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The Cable Communications Policy Act of 1984 v. The First Amendment

by SCOTT SIBARY*

This past year has been perhaps the most eventful in the history of cable television regulation. Since the first system was built in 1949,1 cable television technology has evolved to make cable one of the major media of mass communication today. Along with this development of cable television, a parallel interest has developed on the part of many to regulate it. Partly due to a 1982 Supreme Court case affecting the liability of municipalities regulating cable television,2 regulation of cable has been the recent topic of congressional legislation. The Cable Communications Policy Act of 19843 (CCPA) for the first time establishes a statutory system for the regulation of cable television, and defines the roles to be played by the federal, state, and local governments.

This legislation is not the first word on the regulation of cable television, nor is it likely to be the last. The FCC started placing restrictions on the construction and operation of cable systems in the 1960's.4 Since then, the use and nature of cable has changed dramatically. Current estimates put cable penetration (number of television households in the United States subscribing to cable) at over forty-five percent.5 With the increasing use of cable, some have argued that it is a media resource that should be made available as a forum for the public at large.6 These commentators argue that the structure of

* A.B., University of California, Berkeley, 1975; J.D./M.B.A., University of California, Berkeley, 1980; Assistant Professor, California State University, Chico.
2. Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (Boulder I). The Court held that home-rule status does not render a city's actions exempt under the antitrust laws. Therefore, municipalities need express authorization from their state or from the federal government for anti-competitive regulatory activities (such as allowing only one cable television system to operate in the city).
5. BROADCASTING, Nov. 19, 1984, at 11.
6. See, e.g., Kreiss, Deregulation of Cable Television and the Problem of Access

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cable lends itself well to public access, yet also presents the possibility of becoming a monopoly that could effectively limit access by the public.\textsuperscript{7}

Today, state-of-the-art cable systems offer 108 channels.\textsuperscript{8} This means that a cable system owner may allocate several channels for use by private groups or individuals, governmental bodies, educational institutions, or businesses and still have more available for the owner's use than was possible years ago. Likewise, the great number of channels available over one system presents the possibility that the public, in any given locality, would be unwilling to support more than one cable system, and that the nation as a whole could come to rely on cable as the comprehensive (and nearly exclusive) video source of information and entertainment. Those wishing their expression to reach the public by video would have only one effective choice: the existing cable system.

These issues of access and cable television regulation pose serious constitutional questions. Policies established and decisions made affecting the first amendment status of cable television could determine the nature of the major media in the future, and influence the extent to which our sources of information are open, unfettered, and unintimidated. This article will examine the first amendment implications of regulating cable television, with particular emphasis on an appraisal of the CCPA. The first part of the article will provide an overview of cable technology and other video media. Part II will summarize cable's regulatory history, as well as the case law on its first amendment status. Part III will review the legislative history of the CCPA. Part IV will analyze, in terms of the first amendment, the regulatory framework set up by the Act. Part V will conclude that current laws, without the CCPA, are sufficient to protect and promote the marketplace for mass communications media.


7. \textit{Id.}

I

The Technology

The technology of cable television has changed dramatically since the earliest systems were constructed. Nevertheless, the basic structure remains similar to the early CATV (community antenna television) systems. The system starts with a receiving antenna located so as to receive clear signals from local broadcast antennas. The signals are “prepared” (i.e., modulated) for cable transmission at a nearby building called the “headend.” The cable itself is a coaxial cable with a conductive wire core couched in foam insulation, a conductive aluminum web, and plastic sheathing. From there, the signals are sent over trunk cable out into the community, where feeder cables take signals from the trunk cables to nearby homes. The feeder cables are tapped into with drop lines, which run into the homes and connect to the television sets. This basic structure for cable systems is widely used today, although improvements in equipment have improved the quality of signal the subscriber receives and increased the number of channels offered.

The development of low-cost technology capable of importing signals from sources beyond the receiving potential of the local antenna has led to many major changes in cable television. Microwave transmission has been available for many years, but is costly because microwaves travel along the line-of-sight, requiring numerous facilities in order to cover great distances. However, in 1975, RCA launched the first domestic satellite, and others soon followed. With dish antennas receiving signals from the satellites, cable systems became capable of receiving signals from anywhere in the world. This potential has allowed syndicated programming to appear over such networks as HBO, MTV, ESPN and CNN. The increase in the number and type of programs available over cable also led

10. See BAER, supra note 9, at 5-7.
11. Id.
12. Id.
14. G. Webb, supra note 9, at 4-5.
15. Id.
16. Id.
17. Id.
to an increase in demand for cable. Even those television viewers who had clear over-the-air signal reception were offered something they could not get before.

While improving technology enhances the quality of signals received at the television set, there seem to be some inherent disadvantages to cable systems. The cable itself tends to resist electrical conduction so that as cable length increases, the signals noticeably weaken. This is overcome by adding signal amplifiers along the lines, but amplifiers tend to reduce the signal quality. Better equipment reduces the problems, but adds to the cost of the system. However, none of these problems—technological or economic—presently pose a threat to cable’s commercial viability.

In addition to improved reception and availability of distant signals, there are a couple of other important features that cable offers. One is two-way transmission, with the subscriber sending back over the cable system responses to programming. Simpler response systems, such as videotext (electronic delivery of textual information) currently are being developed. Two-way systems not involving the video aspects of cable television, such as burglar and fire alarms, are already in use.

The fourth major advantage offered by cable is the increased opportunity for local programming. With the large number of channels available over the more modern cable systems, cable operators have provided channels for “local origination” programming. This allows individuals to reach their communities over leased or public access channels. Disputes over the legality of requiring a cable operator to provide public access and leased access channels have a long history, and will be dis-

19. BAER, supra note 9, at 10-11.
20. Id.
22. BAER, supra note 9, at 41-45.
24. G. WEBB, supra note 9, at 13-14; Senate Hearing, supra note 23, at 58-59.
25. J. WALTER THOMPSON U.S.A., INC., supra note 21, at 10. Local origination programming has increased its share of cable viewing audiences from 8 percent in November 1982 to 12 percent by December 1983. Id.
cussed at greater length later in this article.26

To put the development of cable technology and the issue of cable regulation into proper perspective, potentially competitive electronic media must be considered. The technology for every medium changes with time, and as it advances, so does the impact and relative importance of the various media. Cable has several major competitors in the field of video communications.

A. Broadcasting

Even with the recent explosion of cable systems in operation, broadcast television remains a major competitor to cable television. At the same time, however, the two media benefit each other. Broadcast stations are carried over cable systems, thereby increasing the number of homes reached by the broadcasting stations while also increasing the cable systems' offerings. This is particularly true for independent stations, stations that would not otherwise reach beyond their local audiences.

In addition to traditional broadcasting, there are subscription television (STV), low-power television (LPTV), and teletext. These should be grouped with traditional broadcast media because they operate on assigned broadcast frequencies and do not require any new type of antenna for reception.27 STV typically broadcasts scrambled signals over local UHF (ultra-high frequency, 470 to 890 MHz, as compared to 54 to 216 MHz for VHF) stations.28 The subscriber pays a fee for a decoder, which also has the advantageous feature of allowing charges to be assessed on a pay-per-view (PPV) basis. In recent years STV has grown rapidly and some expect this trend to continue.29

LPTV stations are simply broadcast stations with a shorter broadcasting radius than full-power stations. By licensing LPTV stations in areas in which the range of an additional full-power station (approximately 70 miles) would overlap with existing stations, more broadcasting can become available in the given locality. As of late 1984, the FCC had licensed over 250 LPTV stations and had about 27,000 applications pending.30

26. See infra Parts II through IV.
27. G. WEBB, supra note 9, at 16-20.
28. Id.
Another developing feature that has the potential to enhance broadcast offerings is teletext. Similar to videotext, teletext consists of textual material inserted in the horizontal spacing band of the television picture. Its drawbacks are that the television needs an adaptor to insert the text onto the screen, and the transmission, which is slower than videotext, is only one-way.

B. Multi-Point Distribution Service (MDS)

MDS is basically broadcasting at microwave frequencies. For reception, the subscribing viewer needs a microwave antenna and a clear line of site to the transmitting antenna. Since MDS does not require an extensive system of facilities, some expect that if the FCC allows multichannel MDS, it will become a powerful competitor to pay cable in urban areas. Recently, the FCC decided to allocate by lottery about 1000 four-channel MDS permits.

C. Telephone

When telephone companies convert from the present copper wire cables to fiber optic lines, they gain the capacity to transmit video signals. Although the CCPA generally prohibits companies from simultaneously offering telephone and video services, telephone companies could allow others to offer video services over their cables. Given the telephone companies' existing facilities, this potential is enormous. In fact, a videotext service is already offered over telephone lines in an area of southern California.

D. Satellite Master Antenna Television (SMATV)

SMATV consists of an antenna that receives signals from satellites and transmits these via cable to nearby television sets. The typical master antenna will be placed on the roof of an apartment building or near an apartment complex, and

32. Id.
33. Senate Hearing, supra note 23, at 33.
34. G. Webb, supra note 9, at 17-18.
35. Senate Hearing, supra note 23, at 33.
39. G. Webb, supra note 9, at 15.
serve the residents of the apartments. SMATV has the potential to operate like a cable system, and service more than one building or complex, by linking with other master antennas and SMATV systems via microwave or cable. One SMATV operator in Dallas has been allowed to construct a 98-channel system by linking a cluster of apartments by microwave.

E. Direct Broadcast Satellites (DBS)

DBS could become an even more popular source of video programming than cable. With small dish antennas, viewers can pick up signals from satellites anywhere in the viewing sky. By pointing at different satellites, the antenna receives signals for different selections of channels. Typically, one DBS offers two to six channels. Although some signals are scrambled, and all may be scrambled eventually, the owners of the satellites or of the programming can make decoders available. The limitations on DBS at present lie in the strength of the signal. The transmitters can be made more powerful (which is costly), the electromagnetic bandwidth of the signal can be increased (which reduces the number of channels that can be transmitted), the focusing beam can be narrowed (which reduces the area served) or the antenna can be improved. Advances in the first and last of these options are increasing the potential of DBS. Large dish antennas, which are cumbersome, costly and unsightly, are being supplanted by smaller dish antennas. Currently, a small, flat, rectangular-shaped antenna is being developed which would further enhance the attractiveness of DBS. Once these developments become economically feasible, DBS will be able to spread from its stronghold in rural areas, where cable is less cost-effective, into urban areas.

40. Id.
41. Id; See Senate Hearing, supra note 23, at 57.
42. Cable Dallas, Inc., 93 F.C.C.2d 20, 53 RAD. REG. 2d (P&F) 651 (1982). The ruling allowed the SMATV operator to use microwave transmission facilities to link the apartment building clusters.
43. Senate Hearing, supra note 23, at 57.
44. Id.
45. Id. at 61.
46. G. WEBB, supra note 9, at 15-16.
47. BROADCASTING, Oct. 1, 1984, at 41-43.
48. Id. at 42-43.
49. Id.
F. Video Cassette Recorders (VCRs)

VCRs need to be mentioned here because they have the potential of enhancing whatever video medium the viewer receives. Programming available by broadcast, cable, satellite, or microwave may not be aired at a time convenient for a particular viewer. With the ability to record programming, the viewer effectively increases his or her options from the viewing source. Retail outlets also sell and rent video recordings. Thus, a VCR coupled with a subscription to a DBS, MDS, or STV service (plus whatever non-subscription broadcasting is available) provides an attractive alternative to cable.

II

The Developing Legal Status of Cable

A. Cable Television Cases

As had been the case with radio, the mere development of cable television systems did not prompt the FCC to take regulatory action. In fact, despite urging by broadcasters, the FCC declined to regulate cable in 1956.50 The FCC determined that under the Communications Act of 1934—the FCC's authorizing legislation—cable systems could not be considered common carriers.51

In the following years, however, cable systems began to "import" signals from distant broadcasters via microwave transmission facilities. These facilities were deemed subject to FCC regulation.52 This, however, was only the first step for the FCC. In 1965, it asserted jurisdiction over all microwave-fed cable systems.53 In 1966, the FCC asserted jurisdiction over all cable systems.54 The order required mandatory carriage of local signals and prohibited importation of distant signals into the top 100 markets (in the United States) absent a showing that the importation would be in the public interest.55 This proved burdensome for cable operators, and stifled growth of cable sys-

50. S. REP. NO. 67, supra note 13, at 8.
51. Id.
54. Second Report and Order in Docket Nos. 14895, 15233, and 15971, 2 F.C.C.2d 725, aff'd, Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968).
55. Id.
tems in the top 100 markets. When this new assertion of authority was challenged in court on statutory grounds, the Supreme Court upheld the FCC's need to exercise jurisdiction over cable as "reasonably ancillary" to its role of regulating and protecting broadcast television.

Regulation continued. The FCC placed more extensive requirements on cable systems in 1969. The Commission mandated that the larger systems—those with more than 3500 subscribers—produce local programming. The Commission also decreed that cable systems were subject to the equal time requirements and the fairness doctrine. Again, the FCC action withstood challenge, but this time by a divided court. In United States v. Midwest Video Corp., a four-judge plurality agreed that the FCC's actions were reasonably ancillary to the regulation of broadcasting.

Though the FCC came out with another set of regulations in 1972, the tide had already begun to turn away from more extensive regulation. The growth of cable, and its technological development, brought an increasing element of journalism into cable operations and programming. That portion of the 1972 regulations requiring cable systems in the largest 100 markets to have a 20-or-more channel capacity and to provide four access channels for public, educational, local, government and leased access use was determined by the Supreme Court to infringe on journalistic independence. The holding in that case, however, was based solely on the Communications Act of 1934. The Court declined to determine the first amendment status of cable television.

Recently, the Court had another opportunity to address this

56. S. REP. No. 67, supra note 13, at 8.
59. Id.
60. Id.
62. Id.
64. Id. at 194.
66. Id. at 700-1. 47 U.S.C. § 153(h) (1976) provides that "a person engaged in radio broadcasting shall not... be deemed a common carrier."
67. Even before the Supreme Court's decision in 1979, the FCC had begun to modify and eliminate its regulations of cable systems. See, e.g., S. REP. No. 67, supra note 13, at 9.
Operators of cable television systems in Oklahoma challenged a state law prohibiting advertisements for most alcoholic beverages. While the Federal District Court granted summary judgment on the grounds that the ban violated the first amendment, the Tenth Circuit reversed, holding that the ban was a valid restriction on commercial speech. The Supreme Court, however, directed the petitioners to address the question of possible federal preemption of state law. Specifically declining to reach the first amendment question, the Court held that the state law was preempted by the federal regulatory framework administered by the FCC.

Unlike the Supreme Court, several lower courts have addressed the first amendment status of cable television. In Home Box Office, Inc. v. FCC, the District of Columbia Circuit reviewed certain FCC rules restricting programming on cable television. After noting that “differences in the characteristics of news media justify differences in the first amendment standards applied to them,” the court determined that the rationale used for regulation “cannot be directly applied to cable television because an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent.” The court applied the test set out in United States v. O’Brien, holding that the FCC made no showing of an important or substantial governmental interest that would justify prior restraint of first amendment speech.

One year later, the Eighth Circuit, in Midwest Video Corp. v. FCC, held that the FCC exceeded its authority by requiring cable system operations to provide public access channels. In dictum, the court said that the first amendment requires a

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69. Id. at 2698; OKLA. CONST., art. XXVII, § 5; OKLA. STAT. ANN. tit. 37, § 516 (West Supp. 1982).
70. 104 S. Ct. at 2699.
71. Id.; 699 F.2d 490, 500-502 (10th Cir. 1983).
74. Id. at 2703-05.
76. Id. at 43.
77. Id. at 44-45.
79. 567 F.2d at 49-51.
80. 571 F.2d 1025 (8th Cir. 1978).
court to closely scrutinize the Commission's decisions affecting communications because

assessment of the proper balance of first amendment rights must be based on a record, not merely on argument regarding precedent or on resort to an "objectives" rubric. Government control of business operations must be most closely scrutinized when it affects communication of information and ideas, and prior restraints in those circumstances are presumptively invalid. . . . In wresting from cable operators the control of privately owned facilities for transmission of programs not acquired from public airwaves, the Commission makes no effort to show that action to have been necessary to protect a "clear public interest, threatened not doubtfully or remotely, but by clear and present danger," or to show "the gravest abuses, endangering paramount interests [which would] give occasion for permissible limitation." 81

According to the Eighth Circuit, "the Commission appears to have 'minimized the difficult problems' created by its access rules, and thus 'failed to come to grips' with the important first amendment considerations present—'the risk of an enlargement of Government control over the content of [cablecast] discussion of public issues.'" 82

A different approach was taken by the Tenth Circuit in Community Communications Co. v. City of Boulder (Boulder II). 83 That case involved an attempt by the city to restrict the cable company's operations to one area of the city, even though the franchise agreement allowed the company to operate anywhere within the city limits. 84 The district court, in its preliminary findings in Boulder I 85 (a decision based primarily on antitrust law) and Boulder II determined that competition between cable companies in Boulder was possible. 86 In Boulder II, however, the Tenth Circuit ignored these findings and upheld the city's actions. The court reasoned that cable's use of public rights-of-way, eventual physical limitations on the number of cables that could be strung on poles or laid underground and an economic tendency toward the monopolization of cable in Boulder could

81. Id. at 1053-54 (citations omitted).
82. Id.
84. Id. at 1372.
justify restricting cable systems to protect the interests of the viewing public.\textsuperscript{87} However, the Circuit Court remanded the case for factual findings.\textsuperscript{88}

One year later, in Omega Satellite Products v. City of Indianapolis,\textsuperscript{89} the Seventh Circuit made "tentative" findings that the first amendment was not violated by a city's franchising process.\textsuperscript{90} While taking an approach similar to that taken by the Tenth Circuit in Boulder II, the Seventh Circuit added an argument. The court noted that the fundamental reason for regulating broadcasting is to prevent frequency interference.\textsuperscript{91} The court viewed the use of pole space or space in underground ducts as interfering with other users of those poles or ducts.\textsuperscript{92} Although the parallel is rough at best, it does attempt to respond to the argument that without electromagnetic frequency interference, regulation of broadcasting would not be necessary or permissible (and perhaps would never have developed).\textsuperscript{93} The opinion does, however, generally rely on the same reasoning expressed in Boulder II.\textsuperscript{94}

Recently, however, the Ninth Circuit in Preferred Communications, Inc. v. City of Los Angeles\textsuperscript{95}, took issue with some of the arguments expressed in Boulder II. In this case, Preferred Communications (PC) did not participate in the city's auction process for awarding the city's cable franchise.\textsuperscript{96} The city subsequently denied PC's application for a permit to construct a cable system in the city, and the company brought suit.\textsuperscript{97}

\textsuperscript{87} 660 F.2d at 1376-80. In Crisp, the Tenth Circuit used the balancing test applied in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm., 447 U.S. 557 (1980), to determine that the important governmental interest in regulating alcohol justified the restriction on the commercial speech involved in Crisp. 699 F.2d 490, 499-502 (1983). Thus, the Tenth Circuit did not address the first amendment rights of cable television operators at that time.

\textsuperscript{88} 660 F.2d at 1380.

\textsuperscript{89} 694 F.2d 119 (7th Cir. 1982).

\textsuperscript{90} Id. at 127-29.

\textsuperscript{91} Id. at 127.

\textsuperscript{92} Id. Why this interference, if it exists, cannot be cured by providing additional pole space or ducts, rather than by restricting or extinguishing a person's right to speak, is not explained.

\textsuperscript{93} If there was no frequency interference, yet broadcast frequencies remained scarce, the marketplace would allocate these "scarce resources" and decide who would be permitted to speak (as happens with newspapers).

\textsuperscript{94} 694 F.2d at 128.

\textsuperscript{95} 754 F.2d 1396 (9th Cir. 1985).

\textsuperscript{96} Id. at 1402.

\textsuperscript{97} Id.
The trial court dismissed the suit without leave to amend. The Ninth Circuit decided to hear the constitutional issue on appeal, framing the question as whether the City could, consistent with the first amendment, limit access by means of an auction process to a given region of the City to a single cable television company, when the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system?

The Tenth Circuit argument that cable "significantly impact[s] the public domain in order to operate[,] and that] without a license, it cannot engage in cable broadcasting" was rejected by the Ninth Circuit. The latter court held that the city must prove that the elements of the O'Brien test have been met, rather than simply asserting that an impact on the public domain necessitates restricting access to the cable market. Indeed, the court indicated that the "impact" argument would not pass the test.

At least two other federal district courts, however, have followed the lead of the Tenth Circuit in Boulder II. The United States District Court for the Western District of Kentucky relied on the Tenth Circuit's reasoning in Boulder II as well as a 1972 case that found community antenna television to be a natural monopoly. The district court said that because of the asserted tendency of cable toward a natural monopoly, no first amendment concerns were raised by the denial of a franchise after a competitive bidding process. Similarly, the federal

98. Id. at 1399.
99. Id. at 1401. For purposes of the appeal, the court assumed as true plaintiff's allegations that more than one company could physically serve the city and that there is no natural monopoly in cable television in Los Angeles. Id. at 1404.
100. 660 F.2d at 1379.
101. 754 F.2d at 1405-07.
102. 1. That the government regulation furthers an important or substantial state interest; 2. The government interest is unrelated to the suppression of free expression; 3. The incidental restriction on the alleged first amendment freedoms is no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. 367, 377 (1968).
103. Preferred Communications, 754 F.2d at 1405-07.
104. Id. at 1408.
106. Id. at 547. Aside from the merits of this argument, to be discussed in Part IV infra, it remains to be explained why regulation should be applied prospectively— with the government choosing the monopolist—rather than after the public, through the marketplace, has chosen the "winner."
district court in Rhode Island held that "scarcity is scarcity—its particular source, whether 'physical' or 'economic', does not matter if its effect is to remove from all but a small group an important means of expressing ideas."\textsuperscript{107} However, in \textit{Century Federal v. City of Palo Alto},\textsuperscript{108} the United States District Court for the Northern District of California referred to these recent cases but refused to draw, without a full trial, the same conclusions reached by the other two district courts.\textsuperscript{109}

\section*{B. Related Case Law}

The differences in approach taken by these courts is not due solely to the lack of Supreme Court guidance on cable television's first amendment status. Similar uncertainty has been exhibited in decisions by the Court in cases involving broadcasting and newspapers. In \textit{Red Lion Broadcasting Co. v. FCC},\textsuperscript{110} generally considered the leading case supporting content regulation of broadcasting, the Court upheld the FCC's "fairness doctrine."\textsuperscript{111} Of greatest importance to cable television is the Court's statement that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the first amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."\textsuperscript{112}

Later cases have yielded varying results on the issue of access to broadcasting. The Court held in \textit{Columbia Broadcasting System v. Democratic National Committee}\textsuperscript{113} that a guaranteed right of access would interfere with the editorial discretion of broadcasters.\textsuperscript{114} But in \textit{Columbia Broadcasting System v. FCC},\textsuperscript{115} the Court quoted \textit{Red Lion}, holding that requiring access rights for candidates for federal office properly balanced the first amendment interests of candidates, the public, and broadcasters.\textsuperscript{116} Recently, in \textit{FCC v. League of Women Vot-

\begin{thebibliography}{116}
\setlength{\itemsep}{0pt}
\bibitem{109} \textit{Id.} at 1561-65.
\bibitem{111} \textit{Id.} at 375, 400-01. The doctrine requires that all sides of public issues "be given fair coverage." \textit{Id.} at 369.
\bibitem{112} \textit{Id.} at 390.
\bibitem{113} 412 U.S. 94 (1973).
\bibitem{114} \textit{Id.} at 124-126.
\bibitem{115} 453 U.S. 367 (1981).
\bibitem{116} \textit{Id.} at 395, 397.
\end{thebibliography}
At issue in *League of Women Voters* was the constitutionality of part of Section 399 of the Public Broadcasting Act of 1967. The part in controversy provided that “[n]o noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting under subpart C of this part may engage in editorializing.”

The Court began by reiterating that spectrum scarcity requires a different first amendment standard for broadcasting than for newspapers, and imposes on the broadcaster a duty to present “those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.” The Court said that broadcast regulations do not need to serve a compelling governmental interest. Drawing from *Red Lion*, the Court said that restrictions on a broadcaster’s freedom of speech need only be “narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues.”

The test is met by critically examining the interests on each side: in other words, a type of balancing. Referring to the right of access granted to federal candidates in *Columbia Broadcasting System v. FCC*, the Court stated that it constitutes “a significant contribution to freedom of expression” without impairing the “discretion of broadcasters to present their views on any issue or to carry any particular type of programming.”

However, a guaranteed right to buy broadcast time for political advertisements (demanded by plaintiffs in *Democratic National Committee*) “would intrude unnecessarily” upon editorial discretion.

In *League of Women Voters*, the Court held that section 399 was not sufficiently tailored to further what the government

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119. Id.
120. — U.S. at —, 104 S. Ct. at 3116 (quoting *Red Lion*, 395 U.S. 367, 389 (1969)).
121. — U.S. at —, 104 S. Ct. at 3118.
122. Id.
124. — U.S. at —, 104 S. Ct. at 3117.
asserted as a substantial interest, nor did the section substantially advance the asserted interest.\textsuperscript{126}

It is worth noting that the Court acknowledged that the spectrum scarcity rationale for regulation of broadcasting may have been rendered obsolete by the advent of cable and satellite technology.\textsuperscript{127} However, the Court refused to consider the argument that technological developments have advanced so far that some revision of broadcast regulation is required.\textsuperscript{128} It expressly declined to examine whether competition from cable and satellite have ameliorated the impact of allocating a very limited number of broadcast frequencies in any given locality on the diversity of viewpoints available via the television set.

In contrast to the cases involving broadcasters, the Supreme Court took an unequivocal and unanimous stance against access requirements imposed on newspapers. In \textit{Miami Herald Publishing Co. v. Tornillo},\textsuperscript{129} the Court examined the constitutionality of a Florida statute requiring any newspaper that printed an editorial attack on a political candidate's character or record to provide that candidate with an opportunity to reply at no charge. Tornillo argued that the statute did not restrict freedom of speech because the newspaper could say anything it wished.\textsuperscript{130} The Court rejected this argument, stating that "compelling editors or publishers to publish that which 'reason' tells them should not be published is what is at issue in this case."\textsuperscript{131}

The Court then specified three separate ways in which the statute violated the first amendment. First, the right of reply created an economic burden triggered by the newspaper's content.\textsuperscript{132} Second, this content-based penalty could chill editorial discretion.\textsuperscript{133} Third, 

\begin{itemize}
  \item [e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the first amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for
\end{itemize}

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\begin{itemize}
  \item [125.] \textsc{— U.S. at} \textemdash, 104 S. Ct. at 3122-26.
  \item [126.] \textsc{— U.S. at} \textemdash, 104 S. Ct. at 3116, n. 11.
  \item [127.] \textsc{Id.}
  \item [128.] 418 U.S. 241 (1974).
  \item [129.] \textsc{Id. at} 256.
  \item [130.] \textsc{Id.}
  \item [131.] \textsc{Id. at} 256-57.
  \item [132.] \textsc{Id. at} 257.
\end{itemize}
\end{footnotesize}
news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.\textsuperscript{133}

This third argument is particularly important when examining the constitutionality of legally mandated access channels on cable television.

C. Reconciling Cable and Related Cases

Most of the earlier cases on cable television consider whether cable television should be analogized more closely to newspapers or to broadcasting. Not only is it difficult to place cable on a continuum between the print and broadcast media, but the first amendment position of broadcasters seems to be in a state of flux. More importantly, the technology of cable (and the competing media) continues to change. Thus, it has been difficult for lower courts to rule on cable’s prerogatives under the first amendment. When the issue of cable’s status under the first amendment eventually reaches the Supreme Court, the Justices will have to balance the competing first amendment interests in light of the continually changing technology of cable and competing media.

There are several first amendment interests involved in the regulation of cable television. Clearly, the owner of a cable television system has a first amendment interest in expressing his or her views over the cable system, much as does the publisher or producer in any other medium. Of particular importance, then, is the owner’s editorial discretion in what to offer, when, and on which channels.

Viewers have a first amendment interest in receiving programming that has not been censored, abridged, or otherwise inhibited by government influence. Further, it has been argued that viewers have a first amendment interest in hearing a diversity of speakers (and, hopefully, a diversity of viewpoints) over any particular medium. Likewise, it is argued that those who wish to speak have a first amendment interest in being given access to the channels of mass communication.\textsuperscript{134} This can be interpreted to mean that government has an affirmative

\textsuperscript{133} Id. at 258.

\textsuperscript{134} See, e.g., Barron, Access to the Press—A New First Amendment Right, 80 HARV. L. REV. 1641 (1967).
duty to protect diversity in the media through such regulations as access requirements.\textsuperscript{135} How, then, does such an interest arise? Since the first amendment simply decrees that "Congress shall make no law ... abridging the freedom of speech, or of the press,"\textsuperscript{136} the duty, or even power, of government to act to promote diversity must stem from some action that the government has the power to take. Governmental regulation is a practical prerequisite to speech through broadcasting. Without some allocation of frequencies, signals would overlap and clear signal reception would not be possible. Once government has interfered with the market in an attempt to solve the problem of physical scarcity of broadcast frequencies, the market forces that govern the other media are no longer operative; the public cannot automatically pay for and receive a diversity of viewpoints or speakers. To correct this situation, government is allowed some power to regulate in order to promote diversity.\textsuperscript{137}

In the context of cable television, a more fundamental question must be asked—is the physical scarcity argument even applicable? Under existing technology, clearly not.\textsuperscript{138} Of course, there are physical limitations to any resource; but as long as the economics are such that the supply will in practice never be exhausted, physical scarcity does not exist. If broadcasting were a natural economic monopoly, there would only be one broadcaster in any given area and therefore no problem with physical scarcity.\textsuperscript{139} Currently, there are no physical barriers to the construction of as many cable systems as an area is able to support. Although technology or demand could change this, regulation before the problem has been proven to exist is improper. If physical scarcity is the basis for government regulation of a medium, regulation when there is no proven scarcity violates the first amendment.

If cable is a natural monopoly rather than a monopoly created by municipal regulation, would regulations such as access requirements, exclusive franchises, and franchise fees be legiti-

\textsuperscript{135} Id.
\textsuperscript{136} U.S. CONST. amend. I.
\textsuperscript{138} See Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1038 (D. Colo. 1980) for a discussion of physical scarcity.
\textsuperscript{139} This is not quite precise, since there could still be overlapping signals on the periphery of signal-reception areas. However, only a small number of frequencies would be required to eliminate this problem.
mate exercises of governmental power? In other words, does economic scarcity vest in the government the power to promote diversity? The opinion in *Miami Herald* indicates that it does not.\(^\text{140}\)

Relying on *Red Lion*, the Tenth Circuit viewed "natural monopoly [as] a constitutionally permissible justification for some degree" of cable television regulation.\(^\text{141}\) That court distinguished *Miami Herald* as involving "newspapers, a communication medium protected by a long-standing and powerful tradition of keeping government's hands off as the best way to achieve" open discussion on public issues.\(^\text{142}\) The fallacy of the court's argument has been ably noted by other commentators.\(^\text{143}\) The Ninth Circuit in *Preferred Communications* said the "distinction merely begs the question."\(^\text{144}\) If freedom of speech over a medium depends on tradition, then with continually developing technology we might see a future with little or no freedom of speech or press. The Supreme Court indicated recently in *Members of the City Council v. Taxpayers for Vincent*\(^\text{145}\) that there is no traditional right to use utility poles for communication.\(^\text{146}\) Perhaps the court in *Boulder II* had this notion in mind.

The court in *Preferred Communications*, however, explained that "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."\(^\text{147}\) While the posting of campaign bills and advertisements on utility poles did not meet this test in *Vincent*,\(^\text{148}\) the Ninth Circuit distinguished *Vincent* by holding that stringing cable is compatible with the normal use of utility poles.\(^\text{149}\) Moreover, the court said that because the poles are regularly made available to some cable operators, this

\(^{140}\) 418 U.S. at 249-58.

\(^{141}\) *Boulder II*, 660 F.2d at 1379. The Seventh Circuit seems to be in agreement. See Omega Satellite Prods. v. City of Indianapolis, *supra* note 89 at 128.

\(^{142}\) 660 F.2d at 1379.


\(^{144}\) 754 F.2d at 1405 n.8.


\(^{146}\) *Id.* at 2134.

\(^{147}\) 754 F.2d at 1407 (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).


\(^{149}\) 754 F.2d at 1408.
makes the poles a public forum for cable. Therefore, “the City must content itself with uniformly applying to all applicants regulations tailored to minimize the burden on public resources and to grant franchises to all cable operators who are willing to satisfy the City's legitimate conditions.”

In sum, the bases suggested for giving cable television a lesser status than newspapers under the first amendment are invalid. Physical scarcity is not currently a problem for cable, and possibly never will be. Cable is no more a common carrier for transmitting programming produced by others than are newspapers common carriers for publishing syndicated columns. Further, economic scarcity is not a permissible basis for regulating a medium of mass communication. Cable is an expansive medium, not a scarce one. Thus, the appropriate tests to be applied to regulations affecting cable are the traditional ones. If the regulation is not content-related, it must be narrowly tailored to further a substantial governmental interest. If the regulation is content-related, then it must be necessary to protect a compelling governmental interest.

After a review of the CCPA, Part IV of this article will examine the interests that are involved in cable television, and analyze the factors that must be considered in order to fashion an appropriate test for regulations affecting cable television owners' freedom of expression.

III

Legislative History

The CCPA is the culmination of several attempts by Congress to enact cable legislation. Senator Goldwater introduced legislation pertaining to cable in 1979, 1980, 1981, and 1982. Hearings were held only on the last of these. Apparently because of lack of time, however, the bill was not debated by the full Senate prior to adjournment of the 97th Congress.

Goldwater introduced substantially the same bill as S.66 in

150. Id. at 1409. The court also explained that “an otherwise invalid restriction on protected activity is not saved by the availability of other means of expression,” and the City may not point to the existence of access channels to legitimize its restrictions on the cable market. Id. at 1410.
154. Id. at 13.
January, 1983.\textsuperscript{155} This bill provided a regulatory scheme for cable television at the federal, state, and local levels. Among the major provisions of the bill were:

a) a ban of prohibitions on cross-ownership between cable television systems and other media;\textsuperscript{156}

b) requirements that channels be dedicated by the operators for public, educational, and governmental use;\textsuperscript{157}

c) regulation by the franchising authority of the rates charged by the cable operator for basic cable services;\textsuperscript{158}

d) limits on franchise fees, to be determined by the FCC;\textsuperscript{159}

e) standards for renewal of franchises;\textsuperscript{160}

f) a prohibition against a state or local government or governmental agency acquiring an interest in a cable television system at less than fair market value;\textsuperscript{161} and

g) provisions to protect subscriber privacy.\textsuperscript{162}

Hearings were held,\textsuperscript{163} but the ensuing changes in the bill were more the result of negotiations between the two major interest groups than of the hearings. The first of these interest groups, the National Cable Television Association (NCTA), is an industry association and the major lobbying body for cable television operators.\textsuperscript{164} The other group, the National League of Cities (NLC), is an association of municipal corporations. These two organizations held a series of meetings at which they reached agreement as to what the bill should contain.\textsuperscript{165} The legislation was rewritten accordingly, and in March, 1983, Senator Goldwater offered the revised version as an amendment in the nature of a substitute.\textsuperscript{166}

This was the first of many agreements to break down. On April 1, the National League of Cities withdrew its support of the bill.\textsuperscript{167} After another series of meetings and negotiations,
the NCTA agreed to virtually all of the changes requested by the NLC.\textsuperscript{168} These changes were incorporated into S.66, which passed the full Senate on June 14, 1983.\textsuperscript{169}

The legislation at this point differed from the bill originally introduced in the following important ways:

a) access channels could be required by the franchising authority as part of the request for proposals;\textsuperscript{170}

b) provisions were added allowing the operator to increase rates charged for basic services according to a specific formula;\textsuperscript{171}

c) a ceiling of five percent of a cable operator's gross revenues on franchise fees was included;\textsuperscript{172}

d) a presumption was created in favor of the renewal of franchises;\textsuperscript{173}

e) no new cable system could provide cable service without a franchise;\textsuperscript{174} and

f) no governmental authority would be permitted to regulate a cable television operator as a common carrier to the extent that the system provided more than telephone service.\textsuperscript{175}

H.R. 4103, a version of S.66, was introduced in the House of Representatives and passed the Telecommunications Subcommittee of the Energy and Commerce Committee in November, 1983, before running into similar problems.\textsuperscript{176} Another interest group, the United States Conference of Mayors, had opposed the bill, and the NLC decided to withdraw its support.\textsuperscript{177} At the urging of Energy and Commerce Committee Chairman John Dingell, another long bargaining session began until a compromise was reached in late May, 1984.\textsuperscript{178} Under the new agreement, there would be no presumption of renewal and the definition of basic cable service, for which the rates could be regulated, was broadened.\textsuperscript{179} On the other hand, those rates

\begin{flushleft}
\textsuperscript{168} Id. at 14.
\textsuperscript{170} Id. at § 606; see also id. at S8328 § 613.
\textsuperscript{171} Id. S8326-8327 at § 607(b)(1).
\textsuperscript{172} Id. at S8327, § 608(b)(1).
\textsuperscript{173} Id. at S8327, § 609(a).
\textsuperscript{174} Id. at S8325, § 604(3).
\textsuperscript{175} Id. at S8328, § 614.
\textsuperscript{176} BROADCASTING, June 4, 1984, at 39.
\textsuperscript{177} Id. at 41.
\textsuperscript{178} Id. at 39.
\textsuperscript{179} Id. at 40.
\end{flushleft}
could only be regulated for four years. The consensus among these parties broke down once again. In June, 1984, the Supreme Court held that FCC regulations governing cable signal carriage preempted an Oklahoma statute prohibiting cable operators from retransmitting out-of-state signals containing alcoholic beverage commercials. The NCTA interpreted this as reaffirming an FCC decision supporting deregulation of cable rates, and reasoned that it might be as well off if the bill did not pass. After holding out all summer, and with the end of the 98th Congress rapidly approaching, the cities agreed to begin new negotiations. The agreement that resulted was slightly more favorable to cable operators, but involved no changes likely to affect the bill's constitutionality. This series of negotiations reveals an industry lobby that has continually shown little regard for the importance of freedom of the press. To be fair, some cable operators consistently opposed the bill. The majority of the industry, however, supported the legislation, probably hoping that it would protect the government-created monopolies under which most cable systems operate.

Perhaps if more interest groups were actively involved and represented, the resulting legislation would have reflected long-term social goals instead of short-term economies for cities and cable operators. As Monroe Price, Dean of Cardozo Law School, remarked at a seminar on the bill, "[t]he present situation is a remarkable delegation to private parties with Congress saying to the cities and cable industry, 'sit down and decide what you want, and we will pass it.'"

IV
Analysis of the CCPA

Now that Congress, and not merely the FCC or the states, has established a framework for cable television regulation, challenges to that framework must be made on constitutional
grounds. There is always a danger in interpreting the Constitution, however, for the changes that are made have long-run and profound effects. This is particularly true in the area of the first amendment, because the amendment serves to protect the essence of democracy—freedom of political expression. In determining the first amendment status of a major medium such as cable, we must proceed with great caution. Thus far, the Supreme Court has demonstrated its caution by avoiding the issue entirely.

A. Access Requirements

The CCPA provisions requiring a cable operator to make channels available for commercial (or leased) use by others and allowing the forced donation of channel time for public, educational, and governmental access as a condition to receiving a franchise are apparently based on the rationale that cable operates as a monopoly. Indeed, the House committee report characterizes cable as a "bottleneck" facility, arguing that "structural regulation," such as that governing broadcasting and common carriers, may be applied to cable.

The report attempts to distinguish Miami Herald as a case involving the chilling of editorial discretion; because cable access channels are mere conduits, such access requirements do not deprive cable operators of their free speech rights. The report's reasoning is circular. Removing channels from the control of cable system operators necessarily places a burden on the operator as a condition to exercising his right to speak. The Miami Herald decision expressly forbids this result. It is only because of the access requirements that the operators are conduits with respect to those channels. The report's reliance on Pittsburgh Press Co. v. Human Relations Commission, to support structural regulation of media is misplaced. It overlooks the Court's express limitation of the ruling to instances in which the newspaper had chosen to act as a conduit. The Court indicated that its decision did not authorize "any restriction whatever, whether of content or layout, on sto-

188. Id. at 33. This label is neither explained nor supported.
189. Id. at 32-36.
190. Id. at 34-35.
191. 418 U.S. at 259. See supra text accompanying notes 128-33.
193. Id. at 391.
ries or commentary originated by Pittsburgh Press, its columnists, or its contributors.\textsuperscript{194}

Nevertheless, the Committee's concern that economic scarcity in cable can lead to a lack of diversity of viewpoints over the medium and a reduction in the number of local outlets for expression merits a discussion of whether such a concern provides a sound basis for access channel requirements. Perhaps if a complete domination of the "marketplace of ideas" could be demonstrated, regulation to foster access and diversity of speakers and viewpoints would be permissible.

First, it would be necessary to establish that cable television is a natural monopoly. One way to accomplish this would be to consider the average total costs (ATC) of a cable system. If the ATC curve is declining, then a larger plant size is favorable and one operator will become the monopolist.\textsuperscript{195} A recent study indicates that the ATC for cable systems does in fact decrease with the size of the cable system.\textsuperscript{196}

Second, it would be necessary to demonstrate that entry into the market is very expensive and that once a cable operator becomes established, it is essentially impossible to replace him, even by market choice. Otherwise, one could argue, as did the Supreme Court in \textit{Miami Herald}, that the monopolist's position is the result of a free market choice by the public (assuming no government involvement in the selection of the cable operator).\textsuperscript{197}

Third, it would be necessary to show that cable television already is, and is likely to remain, the dominant medium of mass communication in the given locality. If a medium has a small audience, it is difficult to argue that even complete monopolization of \textit{that medium} by a private interest is grounds for regulation. Viewers would still have abundant opportunities to get information, ideas or entertainment from other media; thus, there would be no need to regulate to "protect" the marketplace of ideas. While cable penetration does exceed seventy percent in some cities, one would still need to examine the

\textsuperscript{194} \textit{Id.} The Court in that case upheld a bar against employment advertising specifying "male" or "female" preference.

\textsuperscript{195} G. \textsc{Webb}, supra note 9, at 41-42.

\textsuperscript{196} \textit{Id.} at 41-65. This conclusion is based on a model that might not be sufficiently accurate in all localities. Add to this the possibility of a changing cost structure due to changing technology, and a case-by-case approach to determination of costs seems most appropriate.

\textsuperscript{197} 416 U.S. at 248-49.
availability of, and potential developments in, other media, such as newspapers, magazines and the many competing electronic media.

Fourth, it would be necessary to establish that the existing cable system did not provide access to users on a nondiscriminatory basis. If the operator does provide such access, government involvement would be unnecessary, and therefore, impermissible.198

In sum, to demonstrate a complete domination of the marketplace of ideas, it would have to be shown that the status quo is so adverse to open discussion of diverse opinions that there is essentially no effective forum for public expression. In other words, a market "failure" far more severe than that contemplated in Miami Herald could give rise to a substantial, if not compelling, governmental interest in protecting freedom of expression. Only if such a complete failure existed, however, would courts have to undertake the extremely difficult task of balancing the competing first amendment interests.

The cable operator's first amendment interests are clearly abridged by any law requiring the operator to provide free or leased access channels. Free access channels require the operator to subsidize someone else's speech as a condition of exercising his own.199 Leased access channels remove the operator's editorial discretion over those channels.200 In order to balance the interests involved, however, we need to ask how much the operator's rights are being abridged. How great is the financial burden on the operator? If free access channels constitute an economic loss to the cable operator, is the owner's ability to speak reduced in terms of quantity, quality, or both? How great a loss of editorial discretion does the operator suffer by not being permitted to program on the access channels? But should these concerns matter? Whether the channel time is donated or leased, the operator is being compelled to do something that runs counter to the central foundation underlying freedom of the press: he is required to promote someone else's views. In an attempt to compensate for this, the operator may

198. See supra text accompanying notes 115-29.
199. Midwest Video Corp. v. FCC, 571 F.2d 1025, 1055-56 (8th Cir. 1978).
200. Id. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-58 (1974). This is also true for free access channels, although to make matters worse, the operator is generally required to censor the content of the material on the public access channels. See 47 C.F.R. § 76.215 (1984).
feel compelled to change other programming on the cable system. This only results in a further loss of editorial discretion.

Both cable system operators and the general public have an interest in protecting editorial discretion. In addition, under the severe economic scarcity scenario, it can be argued that the public also has an interest in hearing a diversity of speakers over the cable system, and that this interest must be balanced against the interest in editorial discretion. Moreover, if those who wish to speak are unable to do so because cable is the only effective forum, then their rights should also be balanced against those of the cable operator. The weight accorded the interests in diversity and access will vary with the degree of economic scarcity: the more severe the scarcity, the stronger the argument in favor of access requirements.

Thus, it is difficult to use economic scarcity, or natural monopoly, as a basis for the regulation of cable television. In weighing competing interests, quantitative measurements of "value" or "importance" are difficult, if not impossible, to make. Qualitative assessments are also susceptible to serious error. Moreover, this type of approach is unnecessary. As will be explained later in this article, current laws other than the CCPA are adequate to handle the problems envisioned by would-be regulators.

An examination of the provisions of the CCPA raises additional questions about the Act's constitutionality. Section 611 allows a franchising authority to require the franchisee to provide "channel capacity for public, educational, or governmental [(PEG)] use." The franchising authority may also require the cable operator to provide an "institutional network," separate from the cable operator's revenue-producing network, for educational and governmental use. These requirements run awry of the first amendment by eliminating the editorial discretion of the cable operator over the PEG access channels. These provisions are also inconsistent with the first amendment because they require the operator to subsidize the speech

201. In San Francisco, Viacom Cablevision has felt it necessary to arrange for programming to counter the "Race and Reason" series produced by the White American Resistance and shown on Viacom's public access channel. N. Cal. Jewish Bulletin, Nov. 9, 1984, at 1, 12.
203. Id. at § 611(f).
204. See supra text accompanying notes 113-15.
of others as a condition to the operator exercising his or her own right to speak.\textsuperscript{205}

Section 612 of the Act requires cable operators to designate a prescribed number of channels (depending on the number of channels available on the cable system) for leased, commercial use.\textsuperscript{206} Here again, the editorial discretion of the operator is abridged.\textsuperscript{207} Moreover, the operator is expected to police these leased channels to prevent the broadcast of any cable service which, "in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States."\textsuperscript{208} Thus, the cable operator is supposed to act as censor for the franchising authority.\textsuperscript{209} This has already proven to put operators in a difficult position.\textsuperscript{210} Not only does this violate the rights of the operator, but the rights of the viewer, as well. That "indecent" speech may be subjected to regulation over broadcast media does not mean the same speech may be regulated on cable television.\textsuperscript{211} For these reasons, section 612 is also unconstitutional.

B. Requirement of a Franchise

Perhaps the most egregious violation of the first amendment found in the Act is the requirement that "a cable operator may not provide cable service without a franchise."\textsuperscript{212} This allows a municipality or other franchising authority to exclude those who would be otherwise willing to operate and compete in the given community. No standards or criteria are given for the denial of a franchise. Presumably, a city could decide not to grant a franchise to a cable operator on the basis of the size of

\textsuperscript{205} Id.


\textsuperscript{207} Since the mandated number of commercial access channels varies with the size of the cable system, the restraint on editorial discretion falls into the category of restraints held unconstitutional in Grosjean v. American Press Co., 197 U.S. 233 (1936) (state tax on advertising revenues applying only to newspapers over a certain size held unconstitutional).

\textsuperscript{208} Pub. L. No. 98-549, at § 612(h), U.S. CODE CONG. & AD. NEWS (98 Stat.) 2779.

\textsuperscript{209} Section 624(d) of the Act allows the franchise agreement to specify that obscene or otherwise unprotected speech shall not be provided.

\textsuperscript{210} See supra note 180.

\textsuperscript{211} Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); see also Lee, supra note 143, at 902-05.

the proposed system, the number of channels offered, the proposed rates, the number of access channels offered, or even the programming to be offered. The Act does prohibit "requirements regarding the provision or content of cable services, except as expressly provided in this title." That, however, is not the same as prohibiting discrimination between potential franchisees on the basis of program offerings. Franchising is a subjective process. The decision of the franchising authority may well be swayed by the appeal of the proposed programming to the decision-makers.

The requirement has serious first amendment implications. First, the cable operator who fails to convince the franchising authority that a franchise should be granted to him or her (or, more realistically under current practice, that the operator is the "best" applicant for a franchise) is prevented from speaking in that community. This is a denial of the operator's rights and a denial of the public's right to choose to whom they may listen. Second, any discrimination between cable operators who meet all technical and safety standards might influence the content of the speech provided by the franchise winner. How else may a cable operator legally succeed in obtaining a franchise but by offering what the franchising authority feels is the most desirable proposal? Editorial discretion is sacrificed by the cable operator, and the public has lost an opportunity to view an uninhibited medium of expression. Finally, as a result of the franchising process, the franchising authority may choose a more expensive system than the community is willing to pay for and deny franchises for systems that are more appropriate.

These perils to first amendment freedoms may arise either when the franchising authority indicates in some manner what it prefers, or when the cable operator tailors its proposal to what it perceives as desired. In either case, free expression is abridged, and the failure is the result of an Act which purports to legitimize this system of franchising. Nor can the system be remedied as long as the franchising authority is permitted to

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213. Id. at § 624(f)(1).
214. The specter of extortion and bribery also arises; witness the grand jury indictment of two members of the St. Louis Board of Aldermen on charges of extorting stock and money from two cable television companies bidding for the city's franchise. Los Angeles Daily Journal, Nov. 16, 1984, at 3. See Martin v. City of Struthers, 319 U.S. 141, 143-44 (1943).
predetermine the number of applicants it will franchise. The renewal provisions of the Act illustrate this. They reflect a successful attempt by the NCTA to inject certain criteria into the renewal process. While one criterion pertaining to the quality of the operator's service is to be applied "without regard to the mix, quality, or level of cable services or other services provided over the system," another criterion considers whether "the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the costs of meeting such needs and interests." This criterion cannot be applied consistently with the first amendment. Is freedom of the press conditioned upon meeting "community needs and interests"? That was the position of the House Energy and Commerce Committee. In its report, the Committee stated that "the operator's responsibility is to provide those facilities and services which can be shown to be in the interests of the community to receive in view of the costs thereof." This process of selecting the "best" applicant, however, was labeled "clearly invalid" by the Ninth Circuit in Preferred Communications. The court also disagreed with the House Committee's assertion that the Act gave the franchising authority discretion to determine the number of cable operators allowed to provide service in a particular area.

Is it even possible for a governmental body to dictate what the community's needs and interests in mass media are? Is it not the purpose of the first amendment to prohibit exactly that process? Unless the standards for review of franchise applications and renewals are limited to safety and technical standards, and all who meet the standards are allowed to enter the market, the franchising process will remain constitutionally impermissible.

C. Franchise Fees

Section 622 of the Act authorizes a franchising authority to charge a fee in the amount of five percent of the cable opera-

217. See supra Part III.
219. Id. at § 626(c)(1)(D).
220. H. REP. NO. 934, supra note 1, at 74.
221. 754 F.2d at 1409.
222. Id. at 1410.
actor's gross revenues derived from the operation of the particular cable system. This is presumably to offset the costs to the community in regulating cable. This provision of the Act is also constitutionally invalid. In Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, the Supreme Court reviewed a tax which effectively singled out the press for special treatment. The Court held the tax to be unconstitutional, saying "[d]ifferential taxation of the press ... places such a burden on the interests protected by the First Amendment that we cannot countenance such a treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." Minnesota asserted an interest in raising revenue. The Court said this interest, standing alone, could not justify special treatment of the press.

This holding was recently applied by the California Court of Appeal to a case involving a three percent tax on the subscription fees of a MDS system. In that case, the City of Alameda imposed the tax on Premier Communications for the purpose of raising revenue. The court noted that "[t]here is no doubt that Premier, as a disseminator of motion pictures, news and other information and entertainment programming, engages in conduct protected by the First Amendment guaranties of freedom of speech and press." Then, after discussing Minneapolis Star, the court found that revenue-raising purposes could not justify the "differentially more burdensome" tax (compared to other businesses) applied to Premier.

Short of even suggesting a revenue-raising motive for franchise fees, the CCPA fails to establish any compelling governmental interest in applying a five-percent tax or fee on

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224. S. REP. NO. 67, supra note 13, at 25. Note, however, that the costs of regulating the operations of a cable system would likely be based on impermissible regulatory activities: monitoring the performance of the franchise under the franchise agreement, the use of the access channels, the renewal process (where there is no renewal fee) and the regulation of rates (for the next two years).
226. 565 U.S. at 585.
227. Id. at 586.
229. Id. at 152-53, 202 Cal. Rptr. at 686.
230. Id. at 155, 202 Cal. Rptr. at 686.
231. Id. at 155-57, 202 Cal. Rptr. at 687-689.
cable television. Such a fee is significantly higher than what is usually charged to users of public right-of-ways. Moreover, the House Report specifically notes that "any tax of general applicability" or any tax that does "not unduly discriminate against the cable operator so as to effectively constitute a tax directed at the cable system" is not included within the five-percent fee ceiling. The costs of the franchising process are typically included in the application fee. How then does the franchise fee relate to legitimate costs incurred by the city on account of the cable television system? Under Minneapolis Star, the franchising authority has to prove its costs, thereby establishing the compelling governmental interest to be protected by the fee. With regard to the CCPA, it appears that the fees established by the Act are primarily profit for the cities, and as such, they violate the first amendment.

V

Conclusion

It is understandable that local governments and cable industry representatives should want to codify common practices. Under the CCPA, franchising authorities are able to control the local market for cable television, thereby gaining considerable influence over the structure of the cable system and the content of the cable programming. Local government also profits by collecting five percent of the gross revenue from the operation of the cable system. In exchange, the cable operator is effectively protected from competition. The operator desires this because competition between cable systems in the same area decreases the prices the operator can charge in a monopoly situation, thereby reducing the revenues generated by any one cable system. This in turn decreases the amount a cable system operator can concede (in terms of system structure, free channels, institutional networks and franchise fees)

233. H. REP. NO. 934, supra note 1, at 64.
234. See, e.g., Baer, supra note 9, at 84 (using Louisville ordinance establishing a request for proposals).
235. 565 U.S. 575, 585.
236. Baer, supra note 9, at 132 ("many cities view cable television as merely another source of revenue").
237. See supra text accompanying notes 191-99.
238. See supra text accompanying notes 200-01.
to the local government when bidding to obtain a franchise. Therefore, in the short-run, cable system operators favor the new legislation.

In the long-run, however, competition from other electronic media, such as a combination of DBS and SMATV systems, may cause cable operators to regret their burdened position. The protection offered by municipalities will not be worth the concessions made by the operators if the cable systems have to compete on a large scale with, one would hope, less regulated alternative electronic media.

Regardless of the impact on operating cable systems, the big losers under the CCPA are the public and the cable system operators who are excluded from the market. Those who wish to speak are prohibited by government (rather than by economic or physical limitations) from speaking over a particular medium, and this is clearly an infringement of freedom of speech and of the press.

Also of paramount importance is the principle that the public should not have its sources of information selected by the government. The system of exclusively government-sponsored speakers selected by municipal governments is a malignancy that could spread to other media. If the Supreme Court upholds the Tenth Circuit’s “tradition”-oriented rationale for regulating a medium, the tumor of government control is certain to spread.

Monopoly due to non-economic forces, however, is still a potential concern. If cable somehow came to dominate a local media market, would there be a viable mechanism for promoting diversity of viewpoints? There are two effective and practical solutions.

The first is to use the antitrust laws as they have been applied to the press. The antitrust laws can serve as a practical tool for maintaining diversity and preventing monopolization where monopolization is not the result of natural economic forces. This was the approach taken by the district court in Boulder I and Boulder II and embraced by the Seventh

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239. See supra text accompanying notes 122-27.
Circuit in *Omega Satellite Products*.\(^{243}\) Once competitive bidding as a means of selecting those to be licensed to speak is recognized as violative of the first amendment, the antitrust laws become more effective in promoting competition (at least in allowing the public to choose to whom to listen). Additionally, the antitrust laws are a more appropriate solution than the uniform scheme presented by the CCPA because antitrust law can be applied on a case-by-case basis. Competition for the market is always possible, even if the result is a monopoly. Where continued competition within the market is possible, the CCPA scheme is unnecessary. Instead, if anticompetitive practices are engaged in, the antitrust laws step in to promote both competition and diversity.

Where cable is found to embody a natural monopoly, there remains a far more effective and less intrusive means to accomplish diversity than that presented in the statute: municipally-financed cable systems. If the people, through their elected representatives, wish to assure diversity of speakers over cable television, it is absolutely unnecessary to force an existing or potential operator to donate or sell a portion of its channel space. The municipality itself can construct a small, low-cost cable system and provide channel time on the same terms the CCPA has private operators do. This would avoid intrusion into the operator’s editorial discretion and does not tax the operator for exercising his right to speak. It also avoids the problem of asking the operator to censor obscene, indecent or commercial speech from the public access channels. In fact, the municipalities themselves should leave enforcement of such rules to the courts.

Another advantage of the municipally financed system is that it can be extended to those areas of the municipality that are not served by the existing cable systems. If the local government is truly interested in promoting diversity of viewpoints for the benefit of the community, that benefit should be offered to the entire community and not just to selected areas. In addition, the municipal system could be partially financed by charging those who use channel time.

Nevertheless, as long as municipalities are not required to pay for something because they are allowed to receive it at someone else’s expense, there will be little incentive for them

\(^{243}\) 694 F.2d 119 (7th Cir. 1982).
to spend the money to build even a simple cable system. Moreover, there is no need at present to ensure diversity, nor has it been demonstrated that there will ever be such a need. The electronic media which compete with cable are continuing to develop. Cable television itself has changed enormously in character and function over the past fifteen years. Given these developments, the Supreme Court has chosen perhaps the wisest policy of all by refraining from establishing a rule on the first amendment status of cable television. However, the issue becomes more difficult to avoid once constitutionally questionable practices are condoned by statute. As long as the CCPA remains the law, the public will unnecessarily countenance a regulated and encumbered medium. The individual members of the public, via the market, should decide what services to receive, how much to pay for those services and to whom to listen. That approach will best promote, as it has in the past, the goals of freedom of speech and of the press.