UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 68 | Number 6 Article 18

9-1-1990

Municipal Ownership of Cable Television Systems: Madison Cablevision, Inc. v. City of Morganton

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The cable television industry experienced tremendous change in the 1980s as the number of cable systems in the country doubled[1] and the industry assumed a major role in mass media.[2] The nation's courts took notice of cable television's new functions in society, acknowledging distinctions between cable and local broadcast television[3] and adopting a heightened level of constitutional scrutiny regarding cable regulations.[4] One circumstance that has not changed, however, is the cable industry's dependence upon the public rights of way and the local governments that control them. The local cable operator's dependence on city or county government for the right to provide cable service has been a fertile source of litigation over the past decade,[5] as many local authorities faced for the first time the question whether to renew the contracts that brought cable television to their respective areas.[6]

The North Carolina Supreme Court in *Madison Cablevision Inc. v. City of Morganton*[7] saw such a franchise renewal situation take a strange turn. The City of Morganton denied the franchise applications of three private cable operators, including the current provider, and decided to establish a municipally operated system.[8] Though the event was without precedent in North Carolina, state statutes explicitly empower municipalities[9] and counties[10] to own and op-

1. There were 4,048 cable systems in the United States in 1979. Zupan, *The Efficacy of Franchise Bidding Schemes in the Case of Cable Televison: Some Systematic Evidence*, 32 J.L. & ECON. 401, 425 & n.89 (1989). By 1986 that number had risen to 7,051. *Id.* In 1989 there were nearly 8,000 U.S. cable systems. Comment, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response*, 38 DE PAUL L. REV. 1051, 1056 (1989).

2. Cable television is now a twelve billion dollar per year industry. Comment, *supra* note 1, at 1056. It serves forty-five million subscribers. Zupan, *supra* note 1, at 421. A recent survey of cable users found that roughly half had been subscribers for less than three years. R. BOWER, THE CHANGING TELEVISION AUDIENCE IN AMERICA 61 (1985). The survey revealed that more than half of respondents gave as their main reason for subscribing a desire for more variety. *Id.*

3. *See infra*, notes 93-104 and accompanying text.

4. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1444 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

> In recent years the lower federal courts have subjected FCC regulation of cable television to a far more rigorous constitutional analysis [than regulation of local broadcast television]. It is now clearly established, for example, that cable operators engage in conduct protected by the First Amendment. Most of these courts, mindful of the Supreme Court's repeated admonitions to be sensitive to the unique features of each medium of expression, have cautioned against reflexive invocation of more forgiving first amendment standards applicable to broadcast regulations.

Id. (citations omitted).

5. Congress codified a set of procedural guidelines in an attempt to alleviate the problem. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1984 U.S. CODE CONG. & AD. NEWS 4655 (codified at 47 U.S.C. § 546 (Supp. V 1987)) [hereinafter "the Cable Act"].

6. The franchise renewal provisions were a last minute addition to the Cable Act in response to the trend of disputes arising in the early 1980s, as many cities' original fifteen- and twenty-year franchise agreements with private cable operators expired. *See* Ciamporcero, *Is There Any Hope for Cities? Recent Developments in Cable Television Law*, 18 URBAN LAWYER 369, 378 (1986).

7. 325 N.C. 634, 386 S.E.2d 200 (1989).

8. *Id.* at 640-41, 386 S.E.2d at 204.

9. N.C. GEN. STAT. §§ 160A-311(7), -312 (1987).

erate cable television systems. This Note examines the City of Morganton's action and the statutes that authorized its actions in light of the public purpose provisions,[11] and the exclusive emoluments and antimonopoly clauses[12] of the North Carolina Constitution. The Note summarizes the dispute, including the events that brought the case to the North Carolina Supreme Court.[13] The Note then briefly analyzes the public purpose clause and the antimonopoly and exclusive emoluments clauses of the state constitution[14] through prior case law, emphasizing cable television's statutory status as a "public enterprise."[15] The background analysis traces the evolution of the cable television industry from its origin as a rural antenna service to its present status as a multibillion dollar arm of the mass media, with an eye to the ever-present tension between municipalities and private cable operators.[16] The Note examines the *Madison* court's holding and discusses the court's perception of cable television in light of contemporary administrative and judicial views.[17] It contends that the newly recognized free speech implications of cable television regulation clearly distinguish the industry from other commonly known public enterprises, as well as from local broadcast television. The Note concludes that the North Carolina Supreme Court was unduly timid in its deference to a nearly twenty-year-old statute. The Note further concludes that the court's refusal to acknowledge cable television's changed role in the mass media produced a counterintuitive opinion that opens the door for entrepreneurial municipalities to enter the lucrative world of mass communications.

In October of 1966 the City of Morganton, North Carolina, granted a franchise to privately owned Madison Cablevison, Inc. (Madison Cable).[18] The franchise agreement gave Madison Cable the right to place wires in the public rights of way for twenty years, but also provided that upon termination of the franchise, Madison Cable would be required to remove its wires.[19] The agreement provided no right of renewal, nor any procedures for renewal.[20] The agreement also gave the city an option to purchase the system at the end of the

10. *Id.* § 153A-137.

11. N.C. CONST. art. V, § 2(1) ("The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.").

12. *Id.* art. I, § 32 ("No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services"); *id.* art. I, § 34 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.").

13. *See infra* notes 18-49 and accompanying text.

14. Although the unfair trade practices statute, Chapter 75, is certainly relevant to these antimonopoly considerations, neither the parties nor the court in *Madison Cable* addressed the issue at length, and an adequate treatment of the statute's case law would extend this analysis far beyond its intended scope. *See infra* notes 191-94 and accompanying text; *see also* Plaintiff Appellant's Brief at 41, Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (No. 624PA87) [hereinafter Appellant's Brief].

15. N.C. GEN. STAT. § 160A-311(7) (1987); *see infra* notes 52-79 and accompanying text.

16. *See infra* notes 81-141 and accompanying text.

17. *See infra* notes 152-193 and accompanying text.

18. *Madison Cable*, 325 N.C. at 638-39, 386 S.E.2d at 203.

19. *Id.*

20. *Id.*

franchise term.[21]

Madison Cable's service offers viewers a choice of twenty-seven different channels, including the three broadcast networks (ABC, NBC, and CBS); independent television stations; news, sports, movie, informational, and entertainment channels, including some "pay" channels; and commercial advertising services.[22] Subscribers pay a monthly rate based upon the level of service selected.[23] Though Madison Cable initially provided a local public-access channel, the service was discontinued for lack of use.[24]

In 1983, in anticipation of the franchise expiration in 1986, the city began to gather information regarding the future of cable television in Morganton.[25] In December of 1983, Madison Cable petitioned for renewal of its cable franchise, but the city denied the request.[26] The city then commissioned an independent consulting firm and a law firm to prepare three studies: an analysis of comparable cable system offerings, a study of local communication needs, and a feasibility study for a possible municipal system.[27] The city made the results of these studies publicly available and solicited input from the general public. The city also solicited competing cable system proposals from Madison Cable and two other private cable companies interested in providing service.[28] At a public hearing in November, 1984, the city provided the cable companies with an opportunity to present evidence and to question the city's consultants.[29] At trial, the city contended that Madison Cable participated actively in these proceedings and noted that Madison Cable was "very pleased with the way the meeting went."[30]

Nearly a year later, the city council adopted an ordinance based on the more than 1,200 page record developed in the matter, and declined to renew Madison Cable's franchise.[31] The city council made these conclusions:

> 1) [Madison Cable's] franchise should not be renewed. Within ninety days of this Order [Madison Cable] should submit a plan for orderly removal of its equipment from City poles at the end of the franchise term. 2) [The other two franchise applicants] will not at this time be granted franchises for the City of Morganton. 3) The City Staff should begin the steps necessary to enable the City to establish a municipal system.[32]

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21. *Id.* at 639, 386 S.E.2d at 203.

22. *Id.* The selection also includes Cable News Network (a twenty-four hour news channel), C-SPAN (which provides live coverage of the U.S. Senate and House of Representatives), HBO (a pay movie channel), the Disney Channel (a pay channel that features movies, music, cartoons and other entertainment), and ESPN (a sports programming channel). Appellant's Brief, *supra* note 14, at 5.

23. *Madison Cable*, 325 N.C. at 639, 386 S.E.2d at 203.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 640-41, 386 S.E.2d at 203-04.

30. Defendant Appellee's New Brief at 5, Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989) (No. 624PA87) [hereinafter Appellee's Brief].

31. *Madison Cable*, 325 N.C. at 640, 386 S.E.2d at 204.

32. *Id.* at 640-41, 386 S.E.2d at 204.

The ordinance further stated that the possibility of another operator providing service to the city remained a possibility but that consideration of such a possibility was unnecessary for five years.[33]

The city based its decision primarily on studies by experts that showed that while 70 percent of the city's population of roughly 14,000 subscribed to the current service, a need existed for "a modern communications system with high channel capacity . . . capable of providing diverse services and communication opportunities to the public."[34] The city council determined that Madison Cable's proposed system was not adequate to meet this need, and further, that it was inferior to the systems proposed by the two other private applicants and to some systems in other similar communities.[35] Finally, all parties involved in the franchising process agreed that overbuilding[36] was infeasible, both because of physical scarcity in the public rights of way and because of the economic impracticability of competition in a city of Morganton's size.[37]

Madison Cable initially filed suit in federal court, asserting twelve claims, including violations of the North Carolina Constitution's public purpose,[38] exclusive emoluments,[39] anti-monopoly,[40] and freedom of expression[41] clauses.[42] The city filed an answer and motion for summary judgment.[43] District Court Judge Woodrow Jones dismissed the asserted Cable Act[44] claims because the effective date of the provisions rendered the Act inapplicable.[45] The judge retained jurisdiction over the dispute but issued an abstention order directing Madison Cable to submit the public purpose and antimonopoly claims to the state court.[46]

Madison Cable then filed a complaint in the Burke County superior court, claiming violations of the public purpose and antimonopoly provisions of the

33. *Id.* at 641, 386 S.E.2d at 204.

34. Appellee's Brief, *supra* note 30, at 6. The study found a high degree of interest in the following cable uses not provided by Madison Cable: 1) public, educational and municipal access channels for locally produced programming; 2) local access channels to provide educational training material to the city's employees and volunteers; 3) a Community Information Service to display written information on local events, sevices and activities; 4) fire, security, and medical alert systems connected to city fire and police departments; 5) energy management services; and 6) interconnection to city departments, state institutions, and schools through an institutional network. *Id.* at 6 n.8.

35. *Id.* at 7.

36. Overbuilding is the operation of additional competing systems in the city. *Id.*

37. *Id.* at 7-8.

38. N.C. CONST. art. V, § 2(1).

39. *Id.* art. I, § 32.

40. *Id.* art. I, § 34.

41. *Id.* art. I, § 14.

42. *Madison Cable*, 325 N.C. at 637-38, 386 S.E.2d at 201-02. The complaint also contained a federal first amendment claim, as well as federal due process, equal protection, and Sherman Act claims. *Id.* at 637, 386 S.E.2d at 202. The complaint also requested a declaratory judgment holding that the franchise renewal process was governed by the appropriate provisions of the Cable Act. *Id.*

43. *Id.* at 638, 386 S.E.2d at 202.

44. The Cable Communications Policy Act of 1984, 47 U.S.C. § 521 (Supp. V 1987). The principal aim of the Cable Act is to establish guidelines for the regulation of cable television at various levels of government. *Id.* at § 521(3). *See infra* notes 108-18 and accompanying text for further discussion of the Act.

45. *Id.*

46. *Id.*

North Carolina Constitution and the unfair trade practices provisions of Chapter 75 of the North Carolina General Statutes.[47] The court ultimately granted summary judgment in the city's favor.[48] Madison Cable appealed the ruling, and the city moved to bypass the court of appeals. The supreme court granted this motion.[49] The court heard arguments of the parties and nineteen months later[50] granted the city's motion for summary judgment, having found no violations of the public purpose, antimonopoly, or exclusive emoluments clauses, or of Chapter 75 of the General Statutes.[51]

The public purpose clause of the North Carolina Constitution mandates that the state use public funds "for public purposes only."[52] Courts have interpreted the clause to require that the activity in question be for the "benefit, welfare, and protection" of the public.[53] While the activity need not equally benefit all citizens,[54] mere incidental benefits are insufficient to justify use of public funds.[55] A public purpose must have a "reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion."[56] Yet the line that separates the public interest from private interests, especially when the latter result in cognizable benefits to the public, is difficult to draw.[57]

North Carolina courts repeatedly have cited the maxim that "if there is any restriction implied and inherent in the spirit of the American constitutions, it is

47. *Id.*

48. *Id.* In its brief Madison Cable contended that after Superior Court Judge Gaines heard oral argument on the motions on January 26, 1987, he advised counsel that he was granting summary judgment for plaintiff and instructed Madison Cable's counsel to draw an order to that effect. Appellant's Brief, *supra* note 14, at 4. Responding to a request for clarification of the ruling, on June 25, 1987, Judge Gaines stated that he was granting summary judgment for Madison Cable on the claim that the city's entry into the cable business would violate the public purpose doctrine. *Id.* Because the ruling would prohibit the city from establishing a municipal franchise, the monopoly claim was dismissed as moot. *Id.* On July 6, 1987, however, without further proceedings or opportunity for argument, Judge Gaines reversed his earlier ruling and granted summary judgment for the city. *Id.* at 5.

49. *Madison Cable*, 325 N.C. at 638, 386 S.E.2d at 202.

50. Cases before the North Carolina Supreme Court normally spend two to three months under advisement. Telephone interview with Greg Wallace, Clerk of Court, North Carolina Supreme Court (Apr. 17, 1990).

51. *Madison Cable*, 325 N.C. at 636, 386 S.E.2d at 201.

52. N.C. CONST. art. V, § 2(1). Though the clause uses the language "power of taxation," courts have interpreted the term to mean various types of expenditures of public funds. *See, e.g., In re* Housing Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982) (revenue bonds to finance housing for persons of moderate income).

53. Keeter v. Town of Lake Lure, 264 N.C. 252, 264, 141 S.E.2d 634, 643 (1965). The clause was inserted into the constitution in 1936 (previously art. V, § 3). Ch. 248, § 1 [1935] N.C. Sess. Laws 270. The state courts, however, previously had recognized public purpose as a constitutional limitation to the taxing power of the government. *See, e.g.*, Briggs v. Raleigh, 195 N.C. 223, 141 S.E. 597 (1928) (state fair decreed public purpose).

54. *Keeter*, 264 N.C. at 264, 141 S.E.2d at 643.

55. Stanley v. Department of Conservation and Development, 284 N.C. 15, 33, 199 S.E.2d 641, 653 (1973); *see also* Nash v. Town of Tarboro, 227 N.C. 283, 289-90, 42 S.E.2d 209, 214 (1947) (benefits of municipal ownership and operation of hotel insufficient to justify expenditure of public funds).

56. *Keeter*, 264 N.C. at 264, 141 S.E.2d at 643 (1965) (quoting Airport Auth. v. Johnson, 226 N.C. 1, 9, 36 S.E.2d 803, 809 (1945)).

57. Briggs v. Raleigh, 195 N.C. 223, 226, 141 S.E. 597, 600 (1928).

that the government and its subdivisions shall confine themselves to the business of government."[58] The courts, however, have refused to establish a categorical definition of a "governmental purpose," acknowledging that our changing society causes such a definition to be constantly in flux.[59] The courts have held that certain expenditures of tax funds for activities traditionally considered private will satisfy the public purpose restrictions.[60] Moreover, the legislature has enumerated several nongovernmental activities (including cable television) as "public enterprises" for which public funds may be spent.[61] The legislature also has authorized expenditure of government funds for communicative purposes such as noncommercial public television and radio.[62]

Though there is no standard test for what constitutes a public purpose, the initial responsibility of making such a determination rests with the legislature. These initial determinations, according to the supreme court, are entitled to great weight.[63] The North Carolina Supreme Court, however, bears the ultimate responsibility for determining whether a governmental activity serves a public purpose.[64] Section 160A-311 of the General Statutes lists those activities that the legislature deems to be "public enterprises," including electrical systems, water systems, public transportation systems, waste collection and disposal systems, off-street parking facilities, airports, and cable television systems.[65] Upon challenge of such legislative determinations of public purposes, the presumption is in favor of constitutionality, and all doubts must be resolved in favor of the act.[66]

Article I, section 34 of the North Carolina Constitution states that monopolies, being "contrary to the genius of a free state," are prohibited. This provision often is read in conjunction with article I, section 32, which provides: "[N]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."[67] The supreme court has stated that "grants of well-defined monopolistic rights to regulated quasi-public utilities, including the power of eminent domain, under the public law, are upheld as being 'in consideration of public services.' "[68] For ex-

58. Mitchell v. Financing Auth., 273 N.C. 137, 145, 159 S.E.2d 745, 751 (1968) (citing 38 AM. JUR. *Municipal Corporations* § 395 (1941)); *see also* Dennis v. Raleigh, 253 N.C. 400, 403-04, 116 S.E.2d 923, 926 (1960).

59. *Mitchell*, 273 N.C. at 144, 159 S.E.2d at 750.

60. *See infra* notes 173-77 and accompanying text.

61. N.C. GEN. STAT. §§ 160A-311 (1987).

62. *Id.* §§ 116-37.1 (television), 143B-426.12 (1987) (radio).

63. *In re* Housing Bonds, 307 N.C. 52, 57, 296 S.E.2d 281, 285 (1982), (quoting Mitchell v. Housing Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968)).

64. Mitchell v. Housing Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

65. N.C. GEN. STAT. § 160A-311 (1987). The legislature in 1971 enacted Article 16 (§§ 160A-311 to -340) on public enterprises without any explanatory language in the session laws. Ch. 698, § 1 [1971] N.C. Sess. Laws 770-75.

66. *In re* Housing Bonds, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982).

67. *See, e.g., In re* Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973) (holding that a statute requiring certificate of need from the state Medical Care Commission in order to construct and operate a hospital on private property with private funds violated article I, sections 32 and 34 of the North Carolina Constitution in that it granted exclusive emoluments and established a monopoly in existing hospitals).

68. State v. Felton, 239 N.C. 575, 585, 80 S.E.2d 625, 633 (1954). Though the legislature amended the state constitution in 1946, placing these clauses at §§ 32 and 34 of article I, the supreme

ample, although the court has upheld governmental grants of special privileges to railroads,[69] it also has invalidated legislation that granted an exclusive franchise to operate a race track, based on the activity's failure to come within the public service exception.[70] The supreme court has yet to determine whether the benefits of cable television rise to the level of public service necessary to satisfy the exception. The legislative determination that cable television is a "public enterprise"[71] may give rise to a presumption that it constitutes a "public service company" within the meaning of case law.[72] Further, the existence of a statute that empowers a municipality to grant cable franchises to a private company[73] or to itself[74] creates a presumption of constitutionality.[75]

The exclusive nature of these "non-exclusive" cable franchises complicates matters.[76] The law is quite clear that the constitution forbids the granting of exclusive franchises,[77] and that the holder of a non-exclusive franchise has no monopoly.[78] As to the nature of a particular franchise situation, courts generally defer to municipalities; when a city has a policy of granting a single franchise, the mere labeling of such franchise as "non-exclusive" satisfies the antimonopoly clause.[79]

North Carolina courts had not ruled on the issue of municipal franchising of cable corporations before *Madison*, nor had they addressed the issue of municipal ownership of a cable system from a public purpose standpoint.[80] A court approaching such a dispute faces preliminary questions concerning the extent to

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court for some time after continued to use the 1868 Constitution counterparts, referring to the exclusive emoluments clause as article I, section 7, and the antimonopoly clause as article I section 31. *See, e.g., id.* (discussing article I section 7).

69. Reid v. Norfolk S.R.R., 162 N.C. 355, 360, 78 S.E. 306, 308 (1913) ("these franchises granted to public service corporations come directly within the words and meaning of the exception").

70. State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954). Despite an agreement giving 10% of gross receipts to the municipality, the court deemed the activity not to be "in consideration of public service," and thus the grant of the privilege and the exclusive nature of the privilege were unconstitutional. *Id.* at 588, 80 S.E.2d at 635.

71. N.C. GEN. STAT. § 160A-311 (1987).

72. *See Reid*, 162 N.C. at 359, 78 S.E. at 307-08 (1913) (court took judicial notice of legislative act, passed subsequent to the commencement of the dispute, which validated the disputed activity on a public service basis).

73. N.C. GEN. STAT. § 160A-319 (1987).

74. *Id.* § 160A-312.

75. *See* Town of Emerald Isle v. North Carolina, 320 N.C. 640, 653, 360 S.E.2d 756, 764 (1987) ("The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision." (quoting State v. Warren, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960)).

76. Because the city has the power to grant more than one franchise, Madison Cable's franchise is considered "nonexclusive." As a practical matter, however, the city only issues one franchise.

77. State v. Felton, 239 N.C. 575, 582-83, 80 S.E.2d 625, 631 (1954).

78. Power Co. v. Elizabeth City, 188 N.C. 278, 124 S.E. 611 (1924).

79. *See* Thrift v. Elizabeth City, 122 N.C. 31, 30 S.E. 349 (1898) (execution of "exclusive" franchise agreement enjoined); *see also* Durham v. North Carolina, 395 F.2d 58 (4th Cir. 1968) (City of Kannapolis had policy of granting one non-exclusive franchise for operation of waterworks.).

80. *But see* Warner Cable Communications, Inc. v. City of Niceville, 520 So. 2d 245 (Fla. 1988) (per curiam). In *Warner Cable*, a cable provider challenged the city's issuance of bonds to finance a municipal cable system. The Florida Supreme Court held that: 1) the city had authority to issue bonds for creation of a municipal cable system; and 2) the bonds were for a valid purpose. *Id.* at 246.

which the cable industry should be subject to regulations by reason of its dependence on the public rights of way. The determination whether cable television should be subject to strict, utility-type regulation or media-type regulation with first amendment protection requires an inquiry into the nature of the industry itself.

Cable television systems first appeared in the United States around 1950, with the purpose of providing clear signals of regional broadcast television to predominantly rural, geographically isolated communities that otherwise did not have satisfactory reception.[81] At first, the systems carried only local broadcasting, but eventually advances in microwave technology allowed for distribution of signals from distant stations previously unavailable to viewers.[82] The resulting increase in viewing options created disputes between local broadcast stations and cable operators, and governmental authorities eventually took notice of this new medium.[83]

The cable industry's unavoidable dependence on the public rights of way, coupled with the Federal Communication Commission's (FCC) delay in firmly asserting jurisdiction over the medium,[84] resulted in local governments becoming the first regulators of cable television by default.[85] Dominion over the public streets and thoroughfares ultimately is vested in the state. Many states, including North Carolina, have enacted legislation giving cities authority to grant franchises for cable television,[86] much the same as a municipality grants a franchise to a public utility. Local regulation of cable television experienced an ignominious beginning prior to FCC regulation, as collusion and graft were

81. *See* J. Grow, *Cable Television: Local Governmental Regulation in Perspective*, 7 PACE L. REV. 81, 85 (1986).

82. *Id.*

83. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968). This case, the first before the Supreme Court dealing with cable television operators, arose from such a dispute between a cable operator and the owner of a television station in San Diego. *Id.* at 160. The station owner complained that Southwestern Cable's transmission of signals from Los Angeles stations adversely affected the San Diego station in a manner "inconsistent[] with the public interest." *Id.* The Supreme Court, busying itself with the question of the FCC's authority to regulate such disputes under the Communications Act of 1934, observed that cable television systems were in a period of explosive growth, wherein what were once "no more than local auxiliaries to broadcasting" showed promise of evolving into a "national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country." *Id.* at 164.

84. The Communications Act of 1934, which gave the FCC's predecessor regulatory authority over the broadcast industry, asserts authority over only two types of communications services—"common carriers" and "broadcasters." 47 U.S.C. §§ 151-611 (1982). Local broadcasters, reacting to increased competition, pressed the FCC for a determination of the regulatory authority to which the cable industry was subject. *See* Synchef, *Municipal Ownership of Cable Television Systems*, 12 U.S.F. L. REV. 205, 215-16 (1978). For nearly 10 years the FCC did not assert jurisdiction over the industry, stating that because neither "broadcaster" nor "common carrier" properly characterized cable television, the agency's authority was not triggered. *See In re* J. E. Belknap & Assocs., 18 F.C.C. 642, 643 (1954). The Commission finally reversed its position in 1962, asserting jurisdiction over cable systems using microwave facilities. *See* Carter Mountain Transmission Corp., 32 F.C.C. 459, 461-62 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

85. Synchef, *supra* note 84, at 207-08.

86. N.C. GEN. STAT. § 160A-319 (1987). Other examples include California, CAL. GOV. CODE § 53066 (West Supp. 1990), and New York, N.Y. EXEC. L. § 819 (West 1982). Other states grant such power to municipalities through broad constitutional or statutory home rule powers. *E.g.*, COLO. CONST., art. XX, §§ 1, 6; MICH. CONST., art. VII, § 29.

commonplace in the franchising process.[87]

After the Supreme Court affirmed the FCC's regulatory authority over cable television in 1968 in *United States v. Southwestern Cable Co.*,[88] the agency moved quickly to formulate a federal policy for the industry. Although in 1966 the FCC had bowed to pressure from established broadcast stations[89] by imposing rules preventing cable operators from transmitting signals into the top one hundred markets,[90] the post-*Southwestern Cable* regulatory climate quickly warmed to the idea of an expanded role for cable television in the national communications complex.[91] Despite this new governmental attitude, the FCC's plenary authority persisted and in several ways even increased unchecked well into the 1970s.[92] While access to the top markets began to open up, the FCC saddled all but the smallest cable operations with duties as onerous as those imposed on broadcasters.[93] Among these were requirements that the cable system operate "to a significant extent as a local outlet for community expression."[94] Cable systems also had the responsibility to comply with the equal-time provisions of section 315 of the Communications Act,[95] the sponsorship identification provisions of section 317 of the Act[96] and the fairness doctrine.[97] A 1972 agency

87. *See* Synchef, *supra* note 84, at 208-09. As an example, Synchef cited a 1971 scandal in which a federal grand jury indicted the president of Teleprompter, Inc., a private cable company, on charges of paying $15,000 to three public officials in Johnstown, Pennsylvania, in exchange for a cable franchise. *Id.* at 208. The three officials, one of whom was the mayor, were indicted on bribery and conspiracy charges, and all four were eventually convicted. *Id.* Synchef commented that "political influence appears to be necessary for an applicant to be granted a franchise." *Id.*

88. 392 U.S. 157 (1968).

89. R.L. SMITH, THE WIRED NATION 50-51 (1972).

90. Second Report and Order, 2 F.C.C. 2d 725, 782-84 (1966). This regulation, effectively prohibiting the sale of cable television's most marketable product in the nation's top one hundred markets (representing 89% of homes with televisions) threatened to relegate cable television permanently to its original function as a rural, ancillary television service. *See* P. PARSONS, CABLE TELEVISION AND THE FIRST AMENDMENT 16 (1987).

91. P. PARSONS, *supra* note 90, at 17. The new governmental attitude was largely attributable to the growing role of the executive branch in cable television regulation. The new focus on development of the cable industry first was enunciated by the President's Task Force on Communication Policy. *Id.* (citing E. Rostow, *Final Report of the President's Task Force on Communication Policy*, (1968 Washington D.C.: Government Printing Office)).

92. The *Southwestern Cable* case, by characterizing the cable industry as an interstate communications facility, clearly established the FCC's broad jurisdiction to regulate the industry. 392 U.S. at 168-69. By the late 1960s the Commission had begun to tighten its regulatory grip on cable television. Former Republican National Committee Chairman John Burch became chairman of the FCC in 1969, and under his leadership the Commission formulated comprehensive cable regulation plans in December 1968 and June 1970. Synchef, *supra* note 90, at 224. In 1972 the Commission modified the proposals and promulgated a set of strict regulations that, among other provisions, gave state utility commissions jurisdiction over cable television. Cable Television Report and Order, 36 F.C.C. 2d 143 (1972); *see* Synchef, *supra* note 90, at 207.

93. J. Grow, *supra* note 81, at 86-88.

94. *Id.* at 87.

95. 47 U.S.C. § 315(a) (1982). The equal time provisions require the licensee to abstain from affording one political candidate more broadcast opportunity than another. Congress amended this section in 1974 expressly to include cable television systems. 47 U.S.C. § 315(c) (1982) (definitions). (Cable television is often referred to, as in the Act, as community antenna television systems (CATV)).

96. 47 U.S.C. § 317(a)(1) (1982). The sponsorship identification provisions require that parties who pay for broadcasting must be identified as having done so simultaneously with such broadcast. The language in the statute applies to radio broadcasting, but says nothing about cable television.

97. J. Grow, *supra* note 81 at 87-88. "The fairness doctrine imposes a twofold duty upon

rulemaking promulgated a comprehensive regulatory package, which required cable operations to provide free access channels for use by the general public, local government, and local educational institutions.[98] While explicitly recognizing that cable was by nature distinct from broadcasters and common carriers,[99] the FCC nevertheless continued to exercise rigid authority over the medium in a manner virtually identical to its regulation of broadcast television.[100]

Cable television is subject to regulation by two levels of government. The initial justification for local regulation was government control of the public rights of way.[101] The FCC clarified the role of local government in its 1972 rule, giving governments much the same authority as that normally exercised in granting franchises for public utilities: 1) franchisee selection; 2) determination of franchise duration; 3) rate regulation; 4) oversight of franchisee's subscriber grievance procedure; and 5) determination of service area.[102] Federal regulation is predicated upon the government's asserted exclusive jurisdiction over broadcasting.[103] This governmental regulation of constitutionally protected media of expression is justified in light of the physical limitations on the number of signals that broadcasters can transmit simultaneously over the electromagnetic spectrum, a theory known as the "scarcity rationale."[104] The tremendous growth of the cable television industry starting in the late 1970s caused governments to reconsider these bases of jurisdiction on both the local and federal levels, as well as many of the regulations spawned by this authority.

One writer characterized cable television from its inception until 1984 as "the neglected stepchild of federal communications law."[105] Indeed, the Communications Act of 1934,[106] which regulated the communications industry, never contemplated television, much less its distribution via cable. By the late 1970s courts were becoming more receptive to the cable industry's use of the first amendment as a tool for relief from burdensome regulation on both local

broadcasters. First, a licensee is required to devote a reasonable amount of time to the coverage of controversial issues of public importance. Second, a licensee must provide a reasonable opportunity for the presentation of contrasting points of view." *Id.* at 88 n.33. The FCC no longer supports the fairness doctrine. Report and Order, 102 F.C.C. 2d 143, 147 (1985).

98. Cable Television Report and Order, 36 F.C.C. 2d 143, 190-91 (1972).

99. *Id.* at 211 ("We reaffirm our view that cable systems are neither broadcasters nor common carriers within the meaning of the Communications Act. Rather, cable is a hybrid that requires identification as a separate force in communications."). Despite the lack of "broadcaster" or "common carrier" basis for jurisdiction, the Supreme Court already had upheld the FCC's authority over cable as "reasonably ancillary" to its broadcast television responsibilities. United States v. Southwestern Cable, 392 U.S. 157, 178 (1968).

100. *See, e.g.*, Cable Television Report and Order, 36 F.C.C.2d at 190-91 ("It has long been a Commission objective to foster local service in broadcasting. To this end we have encouraged the growth of UHF television, and have looked to all broadcast stations to provide community-oriented programming. We expect no less of cable.")

101. Synchef, *supra* note 84, at 208.

102. Cable Television Report and Order, 36 F.C.C. 2d at 207.

103. 47 U.S.C. §§ 301, 303 (1982).

104. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 212-13 (1943). Government licensing and regulatory authority over broadcasting is "attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accomodate everybody." *Id.*

105. Ciamporcero, *supra* note 6, at 370.

106. 47 U.S.C. §§ 151-610 (1982).

and federal levels.[107]

In 1984 Congress finally brought communications legislation up-to-date with respect to cable by the passage of the Cable Communications Policy Act of 1984[108] (hereinafter "Cable Act"). The principal aim of the Cable Act is to establish guidelines for the regulation of cable television at the various levels of government.[109] Among its most significant provisions is a comprehensive municipal franchising scheme, which comprises the primary means of cable television regulation.[110] It provides for eventual deregulation of franchisor rate regulation in competitive markets,[111] as well as restrictions on facilities and equipment that a municipality may require in the franchising process.[112] However, the Cable Act still allows the franchising authority to limit franchise awards to one vendor[113] and to prohibit a cable operator from providing service without the grant of a franchise.[114] The Cable Act also permits any state or franchising authority to hold any or all of the ownership interest in any cable system.[115] In this "legislative compromise,"[116] the cable industry finally obtained a much-awaited legislative mandate, while municipal advocates avoided (for the time being, at least) what they perceived as an FCC no longer sympathetic to their claims.[117] Since its enactment, the Cable Act has been assaulted on constitutional grounds in the federal courts,[118] calling into question Con-

107. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). Home Box Office contested several FCC rules that limited the programming operators could offer on a pay basis, the FCC's premise having been that such programming could eventually lead to a dilution of free television offerings, a result not in the public interest. *Id.* The Court of Appeals for the District of Columbia Circuit struck down the regulations as overreaching on the part of the FCC and a violation of the first amendment rights of cablecasters. *Id.* at 49. One commentator has stated that the case

> elevated [cable television] out of its twenty five year status as an auxiliary service. It appeared to give cable First Amendment standing equal to that of the print media. In fact, the test finally used by the court to determine the legitimacy of governmental intervention here was drawn from the symbolic speech case [U.S. v. O'Brien, 391 U.S. 367 (1968].

PARSONS, *supra* note 90, at 63.

108. 47 U.S.C. § 521 (Supp. V 1987).

109. *Id.* § 521(3).

110. H.R. REP. NO. 934, 98th Cong., 2d Sess. 5, 19, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4656 [hereinafter cited as 1984 HOUSE REP.].

111. 47 U.S.C. § 543 (Supp. V 1987). *See* 1984 HOUSE REP., *supra* note 110, at 65-68, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 4702-05.

112. 47 U.S.C. § 544 (Supp. V 1987). *See* 1984 HOUSE REP., *supra* note 110, at 68-70, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 4705-07.

113. 47 U.S.C. § 541(a)(1) (Supp. V 1987). *See* 1984 HOUSE REP., *supra* note 110, at 59, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 4696.

114. 47 U.S.C. § 541 (b)(1) (Supp. V 1987). *See* 1984 HOUSE REP., *supra* note 110, at 59, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 4696.

115. 47 U.S.C. § 533(e) (Supp. V 1987); *see* 1984 HOUSE REP., *supra* note 110, at 18, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 4649.

116. J. GOODALE, ALL ABOUT CABLE, § 2.02[3] (Supp. 1989).

117. *Id.*

118. *See, e.g.*, Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) (FCC cannot require cable operators to carry all local broadcast channels), *cert. denied*, 476 U.S. 1169 (1986); Tele-Communications of Key West v. United States, 757 F.2d 1330 (D.C. Cir. 1985) (court uses public forum doctrine to determine rights of cable operators); Preferred Communications, Inc. v City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985) (city cannot limit issuance of cable franchises if utility poles have physical capacity to accomodate more lines), *aff'd*, 476 U.S. 488 (1986).

gress's perception of today's cable industry relative to other bodies of the mass media.

By the mid-1980s the cable industry was challenging the constitutionality of nearly every form of cable regulation.[119] One of these challenges, *Preferred Communications v. City of Los Angeles*, [120] produced a ruling that "struck at the heart of the Cable Act."[121] *Preferred Communications* grew out of a cable company's attempt to establish a system in south-central Los Angeles without a franchise grant from the city.[122] When the public utility would not allow the company to string wires without a city permit, the cable company challenged the entire franchising process in court.[123] The United States Court of Appeals for the Ninth Circuit held that the district court's dismissal of the claim was in error.[124] The Ninth Circuit decided that the city's policy of limiting one franchise per service area regardless of whether the utility poles were physically capable of accommodating others violated the first amendment.[125] The court expressly rejected the city's demand for application of the first amendment review standard normally applied to broadcasting regulation, concluding that the apparent similarity between cable and broadcast television is "superficial"[126] and citing precedent mandating that "[e]ach medium of expression . . . be assessed for first amendment purposes by standards suited to it."[127] The court of appeals then rejected seriatim each of the city's grounds for application of lenient first amendment review, including the "physical scarcity" rationale[128] and the natural monopoly or "economic scarcity" rationale.[129] The court went on to reject the city's argument that there is a government interest in regulating private disruption of the public domain, reasoning that such a concern was insufficient to justify a government grant of monopoly.[130] The court of appeals refused to rule on the constitutionality of the Cable Act, but in a footnote observed that "the mandatory access and leased access requirements contained in the city's franchising scheme and called for by [the Cable Act] pose particularly troubling constitutional questions," concluding that "[i]mposing access requirements on

119. *See infra*, notes 121-41 and accompanying text.

120. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

121. P. PARSONS, *supra* note 90, at 72.

122. *Preferred*, 754 F.2d at 1400.

123. *Id.* at 1400-01.

124. *Id.* at 1415.

125. *Id.* at 1411.

126. *Id.* at 1403.

127. *Id.* (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

128. *Id.* at 1403-04 ("[A]n essential precondition of [broadcast] theory—physical interference and scarcity requiring an umpiring role for government—is absent." (citation omitted)). For discussion of the scarcity rationale, see *supra* notes 103-04 and accompanying text.

129. *Preferred*, 754 F.2d at 1404-05. The court actually refused to rule on this issue, being bound to accept as true Preferred's allegation that competition between cable services in the Los Angeles area was economically feasible. *Id.* at 1404. The court did cite some cases that had concluded that such natural monopoly characteristics might justify "some degree" of governmental regulation. *Id.* at 1405.

130. *Id.* at 1405-07.

the press would no doubt be invalid."[131]

The Supreme Court's ruling in *Preferred* did not follow the lower court's lead in extending constitutional protection to cable. Significantly, however, the Court acknowledged for the first time that the cable industry enjoyed some measure of first amendment standing.[132] Although the Court recognized cable television as an autonomous medium and stated that the first amendment gave the plaintiff cable operator certain rights, it declined to identify those rights.[133] One writer has observed that "in fact, the Court appeared to be reaching out for guidance about the nature of the cable communications medium."[134]

The ruling of the United States Court of Appeals for the District of Columbia Circuit in *Tele-Communications of Key West v. United States*,[135] is of practical importance. The dispute arose out of a franchising process in which the established cable provider, seeking franchise renewal, was dropped in favor of another company.[136] The court of appeals reversed the lower court's dismissal, based on the public forum doctrine of first amendment jurisprudence. The doctrine holds that property historically open to the public and available to anyone for use as a forum for exercise of first amendment rights constitutes an unconditional public forum.[137] The opinion, written by Judge Skelly Wright, warily applied the public forum analysis, stating that this new context requires more care than traditional arms of the media in deciding which first amendment analytical approach to apply.[138]

Three months later Judge Wright wrote another opinion for the United States Court of Appeals for the District of Columbia Circuit which invalidated long-standing FCC rules that required cable operators to carry all stations operating in or near their market.[139] The court in *Quincy Cable TV v. FCC* was concerned with federal cable regulation, thereby mandating a different analysis from that used to determine local regulatory validity.[140] The ruling, however,

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131. *Id.* at 1401 n.4.

132. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) ("We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests.")

133. *Id.* at 496-97 (Blackmun, J., concurring).

134. P. PARSONS, *supra* note 90, at 73.

135. 757 F.2d 1330 (D.C. Cir. 1985).

136. *Id.* at 1332-33.

137. *Id.* at 1337. Traditional public forums include streets and parks. *See, e.g.*, United States v. Grace, 461 U.S. 171 (1983). Places traditionally considered not open to public expression include restricted access military bases, *see* Greer v. Spock, 424 U.S. 828 (1976), and intraschool mailboxes, *see* Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). Again, the public forum doctrine is not so important to this discussion as is the emerging pervasiveness of first amendment considerations in cable franchising disputes.

138. *Tele-Communications*, 757 F.2d at 1339.

139. Quincy Cable TV v. F.C.C., 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). The plaintiffs in *Quincy* were a local cable operator, Quincy Cable T.V., and a satellite cable programmer, Turner Broadcasting. The "must carry" rules limited the satellite programming Quincy could carry, thus injuring both carrier and programmer. *Id.* at 1437-38. This is the same court that handed down the decision in Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). *See supra* note 107 for discussion of *Home Box Office*.

140. For example, the public forum doctrine is not relevant in considering FCC regulatory actions.

sheds some light on the continued viability of certain aspects of local regulation with respect to the changing judicial perception of cable television. The most important aspect of the ruling is the court's novel suggestion that the "economic scarcity" or "natural monopoly" rationale may be groundless:

> [T]he "economic scarcity" argument rests on the entirely unproven—and indeed doubtful—assumption that cable operators are in a position to exact monopolistic charges. Moreover, the tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal franchising process—than to any "natural" economic phenomenon. In any case, whatever the outcome of the debate over the monopolistic characteristics of cable, the Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights.[141]

The *Quincy* decision, like the Ninth Circuit's ruling in *Preferred* three months earlier, raises serious questions about the validity of governmental regulation of cable on both the local level and within the ambit of the Cable Act. It clearly echoes the message that cable television is not in the same first amendment category as broadcast television,[142] and that regulation based on any scarcity theory is suspect.[143]

Thus, the *Madison* question as to the validity of municipal ownership of a cable television system arose in an environment increasingly hostile toward government involvement in the industry. The cable lobby, victorious in its push for judicial recognition of the distinction between cable television and broadcast television, asserts that its industry deserves the same first-amendment protections as the print media.[144] As courts move toward this view and content regulation in the franchising process becomes unfashionable, if not impossible, familiar questions begin to arise concerning cable's unavoidable dependence on the public domain. These questions, going beyond content to the structural regulation of cable, arose in the germinal stages of the industry.[145] In light of the changed nature of cable and the new, ubiquitous considerations of freedom of expression,

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141. *Quincy*, 768 F.2d at 1450 (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-256 (1974) (other citations omitted)).

142. *Id.* at 1448.

143. *Id.* at 1448-50. *See also* Ciamporcero, *supra* note 6, at 388. ("While the cities may be better able than the FCC to pursue successfully some variant of the physical scarcity rationale, the courts will be skeptical."). Another commentator has concluded:

> In *Quincy* . . . a number of rationales historically used to justify government control of cable were addressed and found insufficient. While the case dealt with only one form of regulation, the logic permeated the framework of FCC authority over cable. Extending the argument of the court in *Quincy*, one could call into question much of the [Cable Act] itself. It seemed possible after the case that if a challenge to the act arose within the jurisdiction of the D.C. Circuit, that body would have little hesitation in finding the new law, or parts of it, unconstitutional.

P. PARSONS, *supra* note 90, at 72.

144. P. PARSONS, *supra* note 90, at 111.

145. *See supra* text accompanying notes 84-85.

these questions, for years easily answered by statute or case law, must be asked anew.

The issue of municipal ownership of cable television systems historically has not been a source of controversy to the FCC.[146] It is expressly allowed by federal and some state statutes.[147] A 1980 survey of the twenty-eight cities with municipally owned systems revealed that the cities' reasons for entering the industry varied according to the year of entry.[148] The earliest systems belonged to the most isolated communities that, without cable, lacked clear reception.[149] Later systems belonged to those communities that failed to attract private companies.[150] The survey cited additional factors as including 1) a desire to provide the service to local citizens; 2) a desire to control the cable system directly; or 3) a desire to benefit directly from cable television revenue.[151]

Among the most important legal issues concerning municipal ownership is whether government, to the exclusion of private enterprise, should engage in a business which is not a practical necessity.[152] Another question is whether the dangers of government control of a powerful medium of communication outweigh the financial and convenience benefits of local ownership[153]. These questions faced the North Carolina Supreme Court as it approached the *Madison Cable* dispute.

Justice Meyer's opinion, representing a unanimous court, began by noting that although Madison Cable had filed a claim in the federal suit based on freedoms of speech and press under Article I, section 14 of the state constitution, it was unclear whether this issue was presented to the state court.[154] The court acknowledged that Madison Cable repeatedly referred to the state free-speech clause in its arguments concerning the public purpose and monopoly issues, but concluded that because a violation of the free-speech clause was not specifically alleged or separately briefed by Madison Cable, the opinion would not address the issue.[155] The court went further, however, and in a statement of crucial importance to the case, ruled that no analysis of the state freedom of speech provision was necessary to determine whether establishment of a municipally owned cable system violates the public purpose and the exclusive emoluments and priv-

146. *See, e.g.*, City of Valparaiso, 61 F.C.C.2d 328, 330 (1976) ("[T]he Commission has never either favored or opposed municipal ownership of cable television. Indeed, municipally affiliated cable systems have existed for almost two decades, and the Commission was well aware of their existence when it adopted the *Cable Television Report and Order*.").

147. *E.g.*, N.C. GEN. STAT. §§ 160A-311, 312 (1987); 47 U.S.C. § 553(e) (Supp. V 1987).

148. D. MacKenna, *The Cabling of America: What About Municipal Ownership?*, 70 NAT'L CIVIC REV. 307, 310-12 (1981) (citing BROADCASTING YEARBOOK 1980, Broadcasting Publications, Inc., Washington, D.C.). The populations of these cities varied from 126 in Boaz, Wisconsin, to 41,500 in San Bruno, California. *Id.* at 311.

149. *Id.* at 311-12.

150. *Id.* at 312.

151. *Id.*

152. Synchef, *supra* note 84, at 205.

153. *See id.* at 242.

154. *Madison Cable*, 325 N.C. at 642, 386 S.E.2d at 204-05.

155. *Id.* at 642, 386 S.E.2d at 205.

ileges clauses of the state constitution.[156]

The court granted great deference to the fact that the North Carolina legislature has explicitly authorized municipalities to establish, own and operate cable television systems.[157] The court cited its most recent public purpose ruling, *In re Housing Bonds*,[158] in laying the groundwork for scrutinizing the constitutionality of the public enterprise statute, stating that the legislature's determination creates a presumption in favor of the constitutionality of the act.[159] The amicus brief filed on plaintiff's behalf directed the court's attention to the encroachment on freedom of expression effected by such a statute.[160] The argument stated that "when courts review the constitutionality of state laws or local ordinances that impose restraints on freedom of expression, they should be less deferential toward legislatures and city councils than when less fundamental rights are at stake."[161] The argument continued: "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."[162]

The court, however, refused to apply these freedom of expression considerations to the case and accepted the city's argument that the "public" nature of cable systems' function casts doubts upon any purely private characterizations of the industry.[163] The city contended that cable systems receive "special privileges" by way of their franchise agreements which allow them access to public rights of way "in consideration for the promise to provide public services," and thus are imbued with characteristics similar to public utilities.[164]

The court's determination of the characteristics of a public purpose largely agreed with the city's public utility characterization.[165] Madison Cable had contended that the determination should be based upon a three-part inquiry: "1) Is the activity one traditionally performed by the government? 2) Is there a public need for the activity? and 3) Is private enterprise unwilling or unable to

156. *Id.*

157. *Id.* at 643-45, 386 S.E.2d at 205-06; *see* N.C. GEN. STAT. §§ 160A-311 (defining cable television as a public enterprise); 160A-312 (authorizing city ownership of public enterprises); 160A-319 (authorizing cities to grant franchises for public enterprises).

158. 307 N.C. 52, 296 S.E.2d 281 (1982).

159. *Madison Cable*, 325 N.C. at 645, 386 S.E.2d at 206 (quoting *In re* Housing Bonds, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982) ("The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.")).

160. Amici Curiae Brief (Newspaper, Broadcast and Cable Associations) at 9, Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989) (No 624PA87).

161. *Id.*

162. *Id.* (citing Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963)).

163. Appellee's Brief, *supra* note 30, at 29-30.

164. *Id.* at 30 (citing Shaw v. Asheville, 269 N.C. 90, 152 S.E.2d 139 (1967); Kornegay v. City of Raleigh, 269 N.C. 155, 152 S.E.2d 186 (1967) (holding that the franchise granted to cable systems is not available to all, and hence is subject to reasonable public interest obligations to ensure that the public's interest in the rights of way is protected)).

165. *Madison Cable*, 325 N.C. at 646-53, 386 S.E.2d at 207-11.

engage in the activity?"[166] Unless all three questions are answered affirmatively, Madison Cable had asserted, the activity cannot be viewed as having a public purpose.[167] Madison Cable had based the test in part on a 1973 supreme court decision, stating "it is only when private enterprise has demonstrated its inability or unwillingness to meet a public necessity that government is permitted to invade the private sector."[168] This language so troubled the court that it took pains to refute the passage as "an aberration" that "must be considered dictum which did not create a rule of decision for future cases."[169] The court held that if indeed this were the test of a public purpose, many, if not most of the services traditionally provided by municipalities under the public purpose doctrine would be subject to challenge on constitutional grounds.[170]

Thus, the court decided the issue under principles traditionally used for determining that a municipality's activity is for a public purpose. The public purpose requirement is met if the activity involves a reasonable connection with the convenience and necessity of the particular municipality,[171] and benefits the public generally, as opposed to special interests or persons.[172] The court then cited a plethora of prior decisions in which the government action met the "traditional test" and competed with private businesses furnishing the same service, including aid to railroad;[173] airport facilities;[174] a grain-handling facility financed by revenue bonds and to be leased to a private concern;[175] low and moderate income housing;[176] and purchase of a lake and generating plant.[177] Finally, the court addressed the communicative aspect of cable television as a public enterprise, drawing parallels between city-owned cable television systems and public radio and television stations owned and operated by the state. The court concluded that invalidating the legislative authorization for municipal ownership of cable systems would call into question the constitutionality of the statutes authorizing public television and radio.[178] On these bases, the court ruled that the municipal operation and ownership of a cable television system

166. *Id.* at 646, 386 S.E.2d at 207.

167. *Id.*

168. *Id.* at 647, 386 S.E.2d at 207 (quoting Stanley v. Department of Conservation and Dev., 284 N.C. 15, 33, 199 S.E.2d 641, 653 (1973)).

169. *Id.* at 648, 386 S.E.2d at 208.

170. *Id.* at 647, 386 S.E.2d at 207. The opinion stated:

> Despite the fact that privately owned utilities stand ready and willing to serve municipal residents, no one would seriously argue that this fact alone renders the provision of electric service a private, rather than a public, purpose. The same holds true for public hospitals, waste disposal, and other similar services.

Id. at 647, 386 S.E.2d at 207-08.

171. *Id.* at 646, 386 S.E.2d at 207 (citing Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946)).

172. *Id.* (citing Martin v. Housing Corp., 277 N.C 29, 175 S.E.2d 665 (1970)).

173. *Id.* at 649, 386 S.E.2d at 209 (citing Wood v. Town of Oxford, 97 N.C. 227, 2 S.E. 653 (1887)).

174. *Id.* (citing Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946)).

175. *Id.* (citing Ports Auth. v. Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955)).

176. *Id.* at 650, 386 S.E.2d at 209 (citing Martin v. Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); *In re* Housing Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982)).

177. *Id.* (citing Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965)).

178. *Id.* at 651-52, 386 S.E.2d at 210-11. "Our examination of statutes enacted by our General

was reasonably related to the convenience and necessity of the city and a benefit to the public generally so as to constitute a "public purpose" within the meaning of the state constitution.[179]

Madison Cable had contended that, even assuming that cable television constitutes a public purpose, and conceding that by reason of statute and use of public rights of way the city has the power to regulate a business or occupation, this does not necessarily include the power to exclude persons from engaging in those activities.[180] Madison Cable then called attention to the state's "constitutional bias in favor of competition,"[181] which is reflected in both constitutional and statutory language.[182] Madison Cable finally argued that because the activity in question is a constitutionally protected exercise of the freedom of expression, the city is precluded from designating itself a monopoly provider, just as it would be precluded from assuming sole control over the distribution of print media or broadcast television transported over Morganton's public rights of way.[183]

The court summarily rejected each of these constitutional and statutory arguments.[184] The opinion first noted that the city expressly had not foreclosed the possibility of granting a franchise to another operator, and the fact that the city would not approach such a decision for another five years did not warrant classification of the city as the "exclusive provider" of cable services.[185] Further, the court cited precedent holding that when a city grants a non-exclusive franchise to another party "it is not a monopoly within the meaning of the general constitutional prohibition."[186]

The court rejected Madison Cable's exclusive emoluments claim by noting that the cable arrangement contemplated does not constitute a "franchise," in that a city needs no grant from itself to engage in activities classified as "public enterprises."[187] Thus, in the court's view, what Madison Cable considered a grant of an exclusive privilege was not a grant at all, but a mere exercise of authority granted to the city by the legislature.[188] The court further pointed out that because such exclusive privileges may be granted "in consideration of public

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Assembly reveals a clear legislative intent and expression of the public policy of this state to foster public ownership and operation of both radio and television." *Id.* at 652, 386 S.E.2d at 211.

179. *Id* at 653, 386 S.E.2d at 211.

180. Appellant's Brief, *supra* note 14, at 40 (citing State v. Harris, 216 N.C. 746, 759, 6 S.E.2d 854, 863 (1939)).

181. *Id.* at 41.

182. *Id.* at 36, 41. Article I, § 34 of the North Carolina Constitution provides: "[M]onopolies are contrary to the genius of a free state and shall not be allowed." N.C. CONST. art. I, § 34. Article I, § 32 provides: "[N]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." *Id.* art. I, § 32. Chapter 75 of the General Statutes prohibits unreasonable restraints of trade, unfair competition, price fixing, and price discrimination. N.C. GEN. STAT. §§ 75-1 to -5 (1988).

183. Appellant's Brief, *supra* note 14, at 43.

184. *Madison Cable*, 325 N.C. at 653-55, 386 S.E.2d at 211-12.

185. *Id.* at 654, 386 S.E.2d at 211.

186. *Id.* at 654, 386 S.E.2d at 212 (citing Thrift v. Elizabeth City, 122 N.C. 31, 30 S.E. 349 (1898)).

187. *Id.*

188. *Id.*

services," the operation of a cable system fits directly into the constitutional exception.[189] Finally, the court held that the constitutional provision was not designed to prevent the community from exercising powers legislatively granted, but rather to prevent the community from surrendering such power to another exclusively in absence of consideration of public services.[190]

The court finally considered the applicability of the unfair trade practices provisions of Chapter 75 of the North Carolina General Statutes, holding that

> [b]ecause cities are authorized to own and operate cable systems and to prohibit others from doing so without a franchise and are not required to issue franchises, it is clear that the legislature contemplated that there would be situations where private corporations would be displaced by municipal cable systems which would operate without competing franchises being issued.[191]

The court concluded that such anticompetitive conduct, which the legislation contemplates, should not be subject to attack under the state's antitrust laws.[192] The court further concluded that because the issues presented were purely legal, the trial judge did not err in granting the city's motion for summary judgment.[193] Meanwhile, Madison Cable continued to provide service to the City of Morganton pending the outcome of litigation on the issues in federal court.[194]

The North Carolina Supreme Court's refusal to consider freedom of expression implications in its analyses of the public purpose and antimonopoly issues led to a counterintuitive ruling that allows for entrepeneurial, yet inexperienced, municipalities to displace established cable operations in hopes of increasing city revenues. It is a basic tenet of our law that a constitutional provision does not operate in a vacuum, isolated from other constitutional concerns.[195] The fact that Madison Cable did not transfer its freedom of expression claim from federal to state court should not preclude consideration of the implications of the constitutional provision with regard to the other claims. Madison Cable discussed the freedom of expression issue in its brief in both the public purpose and antimonopoly arguments. The court's failure to consider the issue ignores the current nature of cable television as an important arm of the mass media.

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189. *Id. See supra* note 182 for the constitutional text.

190. *Madison Cable*, 325 N.C. at 655, 386 S.E.2d 212.

191. *Id.* at 655-56, 386 S.E.2d at 212-13.

192. *Id.* at 656-57, 386 S.E.2d at 213.

193. *Id.* at 657-58, 386 S.E.2d at 214.

194. *Id* at 639, 386 S.E.2d at 203.

195. *See* State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944):

> The will of the people as expressed in the Constitution is the Supreme Law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument.

Id. See also Evans v. Gore, 253 U.S. 245 (1920):

> 'The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning.' This sound rule is as applicable to the amendments as to the provisions of the original Constitution.

Id. at 259-60 (quoting Knowlton v. Moore, 178 U.S. 41, 95 (1900)).

The North Carolina Supreme Court, in *Martin v. Housing Corp.*, stated:

> A slide rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public.[196]

Yet in *Madison Cablevision*, the converse of this statement should apply. The cable television industry has changed in the past twenty years from an auxilliary conduit of broadcast television providing rural areas clear reception of local signals to a leading medium for the dissemination of ideas with widely recognized first amendment protection.[197]

Although the court stated that Madison Cable's proposed public purpose test would call into question the authority of municipalities to construct, own, operate, or regulate those public enterprises in which private companies sought to do business,[198] the court's own public purpose test would allow government to operate nearly any business. Government-run supermarkets or hardware stores, one may reasonably conclude, meet the traditional test in that they "bear a connection with the convenience and necessity of a particular municipality, while benefitting the public generally."[199]

The court's analogy to public television in support of its public purpose conclusion[200] actually supports Madison Cable's proposed test,[201] in that public television is noncommercial[202] and nonprofit oriented. Public television serves its mission of "enhancing the uses of television for public purposes"[203] by offering programming eschewed by commercial broadcasters. Further, North Carolina Public Television does not operate to the exclusion of putative competitors.

The supreme court's opinion ignores practical reality in deferring to the municipality's categorization of its own franchise as "non-exclusive."[204] Although Madison Cable's twenty-year "non-exclusive" franchise was no less illusory, that situation at least involved a franchisor and a franchisee dealing at arms' length. To assume either situation, however, is to beg the increasingly asked question: Is municipal regulation of cable television necessary or even desirable? While federal courts become less and less inclined to assume such a necessity,[205] municipal advocates continue to justify such regulation with the natural monopoly argument.[206] The natural monopoly justification, however,

196. Martin v. Housing Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 672 (1970) (citations omitted).
197. *See supra* notes 119-41 and accompanying text.
198. *Madison Cable*, 325 N.C. at 648, 386 S.E.2d at 208.
199. *Id.* at 646, 386 S.E.2d at 207.
200. *Id.* at 651-52, 386 S.E.2d at 210-11.
201. *See supra* note 164 and accompanying text.
202. N.C. GEN. STAT. § 116-37.1(a) (1987).
203. *Id.*
204. *Madison Cable*, 325 N.C. at 654, 386 S.E.2d at 211-12.
205. *See supra* notes 119-141 and accompanying text.
206. *See id.*

has become increasingly discredited in the communications industry.[207]

The court's classification of cable television as a "public service" satisfying the exception to article I, section 32 of the North Carolina Constitution is not supported by reasoning, but rather is based on a legislative determination that cable television is a "public service company."[208] To this end, inasmuch as the supreme court relied upon cable television's statutory status as a public enterprise in supporting its holdings based upon the public purpose and antimonopoly and exclusive emoluments clauses, it failed to recognize the real cable industry that exists outside of the statute. The statute that designates cable television as a public enterprise came into being in 1971,[209] a time when cable operators made virtually no editorial decisions and the cable industry largely was confined to "remote communities where traditional antenna based systems would not provide satisfactory reception."[210] Municipal advocates freely admit that financial concerns are one driving force behind the establishment of municipal systems today, especially following the displacement of the previous franchise holder.[211] Yet the municipalities reap these revenues at the expense of widely recognized freedom of expression rights.

Indeed, even after having determined that cable television met the judicial "public purpose test," the court should have concluded that an activity cannot constitute a "public purpose" if it is unconstitutional. Despite a proposed activity's facial compliance with judicially set criteria, the fact that such an activity abrogates fundamental liberty interests should prevail over nonconstitutional concerns. In light of the fundamental rights at stake in the *Madison Cable* dispute, the court should have applied a strict scrutiny test of constitutionality to the public enterprise statute in question. Because government ownership of cable television can hardly be said to serve a compelling government interest, under strict scrutiny the court would have declared the city's proposed activity unlawful.

The supreme court's failure to distinguish between sewer systems or even libraries and the cable television systems of today leads to a conclusion that the *Madison Cable* opinion is an example of timid judicial deference to an outdated statute. The situation in *Madison Cable* might be analogized to that of a dissatisfied government seizing control of a city's only newspaper and operating a municipal newspaper while excluding all competitors. This analogy is not as outlandish as one at first might think. Both are media that disseminate information into the marketplace of ideas. The courts have recognized both as meriting first amendment protection. Both rely on the public rights of way for the distri-

207. *See, e.g.*, Hazlett, *The Policy of Exclusive Franchising in Cable Television*, 31 J. BROADCASTING & ELECTRONIC MEDIA 1 (1987) (attacking natural monopoly justification for local regulation of cable television on both economic and political grounds).

208. *Madison Cable*, 325 N.C. at 654, 386 S.E.2d at 212.

209. Ch. 698, § 1 [1971] N.C. Sess. Laws 770-75 (codified at N.C. GEN. STAT. § 160A-311 (1987)).

210. D. MacKenna, *supra* note 148, at 307.

211. *Id.* ("As local officials become more concerned about financial stability, they may be overlooking [cable television], which is not only in demand in many communities but also is recognized as extremely lucrative by the investment community.").

bution of their product. One of these situations is forbidden by the first amendment and the North Carolina Constitution. The other is allowed by statute.

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