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COMMENTARY

MUNICIPAL RIPOFF: THE UNCONSTITUTIONALITY OF CABLE TELEVISION FRANCHISE FEES AND ACCESS SUPPORT PAYMENTS

David J. Saylor *

I. AN INTRODUCTORY PARADE OF HORRIBLES

Imagine the outcry if the Federal Communications Commission (FCC) announced that henceforth all television and radio licenses would be auctioned off to the highest bidder for each license term. The political justification for such a development could be quite straightforward: Uncle Sam needs the money to help reduce the national debt and save government programs from the clutches of Gramm-Rudman.[1] The purported legal rationale for this radical departure from current practice would be that the public, i.e., the federal government, owns the air space and is entitled to get fair market value for renting the airwaves to broadcasters.

Or, consider this frightening scenario. Suppose the mayor and city council of Washington, D.C. were to give the *Washington Post* an ultimatum: pay five percent of the *Post*'s gross revenues into the city coffers. If you don't pay up, your vending machines on public sidewalks will be impounded, your delivery trucks will be ticketed, your newsboys arrested if they dare to use the public rights-of-way, and your reporters will be kicked out of city hall.

And how about these possibilities? Suppose the mayor of Philadelphia, anxious to improve his image, required the *Philadelphia Inquirer* to deliver a copy of his "Weekly Report to the Citizens" to each of the *Inquirer*'s subscribers as a condition of the *Inquirer*'s access to public property and rights-

* Partner, Hogan & Hartson, Washington, D.C. A.B. 1967, Williams College; J.D. 1970, Harvard University.

1. Public Debt Limit—Balanced Budget and Emergency Deficit Control Act of December 12, 1985, Pub. L. No. 99-177, 99 Stat. 1037.

of-way. And, what if he also required the *Inquirer* to buy him the word processing and photocopying equipment needed for production of his "Weekly Report"? Or, what if the Los Angeles city fathers conditioned the local subscription television broadcaster's business license (or its salesmen's and antenna installers' use of the public rights-of-way) on its providing free service to the schools, libraries, and fire department and one-half hour of air time per week for each councilman's public service address?

II. The Nature and Origin of the Problem

The foregoing scenarios would provoke such protest from constitutional scholars, media spokesmen, and the public that they may seem fanciful. But, as applied to cable television, they are par for the course. Until very recently, cable operators have been passive punching bags for municipal pugilists. In order to offer their programming in municipalities, cable operators have had to participate in auctions to balance local budgets. They have been forced to disgorge five percent (and sometimes more) of their gross revenues in the form of "franchise fees" just so they could place their cables in aerial and underground locations alongside gas, electric, telephone, and other utility lines that have paid the same municipalities little or nothing. Cable operators have even given city councils absolute programming control over certain cable channels. Such operators have been forced to finance the construction of municipally controlled television studios, to deliver free production equipment to city officials and institutions, and to provide free installation and program service to schools and other city designees. Cable companies have been required, without reimbursement, to train and equip amateur programmers whose frequently low-quality, mandatorily carried programming may cause the operators to lose subscribers. Even when such programming is of high quality it diverts subscribers from the operators' revenue-earning services. Unless paid as "franchise fees," the foregoing cash and in-kind obligations are generally referred to as "support" for public, educational, or governmental (PEG) access programming. The list of such obligations goes on, reflecting the remarkable ingenuity of cities and their consultants in devising schemes for financing pet "public interest" projects out of cable companies' and subscribers' money.

This Commentary explains why the cities' imposition of franchise fee and related cash and in-kind payment requirements violates the free speech, free press, and equal protection guarantees of the United States Constitution. The subject is timely and not without its strong advocates on both sides. In 1985 cable companies filed two federal lawsuits[2] and at least one state court

2. Erie Telecommunications, Inc. v. City of Erie, No. 85-185 (W.D. Pa. filed July 16,

counterclaim[3] raising these constitutional issues.

The curious reader may wonder why these constitutional issues were not litigated and decided years ago during the first several decades of cable television. After all, franchise fees are not a new requirement; they date back twenty years or more. Access programming support payments, equipment and studio grants, and free service to city-designated recipients were all in evidence by the mid-1970's. Yet not until the cabling of the largest urban and suburban communities in the late 1970's and early 1980's did the municipal appetite for franchise fees and access support payments grow to its current gargantuan proportions.

The cable industry might blame some of its own propagandists, in part, for the situation. Cable salesmen and "wired nation" visionaries surely contributed to the views of mayors and councilmen. And the latter often viewed cable television as a panacea for municipal financial ills, a laboratory for latent local creative talent, and the answer to the incumbent politician's dream that he be seen frequently in video.

But the real reason why cable companies did not challenge the cities was quite simple. No cable franchise applicant could even question the constitutionality of franchise fees without automatically forfeiting its chance to win the franchise. By suing one franchise authority, a company would have guaranteed itself a prominent position on the equivalent of a national blacklist, effectively ending its franchise hopes in other jurisdictions.[4] Until the Cable Communications Policy Act of 1984 (Cable Act)[5] accorded cable franchisees a reasonable renewal expectancy, an incumbent operator would have risked almost certain nonrenewal by challenging franchise fee and support payment requirements. Ironically, that very Cable Act—compromise

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1985); Tribune Co. Cable v. City of Lakewood, No. CV-85-2721-AAH(Ix) (C.D. Cal. filed Apr. 24, 1985). As counsel for the plaintiff cable companies in these cases, the author admits to a professional bias. Inasmuch as this area of law is evolving rapidly and the facts are still emerging in those cases, however, nothing said in this article is in any way binding on the plaintiffs or their counsel in those cases.

The author is indebted to his colleagues Steven J. Horvitz and Robert L. Corn, associates at Hogan & Hartson, for their work on these two cases. Certainly, their thoughts and research have influenced the direction and substance of this article; but, of course, any misjudgments are the writer's own. The author also acknowledges his debt to the seminal work in the field, G. SHAPIRO, P. KURLAND, & J. MERCURIO, "CABLESPEECH": THE CASE FOR FIRST AMENDMENT PROTECTION (1983).

3. City of Sheboygan v. Lakeside Cablevision, No. 85-CV-306 (Cir. Ct., Sheboygan Co., Wis., answer and counterclaim filed May 30, 1985).

4. The typical request for proposals (RFP) requires the applicant to disclose any cable litigation with other municipalities.

5. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (to be codified at 47 U.S.C. §§ 521-559). *See* 47 U.S.C.A. § 546 (West Supp. 1985) (pertaining to renewals).

legislation that was vigorously supported by some elements of the cable industry—seemingly legitimized five-percent franchise fees and most access support payments.[6]

III. Cable Television Operator as a First Amendment Speaker

There was a time when the cable television operator was considered not a speaker but solely a distributor of other persons' speech. That day has long passed. At first, cable operators provided only community antenna television (CATV) service, which was just what the name implied. The operator placed an antenna on the community's highest building or hill and by coaxial cable brought in improved reception of all the local off-air broadcast stations. Provided that the cable had enough electronic capacity, the operator made no signal selection; all stations received were carried. Eventually, however, regionally popular distant stations began to be microwaved to the cable system. The additional signal choices made available by microwave technology presented the cable operator with quasi-editorial opportunities. Cable operators also began to cablecast movies from films or tapes licensed by the studios and delivered through the mail.

Satellite technology spawned the greatest wealth of program diversity available to cable: broadcast "superstations," premium pay services, and advertiser-supported nonbroadcast networks. The FCC's must-carry,[7] distant signal,[8] sports blackout,[9] syndicated exclusivity,[10] and network nonduplica-

6. 47 U.S.C.A. § 542(b) (West Supp. 1985) permits franchise fees up to 5%. 47 U.S.C.A. § 542(g)(2) (West Supp. 1985) excludes from the definition of "franchise fee" (and therefore from the 5% ceiling) certain payments for support of public, educational, or governmental (PEG) access. In the case of any franchise in existence on the date of enactment, October 30, 1984, PEG programming and facilities payments are excluded from the definition of "franchise fee." *Id.* For franchises granted after October 30, 1984, only PEG "capital costs" are excluded. *Id.* PEG support provisions in effect on the Act's effective date, December 29, 1984, are grandfathered. 47 U.S.C.A. § 557(a) (West Supp. 1985). 47 U.S.C.A. § 542(g)(2)(d) (West Supp. 1985) excludes from the definition of "franchise fee" and the 5% limit "requirements or charges incidental to the awarding or enforcing of the franchise."

The retroactive effect *vel non* of these sections of the Cable Act, as applied to payments made under franchise provisions that were declared or would have been declared unlawful by the Federal Communications Commission (FCC) under the law as it existed prior to October 30 or December 29, 1984, remains an open question. The Cable Act took effect "60 days after the date of enactment," i.e., on December 30, 1984, "[e]xcept where otherwise expressly provided" in the Act. 47 U.S.C.A. § 521 (West Supp. 1985). One court, however, has declined to treat the Cable Act's franchise fee provisions as prospective only and has denied a cable operator's post-Cable Act request for restitution of franchise fees paid pre-Act in excess of FCC limits. Village of Beverly Hills v. Booth Communications, No. 85-291948 CZ (Mich. Cir. Ct., Oakland Co. Sept. 10, 1985).

7. 47 C.F.R. §§ 76.55, 76.57, 76.59, 76.61, 76.64, 76.65 (1985).

8. *Id.* §§ 76.57, 76.59, 76.61, 76.65 (1980).

9. *Id.* § 76.67 (1985).

tion[11] rules, and the Copyright Act's compulsory royalty fees[12] restricted the cable operator's freedom to choose among various broadcast signals, but some journalistic discretion remained. In the realm of nonbroadcast services, both pay- and advertiser-supported, the cable operator's opportunities for editorial selection expanded dramatically. In addition to selecting or rejecting a service entirely, the operator retained much freedom to package several services together or to tier them at different price levels. With the demise of the FCC's distant signal and must-carry rules,[13] the cable operator acquired still greater freedom of choice even though it remained subject to compulsory copyright license constraints. Many cable systems today originate their own local news, public affairs, and sports programming. Some systems also sell advertising time on their origination channels, and even more are selling time allotted to them by the nonbroadcast advertiser-supported networks.

Whether or not a cable operator today actually produces programming in its own studio or sells advertising time, all cable operators truly have become electronic editors and journalists. The fact that a cable operator may simply select and retransmit other persons' creative efforts does not make the cable operator any less a first amendment speaker. *Readers' Digest* is fully protected by the first amendment even though it selects and republishes works that first appeared in other publications. Small town newspapers are fully protected by the first amendment even though many of their columns and features are taken directly from the Associated Press or United Press International wires and from the syndicated services of far larger newspapers. Book and magazine stores are protected first amendment speakers even if their proprietors have not authored a single book or article sold in their stores. "Whether or not [the cable operator] produces any original programming of its own, its activities of transmitting and packaging programming mandate that it receive First Amendment protection."[14]

The courts have confirmed cable's status as a first amendment speaker.[15]

10. *Id.* §§ 76.151, 76.153, 76.155, 76.157, 76.159, 76.161 (1980).

11. *Id.* §§ 76.92, 76.94, 76.95, 76.97, 76.99 (1985).

12. 17 U.S.C. § 111 (1982).

13. Malrite TV v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982); Quincy Cable TV, Inc. v. United States, 768 F.2d 1434 (D.C. Cir. 1985).

14. Tele-Communications, Inc. v. United States, 757 F.2d 1330, 1336-37 (D.C. Cir. 1985).

15. *See, e.g.,* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1444 (D.C. Cir. 1985), *petition for cert. filed sub nom.* National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 54 U.S.L.W. 3229 (U.S. Oct. 8, 1986) (No. 85-502); Tele-Communications, Inc. v. United States, 757 F.2d 1330, 1336 (D.C. Cir. 1985); Cruz v. Ferre, 755 F.2d 1415 (llth Cir. 1985); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir.), *cert. granted,* 106 S. Ct. 380 (1985); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on*

Cable television, however, is a medium of expression somewhat different from others. The question remains whether the courts will accord cable operators the same rights as those granted to newspaper or magazine publishers, somewhat lesser rights analogous to those of broadcasters, or some hybrid of the rights of both.

IV. THE MUNICIPALITIES' ARGUMENT: POSSIBLE RATIONALES

There are six possible rationales that a city might offer in defense of its franchise fee and PEG access support requirements:[16]

(1) Some politicians candidly preach that any time a city has the opportunity to raise revenues by means other than conventional taxes it would be almost criminal not to do so. Advocates of this view see cable TV as simply another contract service performed for the city. If the ambulance, taxi, or refuse company must pay the city a portion of the company's gross revenues for the valuable privilege of doing business there, why should the cable operator be any different? This can be called the "revenue-raising" rationale in its purest form.

(2) Municipal officials may also look at cable TV from a landlord's perspective. The streets and sidewalks, and the aerial and subterranean property adjacent thereto, have been dedicated to public use and subjected to city control. The city ultimately is responsible for the care and policing of the public rights of way. Because it exercises authority akin to that of a private landlord, is it not reasonable for the city to charge the cable operator fair market rent for cable's specialized use of aerial and subterranean property? This is the "rent" rationale.

(3) Politicians with an amateur economic bent often stress the de facto exclusivity of most cable franchises. By exercising its police powers, the city has created and preserved the cable system's most valuable asset—its uniqueness. In return for insulating the cable franchisee from a direct competitive "overbuild,"[17] has not the city earned a share of the franchisee's

other grounds, 440 U.S. 689 (1979); Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-45 (D.C. Cir.) (per curiam), *cert. denied,* 434 U.S. 829 (1977).

16. A seventh rationale is waiver or estoppel. Cities typically argue that cable operators which sign franchise agreements committing them to make certain franchise fee and access support payments are "estopped" from later contending that the payment requirements are illegal. They are deemed to have "waived" their rights. The estoppel and waiver arguments are offered usually as an affirmative defense rather than a constitutional justification. To treat them in the constitutional context would require a separate article. Therefore, they will not be considered in this Commentary.

17. "Overbuild" is the cable industry's term for head-to-head competition between two or more cable television operators for the same group of potential subscribers. Sometimes a company may actually "overbuild" the wires of its competitor. Other times, when a city has

gross? This is the "exclusivity" rationale. It is somewhat akin to the proprietary prospective of the commercial franchisor.

(4) Another view justifies collection of franchise fees and access support payments as a way of financing diversity on what would otherwise be a de facto or "natural" monopoly medium. Advocates of this view would spend a portion of the cable operator's gross (as well as additional cash and in-kind payments) to create diverse programming on PEG access channels. The typical city cannot afford to build and operate its own cable facility. Nor can school districts, colleges, fire and police departments, libraries, or public service and minority groups afford to create their own cable systems or even pay commercial leasing rates for cable channels. To maximize speaker diversity, is it not in the public interest to require the cable operator to contribute financially to others' ability to speak? This is the "diversity" rationale.

(5) A variation on the preceding rationale is the view that the cable operator actually profits from the presence of city council meetings, instructional programs, and amateur productions on its PEG channels. In other words, but for the PEG programming, some persons would not subscribe to cable at all. This is the "benefit" rationale.

(6) One final viewpoint is simply that cable operators should reimburse cities for all the regulatory costs attributable to cable. If a municipality hires a consultant to select a franchisee, deploys inspectors to ensure the safe construction of cable lines, dispatches policemen to contend with cable-caused traffic problems, or fields consumer complaints about shoddy service, should not the cable operator make the municipality financially whole? This is the "regulatory cost" rationale. It is the only rationale to pass constitutional muster, as explained below. But even this rationale is subject to abuse and requires close judicial scrutiny to prevent cities from cross-subsidizing their other functions with cable television regulatory fees.

V. FREE SPEECH/FREE PRESS GUARANTEES VIOLATED

The first amendment forbids any federal "law . . . abridging the freedom of speech, or of the press."[18] "[T]he states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment."[19] And the fourteenth amendment applies to the actions not only of the states, but also of the municipalities within those

franchised two companies simultaneously, each may race to beat the other to particular streets or subdivisions but neither actually "overbuilds" the other's wires.

18. U.S. CONST. amend. I.

19. Grosjean v. American Press Co., 297 U.S. 233, 243 (1936).

states.[20] That constitutional protection benefits corporations as well as individuals.[21] Cable television operators are electronic publishers engaged in the constitutionally-protected freedom of speech and of the press,[22] freedoms that municipalities may not abridge.

Perhaps more than any other decision, *Murdock v. Pennsylvania*[23] illustrates why virtually all franchise fee and all PEG support requirements violate the first and fourteenth amendments. In *Murdock*, the Borough of Jeannette, Pennsylvania, promulgated an ordinance requiring the registration and licensing of all door-to-door salesmen. The license fee was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question."[24] Several Jehovah's Witnesses went door-to-door in Jeannette distributing literature, soliciting purchase of religious tracts, and playing a phonograph record expounding their religious views. They were prosecuted for failing to purchase licenses for their activities.

The Supreme Court treated the *Murdock* case as one in which the freedoms of speech and of the press were as important as the freedom of religion.[25] The Court overturned the Pennsylvania Supreme Court's affirmance of the Jehovah's Witnesses' convictions. The license fee, the Court said, was a "tax imposed on the exercise of a privilege granted by the Bill of Rights. A state [or municipality] may not impose a charge for the enjoyment of a right granted by the Federal Constitution. . . . The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."[26] Although the Jehovah's Witnesses necessarily used the public rights-of-way to do their soliciting, the Court said that "whether the state has given something for which it can ask a return . . . is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege exists apart from state authority. It is guaranteed the people by the Federal Constitution."[27]

The typical cable television ordinance is indistinguishable from the ordinance in *Murdock* in this respect. It "sets aside the residential areas [indeed, the whole municipality] as a prohibited zone, entry of which is denied [the

20. Lovell v. City of Griffin, 303 U.S. 444 (1938); *see also* Murdock v. Pennsylvania, 319 U.S. 105, 108, 116 (1943).

21. Grosjean v. American Press Co., 297 U.S. at 244.

22. *See supra* notes 7-15 and accompanying text.

23. 319 U.S. 105 (1943).

24. *Id.* at 113-14 (footnote omitted).

25. *Id.* at 108-10.

26. *Id.* at 113.

27. *Id.* at 115.

cable operator] unless the [franchise fee] is paid."[28] That the municipality may need the money for general revenue purposes is not a valid defense, any more than it would have been in *Murdock*. Nor may the municipality assert that it is only charging reasonable rent for the use of the public rights-of-way. In the first place, the municipality normally does not "own" the rights-of-way in the sense that it "owns" city hall or central park. Second, those rights-of-way are already encumbered by utility easements; and, in most instances, the utilities pay no tribute to the municipality. The cable operator does not need to pay "rent" to the municipality, but only pole attachment license fees to the utilities. Indeed in some cable systems, the predominant rights-of-way are backyard easements and are not above or below public streets, alleys, or sidewalks. But even where the cable system does cross public ways, *Murdock* made clear that the use of the municipality's rights-of-way is "irrelevant" in determining the permissibility of the license fee.[29]

The "exclusivity" rationale fares no better than the "revenue-raising" and "rent" rationales. Virtually all cable franchises are expressly nonexclusive and are required to be so under state law. Having reserved to itself the power to authorize competition without the incumbent operator's consent and without reducing the incumbent's franchise fee obligations, the municipality can hardly assert that de facto exclusivity is adequate constitutional justification for franchise fees. Moreover, most cable operators are subject to vigorous competition, and few possess a municipally created monopoly in an economically meaningful market. Cable's pay movie fare competes directly with video cassettes, movie theaters, and the movies offered on network and independent broadcast stations. In some communities cable movies also compete with movies transmitted by over-the-air subscription television (STV) and microwave (MDS). Cable's sports programming competes with network and independent broadcasters' sports offerings and with live events themselves. As somewhat interchangeable forms of entertainment, movies and sports compete with each other and with other live spectacles such as theater and concerts. Cable's news programming competes with the network, independent, and noncommerical television and radio broadcasters' news shows available over the air, and with local newspapers and national newspapers and magazines such as *USA Today, The Wall Street Journal, Time,* and *Newsweek*. In the advertising side of its business, cable is as yet only a tiny participant in a market dominated by the broadcast and print media. Municipalities are powerless to grant a cable operator exclusivity in any of these markets. Furthermore, even if there is no direct competition in

28. *Id.* at 117.
29. *Id.* at 115.

the particular medium, the Supreme Court has not allowed that to justify municipal intrusion into the putative monopolist's editorial judgments.[30] It seems unlikely, therefore, that the Court would allow the absence of direct cable competition to justify a municipal raid on the cable operator's treasury.

The *Murdock* decision did not directly address whether a municipality might justify its imposition of a license fee upon one first amendment speaker in order to finance expression by other speakers who otherwise might be unable to publicize their views. Defenders of access support requirements and of that portion of franchise fees which exceed the cost of legitimate regulation frequently argue that cable operators should fund the creation of diversity on PEG channels. The Supreme Court examined and rejected a similar form of government paternalism in *Buckley v. Valeo.*[31] *Buckley* involved provisions of the Federal Election Campaign Act that restricted the amount a political candidate and other individuals could spend. Although the purpose of those provisions was to equalize the comparative opportunities of rich and poor candidates to communicate with the electorate, the Court struck them down as infringements on the first amendment freedoms of candidates and their supporters. By requiring a cable operator to make payments for the support of PEG users, municipalities necessarily restrict the amount of money a cable operator has available to finance its own freedom of expression. While the ceiling is not imposed directly as in *Buckley,* it is imposed in an impermissible economic sense nonetheless.[32] Nor is forced financing of PEG diversity content-neutral even though it is not program-specific. By definition and purpose, PEG programming is supposed to contrast with the views, styles, and interests of the programming cablecast under the operator's control. Thus, forced access support financing and PEG channel carriage unconstitutionally compel the cable operator "to associate with speech with which [it] may disagree" and, by definition, which it would not have telecast voluntarily.[33]

The concept of using the first amendment to enhance "the public's" opportunity to hear and to speak is derived from *Red Lion Broadcasting Co. v. FCC.*[34] In *Red Lion,* the Supreme Court rejected broadcasters' first amendment challenge to the "personal attack" and "political editorial" corollaries

30. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-56 (1974).

31. 424 U.S. 1 (1976).

32. *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (unconstitutional right-of-reply statute imposes printing, composing, and opportunity costs on newspaper).

33. Pacific Gas & Electric Co. v. Public Utilities Comm'n, 106 S. Ct. 903, 911 (1986).

34. 395 U.S. 367 (1969).

of the FCC's "fairness doctrine." The Court said that the right of the public to receive information and ideas was "paramount,"[35] although it conflicted with the broadcaster's desire not to be the required vehicle for communicating certain information or ideas to the public. The same theme was endorsed by the Court in *CBS, Inc. v. FCC,*[36] which upheld a limited affirmative right of access by federal candidates to the broadcast media. Additionally, in *FCC v. National Citizens Committee for Broadcasting,*[37] the Court upheld the FCC's newspaper-broadcast TV crossownership rules as a legitimate means of enhancing diversity of broadcast programming through forced diversity of ownership.

Still the Supreme Court has never accepted the proposition that the first amendment permits the government to restrict broadcasters' freedom of expression by according the government (or a broad class or classes of government-designated speakers) mandatory access to the airwaves. In *Columbia Broadcasting Systems, Inc. v. Democratic National Committee,*[38] the Court rejected the notion that the first amendment afforded a private right of access to the broadcast media. In *FCC v. WNCN Listeners Guild,*[39] the Court held that disappointed listeners did not have a first amendment right to prevent radio stations from abandoning arguably unique formats and adopting ones that allegedly contributed nothing new to program diversity. Moreover, recently the Court has questioned the frequency "scarcity rationale"—the rationale used to justify restricting broadcasters' first amendment rights.[40] Thus, even the Supreme Court is beginning to recognize that broadcast frequencies are no longer as scarce as they once appeared and that broadcasters' second class citizenship in this area must be reexamined.

In any event, cable television does not communicate through limited over-the-air frequencies, but rather through closed-circuit coaxial cables that have dozens and sometimes hundreds of channels. A cable operator can often double or triple its channel capacity if there is enough program supply and subscriber demand to warrant it. Competitive cable operators can also be authorized[41] if the incumbent does not respond to burgeoning consumer demand and program supply. In the unlikely event that utility poles and conduits have no space for additional cables, the poles can be replaced with taller poles, and deeper trenches can be dug for supplemental conduits.

35. *Id.* at 390.
36. 453 U.S. 367 (1981).
37. 436 U.S. 775 (1978).
38. 412 U.S. 94 (1973).
39. 450 U.S. 582 (1981).
40. *See* FCC v. League of Women Voters, 104 S. Ct. 3106, 3116 n.11 (1984).
41. *See* Huntington TV Corp. v. New York Comm'n on Cable Television, 61 N.Y.2d 926, 463 N.E.2d 34 (1984).

"[T]he 'scarcity rationale' has no place in evaluating government regulation of cable television."[42]

In *Quincy Cable TV, Inc. v. FCC*, the United States Court of Appeals for the District of Columbia Circuit struck down the FCC's must-carry rules, which required cable operators to carry all local broadcast stations upon request, as an impermissible infringement on the first amendment editorial and journalistic rights of cable operators. The *Quincy* decision did not comment on the legality of mandating public access channels.[43] But its criticism of the must-carry rules carries obvious relevance in the PEG access realm:

> The [must-carry] rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the community it serves. . . . [C]ertain injury stems from the substantial limitations the rules work on the operator's otherwise broad discretion to select the programming it offers its subscribers.[44]

The appellate court further observed "that the rules force operators to act as a mouthpiece for ideological perspectives they do not share."[45]

Just as the District of Columbia Circuit in *Quincy* rejected broadcast frequency scarcity as a means for legitimizing the must-carry rules, the United States Court of Appeals for the Ninth Circuit in *Preferred Communications v. City of Los Angeles*, concluded that economic scarcity did not justify Los Angeles' decision to auction off the right to offer cable television service.[46] The Ninth Circuit relied on *Miami Herald Publishing Co. v. Tornillo*,[47] which held that the *Herald*'s economic power did not justify forcing that newspaper to contribute space to political candidates.

On these authorities, it is extremely doubtful that broad cable channel access requirements are constitutional.[48] It is conceivable that some court may be asked to legitimize the mandatory setting aside of PEG channels on the ground that the presence of one cable operator on the poles has increased prohibitively the pole attachment costs for the government or any public or educational group which otherwise might have offered cable service. The argument would be that the cable operator's actions have raised to an insur-

42. Quincy Cable TV Inc. v. FCC, 768 F.2d 1449; *accord* Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1404 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985).

43. 768 F.2d at 1452 n.39.

44. *Id.*

45. *Id.*

46. 754 F.2d at 1404-05.

47. 418 U.S. 241, 249-58 (1974).

48. *But see* Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983), *vacated*, No. 83-1800 (1st Cir. 1985).

mountable level the independent entry costs for PEG cable systems, thus making access to the cable operator's system "essential" for the PEG programmer. Yet, even accepting *arguendo* such a peculiar extension of antitrust law's "essential facility" doctrine[49] to justify a first amendment right of access to the cable operator's transmission system, there would be no basis for extending the concept further to justify franchise fee and PEG support requirements. The cable operator's presence on the poles and on the underground conduits has not increased the cost of constructing municipal cable access studios or the cost of producing PEG programming, irrespective of whether that presence constitutes a practical economic barrier to the construction of a second cable transmission system. In short, no amalgamation of *Red Lion*'s public-is-paramount concept with the "essential facility" doctrine should warrant a city to require the cable operator to finance construction of city-controlled studios, to furnish cameras and other production equipment, to train personnel, or to provide free installation and monthly program service to schools and public service organizations. Instead the rule of *Murdock* prevails. As gatekeeper to the public rights-of-way, the municipality may charge a license fee limited to the legitimate costs of regulation. The municipality may not charge for the exercise of first amendment privileges a fee that is designed to raise money for other municipal services.

To defend the constitutionality of mandatory access support payments, some municipalities have alleged that the cable operator actually benefits from those payments. In their view the programs financed through cable operator payments attract customers who otherwise might not be cable subscribers. Whether such could be proven through scientifically sound surveys is problematic. It is one thing for a subscriber to say he views city council meetings regularly on the government access channel. It is quite another thing for the subscriber to say truthfully that he would never have subscribed to cable if council meetings had been carried only as brief news items on the retransmitted local broadcast stations or on local news cablecasts under the cable operator's editorial control. Obviously, price and programming variety are key variables in subscribers' minds. Lower or no access support payments would permit an operator to reduce prices, create or expand its own local news and public affairs programming, or acquire other commercial programming. The lowered prices or the additional cable operator-controlled programming might well attract far more viewers than those who subscribe to cable only for its PEG programming.

Even if the cable operator "benefits" from forced PEG payments (or re-

49. *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).

quired franchise fees dedicated to PEG purposes), that should not legitimize direct government interference into the cable operator's determination of how to finance his first amendment enterprise. No doubt a controversial mayor's "op-ed" column or letters to the editor could generate newspaper purchases. But surely it violates the first amendment to force a newspaper publisher not only to print the mayor's messages but to pay the mayor's ghostwriter. The FCC's control over the allocation of broadcast frequencies to particular geographic locations clearly benefits broadcasters by preventing interference and thereby permitting broadcasters to communicate effectively. Bestowal of such a government benefit on a private first amendment speaker might well entitle the government to reimbursement of its regulatory expenses. But one could not seriously suggest that this undeniable benefit would permit Uncle Sam to force broadcasters to finance government-owned studios and programs. Like the "diversity" rationale, the "benefit" rationale (even if factually provable) does not make cable access support payments something that cities can impose on cable operators as a precondition to the exercise of first amendment privileges.

The sole remaining municipal rationale for franchise fees is regulatory cost reimbursement. In *Murdock*, the Supreme Court was careful to differentiate the license tax from a legitimate "nominal" fee "imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors."[50] The Court distinguished *Cox v. New Hampshire*,[51] which had upheld the convictions of Jehovah's Witnesses for parading on the public streets without a permit. The *Cox* opinion held that the state statute relied upon by the City of Manchester was a permissible, nondiscriminatory "time, place, and manner" regulation and that its license fee was consistent with the first amendment. The New Hampshire fee, which could be adjusted up to a maximum of $300 by local authorities according to the expected size and length of the parade, was "not a revenue tax, but one to meet the expense incident to the administration of the [parade licensing] Act and to the maintenance of public order in the matter licensed."[52]

Since *Cox* and *Murdock*, courts have closely scrutinized governmental claims that license fees imposed on first amendment activities are essential for regulatory cost reimbursement. In *Fernandes v. Limmer*,[53] the Dallas-Fort Worth airport authority failed to offer any support for its contention that a $6.00 daily fee was needed to regulate the granting of each permit to

50. 319 U.S. at 116.
51. 312 U.S. 569 (1940).
52. *Id.* at 576 (quoting State v. Cox, 91 N.H. 137, 142, 16 A.2d 508, 513 (1940)).
53. 663 F.2d 619 (5th Cir. 1981).

distribute literature and solicit funds within the airport terminal. At the request of adherents to the Krishna religion, the United States Court of Appeals for the Fifth Circuit struck down the fee provision. The *Fernandes* court found the burden to be on the municipality to "demonstrate a link between the fee and the costs of the licensing process."[54] It concluded that a fee for defraying administrative costs "is permissible . . . only to the extent that the fees are necessary" and the uses of the fee are restricted to "covering the costs of regulation."[55] Several other rulings demonstrate the demanding scrutiny that municipalities must satisfy in order for their license fees to survive a first amendment challenge.

In *Baldwin v. Redwood City,*[56] the Ninth Circuit invalidated a California city's sign inspection and removal fees because they did not "fairly reflect costs incurred by the city in connection with such activity."[57] In defense of the $1.00 inspection fee, the city offered evidence that the average inspection cost was $10.00; and in support of the $5.00 removal "deposit," the city asserted an average removal cost of $25.00. But averaged cost data was unacceptable to the court. The *Baldwin* court held that the charges were "disproportionately burdensome" and therefore invalid because the city's administrative costs varied widely depending on the size and number of temporary signs and because of "[t]he absence of apportionment" or other appropriate tailoring of fees to costs.[58]

In *Bayside Enterprises, Inc. v. Carlson,*[59] Jacksonville, Florida, estimated its annual personnel and equipment costs to license adult entertainment businesses at several hundred thousand dollars, in order to justify annual license fees of a thousand dollars or more per most adult establishments. The court enjoined the license fee system because "none of the witnesses was able to tie his particular projections to specific administrative requirements in anything other than a speculative manner."[60] Similarly, in *Wendling v. City of Duluth,*[61] the $500 adult bookstore license fee was struck down because the funds received by the city were used not only to administer the licensing scheme but also to enforce a separate obscenity ordinance. There have been parallel rulings in other jurisdictions.[62]

54. Fernandes v. Limmer, 663 F.2d 619, 633 (5th Cir. 1981), *cert. dismissed,* 458 U.S. 1124 (1982).

55. *Id.* at 633.

56. 540 F.2d 1360 (9th Cir. 1976), *cert. denied,* 431 U.S. 913 (1977).

57. *Id.* at 1372.

58. *Id.* at 1371-72.

59. 450 F. Supp. 696, 705 (M.D. Fla. 1978).

60. *Id.* at 705.

61. 495 F. Supp. 1380 (D. Minn. 1980).

62. *Id.* at 1385. For similar rulings, see, e.g., Hull v. Petrillo, 439 F.2d 1184 (2d Cir.

When the FCC promulgated a regulation governing cable TV franchise fees, it simply presumed that a three-percent fee was justifiable.[63] The FCC inquired into regulatory costs only when a city sought fees over three percent of gross revenue.[64] On application for waiver the agency allowed up to five percent, but only if the city could demonstrate that it needed the funds for cable television-related activities.[65] The FCC did not, however, require that those funds be used strictly for regulation of the cable operator.[66] Instead the agency permitted the fees to be used for support of PEG programming and facilities.[67] Also, the FCC usually was satisfied by projections of the first three years' cable revenues and city costs.[68] The Commission typically added a general admonition that any imbalance between fees and costs should be rectified over the term of the franchise.[69]

The first amendment cases impose a much more rigorous standard than does the FCC. PEG support is not a cost of "regulating" the cable operation; rather, it is the municipality's cost in producing or assisting in the production of programming. The "regulatory cost" rationale, therefore, cannot help justify PEG support requirements as permissible under first amendment precedent. The first amendment authorities also impose a stringent burden of proof on the cities to link the size of the fee to the true regulatory costs. Constitutional precedent requires a reasoned prediction not only for the first three years, when the bulk of regulatory expenses occur, but for the entire term.[70]

Ordinarily a city charges an application fee for any operator who files a formal response to the city's request for proposal (RFP). If the city can demonstrate a reasonably close dollars-and-cents correlation between the fee

1971) (reversing dismissal of Black Panther challenge to $15 annual newspaper street vendor fee); Moffett v. Killian, 360 F. Supp. 228 (D. Conn. 1973) (invalidating lobbying registration fee that exceeded administrative costs); NAACP v. City of Chester, 253 F. Supp. 707 (E.D. Pa. 1966) (invalidating $25 sound truck license fee because city did not submit evidence justifying permit fee on basis of administrative costs).

63. *See* 47 C.F.R. § 76.31 (1985).

64. *Id.*

65. *In re* City of Miami, 56 RAD. REG. 2d (P & F) 458 (1984) ($200,000 annually for city drug enforcement efforts disallowed by FCC).

66. *Id.* at 462-63 (access support payments permitted as franchise fees, but only up to 5% limit for all franchise fees).

67. *Id.*

68. Cable Television Franchise Fee Compliance, FCC Pub. Notice No. 2858 (Mar. 5, 1984).

69. *In re* City of Miami, 56 RAD. REG. 2d (P & F) at 462; *see also* Letter from Roy J. Stewart, Chief, Video Services Division, Mass Media Bureau, FCC, to Robert H. Ruxin (Aug. 17, 1984), available at the FCC File Reference Room, Ref. No. 4620-PP.

70. *See supra* notes 50-67 and accompanying text.

and the cost of processing the application, the fee should survive constitutional challenge.

Municipalities also typically require the successful bidder to pay all of the municipality's franchising costs, net of whatever application fees were previously collected. This is a much more questionable requirement. Many of a city's so-called "franchising" costs are attributable to the costs of processing other bidders' applications or of drafting regulatory provisions of obvious illegality. Why should the successful bidder pay part of the costs of processing and rejecting other applications? To be sure, there is an economic benefit to the franchise winner in not having to compete head-to-head for pole space and cable subscribers.[71] But there is also a benefit to each applicant in having its application thoroughly considered. The successful cable applicant should no more have to subsidize the thorough consideration of its rivals' applications than the political poster permittee in *Baldwin v. Redwood City*[72] should have had to subsidize the cost of inspecting and removing other persons' signs. Furthermore, if the city has used outside consultants and its own lawyers to draft illegal ordinance provisions (including overreaching franchise fee and PEG support requirements), the successful bidder should not have to pay those consultants' and lawyers' fees. Many RFP's and cable ordinances contain elaborate language relating to matters that had been preempted by the FCC. There is no constitutional basis for having the successful bidder finance the research and drafting of such obviously illegal provisions.

Many municipalities require a permit for each "street cut" undertaken by a utility or other entity which needs to dig a hole or trench in the public streets. A fee is charged for each permit. If a municipality requires the cable operator to pay for street-cut permits in addition to the franchise fee, then obviously the regulatory costs incident to administering the street-cut permit program, as well as any additional public safety costs the street-cut permit fee is to cover, cannot be used to justify the franchise fee. In many communities, the entity making the street cuts must itself restore the street to its original condition. If the cable operator does that, then the restoration costs cannot be used to justify the franchise fee. Typically, municipalities do not inspect cable television construction for compliance with electrical safety codes; that job is handled by the cable operator, the utilities that share the poles and conduits with the cable operator, or the state public utility commission. If the city does inspect cable construction and maintenance, the

71. Even this benefit could prove illusory in light of the typical franchise's express nonexclusivity.

72. 540 F.2d at 1371-72.

inspection cost may be used to justify the equivalent amount of the franchise fee. But care should be taken to exclude right-of-way inspections done for the city's own purposes, such as determining where or how to place street lamp and traffic light lines and water and sewer facilities. Typically, once a cable system is built, there is little occasion for municipal officials to expend resources policing the public safety aspects of the cable system. The occasional cracked or broken coaxial cable may impair television viewing but it does not endanger public safety in the manner of a downed electrical line or a leaking gas main.

If city police, planning, or engineering resources are expended during cable construction to supervise traffic diversion and are not otherwise reimbursed by the cable operator, such expenses can be used to justify an equivalent franchise fee. But the city may not use cable's arrival on the scene as the vehicle for subsidizing the salaries of city employees who rarely spend any significant amount of time on cable television matters over the life of the franchise.[73] Similarly, where supervening law eliminates a franchise-mandated task, e.g., basic cable rate regulation after 1986,[74] the municipality must factor that reduced regulatory role into its projection of franchise fee-reimbursable costs. Where the city does have an active regulatory role, e.g., investigating and resolving subscriber complaints, those costs should be chargeable to franchise fees. But if the city merely bucks complaints to the cable operator for resolution and rarely follows up, the city should not use that minimal involvement to justify any significant portion of the required franchise fees.

VI. Equal Protection Violated

Municipalities, as instruments of state action, are subject to the equal protection strictures of the fourteenth amendment.[75] Where municipalities single out all or some speakers for special regulation, that differential treatment is also subject to a special form of equal protection scrutiny required by the first amendment, as applied under the fourteenth amendment's due process

73. *See* Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696, 705 (M.D. Fla. 1978) (court rejects as unreasonable personnel and office equipment projections for administering adult entertainment licensing ordinance).

74. *See* § 623 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2788 (to be codified at 47 U.S.C. § 543). *In re* Amendment of Parts 1, 63, 76 of the Commission's Rules To Implement the Provisions of the Cable Communications Policy Act of 1984, MM Doc. No. 84-1296 (FCC 85-179), 50 Fed. Reg. 18,637 (May 2, 1985), 58 RAD. REG. 2d (P & F) 1 (1985), *appeal docketed sub nom.* American Civil Liberties Union v. FCC, No. 85-1666 (D.C. Cir. filed Oct. 16, 1985).

75. *See supra* notes 18-21 and accompanying text (first amendment applies to municipalities through the fourteenth amendment).

clause. Cable television franchise fees in excess of legitimate regulatory costs and all forms of mandatory PEG support contributions fail both equal protection tests.

Grosjean v. American Press Co.[76] fathered the concept that equal protection of the media is embedded in the first amendment. Louisiana imposed a special license tax of two percent of gross receipts upon any advertising-supported publication having a circulation of more than twenty thousand copies per week. Due to the circulation minimum, the tax applied to 13 daily newspapers but effectively exempted 4 other dailies and 120 weeklies. The Supreme Court struck down the statute as an abridgment of freedom of the press in contravention of the due process clause of the fourteenth amendment.[77] It did not reach the thirteen daily papers' additional claim that the statute violated the equal protection clause of that same amendment.[78] The Court reviewed the Stamp Act and similar "obnoxious" English taxes which preceded the Colonies' independence, and concluded that the first amendment was intended to prohibit not only prior censorship of content but also taxes that single out publications and advertisements for special treatment. Louisiana's tax was not one of "the ordinary forms of taxation for support of the government . . . but one single in kind."[79]

Part of the *Grosjean* opinion indicates that its principles apply if the "effect" of the differential tax is to curtail circulation. For example, the Court said "the First Amendment . . . was meant to preclude . . . any form of previous restraint upon printed publications, or their circulation, including that . . . *effected* by these two well-known and odious methods [i.e., newspaper and advertisement taxes]."[80] Yet, elsewhere the Court implied that legislative intent was determinative when it called Louisiana's action "*a deliberate and calculated* device in the guise of a tax to limit the circulation of information,"[81] which had "*the plain purpose* of penalizing the publishers and curtailing the circulation of a selected group of newspapers."[82]

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,*[83] the Supreme Court made clear that differential taxation of the press violates the first amendment even when there is "no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the

76. 297 U.S. 233 (1936).
77. *Id.* at 251.
78. *Id.*
79. *Id.* at 250.
80. *Id.* at 249 (emphasis added).
81. *Id.* at 250 (emphasis added).
82. *Id.* at 251 (emphasis added).
83. 460 U.S. 575 (1983).

part of the legislature."[84] *Minneapolis Star* struck down Minnesota's imposition of a "use tax" on the cost of paper and ink products (excluding the first $100,000) consumed in the production of a publication. The Court noted that the statute was "facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law."[85] Unlike Minnesota's general use tax, which applied only to out-of-state purchases avoiding Minnesota's sales tax, the ink and paper use tax applied even if those items were purchased in the state.[86] The ink and paper tax also applied to components of the ultimate product (newspapers), whereas Minnesota ordinarily taxed only the retail sale or use of the ultimate product.[87] The challenged use tax was different in a third respect: it targeted only a limited group of large newspapers (those whose cost for ink and paper exceeded $100,000) and exempted all smaller newspapers.[88] General Minnesota tax law, by contrast, had no small enterprise exemption.[89]

The Court in *Minneapolis Star* was guided by two basic principles: first, "[A] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action";[90] and second, to satisfy that burden, the government must evidence "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."[91] Minnesota's main interest was that it needed the money. But the Court rejected this revenue-raising rationale because "an alternative means of achieving the same interest without raising concerns under the First Amendment [was] clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press."[92] The state responded that the tax "actually *favors* the press over other businesses."[93] The Court rejected this invitation to fashion a rule to permit "singl[ing] out the press for a different method of taxation" if the economic burden could be shown to be different from or lighter than that on other businesses.[94] The Court reasoned first that "the very selection of the press for special treatment threatens . . . the possibility of subsequently differentially *more burdensome* treatment."[95]

84. *Id.* at 580; *see also id.* at 592.
85. *Id.* at 581.
86. *Id.* at 582.
87. *Id.*
88. *Id.* at 591.
89. *Id.*
90. *Id.* at 592-93.
91. *Id.* at 585.
92. *Id.* at 586.
93. *Id.* at 588.
94. *Id.*
95. *Id.* (emphasis in original).

Second, it found that courts are "poorly equipped to evaluate with precision the relative burdens of various methods of taxation."[96] The first amendment forbids a court from taking the risk that its economic calculations of comparative tax burdens may be erroneous.[97]

The *Minneapolis Star* rationale was recently applied to microwave-delivered subscription television in *City of Alameda v. Premier Communications Network, Inc.*[98] Alameda's municipal code imposed a business license tax of three percent of gross receipts upon "[e]very person conducting a television subscription service business" or "providing emergency communications systems or alarms."[99] A company transmitting HBO programming by over-the-air microwave signal from a transmitter in Berkeley to customers' leased antennas in Alameda refused to pay the tax. The state court of appeals found the ordinance to be unconstitutional as applied to the particular subscription television operator and did not reach the question of its application to emergency communications services.[100] The court rested its decision on the fact that, with the exception of emergency communications services, television subscription services were "taxed differently from any other business in the City."[101]

Most Alameda businesses were subject to annual license taxes based on "flat fees, 'per unit' fees, [or] flat fees plus sums based upon the number of employees," and only a handful of businesses' fees were tied to gross receipts.[102] All but six categories of such businesses also were eligible to elect "in lieu" fees based on gross receipts; the maximum "in lieu" rate, however, was "less than one thirteenth of [the] 3 percent rate" required of subscription television.[103] Five of the remaining six business categories ineligible to elect "in lieu" fees—amusement parks and exhibitions, dance halls, and handbill distributors, among others—were protected by comparatively low dollar ceilings, the highest being $600. The sixth category, building and hotel leasing, paid a modest $4.00 per room annually. Only two businesses, drive-in theaters and outdoor advertising, were taxed in a similar manner as subscription television, in that their license fees were tied to gross receipts and no "in lieu" option was available. Yet, their tax rates were substantially lower than the rate for subscription television. With annual gross receipts of

96. *Id.* at 589.
97. *Id.* at 591 n.14.
98. 156 Cal. App. 3d 148, 202 Cal. Rptr. 684 (Ct. App.), *cert. denied,* 105 S. Ct. 567 (1984).
99. *Id.* at 151, 202 Cal. Rptr. at 686.
100. *Id.* at 154, 155 n.5, 202 Cal. Rptr. at 688 n.5.
101. *Id.* at 155, 202 Cal. Rptr. at 688.
102. *Id.* at 155, 202 Cal. Rptr. at 688.
103. *Id.* at 155-56, 202 Cal. Rptr. at 688-89.

$210,000, the subscription television business would pay a tax of $6,300, whereas the outdoor advertiser would pay $1,650 and the drive-in theater would pay $472.50.[104]

Finding that subscription television is "a disseminator of protected speech" under *Minneapolis Star* principles, the court in *City of Alameda* considered whether the differentially heavier tax burden imposed upon subscription television was "necessary to achieve an overriding governmental interest."[105] The court agreed with the city that revenue generation is a critical governmental interest, but it held that such an interest "cannot, standing alone, justify special treatment of a segment of the media . . . when alternative means of achieving the same interest without implicating First Amendment concerns are available."[106] The city could have achieved its revenue objective simply "by imposing a generally applicable tax on businesses."[107]

The court in *City of Alameda* recognized that "the rationale of its opinion would apply to any television subscription service business engaged in dissemination of speech protected by the First Amendment," but it did not attempt to identify all such businesses.[108] The particular ordinance included cable television within the definition of "[t]elevision subscription service" and permitted the imposition of a license tax or franchise fee upon the franchised cable operator(s) up to "the maximum allowed under state or federal law not in excess of [three percent]."[109] Yet, the court skirted the issue, saying instead "that the propriety of franchise fees which the City requires of cable television businesses is in no way involved in this case."[110]

There should be little question that the rationale of *City of Alameda, Minneapolis Star,* and *Grosjean* applies to cable television franchise fees and PEG support payments. Like the newspapers in *Minneapolis Star* and *Grosjean*

104. *Id.* at 156 n.6, 202 Cal. Rptr. at 689 n.6.

105. *Id.* at 156, 202 Cal. Rptr. at 689.

106. *Id.*, 202 Cal. Rptr. at 689.

107. *Id.* at 157, 202 Cal. Rptr. at 689. The city also attempted to defend the unavailability to subscription television businesses of the lower "in lieu" gross receipts tax schedule on the ground that such businesses did not pay taxes and provide employment in the city. Without determining whether that was so with respect to the particular subscription television company defendant, the court rejected the purported justification on the ground that most of the other businesses which also were denied the benefit of the "in lieu" schedule clearly did pay taxes and provide employment in Alameda. *Id.*, 202 Cal. Rptr. at 689. In short, the city's post hoc justification could not have been the intended basis of the differential treatment. The court also rejected as irrelevant the city's contention that the differential taxing of subscription television was not "intended to censor speech." *Id.* at 158 n.7, 202 Cal. Rptr. at 689 n.7.

108. *Id.* at 157 n.8, 202 Cal. Rptr. at 690 n.8.

109. ALAMEDA MUNICIPAL CODE §§ 13-111(s), 13-1951(c), *reprinted in City of Alameda,* 156 Cal. App. 3d at 151 n.1, 202 Cal. Rptr. at 685 n.1.

110. *City of Alameda,* 156 Cal. App. 3d at 157 n.9, 202 Cal. Rptr. at 690 n.9.

and the microwave-distributed pay TV service in *City of Alameda*, cable television is a first amendment speaker/publisher. And like the media in those cases, cable television has been singled out from other communications media and community businesses and has been subjected to a differentially heavier tax in the form of franchise fees and PEG payments. Cities attempt to defend this apparent inequity on the ground that cable television uses the public rights of way in a more extensive and burdensome way than other businesses. Assuming *arguendo* that cable television does use the public rights-of-way in a manner different from other businesses, that fact alone would not justify the differentially heavier financial burden imposed by a municipality on cable television. Minimally, the municipality should have to show that its tax and license schemes for other community businesses are calibrated according to those other businesses' relative uses of the rights-of-way. Most, if not all, cities would fail that test.

A. Comparison to Utilities

Typically, natural gas, electric, steam heat, and telephone utilities run their lines along public rights-of-way and pay cities little or nothing for that usage.[111] Utility lines have been a permanent fixture of the municipal scene, in contrast to cable television lines, which are a comparatively recent phenomenon. Moreover, utility lines along a particular route typically consume far more underground or aerial space in the aggregate than do cable television lines. Because they are inherently more dangerous than cable television wires, individual electricity lines and steam and gas mains require much more space between them and other lines than does cable TV wire. In most urban areas, streets are frequently dug up or manholes opened for repair or installation of utility lines. In contrast, once cable TV trunk and feeder lines have been put in place, either underground or on poles, there is little likelihood of repair disrupting vehicular or pedestrian traffic during the remainder of the typical fifteen-year franchise term. Furthermore, many municipalities charge cable construction firms, or the franchised operators, street-cutting fees that are designed to compensate the government for regulatory work in connection with the street cuts. Such street-cutting fees are also required of utilities. The typical municipal street-cut permit file shows vastly more permits granted to utilities than to the cable operator, reflecting the far greater and more continuous disruption of public ways caused by utilities.

111. Telephone companies even install booths on public sidewalks, but are not generally required to give the city free telephone service or equipment or a share of the companies' revenues.

In short, a defender of cable TV franchise fees will have difficulty showing that utilities actually pay cities for the use of public rights-of-way, much less that what they pay is tied proportionately to the physical extent to which they burden those rights-of-way. Two debatable propositions—that utility services may be more of a "necessity" than cable television and that utilities may have a "duty" to serve everyone whereas the cable television operator does not—have no bearing on this analysis. Either differential payment schemes are tied to differential degrees of burdening public rights-of-way, or they are not so tied. Other differences between the utility and cable TV businesses cannot justify subjecting the first amendment electronic speaker/publisher to the heavier payment obligation.

B. Comparison to Advertising Signs and Other Uses

In an indeterminate number of urban cable TV communities, business establishments are free to extend signs out from their buildings over the dedicated public sidewalks. Rarely is there any fee for this use of the aerial public rights-of-way. Yet, these signs are at least as "permanent" as overhead coaxial cable. Further, they are certainly no more aesthetically pleasing, and, if improperly installed or maintained, they are potentially much more dangerous to passers-by. Some communities also allow rolling signs and vending carts on public sidewalks, but rarely do such communities tie any permit fees to the extent of physical usage or actual disruption of the public passageways. The same tends to be true when streets and sidewalks are closed off for parades, festivals, block parties, and building construction or renovation.

Advertising increasingly is finding its way onto bench backs, transit stop shelter walls, and the sides of refuse cans along public sidewalks. In some instances, the entity owning the advertising facility does pay the city a percentage of gross receipts. In other cases, the entity may furnish the benches, shelters or cans as a public service. Whatever the situation, it is unlikely that the city has calculated its "compensation" according to the extent of physical space used, the amount of net pedestrian convenience/inconvenience created, or the permanent/portable nature of the bench/shelter/can involved. Absolute precision cannot be expected. However, if the municipality has made no effort whatsoever to tie its compensation to the particular use of the rights-of-way, then the absence of such a tie makes unpersuasive any attempted justification of franchise fee/PEG support obligations based on cable's burdening the public rights-of-way. Installed cable rarely interferes with anyone's use of the rights-of-way. On the other hand, an advertisers' benches, shelters, and trash cans unquestionably require pedestrians to walk

around them, and they are commonly damaged by vandals and wayward automobiles, thus necessitating frequent scrutiny by police and public safety engineers.

Taxicabs, buses, ambulances, courier services, refuse vehicles, hearses, and delivery vans, carrying everything from raw produce to sophisticated satellite dishes and television paraphernalia, ply the public ways, sometimes blocking streets or curb lanes or sidewalks. Taxicabs and buses may carry inside or outside advertising as well as passengers. Television and radio stations depend upon the public thoroughfares for supplies and employees to reach them. Their electronic news-gathering vans with sophisticated cameras and microwave-relay antennas can often be seen on public streets and walkways; and certainly, the news media's reporters depend upon unhindered access to public buildings and officials. Movie theaters and concert halls create major human and vehicular congestion and promote occasional littering problems along the sidewalks and street lanes outside their establishments. Even video cassette rental shops fronting on main thoroughfares are prone to burden the flow of traffic at key hours of the day or evening. Yet, none of these users of the public rights-of-way—including many that compete directly or indirectly with cable television for customers or advertising dollars—pays municipal fees calculated according to the extent to which its business burdens or benefits from those rights-of-way. None is obliged to furnish free service or equipment to the city.

C. Comparison to Newspapers

Like cable television, the newspaper business has always depended for its existence upon extensive use of the public rights-of-way. The earliest Tom Paine "newspapers" were one-sheet circulars or pamphlets passed around on public streets and door-to-door. As printing technology developed and literacy spread, newsboys hawked their papers on street corners and delivered periodicals over public sidewalks to private dwellings and businesses. Also, printed matter began to be delivered by mail over public rights-of-way. Today, newspaper delivery vehicles drive the public streets, often temporarily blocking or diverting traffic at pickup and dropoff points. Some periodicals are even delivered to television sets and computer screens by cable television or other wire facilities running through the public ways. Newspaper vending machines, unheard of in Tom Paine's day, are placed on public sidewalks and chained to benches, traffic meters, or light poles.

Despite their extensive use of the public rights of way, newspaper publishers are not typically subject to anything remotely comparable to the franchise fee and PEG support obligations imposed on cable television. This

radically different treatment of two users of the public ways cannot be justified on the basis of any compelling governmental interest and, therefore, it is a violation of free speech and equal protection guarantees of the Constitution. Before considering possible municipal arguments to justify this blatantly unequal treatment, it may be helpful to review some of the constitutional precedents that protect the print media.

In *Lovell v. City of Griffin,*[112] the Supreme Court held an ordinance requiring persons to obtain written permission of the city manager before "distributing . . . literature of any kind"[113] to be void on its face. The city accurately reasoned "that every municipality is faced with a sanitary problem in removing from its streets, papers, circulars and other like materials."[114] Yet, the ordinance was fatally flawed because it prohibited distribution "at any time, at any place, and in any manner without a permit" and was not tailored to address any legitimate municipal concern such as "littering of the streets."[115] In words that ring just as true in the cable television context today as they did in *City of Griffin*'s print media context, the Court said: "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' "[116] In *Jamison v. Texas,*[117] the Court invalidated a Dallas ordinance that prohibited handbill distribution. The Court had no quarrel with the proposition that "states [and their municipal instrumentalities] may provide for control of travel on their streets in order to insure the safety and convenience of the traveling public."[118] Nonetheless, "[t]he right to distribute [literature] . . . on the streets may not be prohibited at all times, at all places, and under all circumstances."[119] The Court held that

> one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.[120]

112. 303 U.S. 444 (1938).
113. *Id.* at 447.
114. *Id.* at 445.
115. *Id.* at 451.
116. *Id.* at 452 (citing *Ex parte* Jackson, 96 U.S. 727, 733 (1877)).
117. 318 U.S. 413 (1943).
118. *Id.* at 416.
119. *Id.*
120. *Id.*

Prior to *Schneider v. State,*[121] lower courts had sustained convictions under the antipamphleteering ordinances of Los Angeles, Milwaukee, and Worcester, Massachusetts, on the ground that distribution of literature "encouraged or resulted in" littering by the intended recipients of the literature.[122] The Supreme Court overturned the convictions, reasoning that:

> Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.[123]

The Court also rejected the suggestion that the ordinances were valid because persons were free to distribute printed matter in public places other than streets and alleys. The Court said, "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[124]

The print media's right to distribute door-to-door, a distribution that cable television accomplishes through salesmen's visits followed by installation of "drop" cables, has been repeatedly affirmed by the courts. In *Martin v. City of Struthers,*[125] the Supreme Court stated: "Freedom to distribute information to every citizen whenever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."[126] Believing that the individual householder could decide whether or not to deal with the solicitor/distributor,[127] the *City of Struthers* Court overturned the city's absolute ban on door-to-door distribution of literature. Eight years later in *Breard v. Alexandria,*[128] however, the Court upheld the conviction of door-to-door magazine solicitors under an Alexandria, Louisiana, ordinance that forbade solicition by persons " 'not having been requested or invited so to do by the owner or owners.' "[129] The Court, of course, did not question the print media's first amendment right to dis-

121. 308 U.S. 147 (1939).
122. *Id.* at 162.
123. *Id.*
124. *Id.* at 163.
125. 319 U.S. 141 (1943).
126. *Id.* at 146-47.
127. *Id.* at 147-49.
128. 341 U.S. 622 (1951).
129. *Id.* at 624 (quoting the Alexandria, Louisiana, ordinance).

tribute requested literature door-to-door; its focus was limited to the solicitation of subscriptions, which the Court said "may be made by anyone interested in receiving the magazines without the annoyances of house-to-house canvassing."[130] *Breard* attempted to distinguish *City of Struthers* as having involved free religious solicitation with "no element of the commercial."[131] *Breard*'s "commercial" distinction has fallen out of favor in more recent precedent.[132] The basic thrust of *City of Struthers,* therefore, is still good law today.[133]

Following the Supreme Court's lead, the lower courts have spelled out in some detail the broad extent of the print media's protection against municipal interference with the means and methods of distribution. In *Strasser v. Doorley,*[134] the United States Court of Appeals for the First Circuit found "no governmental interest of any importance" in holding that Providence, Rhode Island's requirement that newsboys register with the city and pay fifty cents for a numbered identification badge was unconstitutional.[135]

In *Miller Newspapers, Inc. v. City of Keene,*[136] the United States District Court for the District of New Hampshire enjoined the city's summary removal of the *Brattleboro Reformer*'s newsracks, which had been attached to parking meters on public sidewalks. The city asserted that the newsracks "might" impede pedestrian traffic or interfere with utilization of the meters.[137] The Court accepted the municipality's right to "impose reasonable time, place, and manner restrictions" on newspaper vending machines.[138] There was no evidence, however, of poorly maintained or damaged newsboxes endangering pedestrians or automobiles, and there was substantial evidence that the city itself attached trash cans and ticket collection boxes to parking meters.[139]

In a parallel decision, *Southern New Jersey Newspapers, Inc. v. State of*

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130. *Id.* at 644.

131. *Id.* at 643.

132. "To the extent that any of the Court's past decisions [such as *Breard*] . . . indicate that commercial speech is excluded from First Amendment protections, those decisions, to that extent, are no longer good law." Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 632 n.7 (1980).

133. *Cf.* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2274-75 (1985) (commercial speech entitled to first amendment protection somewhat less extensive than noncommercial speech).

134. 432 F.2d 567 (lst Cir. 1970).

135. *Id.* at 569; *accord* Wulp v. Corcoran, 454 F.2d 826, 834-35 (lst Cir. 1972).

136. 546 F. Supp. 831 (D.N.H. 1982).

137. *Id.* at 835 n.1.

138. *Id.* at 834.

139. *Id.* at 835 n.1.

New Jersey,[140] the United States District Court for the District of New Jersey enjoined the state's removal of newspaper vending machines from street curbs and sidewalks along state highway routes as an impermissible first amendment infringement. The court was unimpressed by the argument that the ban was limited to state-maintained routes, holding instead "that the existence of alternative categories of public streets is not sufficient by itself to justify a total prohibition on one category of public roads."[141] The state's concern about "possible safety hazards" was "speculative" and was based on a few photographs of newsboxes that had unshoveled snow around them or that partially obstructed access to utility poles.[142] Contrary evidence and photographs showed that the newsboxes caused no obstruction, did not contribute to pedestrian or motor vehicle accidents, incurred minimal vandalism, and spurred no complaints.[143] Similarly, most cable television companies could show that their facilities, once installed, posed no more health or safety danger than did the newsboxes. The state's aesthetic argument in the *Southern New Jersey* case was unpersuasive because the boxes were in areas already blighted by houses, stores, utility poles, billboards, traffic signs, benches, fire hydrants, mail boxes, and street signs.[144] The same, of course, is true today for most cable television facilities, which are placed on poles and in conduits that already hold unsightly telephone, electric, and other utility lines.

An ordinance totally banning newspaper vending machines from public sidewalks was declared unconstitutional as applied in *Philadelphia Newspapers, Inc. v. Borough Council.*[145] The United States District Court for the Eastern District of Pennsylvania rejected the Borough of Swarthmore's contention that the ordinance was valid because newspapers could still be sold on private property, either by home delivery, in stores, or at the train station.[146] The court was also unimpressed by the Borough's "hypothesized" public safety concerns as purported justifications for a total ban.[147] On the other hand, carefully tailored regulations as to size, location, appearance, and nonremovability, the court said, might survive constitutional scrutiny.[148]

Other court opinions have adopted similar reasoning in invalidating news-

140. 542 F. Supp. 173 (D.N.J. 1982).
141. *Id.* at 184 n.21.
142. *Id.* at 178, 186.
143. *Id.*
144. *Id.* at 186-87.
145. 381 F. Supp. 228 (E.D. Pa. 1974).
146. *Id.* at 242 n.8.
147. *Id.* at 242-43.
148. *Id.* at 244.

box prohibitions.[149] It is also apparent that newspapers and other print media may not, consistent with the Constitution, be subjected to any "deliberate and calculated device in the guise of a tax to limit the circulation of information."[150] Nor may government directly tax a newspaper's mere exercise of its constitutional right to publish or communicate knowledge.[151] Municipalities may, of course, require newspapers to reimburse the government for the reasonable costs of any constitutionally permissible time, place, and manner regulation.[152] Newspapers also may be subject to nondiscriminatory revenue-raising sales, business license, or income taxes.[153] But revenue-raising taxes that single out the press for differential treatment generally are not constitutional.[154] Additionally, the first amendment prevents the government from compelling newspapers to provide reply space, both because the associated cost may prevent the publication of other material and because compelled access robs newspapers of their editorial discretion.[155]

D. Outlook for Challenges to Municipal Cable Franchise Payments

In *Minneapolis Star,* the Court held that government must demonstrate "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation" for such a taxation scheme to stand when applied to a first amendment medium.[156] Dissenting, Justice Rehnquist argued that the tax classifications should have been judged under more traditional

149. *See, e.g.,* Kash Enterprises v. City of Los Angeles, 19 Cal. 3d 294, 562 P.2d 1302, 138 Cal. Rptr. 53 (1977) (required notice and hearing before removal of newsracks); Remer v. City of El Cajon, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (Ct. App. 1975) (ordinance overbroad on its face); Gannett Co. v. City of Rochester, 69 Misc. 2d 619, 330 N.Y.S.2d 648 (Sup. Ct. 1972) (ordinance is impermissible prior restraint); *see also* Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (llth Cir. 1984) (invalidated the regulation of newspaper vending machines where the ordinance gave uncontrolled discretion to city officials and failed to guarantee procedural due process).

150. Grosjean v. American Press Co., 297 U.S. 223, 250 (1936).

151. Murdock v. Pennsylvania, 319 U.S. 105, 112-16 (1943); Jones v. Opelika, 316 U.S. 584 (1942), *rev'd,* 319 U.S. 103 (1943).

152. *Murdock,* 319 U.S. at 116-17; Cox v. New Hampshire, 312 U.S. 569, 576-77 (1941); Gannett Co. v. City of Rochester, 69 Misc. 2d at 629, 330 N.Y.S.2d at 659-60.

153. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586 & n.9 (1983); City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P.2d 56 (Ct. App.) (business license tax upheld), *cert. denied,* 346 U.S. 833 (1953). *But cf.* Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d at 669-73 (district court found revenue-raising occupational licensing tax unconstitutional as applied to newspaper vending machines; appellate court reversed on ground that Tax Injunction Act withdrew federal court jurisdiction).

154. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. at 590-93.

155. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-58 (1974).

156. 460 U.S. at 585.

equal protection analysis. If the tax scheme "*significantly burden[ed]*" first amendment rights, he would have subjected the classifications to "strict scrutiny."[157] Apparently believing that the ink-and-paper use tax was not particularly burdensome, Justice Rehnquist contended that the tax scheme should be upheld because there was a "rational" explanation for the different classifications. The majority, by contrast, "view[ed] the problem as one arising directly under the First Amendment" because "the Framers perceived singling out the press for taxation as a means of abridging freedom of the press."[158] Thus, rather than analyze the issues under the familiar tiers of equal protection scrutiny, the Court held that the use tax could survive "only if the governmental interest outweighs the burden [on the press] and cannot be achieved by means that do not infringe First Amendment rights as significantly."[159]

Applying the majority view in *Minneapolis Star* to cable television, revenue-raising franchise fees and required PEG support payments quite obviously are unconstitutional. They "singl[e] out the press"[160]—in this case the electronic press. Whatever level of importance is assigned to the government interests in raising general revenues and in financing PEG support, those interests can *always* be achieved by a means that does not single out cable television operators or infringe upon their first amendment rights. Municipalities can simply "raise the [needed] revenue by taxing businesses [or individuals] generally, [thereby] avoiding the censorial threat implicit in a tax that singles out the press"[161] (or here, cable television operators). As noted, however, the majority opinion rested heavily on the Framers' intent and actual experience with taxes on the print media. No doubt municipalities will argue that *Minneapolis Star* applies only to the printed press. Yet, the first amendment has never been given such a narrow reading, tying it to the technology of the eighteenth-century printing press.

In the event that *Minneapolis Star* is not extended to embrace cable television, however, then Justice Rehnquist's dissent suggests that the analysis must follow the equal protection "tiers" approach. There is a line of equal protection cases involving the "public forum" doctrine that would appear relevant in this context. Under those authorities, if the disfavored medium operates (or seeks to operate) in a public forum, the government must demonstrate "compelling reasons" for favoring another class of entities over

157. *Id.* at 600 (Rehnquist, J., dissenting).

158. *Id.* at 585 n.7.

159. *Id.*

160. *Minneapolis Star,* 460 U.S. at 586.

161. *Id.*

it.[162] If the disfavored entity operates in a nonpublic forum, however, the discrimination "need only rationally further a legitimate state purpose."[163] Streets and parks are traditional public fora; other government property "opened for use by the public as a place for expressive activity," but which the government is "not required to create [as a] . . . forum in the first place," is also a public forum.[164] "Public property which is not by tradition or designation a forum for public communication" falls into the nonpublic forum category.[165] "[S]elective access [to such property] does not [automatically] transform [it] into a public forum."[166]

In *Members of the City Council v. Taxpayers for Vincent,*[167] the Supreme Court held that utility poles were not traditional or designated public fora.[168] Consequently, the city's total ban on the posting of signs on utility poles could survive first amendment scrutiny if it was reasonably necessary to accomplish a substantial, content-neutral municipal purpose. The Court held that the sign ban was content-neutral and curtailed speech no more than was minimally necessary to accomplish the city's traffic safety and aesthetic objectives.[169]

Vincent has obvious ramifications for cable television operators who attach cables to utility poles. In *Preferred Communications,* the Ninth Circuit conceded that utility poles and conduits are not traditional public fora.[170] Nonetheless, the court characterized those facilities as designated public fora because state law dedicated surplus pole space to cable television and because utilities hold themselves out as providers of pole-attachment services to cable companies.[171] The Ninth Circuit also distinguished *Vincent* on the ground that cable television is "basically compatible" with the normal use of utility poles whereas the signs in *Vincent* were not compatible.[172] After *Vincent* and *Preferred Communications,* three issues evolve regarding the applicability of the public forum doctrine to cable franchising: first, whether the aggregate right-of-way—subsurface, surface, and aerial—is indeed a thoroughfare open to the public and various media of expression; second, whether a single cable television operator's use of that right of way is com-

162. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983).
163. *Id.* at 54.
164. *Id.* at 45.
165. *Id.* at 46.
166. *Id.* at 47.
167. 104 S. Ct. 2118 (1984).
168. *Id.* at 2134.
169. *Id.* at 2135.
170. 754 F.2d 1396, 1408 (9th Cir. 1985).
171. *Id.* at 1409.
172. *Id.* at 1408.

patible with legitimate use by utilities, other media of expression, or the pedestrian and vehicular public; and third, whether cable television is a discrete medium of expression much the same as newspapers are. With respect to the last issue, it should be noted that cable television, unlike the posted signs in *Vincent,* is "a uniquely valuable [and] important mode of communication"[173] that cannot be banned from the public rights-of-way upon which that mode of communication depends.

Although this Commentary will not pursue these issues, suffice it to say that in *Vincent* the Court was uncomfortable with applying the "public forum" doctrine to a specific piece of "tangible property," i.e., utility poles.[174] Nor did the Court view sign-posting as a "discrete medium of expression."[175] Whatever the outcome of *Preferred Communications* so far as the question of allowing access to a second cable operator, the incumbent cable operator's right to be free from differentially burdensome taxation should be unaffected. *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*[176] is not to the contrary. In *Gannett,* the United States Court of Appeals for the Second Circuit permitted the Metropolitan Transportation Authority (MTA) to charge revenue-raising license fees for the placement of newspaper vending machines in train stations. The court concluded, perhaps erroneously, that MTA's stations were neither traditional nor dedicated public fora. Because MTA operated the stations in a proprietary rather than governmental capacity, the court held that it was reasonable for MTA to charge for the use of its facilities.[177] Cities, on the other hand, do not normally operate streets and sidewalks and the area above and beneath them in a proprietary way. Moreover, in *Gannett,* the plaintiff had numerous places on the public rights-of-way to locate its newspaper vending machines. Placement in MTA stations was hardly essential to the newspaper publisher's ability to distribute. Because of those options, the Second Circuit was able to say "[t]he marketplace provides protection against unreasonable licensing fees."[178] The marketplace does not, however, control cities' greed in raising cable television franchise fees and PEG support funds to unreasonable or discriminatory levels. The regulation of cable television is distinguishable in several respects from the restriction of newspaper distribution in *Gannett.* First, cable television cannot operate at all unless it has access to the public rights-of-way. Second, in *Gannett,* newspa-

173. 104 S. Ct. at 2133.
174. 104 S. Ct. at 2134 n.32.
175. *Id.*
176. 745 F.2d 767 (2d Cir. 1984).
177. *Id.* at 774-75.
178. *Id.* at 775 n.4.

pers were "in a privileged position and . . . not . . . the victims of discrimination."[179] No other types of vendors were allowed into the MTA stations. Contrast this with the usual municipal rights-of-way, which are extensively used by all sorts of utility, business, and individual users who pay no franchise fees or anything remotely similar to PEG support payments. Third, despite the proprietary nature of MTA's control over its "nonpublic forum," the *Gannett* opinion directed the lower court "to enter an order prohibiting MTA from discriminating unreasonably in fees charged for licensing of newsracks."[180] In sum, even in a nonpublic forum environment, first amendment media are entitled to full protection against unreasonable discrimination done in the name of municipal revenue-raising.

Most businesses and media make extensive use of public rights-of-way without being required to pay franchise fees or any fees comparable to PEG support payments. In light of this differential treatment and of the minimal health, safety, or aesthetic burdens imposed by installed cable television facilities (as compared to burdens imposed by other nonpaying users), PEG support requirements and franchise fees in excess of reasonable regulatory costs violate the equal protection strictures of the first and fourteenth amendments.

VII. CONCLUSION

Despite the cable industry's long-time inertia on the subject and despite the endorsement in the Cable Act, municipally imposed franchise fee and access programming financial support requirements seem doomed to invalidation under the free speech, free press, and equal protection guarantees of the Constitution. The forthcoming Supreme Court decision in *Preferred Communications* is unlikely to change that result, although it doubtless will affect some of the terminology and focus of the debate.

179. *Id.* at 774.
180. *Id.* at 776.