cable system usually carries or duplicates every other television service available in the community at the time the cable system was built. Unless the cable operator consents, however, new over-the-air television services such as low power television and subscription television will not be transmitted on the cable system.

Local governments typically protect their citizens from cable’s monopoly power by regulating rates for basic subscriber services, insuring access for users on a nondiscriminatory basis, and setting minimum service standards.

2. Concentration of Control

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.\textsuperscript{46} Congress and the FCC have implemented this constitutional principle by encouraging competition and preventing concentration of control in the media. For example, the Newspaper Preservation Act of 1970\textsuperscript{47} facilitates continued editorial competition between newspapers even though one of the newspapers in a community is facing economic failure. The FCC will not grant an entity more than one license for television broadcast service in a market, limits an entity to seven television licenses nationwide, and limits the cross-ownership of a television or radio station and a daily newspaper in the same community.\textsuperscript{48} The FCC also proscribes cross-ownership between a cable operator and a broadcast television station (or national network) or telephone company in the same community.\textsuperscript{49}

Cable has the potential to make widely available a diversity of communications. The emerging ownership structure of the cable industry, however, may prevent realization of that potential. Many of the same factors that led to the present federal policy of limiting ownership concentration in other media are evident in the ownership structure of cable. Each cable operator, subject only to its particular franchise requirements, has control over who uses the system's channels and what services and programming are provided over the system.\textsuperscript{50} This potential control of a wide range of electronic communications in a community contrasts with a broadcaster's limited control of one electronic voice. The broadcaster controls only the single frequency channel assigned under an FCC license. As cable subscribers increase and the number of homes and businesses with alternative electronic communications access decreases, the ownership concentration issues will assume even greater significance.

\textsuperscript{46.} Associated Press v. United States, 326 U.S. 1, 20 (1945).
\textsuperscript{49.} 47 C.F.R. §§ 63.55, 76.501 (1980). The FCC occasionally waives the telephone-cable cross-ownership prohibition in rural areas. See Telephone Co.-CATV Cross-ownership Rules, 84 F.C.C.2d 335 (1980) (notice of proposed rulemaking). It recently granted a waiver of the network-cable ownership proscription to permit CBS to own cable systems serving no more than 90,000 subscribers or 0.5% of the nation's cable television subscribers, whichever is less. \textit{Television Digest}, Aug. 10, 1981, at 4.
\textsuperscript{50.} The cable operator will not always choose to control the information on every channel but will presumably select the signal or user for each channel.
Another ownership concentration problem is caused by the growing acquisition of cable systems by large operators who own many systems. In 1970, the largest twenty-five cable system operators served only 46.7% of all cable system subscribers in the United States. By 1980 the figure was 68%. Federal law does not place any limit on multiple system ownership. This concentration problem is exacerbated by the increase in vertical integration of the multiple system operators, as they develop an extensive capacity to produce programs. This vertical integration gives them additional power over the content of programs, the prices paid by cable operators for the programs, and access of competing programmers to their systems. Additionally, ownership of cable by other media is a growing phenomenon. The FCC does not limit this cross-media

51. CABLE TELEVISION INFORMATION CENTER, CABLE DATA 6 (1972).
52. Calculated from statistics in TELEVISION DIGEST, CABLE AND STATION COVERAGE ATLAS 4a, 12a (1980-81).
54. In 1979, four pay cable programmer/packagers producing programs for approximately 85% of the pay cable subscribers in the U.S. were owned by or affiliated with cable operators serving approximately 20% of the nation's cable subscribers. No system owned by a pay programmer had an affiliation with any programmer other than its corporate relative. FCC REPORT, CABLE APPENDIX, supra note 4, at 35-36. See also note 57 infra.
55. Unlike an independent program producer, a producer related to a cable operator is assured of a market for its programming in affiliated cable systems. Thus, a cable related producer has greater flexibility in pricing its products for use by nonaffiliated cable systems.
56. FCC Commissioner James R. Fogarty recently expressed concern over the trend toward vertical integration in cable systems. FCC News, July 31, 1981, at 1 (separate statement of Commissioner Fogarty on FCC approval of transfer of control of Teleprompter Corporation to Westinghouse Broadcasting Company). He said that vertical integration of cable systems held the potential for anti-competitive conduct if vertically integrated cable operators did not provide full and open access to their systems. For example:

[A] vertically integrated cable operator may refuse to distribute programming from other companies in order to preclude competition with services offered by its own affiliated program supplier. For example, HBO might be dropped to promote Showtime, or CNN might be dropped to promote a new Group W news service, thereby eliminating competition at the local level. If this should in fact occur, the subscribers to these cable systems would be denied a measure of program choice and program suppliers would be denied the ability to compete directly for the patronage of those subscribers.

Id. The Commissioner conceded that vertical integration is a fact of life in the cable system. Nevertheless, he noted that a 1974 Cabinet Committee on Cable Communications had concluded that a policy preventing system operators from owning the programs they distribute would best serve the public interest. Id.
57. In 1979 some 78.6% of all cable systems were owned by corporations with other media interests. This figure represents a 3.1% increase in such cross-media ownership over 1978. The following cross-media ownership patterns were reported in 1979: broadcasters—32.8%; program producers and distributors—17.5%; newspapers—13.1%; book or magazine publishers—11.1%; and theatre—4.0%. TELEVISION DIGEST, CABLE AND STATION COVERAGE AT-
ownership except where it proscribes cable ownership by broadcast television stations in the same market.

The monopoly position of cable operators in the geographic area served by the system, their control over a single distribution system with multichannel capacity, and the growth in horizontal and vertical integration and in cross-media ownership raise significant public policy questions. It is a risky proposition to rely on potential competition to deter abuses by national conglomerates in the cable industry. During a similar period of governmental neglect between 1907 and 1921, Theodore Vail assimilated a number of monopolistic local telecommunications companies into the largest, most monopolistic corporation in the United States today: American Telephone & Telegraph Company. Thoughtful analysis of the appropriate relationship between evolving communications media and the government is a prerequisite today for developing policy on concentration of control.

3. Use of the Public Right-of-Way

A cable operator, like the telephone and electric power companies, must string the system’s cable on utility poles or use underground cables or ducts. These pole-line or underground facilities are usually located in a public right-of-way or street, or traverse private property under public utility easements. The public has a substantial interest in requiring that the construction, maintenance, and use of utility poles and the digging up of city streets or private land under easement rights meet aesthetic, safety, and convenience standards. Local governments typically require a cable operator to get a permit for such public utility-type privileges.

Even if a cable system were not a natural monopoly, the limited availability of space for pole attachments and underground ducts in many communities would preclude the existence of more than

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58. See J. Brooks, Telephone: The First Hundred Years (1976).
59. Private individuals have no inherent right to conduct private business along public rights-of-way. The right of state or local governments to require permits for encroachment and to assign conditions to such use has been universally upheld. Moreover, such permits are revocable at any time, and no right to use the street for private purposes can be acquired except by prescription from the municipality. 10 McQuillan, Municipal Corporations §§ 30.48-52 (3d ed. 1981). See Walker v. City of Birmingham, 388 U.S. 397, 315 (1967) (“We have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places.”).
one cable system. When several service providers wish to offer services to the public but physical limitations permit only one to offer services, the local government is obligated to impose conditions on the permit that will insure that the community receives the services most nearly equivalent to those which would have been offered had there been no physical limit on competition.

4. Access Rights

Because of cable's monopoly position, access to the cable system for parties other than the cable operator needs to be insured in order to maintain distribution of a wide range of communications services on a competitive basis with minimal entry barriers to new service providers. Cable operators, free of regulatory constraints, are likely to maximize profits by using their monopoly and monopsony powers. On the basis of their monopoly position, cable operators can set the prices charged to subscribers for services largely free of all market constraints and limited only by the consumers' elasticity of demand. As monopsonists, operators are able to control the prices charged to users for access to the cable system. By using the pricing mechanism in a discriminatory fashion to exclude competitive services from the system, operators have the power to determine which service providers and programmers can have access to the cable system.

A logical limit on the operator's power is to require the operator to allow reasonable access to the pipeline for others to distribute competing services, whether entertainment or public affairs programming, data distribution or two-way interactive services. Government currently imposes two general access requirements on cable systems to insure access for some competitive services. The FCC requires that cable systems must carry the unaltered signals of local television broadcast stations, and many franchise agree-

60. Utility poles and underground duct space represent major construction expenses. Existing utility poles frequently have little if any additional space besides electric and telephone cables. For example, the FCC assumes a typical 35-foot utility pole to have 17 feet of usable space which, considering electrical interference, placement, and safety space requirements for three cables (one telephone, one electric, and one cable television), is insufficient to accommodate a fourth cable without substantial rearrangement or replacement. See Pole Attachments, 72 F.C.C.2d 59, 71 (1979).

61. See F. WELCH, PUBLIC UTILITY REGULATION 76-78 (1968), for a discussion of the convenience and necessity certification requirements of state and federal law. See generally New York State Commission on Cable Television, Cable Television Franchising Workbook chs. 4, 5 (1980).

62. See note 31, supra.
ments require cable operators to provide channels for community, educational, governmental, and commercial leased access on a non-discriminatory basis.\footnote{63} These access requirements are predicated on the assumption that persons other than the cable operator should have some rights to use the cable system.

5. Content Regulation

In regulating programming content, the FCC recognizes the need for cable programming that serves the interests of the community. The FCC imposes content regulation on cablecast programming similar to that applied to broadcasters. This regulation includes the fairness doctrine, personal attack, and election candidate equal time rules.\footnote{64} If local governments have the authority to guarantee access to channels for individuals and groups, then perhaps no broadcast-type content regulation of cable may be necessary. This concept is discussed below.\footnote{65}

C. The Cable Operator's First Amendment Status as Determined by Function

Cable performs many functions, and the cable operator’s control of the content of the communications differs from function to function. Because cable’s First Amendment status differs for each of these functions, the First Amendment rights of the cable operator, cable program supplier, and cable viewer should be analyzed separately for each function. An analysis by function avoids overgeneralization and provides the flexibility to address new functions that may develop without having to reevaluate the cable system as a whole.

There are three basic categories of operator control relevant for First Amendment purposes: no control over content, selection control over content, and exclusive control over content. The no-control category includes mandatory broadcast signals that the operator must carry, such as local television, local access programming, and leased access programming. Selection control includes programming and services selected by the operator but over which the

\footnote{63} The FCC has deleted its minimum access requirements which were struck down as beyond the Commission's authority under the Communications Act in FCC v. Midwest Video Corp., 440 U.S. 689 (1979). Cable TV Access Channel Rules, 83 F.C.C.2d 197 (1981).

\footnote{64} See note 38, supra. See also note 31, supra (FCC rules require carrying most local TV signals).

\footnote{65} See notes 99-124 and accompanying text, infra.
operator exercises no content control once the selection is made. Examples of selection control are distant television signals and information and textual services. The exclusive control category encompasses local origination cablecasting. The cable operator's First Amendment rights vary according to the category of content control.

1. No-Control Category

Within the no-control category, the cable operator engages in none of the communicative, self-expressive activity which the First Amendment protects.66 The operator exercises no control or editorial discretion over the information, but merely provides a channel to transmit programming or information created, controlled, and selected by others. The First Amendment protects the underlying speaker, for example the local broadcast station or the citizen producing a public access program. The no-control category involves no First Amendment rights for the cable operator, however, because the cable operator is not speaking in the First Amendment sense.67

2. Selection Control Category

Cable operators argue that their selection of a television signal or

66. Although the Supreme Court has not defined precisely the speech protected by the First Amendment, protected expression generally involves communication of thoughts, ideas, or emotion. See Cohen v. California, 403 U.S. 15, 18 (1971); Roth v. United States, 354 U.S. 476, 482 (1957); Hague v. CIO, 307 U.S. 495, 515 (1939). Moreover, protected speech does not encompass all words or conduct intended to express an idea. United States v. O'Brien, 391 U.S. 367, 376 (1968); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

67. The First Amendment prevents the government from requiring involuntary speech in certain circumstances. See Wooley v. Maynard, 430 U.S. 705 (1977) (state may not constitutionally require individual to disseminate ideological message on license plate); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (state cannot compel flag salute). The Supreme Court distinguished Wooley and Barnette, however, and held that a state can require a private shopping center owner to allow individuals to petition on the private property. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). The Court rejected the shopping center owner's argument that he had a First Amendment right not be forced to use his property as a forum for others for three reasons. First, the views of the speakers were unlikely to be identified as those of the owner. Second, the state does not dictate the message to be displayed. And third, the property owner could expressly disavow any connection with the message by posting signs disclaiming sponsorship. Id. at 87.

This reasoning applies to cable access requirements imposed by local governments. Cable operators are not required to carry a state-dictated ideological message and cable operators can present their own views on other channels and disclaim sponsorship of views on local or leased access channels. See text accompanying notes 69, 85-88, 99-105, infra.
other information for carriage on their systems is protected by the First Amendment. But the First Amendment comes into play in this selection control category only in limited instances and primarily protects the rights of the viewers, not the rights of the cable operator per se. The appropriate comparison is not to a newspaper publisher, but a broadcaster whose license is conditioned on serving the public interest.\textsuperscript{68} Addressing the First Amendment rights of broadcasters in relation to those of the public, the Supreme Court recently stated:

Although the broadcasting industry is entitled under the First Amendment to exercise "the widest journalistic freedom consistent with its public duties,"\textsuperscript{68} the Court has made clear that: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It 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. . . . It is the right of the public to receive suitable access to social, political, esthetical, moral, and other ideas and experiences which is crucial here."\textsuperscript{69}

In the cable context, the Court of Appeals for the District of Columbia quoted Professor Meiklejohn, "'the point of ultimate interest is not the words of the speakers, but the minds of the hearers,'"\textsuperscript{70} and further noted that "the right of free speech . . . does not embrace a right to snuff out the free speech of others.'"\textsuperscript{71} If cable operators do have a right under the First Amendment to select programs, this right must be balanced against the First Amendment rights of the viewers.

Less weight should be given to the operator's rights in the selection control category because the cable operator's selection of a particular signal does not add significantly to the message transmitted.\textsuperscript{72} Indeed, the cable operator's purpose in choosing pro-

\textsuperscript{68} See Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976 & Supp. III 1979). The FCC is empowered to issue regulations and grant licenses based on public interest, convenience, and necessity. \textit{Id.} §§ 303, 309. Similarly, a municipality authorizes a private entity (e.g., a cable system or a utility) to use public rights-of-way to promote the general public interest and provide service to the public.


\textsuperscript{70} Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir.), \textit{cert. denied}, 434 U.S. 829 (1977) (quoting A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1960)).

\textsuperscript{71} \textit{Id.} at 46 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969)).

\textsuperscript{72} See \textit{id.} at 49.
gramming (for example in selecting Home Box Office rather than Showtime) is not to participate in public discussion or to express ideas, activities which the First Amendment is primarily designed to protect. Rather, the operator is merely exercising a business judgment as to which product will sell best. To the extent that this judgment involves speech, that speech is related primarily to the operator's economic interests and therefore receives only limited First Amendment protection.

Even assuming that the cable operator is "speaking" for First Amendment purposes when the operator selects programs for the system, this speech act does not supersede the First Amendment rights of the cable system subscribers. Many cable franchise agreements specify television signals that the cable system must carry, and FCC rules require carrying local television signals. Such requirements generally reflect the community's desire for diverse programming and for continuing existing television services. Operators may contract away their right to select programming, either in a franchise agreement with the local government or in a distribution contract with a program service provider. The local government, in negotiating a franchise, has the right to insure the widest possible selection of available programs on the de facto monopoly cable system. If the cable operator is committed to providing specific programming in the franchise agreement, the contractual rights of the subscribers to receive that programming, as reflected


74. On the surface such a choice appears similar to a broadcaster's decision to affiliate with (and carry the programs of) network A as opposed to network B. However, broadcasters are ultimately responsible for the content of the programming they broadcast, whether network originated or not. See National Broadcasting Co. v. United States, 319 U.S. 190, 204-06 (1943). Broadcasters routinely review network programming in advance and substitute other programming. In contrast, cable operators exercise no such control over the signals they import (except as noted in notes 35 & 36, supra).

75. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 561-63 (1980); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 86, 97 (1977). If the cable operator voluntarily agrees to limit selection discretion as part of the commercial transaction of obtaining a franchise, the operator's first amendment arguments are weakened further. See notes 133-145 and accompanying text, infra.

76. See note 31, supra ("must carry" rules).

77. "Must carry" rules were developed to insure that cable would increase the broadcast service available to a community by supplementing rather than replacing existing signals. Second Report and Order in Docket 14895, 2 F.C.C.2d 725, 736 (1966).

78. Local governments often ask for specific signals or categories of signals in their request for proposals. See, e.g., New York State Commission on Cable Television, Cable Television Franchising Workbook 70 (1980).
in the negotiated agreement, will prevail over any rights of the cable operator. 79

3. Exclusive Control Category

When a cable operator originates cablecast programming, the operator controls the content of programming transmitted on that particular channel. This function raises complex first amendment questions. The two relevant First Amendment models are broadcasting and the print media. These models present the issue of what the government can require from certain classes of speakers. The government's power to require speech, rather than to proscribe it, 80 is implicit in rules imposed by the FCC such as the fairness doctrine, personal attack, and equal time. A comparison of these models and an analysis of why they differ will be instructive for determining the appropriate model for cable.

(a.) Comparing the Newspaper Model and the Broadcast Model

The Supreme Court has zealously guarded the print media's First Amendment rights, but has not allowed the media to use their First Amendment rights to restrain others' First Amendment rights. In Associated Press v. United States, 81 the Court held that the First Amendment did not exempt the media from antitrust laws. The Court stated that 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. . . . Freedom to publish means freedom for all and not for some." 82 This suggested that a right of access to newspapers might exist. In Miami Herald Publishing Co. v. Tornillo, 83 however, the Court ruled that a Florida Statute giving a person attacked in a publication a right of reply violated the First Amendment. In Tornillo, the Court reasoned that requiring the additional printing cost, the composing time, and the use of scarce column

79. See text accompanying notes 133-145, infra (discussion of the effect of negotiating the franchise agreement on the cable operator's first amendment rights).
80. This analysis does not address government censorship because no such government right has been seriously claimed for broadcasting or newspapers nor is it claimed for cable-casting. 47 U.S.C. § 326 (1976) specifically proscribes any FCC censorship or interference with the right of free speech by radio communications.
81. 326 U.S. 1 (1945).
82. Id. at 20.
space would restrain publishing. It stated that publishers should not be compelled "to publish that which "'reason tells them should not be published.""84

The Court has not extended such broad First Amendment rights to broadcasters. The Court has upheld rules that require broadcasters to provide time for airing opposing points of view or for responding to personal attack. In Red Lion Broadcasting Co. v. FCC,85 the Court stated:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.86

The Court went on to state: "[T]he First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use."87

Unfortunately, neither the Red Lion nor the Tornillo opinions analyze and compare their different treatment of the print media and the broadcast media under the first amendment. In Red Lion, the Court focused on the first amendment rights of the listening or viewing audience and the physical limitations of the radio spectrum. The Red Lion Court quoted Associated Press: "'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'"88

In Tornillo, the Court was not concerned by the lack of access to a limited medium. This was in spite of strong evidence that concentrated ownership of the press had virtually eliminated competition. Many cities have only one local newspaper but most communities are served by several television and radio stations. Yet the Tornillo Court, unlike the Red Lion Court, did not give any weight to the reader's right to know or the speaker's right to access when press outlets are limited.

84. Id. at 256.
86. Id. at 389.
87. Id. at 391.
88. Id. at 392 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
To understand the Supreme Court's disparate treatment of first amendment rights in these cases, the circumstances of each case must be analyzed. In Tornillo, although the opportunity for new newspapers was limited, the limited availability of newspaper outlets was the result of natural economic forces, rather than of governmental restrictions. In broadcasting, however, the limited competition is the result of governmental restrictions on the number of outlets due to radio spectrum limitations. Any person has the right to publish printed material without any significant government restriction although competition and other economic factors (for example, the large initial investment required) may limit the number of economically viable publications in a given area or on a particular subject. Because these limitations are the result of the marketplace rather than government action, government intervention to protect readers' rights is not justified. In contrast, the limited number of broadcast outlets is the result of governmentally imposed limits and generally is not the result of marketplace forces.

An additional distinction between the print and the broadcast media is that the print media do not use a public resource as a transmission medium. Since broadcasters use a valuable public resource—the radio spectrum—they must behave as trustees: "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." Another possible reason for the disparate treatment of the two media under the First Amendment is the reverence given to the press in the United States as the basic

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89. Many communities can economically support only one daily newspaper. However, a wide variety of other publications circulate: national newspapers, regional newspapers, weekly newspapers, national news and specialty magazines, and trade publications, to name a few. See, e.g., Lippman, Journal Papers Will Go Daily in September, WASHINGTON POST, Aug. 5, 1981, at 1, col. 3.

90. The D.C. Circuit has recognized this distinction between Red Lion and Tornillo. The court said: "[S]carcity 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. See Miami Herald Publishing Co. v. Tornillo..." Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). In a dictum, the court in Home Box Office refused to apply to cable the first amendment analysis developed in Red Lion for broadcasting because "an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent." Id. at 44-45. Nevertheless, the court suggested that the Tornillo analysis for newspapers may also not be appropriate. Id. at 46 n.82.

91. Red Lion, 395 U.S. at 394.
vehicle for "diverse and antagonistic voices." Twentieth century technologies, such as broadcasting and cable, offer the courts and Congress an opportunity to reevaluate how to attain the goals of the First Amendment without altering the special status of newspapers under the Constitution.

In summary, the primary reason for treating the two media differently is the degree of government and public involvement in each. In the print media, where the degree of competition and the number of outlets is the result of natural market forces and those outlets can operate without a special governmentally conferred benefit, the Court generally has not allowed regulation of the outlet's content. In broadcasting, where the degree of competition and number of outlets is the direct result of government control and those outlets can only operate by using a public resource, the Court has permitted some limited control of content.

(b.) The Cable Model

The Supreme Court has not directly ruled on how the First Amendment applies to cable. The Court has held, however, that cable is engaged in interstate communications by wire or radio and that the FCC has authority to regulate cable as "reasonably ancillary" to its regulation of broadcast television under the Communications Act of 1934. The FCC has imposed restraints upon cable similar to those the Court refused to apply to newspapers in Tornillo. The FCC determines which broadcast signals a cable system must carry and applies virtually the same fairness, equal time, and personal attack regulations to cablecasting as govern broadcasting.

In addition to the historical links between broadcasting and cable, the Red Lion and Tornillo analyses suggest that cable should be accorded treatment for exclusively controlled programming similar to that of broadcasting rather than that of newspapers under the First Amendment. Unlike newspapers, cable depends on government for its existence. Federal rules and statutes establish specific market opportunities and advantages for cable.

92. See note 20 and accompanying text, supra.
94. See note 19, supra, for a list of the regulations applied by the FCC to cable.
At the local level, cable would not exist without a grant of authority to use the public right-of-way. In most cases, as a result of a combination of technological factors, physical availability of pole space, the need to use the public right-of-way, and the economics of the market, only one cable system can exist. Local government has the authority to select the operator of that system on the basis of the community's needs through a franchise agreement.

Government regulation of the cable monopoly is lawful at the federal level under the Communications Act of 1934 and at the state or local level under public police powers. Government may regulate to protect the public interest (for example, to insure adequate service or reasonable access to the system or to prevent monopoly profits) or to allocate a limited public resource (such as pole and underground space). Thus, the conceptual basis for First Amendment standards for cablecasting is similar to that for broadcasting. A broadcaster can speak only if the government grants the broadcaster a license to use the radio spectrum. Similarly, a cable operator can speak only if the government grants the operator a license to use the limited public right-of-way. For First Amendment purposes, cable should be treated like broadcasting when the cable operator is performing those functions, such as origination programming, that are similar to broadcasting.

III.
The First Amendment and Access

Affirmative government action to facilitate expression has emerged in the last forty years as one of the most significant First Amendment issues. The Supreme Court's statement in Red Lion, reemphasized in Columbia Broadcasting System, Inc. v. FCC, in part “to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.” S. Rep. No. 95-580, 95th Cong., 2d Sess. 14, reprinted in [1978] U.S. Code Cong. & Ad. News 109, 122.

96. See note 60, supra; text accompanying notes 42 & 43, supra.
97. See notes 509, supra; notes 20-23 and accompanying text, supra.
98. In Columbia Broadcasting Sys., Inc. v. FCC, 101 S. Ct. 2813 (1981), the Court stated: “A licensed broadcaster is ‘granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'” Id. at 2829 (quoting United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966)). Such language fits the circumstances of a cable operator as easily as a broadcaster.

99. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 559 (1941); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 693 (1978).
that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount," is as relevant for cable as it was for broadcasting. This section develops the argument that the right of access to cable systems is essential for cable to achieve its full potential as a medium for free expression. Cable access differs from access to other media and reasonable cable access requirements are consistent with fundamental principles of free expression.

A. Justification for Access

The principle that a multiplicity of outlets permits robust expression\(^1\) argues for a multiplicity of voices free from operator control on the single cable system in a community. In *FCC v. WNCN Listeners Guild*,\(^2\) the FCC determined that the radio marketplace has enough licensees to provide diverse expression and entertainment without specific government regulation of programming formats. Each radio station in a community is owned, operated, and controlled by a licensee unaffiliated with any other radio station in that community. In contrast, each community with a cable system has only one licensee, who operates the only entrance to the cable marketplace. Having designated the gatekeeper, the government—whether federal, state, or local—must assume responsibility for insuring that the gatekeeper serves the community's interests by opening that gate on a nondiscriminatory basis to a variety of speakers. Then the community should not significantly control what those speakers say once they enter.\(^3\)

Moreover, the local cable company has ample opportunity to express opinions, present information, and select entertainment. For example, on a thirty-six channel cable system with six channels reserved for access and ten "must carry" broadcast station signals, the operator has 480 channel hours per day to program as the operator sees fit. In *Columbia Broadcasting System*, the Supreme Court held that reasonable statutory broadcast access rights for political candidates do not impair the discretion of broadcasters.


\(^2\) 101 S. Ct. 1266 (1981), NCTA cites this case to support the proposition that the best guarantee of diversity and freedom of information is to eliminate government regulation in the communications marketplace. NCTA Report, *supra* note 2, at 118-19.

\(^3\) There are some limited exceptions to the proscription of government control of speech. Regulation of obscenity, see *Miller v. California*, 413 U.S. 15, 23-25 (1973), and prohibition of broadcasting lottery information, 18 U.S.C. § 1304 (1976), are two examples.
Similarly, reasonable access requirements do not impair the discretion of cable operators "to present their views on any issue or to carry any particular type of programming."\textsuperscript{104}

\textit{Columbia Broadcasting System} reaffirms the validity of government regulation that balances the First Amendment rights of various interests. Cable access requirements imposed by a local government as a condition for the grant of a monopoly franchise and structured like the access statute at issue in \textit{Columbia Broadcasting System} create limited but reasonable rights to access, not a general right of access to any channel at any time. In so doing, these requirements balance the first amendment rights of the viewers with the economic interest and first amendment rights of the cable operator.\textsuperscript{105}

General communications policies, as well as the First Amendment, justify cable access.\textsuperscript{106} Cable can provide competition and diversity in communications services. Cable channels used for the one-way or two-way transmission of data or voices will perform a valuable local communications service now largely monopolized by the local telephone company. While a cable system is not likely to be a substitute for the local telephone network, it can perform certain local two-way communications more efficiently than the telephone system, such as communications between a central location and multiple terminals.\textsuperscript{107}

\textsuperscript{104} \textit{Columbia Broadcasting Sys.}, 101 S. Ct. at 2830. Cable operators also argue that they need absolute control over all of a cable system's channels for financial reasons. This need has not been established. In fact, the skyrocketing value of cable systems and the fierce competition for franchises, even in cities with extensive access requirements, suggest strongly that total control of all channels is not necessary for financial viability. See text accompanying note 132, infra.

\textsuperscript{105} Implementing the principle of access can be left to the states and their instrumentalities. Allowing states or local governments to establish access requirements comports with the tenth amendment concept of federalism. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." Addington v. Texas, 441 U.S. 418, 431 (1979).

\textsuperscript{106} The justification for access extends beyond First Amendment considerations to public policies such as those embodied in the antitrust statutes. For example, leased access requirements can prevent a cable operator from monopolizing interactive services such as security systems, banking, or data base access. See Channel 100, Toledo, Inc. v. Comcast Cablevision Corp., No. 80-40071 (E.D. Mich. May 5, 1980) (order granting preliminary injunction), where a preliminary injunction was issued preventing the cable system from evicting a channel lessee. See also Barnett, \textit{Cable Television and Media Concentration}, 22 STAN. L. REV. 221 (1970).

\textsuperscript{107} For example, Manhattan Cable Television plans to transmit data between the municipal building and nine New York City municipal computer service centers using its coaxial cable rather than leased telephone lines. See \textit{Cablevision}, July 20, 1981, at 12. Also, local
If competition and diversity in communications services are desirable, this alternative local communications medium should be available for the widest possible public use. But the cable operator, left to his or her own discretion, will have little incentive to lease two-way channels to potential competitors on nondiscriminatory terms and conditions. For example, a cable operator with a financial interest in a security service provided over its cable system may be unwilling to lease channel capacity to a local burglar alarm company or may charge a discriminatory rate. A cable system’s leased channel service need not be subjected to common carrier-type regulation to achieve equitable results. A reasonable, nondiscriminatory rate and service access requirement applicable to all types of services would insure that the local cable system is used for the benefit of all citizens and is available to growing and diverse communications services.

B. Lack of Danger in Access Requirements

The National Cable Television Association argues that cable access requirements are dangerous for the media. It lists a series of dangers which apply, if at all, to newspapers and broadcasting and then fails to show how cable may be subject to these dangers. It is inappropriate to presume that potential dangers associated with print and broadcast access automatically apply to cable system access. One commentator who has explicitly assessed the potential harms and benefits of cable access regulation has concluded that the competing values of minimizing government intervention and insuring equal opportunity for expression can be reconciled through regulating cable access.

A review of NCTA’s list of “potential dangers” will clarify the debate. The first danger, as described by Professor Tribe, discussing access requirements in the media, is “‘deterring those items of coverage that will trigger duties of affording access at the media’s expense.’” This is not relevant to cable access requirements because requiring leased and local cable access is not contingent on a

cable channels will be used in connection with a switched digital data network being developed by Tymnet, Inc. and Satellite Business Systems for communications between New York City and San Francisco.

108. NCTA Report, supra note 2, at 147.
110. NCTA Report, supra note 2, at 147 (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW 697 (1978)).
trigger event. Access requirements do not depend on how a cable company uses other channels or on the content of programs on those channels. For example, cable access does not require that a cable company carrying one news service provide channels to all other news services. Instead, it requires merely that the company make channels available for others to use as they wish. Cable access, unlike newspaper or broadcast access, does not encourage cable operators to self-censor or to "conclude that the safe course is to avoid controversy."

The second suggested danger is "'inviting manipulation of media by whichever bureaucrats are entrusted to assure access.'" The government's role, however, in insuring nondiscriminatory access to the community's cable system resembles its role in adopting reasonable time, place, and manner regulations for other forms of expression. In these other roles, the danger of government "manipulating the media" is not outweighed by the value in reasonable regulation. When a citizen uses a public resource for an expressive purpose, the government may insure that the citizen does so in an orderly fashion, with minimal intrusion on the First Amendment rights of other citizens. The benefits from access, in facilitating rational and fair opportunities to communicate through cable, far outweigh any potential abuse. A government access channel, for example, promotes the important goals of conducting government in the open and of "enhancing the ability of . . . the public to receive information necessary for the effective operation of the democratic process."

The manipulative bureaucrat has not emerged in cable access requirements. No case of actual abuse or of any significant problem

111. Tornillo, 418 U.S. at 257.
112. NCTA Report, supra note 2, at 147 (quoting L. Tribe, American Constitutional Law 697 (1978)).
113. See Buckley v. Valeo, 424 U.S. 1, 18 (1976) ("[T]he government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).
114. Compare Schneider v. State, 308 U.S. 147 (1939) (anti-handbill ordinance was invalid as applied to labor, religious, and political pamphleteering despite the state's legitimate purpose of minimizing litter, noise, and traffic congestion and protecting people from fraud and invasion of privacy) with Reynolds v. Tennessee, 414 U.S. 1163 (1974) (the Court refused to review a conviction, under a statute prohibiting disturbance of religious assemblies, for chanting during the President's speech at a religious gathering).
associated with access regulations has arisen anywhere in the country. Moreover, most cities have established access plans that are free of any administrative discretion. Such plans commonly provide nondiscriminatory guidelines to qualify for access, insulate supervision of access channels from government influence (except government access channels),\textsuperscript{117} and establish separate noncompeting categories for access.\textsuperscript{118} A cable system operator's discretion in providing additional access through its own channels is unaffected.

NCTA suggests a third danger, "'escalating from access regulation to much more dubious exercises of government control.'"\textsuperscript{119} This allegation is irrelevant to access regulations, which are based on structure rather than on content.\textsuperscript{120} Requiring access does not give the government the opportunity to interfere with program selection and program content on access channels.\textsuperscript{121}

Significant access opportunities—community, educational, governmental, and commercially leased—and increased cable coverage and penetration should decrease rather than increase the need for federal cablecasting rules such as equal time, fairness, and right of reply. Developing alternative opportunities for electronic expression may even eliminate the need for such rules (or "regulatory impediments" as NCTA characterizes them).\textsuperscript{122} Until those alternatives exist, however, "impediments" must be distinguished from access opportunities. NCTA cites practical considerations such as burdensome recordkeeping requirements and intrusive government enforcement as reasons for avoiding content regulation. Access arrangements have none of these problems. If, as NCTA suggests, a

\textsuperscript{117} See note 121, infra.
\textsuperscript{118} For example, an access agreement will have different access requirements for community, educational, leased government, and two-way access.
\textsuperscript{119} NCTA Report, supra note 2, at 147 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 697 (1978)).
\textsuperscript{120} The FCC has sanctioned this concept of structural rather than content based regulation of cable television. It recently reaffirmed its policy of not applying the fairness doctrine and equal opportunities for political candidates rules to access programming, "as long as the channels on which such programming is presented themselves have inherent in their functioning, access of a type which makes possible equal opportunities for political candidates and time for the provision of programming covering all sides of controversial issues of public importance." Cable TV Access Channel Rules, 83 F.C.C.2d 147, 148 (1980).
\textsuperscript{121} If an access channel is dedicated to government use, the government may exclude others from using that channel and control the content. This limited direct government use of cable is consistent with the First Amendment, which allows the government to "add its own voice to the many that it must tolerate, provided it does not drown out private communication." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 590 (1978).
\textsuperscript{122} NCTA Report, supra note 2, at 150.
cable system with 100 channels has 2,400 hours of program transmission per day, reserving some of these channels for access is a reasonable and minimally burdensome means of protecting citizens' First Amendment rights. If Congress and the Supreme Court affirm government's authority to guarantee the availability of adequate access channels on all cable systems, then perhaps content regulations, such as the fairness doctrine and equal time, may be eliminated or made less burdensome.

C. Voluntary Contractual Obligations and the First Amendment

Most local governments continue to require access channels in the franchise agreement. Although cable operators voluntarily commit themselves to providing access in these franchise agreements, the NCTA criticizes such access requirements as unconstitutionally conditioning enjoyment of a state granted privilege on relinquishing First Amendment rights. This argument, however, ignores the many cases that uphold state regulation even when it curtails the exercise of constitutional rights.

This article has argued that access provisions in a franchise agreement do not violate the First Amendment rights of cable operators. Although requiring the operator to reserve some channels for public access may possibly affect the operator's profit potential, that is not sufficient to justify prohibiting municipal regulation of a business activity in which the public has a substan-

123. Id.
124. Access requirements may even benefit the cable company. NCTA notes the valuable marketing role access plays. NCTA Report (original unpublished version to Senator Packwood), supra 2, at 31 n.95. See note 131 and accompanying text, infra.
125. The FCC's access requirements were held to be void in FCC v. Midwest Video Corp., 440 U.S. 689 (1979). See text accompanying note 20, supra.
126. NCTA Report, supra note 2, at 156 (citing Perry v. Sindermann, 408 U.S. 593 (1972)).
127. See notes 135-145 and accompanying text, infra.
128. The First Amendment prohibits governmentally sanctioned distinctions based on the content of speech. Hudgens v. NLRB, 424 U.S. 507, 520 (1976). Access provisions in a franchise agreement, however, are content neutral. See text accompanying notes 110-124, supra. A local government does not tell the cable operator what messages to carry on the access channels. The cable operator is simply required to make channels available to those who want to convey a message. Cases such as Elrod v. Burns, 427 U.S. 347 (1976), and Speiser v. Randall, 357 U.S. 513 (1958), in which the government abridged individual freedom of expression by imposing sanctions based solely on the content of constitutionally protected speech, do not apply to content neutral requirements. See also FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 773, 799-800 (1978).
Local governments typically require access channels in the franchise agreements by stating these and other requirements in a request for proposals and including these obligations in the final franchise agreement. As of March, 1981, according to NCTA, more than 1,018 access channels were operating. The cable industry recognizes the utility of free public access channels "as a marketing technique to gain consumer acceptance and expand market penetration."%130 Cable companies continue to bid for franchises, promising substantial commitments to access and frequently offering more access channels than required. Even in Boston, where proposed access requirements are among the most demanding, two cable companies conducted a fierce battle for the franchise.%131

To the extent that access requirements involve First Amendment rights of the cable operator, the parties to a cable franchise agreement—freely entered into by each party for mutual benefit—may limit the operator's First Amendment rights in return for the benefits of the franchise. A fundamental principle of contract law allows competent parties to contract to perform or abstain from a course of conduct and to manage their affairs in their own way unless grounds for judicial interference are very clear. A cable company has no opportunity to exercise any First Amendment rights in a community until it is awarded a cable franchise. The franchise gives the cable company the ability and the right to...

129. Home Box Office, Inc. v. FCC, 567 F.2d 9, 49 n.97 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). Cf. California State Auto Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 111 (1951) (fact that insurance regulation, which requires insurance companies to insure certain high risk persons, may diminish company profits does not render regulation an unconstitutional taking of property). Cable operators' deduction of some channels solely to nonexpressive purposes, such as business data transmission, security monitoring, and banking, challenges NCTA's arguments that the cable operator's freedom of expression will be unconstitutionally limited if the operator is faced with any regulation which intrudes on the operator's content discretion. NCTA's real concern appears to be that access requirements might interfere with a cable operator's ability to allow access only to the most lucrative lease customers.

130. NCTA Report (original unpublished version to Senator Packwood), supra note 2, at 31 n.95.

131. For example, Cox Cable recently agreed to provide $450,000 annually for public access in New Orleans and more when the company increases rates. New Orleans and Cox Sign Franchise Pact, MULTICHANNEL NEWS, July 27, 1981, at 11.


express itself without government interference. In exchange for this right, the cable operator may voluntarily and constitutionally agree to allocate some channels for access in consideration for the franchise so that the First Amendment rights of others will be enhanced.\footnote{134}

Agreements which limit the constitutional rights of one or both parties are often valid. For example, a prospective employee of the Central Intelligence Agency must sign a contract which requires that the employee submit any proposed publication for prior review.\footnote{135} Other cases have upheld agreements waiving various constitutional rights, including certain procedural due process rights,\footnote{136} eleventh amendment sovereign immunity,\footnote{137} the right to be present at a trial,\footnote{138} the right to a jury trial,\footnote{139} and the right to be free from warrantless searches.\footnote{140} Similarly, a cable operator's agreement to dedicate a portion of the community's cable system for public access is lawful. The franchising authority is simply contracting to protect substantial community and public interests\footnote{141} by requiring access channels as one term of the franchise contract.\footnote{142}

\footnote{135. Snepp v. United States, 444 U.S. 507 (1980). The Supreme Court sanctioned this provision and noted: "Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." \textit{Id.} at 509 n.3.}
\footnote{136. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).}
\footnote{137. Parden v. Terminal Ry., 377 U.S. 184 (1964).}
\footnote{139. Zap v. United States, 328 U.S. 624 (1946).}
\footnote{140. See part II B, \textit{supra}.}
\footnote{141. The cable industry cites Frost v. Railroad Comm'n, 271 U.S. 583 (1926), for the proposition that the state "may not impose conditions [on the grant of a privilege] which will require the relinquishment of constitutional rights." NCTA Report, \textit{supra} note 2, at 156. The validity of \textit{Frost} in light of the undoubted constitutionality of the Communications Act of 1934, which conditions the grant of a broadcast license on a number of public interest requirements, including access requirements that limit a broadcaster's First Amendment rights, is questionable. See FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978), which upheld FCC rules preventing those acquiring a broadcast license from owning a newspaper in the same community. See \textit{generally} Parden v. Terminal Ry., 377 U.S. 184, 193 n.11 (1964)(distinguished \textit{Frost} on the ground that the condition sought to be imposed there was outside the scope of the municipality's regulatory power); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 82 n.3 (1955)(Frankfurter, J., concurring)(suggesting \textit{Frost} may have little survival value); Portland Gen. Elec. Co. v. Federal Power Comm'n, 328 F.2d 165, 173 (9th Cir. 1964)(plaintiff was required to accept a power license "upon such terms as Congress has determined should be imposed in the public interest").}
Even without an express agreement, a party's acceptance of a public benefit, such as a franchise agreement, may operate as an implied waiver of constitutional rights, particularly if infringing on those rights is necessary to protect the public interest served by granting the benefit. Restrictions on political activity that would otherwise be protected by the First Amendment may be imposed on federal employees, as may restrictions on the rights of military personnel to petition the government. It is well settled that a statute imposing a minimal burden on First Amendment rights will be upheld if it furthers an important purpose within the state's regulatory powers. Mandating reasonable access to a limited number of cable system channels is not intruding on the cable operator's own freedom of speech and upholds an important public interest in furthering the ability of others to speak. Access requirements are a reasonable means of insuring that a community's cable system will operate in the public interest with minimal government regulation.

IV. Conclusion

Cable provides an increasing variety of communications services; it is much more than just "cable television." Cable today carries broadcast television signals, nonbroadcast television signals, and local cablecast and access programming. It also offers informational services, data services, and two-way communications which will increase substantially as information retrieval and interactive systems are fully developed.

For First Amendment purposes, cable is a unique communications medium, fulfilling several significant, different communications functions simultaneously. The First Amendment requires evaluating cable on a function-by-function basis according to the nature of the communication and the degree of control over content exercised by the cable operator. Functionally, some channels are much like common carrier services, where the cable operator has no control over content. On other channels the cable operator merely selects the general type of information or programming to be transmitted but does not control the content. The third func-

tional category includes channels that are similar to broadcasting where the cable operator has exclusive control.

The cable system operator has no First Amendment rights in the no-control channels. The other two channel categories raise questions about the First Amendment rights of the subscriber and the community as well as rights of the cable operator. A community served by a single high-capacity distribution cable system can protect its citizens' First Amendment rights without unduly hampering those of the cable operator. The cable operator may transmit whatever programming and information the operator believes appropriate, subject only to carrying those broadcast signals the federal government believes necessary to protect over-the-air broadcasting and carrying any additional signals the local government believes necessary to protect the First Amendment rights of the community's citizens. Other potential cable system users must also have reasonable access to this conduit to insure that it distributes a multiplicity of voices, ideas, and information. Indeed, while the cable operator enjoys an economic monopoly in operating the conduit, the operator has no monopoly rights that the First Amendment protects. Government regulatory requirements, which need not be complex or burdensome, are necessary to balance the community's interests in reasonable diversity and public access against the potential dangers associated with monopoly control of the system by the operator.

The cable industry suggests that cable is an electronic newspaper entitled to the same protection under the First Amendment as the printed press. Such a unitary classification of cable is not only self-serving but illogical. The cable operator does not perform the same editorial role as a newspaper editor. The cable operator may exert full editorial control over some channels of the system but even in this role the operator is more like a broadcaster than a newspaper editor.

Unlike a newspaper, the cable operator distributes a valuable and limited public resource through a pipeline that uses the public right-of-way. Cable is a natural monopoly, in some respects like a utility. Substitutes for various services provided over a given channel of the system may exist in the community, but there is only one cable pipeline, with vast capacity and service diversity potential, and consequent economic advantage. A government franchise effectively gives a system operator a de facto monopoly. This alone justifies different First Amendment treatment from the print me-
dia which experiences intense marketplace competition.

Cable performs important functions similar to broadcasting. Yet cable need not be regulated like broadcasting, with each cablecast channel subjected to broadcast-like content regulation. A regulated system of reasonable access which gives expression to multiple community views could eliminate the need for broadcast-type regulation of cable.

Cable is a unique communications medium. It and its multiple functions in a community should be so treated under the first amendment. Sweeping constitutional generalities oversimplify cable’s problems, denigrate the First Amendment rights of others in communities it serves, and ignore all the government experience with cable at the federal, state and local levels.