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# Midwest Video Crop. v. FCC: The First Amendment Implications of Cable Television Access

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## *Midwest Video Corp. v. FCC:* The First Amendment Implications of Cable Television Access

The United States Court of Appeals for the Eighth Circuit recently considered the validity of the cable television access rules<sup>1</sup> promulgated by the Federal Communications Commission (FCC) in 1976. In a case which is currently before the Supreme Court, the Eighth Circuit held in *Midwest Video Corp. v. FCC*<sup>2</sup> that the rules must be set aside as exceeding the Commission's jurisdiction.<sup>3</sup> The major features of the cable television access rules provide: That cable systems with 3,500 or more subscribers designate at least four channels for access use,<sup>4</sup> including one for public access, educational access, local government access, and leased access;<sup>5</sup> that, until demand exists for full time use of all four access channels, cable operators may combine access programming on one or more channels;<sup>6</sup> that at least one public access channel be supplied free of charge;<sup>7</sup> that operators establish rules providing for access on a first-come, non-discriminatory basis on both the public access<sup>8</sup> and leased access<sup>9</sup> channels; and that each cable system subject to the rules supply the equipment and facilities necessary for local production and presentation of access programs.<sup>10</sup>

Although the court invalidated the Commission's cable access rules on jurisdictional grounds, making discussion of the constitutional issues unnecessary, the Eighth Circuit nevertheless found the first amendment implications of the rules serious enough to warrant attention. The jurisdictional issue surrounding the Commission's promulgation of a wide range of cable television rules is a complicated one which has received much scholarly attention<sup>11</sup> and is beyond the scope of this note.

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<sup>1</sup>The Federal Communications Commission's cable television access rules appear in Report and Order, Docket No. 20508, 59 F.C.C. 2d 294, 294-97 (1976).

<sup>2</sup>571 F.2d 1025 (8th Cir. 1978), cert. granted, 47 L.W. 3187 (1978).

<sup>3</sup>*Id.* at 1029.

<sup>4</sup>The term "access use" describes the exercise of the right, established under the FCC's cable rules, to communicate over a cable television channel. Thus, an individual appearing on the free-of-charge channel or the leased access channel mandated by the rules (*see* note 5, *infra*) is exercising his right of access to the cable channel, and the channel may be said to be set aside for "access use."

<sup>5</sup>47 C.F.R. §76.254(a) (1977).

<sup>6</sup>47 C.F.R. §76.254(b) (1977).

<sup>7</sup>47 C.F.R. §76.256(c) (2) (1977). However, live studio programs longer than five minutes are subject to a reasonable charge for production costs. 47 C.F.R. §76.256(c) (3) (1977).

<sup>8</sup>47 C.F.R. §76.256(d) (1) (1977).

<sup>9</sup>47 C.F.R. §76.256(d) (3) (1977).

<sup>10</sup>47 C.F.R. §76.256(a) (1977).

<sup>11</sup>*See, e.g.,* Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972); Berman, *CATV Leased-Access Channels and the FCC: The Intricable Jurisdiction Question*, 51 NOTRE DAME LAW. 145 (1975); Botein, *CATV Regulation: Jumble of Jurisdictions*, 45 N.Y.U.L. Rev. 816 (1970); Hoffer, *The Power of the FCC to*

Rather, the focus will be upon the first amendment implications of the cable access rules.

#### BACKGROUND

A review of the Supreme Court's approach to the access issue in the context of other communications media may serve to illuminate some of the considerations central to the cable access issue.

#### *Broadcast Access*

In *Red Lion Broadcasting Co. v. FCC*,<sup>12</sup> the Supreme Court upheld the FCC's personal attack and fairness doctrines.<sup>13</sup> Justice White's opinion for a unanimous Court placed heavy emphasis on the scarcity of broadcast frequencies as a basis for the Commission's regulation.<sup>14</sup> The impossibility of allowing everyone who so desires to operate television or radio broadcast stations had necessitated extensive regulation over the years, and the Court recognized the Commissions' broad authority in this regard. While the opinion acknowledged that broadcasters possess a first amendment interest in controlling what they communicate, the Court concluded that the right of the viewers and listeners is to have access to "an uninhibited marketplace of ideas,"<sup>15</sup> and that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."<sup>16</sup> Thus, in the Court's view, the Commission was justified in abridging the broadcasters' rights in order to insure the presentation of diverse ideas over a medium with limited availability to potential speakers. Moreover, the Court found significant the government's own role in securing a preferred position for broadcasters through the licensing process. This, according to the Court, imposed upon broadcast licensees a fiduciary-like duty to present views which are representative of the community.<sup>17</sup> Guided by these considerations, the justices had little trouble upholding the challenged regulations.

Two other aspects of the Court's opinion in *Red Lion* are worth noting. A certain deference toward the FCC's view of its own authority is evi-

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*Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DEN. L.J. 477 (1976); Note, *Sports Anti-Siphoning Rules for Pay Cable Television: A Public Right to Free TV?*, 53 IND. L.J. 821 (1978).

<sup>12</sup>395 U.S. 367 (1969).

<sup>13</sup>The personal attack rules provide that any station broadcasting a personal attack must seek out the individual attacked, supply him with a transcript of the broadcast, and offer him airtime for a reply. 47 C.F.R. §73.123 (1977). The personal attack rules represent a particular application of the FCC's fairness doctrine, which imposes upon broadcasters the obligation to cover issues of public importance and to fairly represent different points of view on those issues. If a paid sponsor for an opposing view is not available, the broadcaster must provide free time for that purpose. 47 U.S.C. §315(a).

<sup>14</sup>395 U.S. at 376, 388.

<sup>15</sup>*Id.* at 390.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 389. See also *id.* at 400.

dent. Referring to the Communications Act of 1934,<sup>18</sup> Justice White declared that, "[t]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ."<sup>19</sup> The opinion's approach was also one of caution, as the Court realized it was dealing with an area in which rapid technological change is the rule. Thus, the Court preferred to uphold the Commission's regulations on the basis of the present scarcity of broadcast frequencies rather than speculate as to their future scarcity or abundance.<sup>20</sup>

In *CBS v. Democratic National Committee*,<sup>21</sup> the majority reaffirmed *Red Lion's* emphasis on the importance of scarcity in justifying the regulation of broadcast frequencies.<sup>22</sup> The Court upheld the Commission's ruling that broadcasters could not be required to accept paid editorial advertisements. The Court also cited with approval *Red Lion's* commitment to the rights of the viewing public, noting that these rights are served when everything of importance is said.<sup>23</sup> When a limited resource is concerned, the Court continued, it is not essential that everyone has an opportunity to speak.<sup>24</sup> As long as the leading viewpoints on matters of public concern are represented, the proposed right of paid editorial access would not appreciably further the viewing public's interest in being informed. Thus, in balancing the interests of the viewers against those of the broadcasters, the Court found that while "the interest of the public is our foremost concern,"<sup>25</sup> that interest simply was not served by the proposed right of access.

Another reason stated by the Court for its position that a right of paid editorial access would not benefit the viewer was that the more affluent would purchase the most editorial time and thus effectively prevent the presentation of a broader range of ideas.<sup>26</sup> Chief Justice Burger's opinion for the majority expressed a lack of confidence in the adequacy of the FCC's fairness doctrine to resolve this problem.

Application of the doctrine, Burger suggested, would only permit the less affluent to comment on those issues the wealthy have chosen to raise.<sup>27</sup> In Burger's view, the inadequacy of the fairness doctrine meant that in order to implement the right of access fairly, the Commission would have to oversee a great deal of broadcaster activity. Determination of which individuals and viewpoints had received sufficient air time would be in the Commission's hands, thus risking "an enlargement of Government control over the content of broadcast discussion of public

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<sup>18</sup>47 U.S.C. §§151 *et seq.*

<sup>19</sup>395 U.S. 367, 381 (1969).

<sup>20</sup>*Id.* at 397-99.

<sup>21</sup>412 U.S. 94 (1973).

<sup>22</sup>*Id.* at 101.

<sup>23</sup>*Id.* at 122.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 123.

<sup>27</sup>*Id.*

issues."<sup>28</sup>

As in *Red Lion*, the Court acknowledged the advisability of according "great weight to . . . the experience of the Commission."<sup>29</sup> Once again, the majority sounded a cautious note, praising the virtues of flexibility in a fast-changing field.<sup>30</sup> Nevertheless, the Court closed its opinion by observing that in the future, the Commission "may devise some kind of limited right of access that is both practicable and desirable," citing the evolving cable television access rules as an example.<sup>31</sup>

### *Newspaper Access*

In *Miami Herald Publishing Co. v. Tornillo*,<sup>32</sup> the Court held a Florida statute granting political candidates a right to equal space to reply to newspaper criticism unconstitutional, as violating the first amendment guarantee of freedom of the press. The Court conceded that the newspaper industry had become a highly monopolized one.<sup>33</sup> Entry into the field, the opinion noted, was almost impossible, and the number of newspapers in operation had remained quite small. Chief Justice Burger's opinion for a unanimous Court also recognized the public's interest in receiving information from a variety of viewpoints.<sup>34</sup> But the Court found that this interest neither required nor justified even this relatively modest regulation of a limited resource. The best way to serve that interest, the Court declared, was to pursue Professor Thomas I. Emerson's suggested use of "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody. . . ."<sup>35</sup> The Court emphasized that an enforceable right of access, even when limited to political candidates replying to criticism, requires government coercion inimical to the first amendment.<sup>36</sup>

The Court was concerned in *Miami Herald* with the potentially chilling effect the statute might have upon criticism of political figures.<sup>37</sup> But beyond this, the majority declared that the statute imposed a substantial cost upon newspapers based on their content;<sup>38</sup> this cost consisted of not only the time and materials involved in printing and composing, but also

<sup>28</sup>*Id.* at 126-27.

<sup>29</sup>*Id.* at 102.

<sup>30</sup>*Id.* at 132.

<sup>31</sup>*Id.* at 131.

<sup>32</sup>418 U.S. 241 (1974).

<sup>33</sup>*Id.* at 248-51.

<sup>34</sup>The opinion finds support for this point in some of the Court's earlier decisions. The first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ." 418 U.S. 241, 252 (1974), quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945). "[D]ebate on public issues should be uninhibited, robust, and wide-open." 418 U.S. 241, 252 (1974), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>35</sup>418 U.S. 241, 247 (1974), quoting T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 671 (1970).

<sup>36</sup>418 U.S. at 254.

<sup>37</sup>*Id.* at 257.

<sup>38</sup>*Id.* at 256-57.

the loss of space the publishers would have used in other ways. It would be impractical for newspaper publishers to expand their editions in order to include the replies of political candidates. Thus, publishers would have to eliminate some of their planned material to accommodate the responses submitted by candidates. Yet even if there were no additional costs or loss of space, the Court concluded, the statute still would not pass constitutional muster because of its invasion of editorial judgment, an area protected by the first amendment.<sup>39</sup>

*The State of Mass Media Access*

Taken together, these leading decisions suggest that the Supreme Court has adhered to a scarcity theory as the basis for regulation which encroaches upon the First Amendment rights of the communications media. Scarcity due to economic, rather than technological, limitations has failed to persuade the Court to uphold access regulation.

The Court in *Red Lion* had no difficulty approving a personal-attack doctrine applicable to broadcasters who had attained a preferred position through government licensing, while it unanimously struck down similar regulations of narrower scope in *Miami Herald* when directed at unlicensed newspapers. Thus, the Court has been concerned not only with the technological scarcity of the communications resource, but with the presence of a governmental role in determining who may operate through such a resource.

*Red Lion* made clear, as Justice Stewart conceded in his *CBS* concurrence,<sup>40</sup> that the broadcaster's first amendment rights are not absolute, but must be balanced carefully against those of the viewing public. While the Court sustained the position of the newspaper publishers in *Miami Herald*, this does not necessarily indicate the majority viewed the publishers' first amendment interests as superior to those of the readers. The result probably reflects the majority's belief that the newspaper is not an appropriate medium for the sort of regulation attempted in that case, rather than a finding that the publisher's interests are generally paramount to those of the reader.

Caution and flexibility have guided the Court's approach to the issue of public access to the mass communications media. A deferential attitude toward the FCC's judgment has accompanied a wariness toward increasing government involvement in the control of what goes out over the airwaves or appears in the morning paper. If a cautious approach has thus far prevented the Court from accepting a mandated right of access to the media, circumspection has also restrained the Court from ruling out such a right in the future. As the Eighth Circuit concedes in *Midwest Video Corp. v. FCC*, *CBS* held only that the FCC was not *required* to force an access right upon broadcasters.<sup>41</sup> *CBS* did not hold that the Commis-

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<sup>39</sup>*Id.* at 258.

<sup>40</sup>412 U.S. 94, 146 (1973).

<sup>41</sup>571 F.2d 1025,1049 n.60 (8th Cir. 1978).

sion was prohibited from doing so. Moreover, the Court concluded its *CBS* opinion, as noted above, with a hint that future attempts to establish a limited right of access might meet with Court approval, and referred to the cable television access rules as an area of some promise.<sup>42</sup> Thus, the broadcast regulation cases decided by the Supreme Court have not foreclosed the possibility of mandated access to mass communications media.

### *Previous Cable Television Regulation*

In *United States v. Southwestern Cable Co.*,<sup>43</sup> the Court upheld broad authority on the part of the FCC to regulate the retransmission of distant broadcast television signals through cable systems.<sup>44</sup> The Court's opinion concerned itself solely with the issue of the Commission's jurisdiction over cable television, with no discussion of the first amendment. The majority concluded that the Commission's regulations served the purpose of preserving adequate *broadcast* television service, and were thus within the FCC's jurisdiction. The Court held that the Commission's authority was limited to that "reasonably ancillary" to the fulfillment of its broadcast television regulatory responsibilities.<sup>45</sup>

Several years later, in *United States v. Midwest Video Corp.*,<sup>46</sup> the Court also upheld a Commission rule that "no [cable television] system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs."<sup>47</sup> The Court found this regulation met *Southwestern Cable's* requirement of being "reasonably ancillary" to the Commission's responsibilities for broadcast regulation.<sup>48</sup> As in *Southwestern Cable*, the determinative issue was that of the FCC's jurisdiction to promulgate the particular cable television regulations, with considerable deference once again extended to the Commission's

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<sup>42</sup>412 U.S. 94, 131 (1973).

<sup>43</sup>392 U.S. 157 (1968).

<sup>44</sup>The FCC rules (47 C.F.R. §74.1107 *et seq.* (1972)) at stake in *Southwestern Cable* involved a number of regulatory powers. The Commission forbade the retransmission by cable television systems of distant broadcast television signals into the 100 largest television markets, unless this service had been offered as of February 15, 1966, or unless the Commission found that such service was consistent with the public interest. Moreover, the rules required cable television systems to carry the signals of local broadcast television stations. Finally, the rules prohibited cable television systems from duplicating local broadcast television station programming within 15 days before or after local broadcast of the signal. The Court upheld these rules as within the FCC's broadcast television regulatory authority, since the rules would enable broadcast television stations to continue effective service. *See* note 45 *infra*.

<sup>45</sup>392 U.S. 157, 178 (1968).

<sup>46</sup>406 U.S. 649 (1972).

<sup>47</sup>47 C.F.R. §44.1111(a) (1972) (rescinded in 39 Fed.Reg. 43302 (1974)).

<sup>48</sup>*E.g.*, 406 U.S. 649, 676 (1972) (concurring opinion).

own judgment in this regard.<sup>49</sup> The Court's opinion raised the first amendment objective of program diversity only as a possible basis for jurisdiction, refraining from any discussion of the various first amendment issues involved in the cable television context.

THE CABLE TELEVISION ACCESS RULES

*Midwest Video Corp. V. FCC*

As noted at the outset, the Eighth Circuit invalidated the Commission's cable television access rules on jurisdictional grounds. Nevertheless, the Court refers to its own opinion as the first to raise "the First Amendment implications of a Commission effort to enforce unlimited public access requirements."<sup>50</sup> Chief Judge Markey, writing for the Eighth Circuit, found the first amendment questions raised by the rules to be of such importance that he took the opportunity to discuss them by way of dictum, and to declare that had it been necessary, the Court would have held the rules invalid on constitutional grounds.<sup>51</sup>

The Court's discussion of the first amendment approves the scarcity theory followed by the Supreme Court in *Red Lion*, *CBS*, and *Miami Herald*. The Court cites the D.C. Circuit's opinion in *Home Box Office, Inc. v. FCC*<sup>52</sup> for the proposition that the regulatory treatment of cable television should be substantially the same as that of newspapers, since the scarcity of each is due to economic, rather than technological, limitations.<sup>53</sup> Thus, according to the Eighth Circuit, FCC authority to intrude upon first amendment rights must be less extensive with regard to cable systems than it is in the broadcast context. Nevertheless, the Court concedes that the broadcaster's, or cablecaster's, rights are not the only rights protected by the first amendment. The opinion suggests that if there were evidence of substantial viewer demand for access programming, then the Court would necessarily engage in "the most careful evaluation of First Amendment values involved."<sup>54</sup> However, according to the Court, such evidence is lacking, and there is no assurance that if the cable operators would be compelled to develop additional channel capacity and allow the public access to their systems, there would be anyone who would watch such programming. Thus, the Eighth Circuit appears to accept the preeminence of the viewing public's interest in receiving ideas and information from diverse points of view. The Court simply finds no evidence that access programming would serve that interest. Absent such evidence, the Court's view is that the cablecaster's right to exercise

<sup>49</sup>*Id.*

<sup>50</sup>571 F.2d 1025, 1053 (8th Cir. 1978).

<sup>51</sup>*Id.* at 1056.

<sup>52</sup>567 F.2d 9 (D.C.Cir. 1977). For an extensive discussion of the jurisdictional and first amendment issues in *Home Box Office*, see Note, *Sports Anti-Siphoning Rules For Pay Cable Television: A Public Right to Free TV?* 53 IND. L.J. 821 (1978).

<sup>53</sup>571 F.2d 1025, 1055 (1978), citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9,46 (D.C.Cir. 1977).

<sup>54</sup>571 F.2d 1025,1046 n.54 (8th Cir. 1978).



editorial control over its programming ought to remain unimpaired.<sup>55</sup>

The Eighth Circuit distinguishes the cable access rules from the mandatory program origination rule upheld in *Southwestern Cable* by noting that under the latter, editorial discretion as to what original programming would be cablecast remained in the hands of the cable operator.<sup>56</sup> Neither *Southwestern Cable* nor *United States v. Midwest Video* approved of cable regulation this extensive, the Court continues, and the Supreme Court's decisions in those cases should serve as the boundaries of permissible regulation.<sup>57</sup> Moreover, the Court points out, the *Southwestern Cable* and *United States v. Midwest Video* opinions did not address the first amendment values so heavily involved in the cable access context of the present case.<sup>58</sup> And even though it concedes that the Supreme Court's decisions have not precluded the possibility of valid access requirements, the Eighth Circuit minimizes the practical importance of the Supreme Court's favorable reference to the cable access rules at the close of *CBS*.<sup>59</sup> Far more significant, in the Court's view, is the substantive discussion in that case of the probable domination of access time by the affluent, and the inadequacy of the fairness doctrine to rectify such a development. It would be impossible to prevent such a result, the Court fears, without risking an unacceptable level of governmental involvement in the day-to-day programming decisions of the cable operator.<sup>60</sup>

Finally, the Eighth Circuit's opinion in *Midwest Video v. FCC* is marked by caution. In the Court's view, the necessity of the cable access rules is evidenced only by the Commission's speculations concerning the future. There is, the Court concludes, no showing of a viewer interest which justifies the Commission's intrusion upon the first amendment rights of the cable operators.<sup>61</sup>

#### *The Constitutional Considerations*

The potential abundance of cable television channels creates the technology (at least in the foreseeable future) for virtually everyone to get on the "air" who wants to do so. Thus, it is possible in the cable context to propose a right of access that is perhaps unrealistic in the broadcast area. However, as previously discussed, this abundance of channels also removes the basis on which the Supreme Court has most often justified regulation of the communications media: the scarcity of the regulated resource.<sup>62</sup> Yet, as the D.C. Circuit conceded even while invalidating the cable regulations involved in *Home Box Office*, "The

<sup>55</sup>*Id.* at 1053-54.

<sup>56</sup>*Id.* at 1055.

<sup>57</sup>*Id.* at 1038 n.29.

<sup>58</sup>*Id.* at 1055.

<sup>59</sup>See note 31 *supra*.

<sup>60</sup>571 F.2d 1025,1054 (8th Cir. 1978).

<sup>61</sup>*Id.* at 1059-63.

<sup>62</sup>See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367,376 (1969); *Home Box Office, Inc. v. FCC*, 567 F.2d 9,44-45 (D.C.Cir. 1977).

absence in cable television of the physical restraints of the electromagnetic spectrum does not ... automatically lead to the conclusion that no regulation of cable television is valid."<sup>63</sup> Clearly, this position has the support of the Supreme Court, as the Court has upheld the cable regulations challenged in *Southwestern Cable* and *United States v. Midwest Video*. Moreover, the absence of scarcity relates primarily to the complex jurisdictional question, which is not under examination here. If the Commission's jurisdiction to issue its cable access rules may be assumed, as we have done here, in order to reach the first amendment question, then the relevance of the lack of scarcity lies mainly in the absence of the viewer's interest in preventing airwave chaos which would make viewing impossible.<sup>64</sup> Also, as noted above, the abundance of cable channels negates the argument that a right of access is impossible due to technological limitations. Thus, we may reach the more critical question of whether an access right would serve the interests of the viewing public. Rather than preclude access regulations, at least as far as constitutional grounds are concerned, the abundance of cable channels merely complicates further the process of balancing the rights of communications media operators and viewers.

The abundance of cable channels may also permit the avoidance of some of the undesirable aspects of the FCC's fairness doctrine.<sup>65</sup> The doctrine may have functioned well in the broadcast situation, where channels are limited and mandated access would necessarily consume a substantial portion of a broadcaster's air time. However, as we have seen, these considerations are not present in the cable context, where an operator can have so many channels at his disposal<sup>66</sup> that the setting aside of as many as four is at least arguably reasonable. Thus, cable channel abundance suggests it may be unnecessary to depend upon a cable operator's determination, under the fairness doctrine, of what issues are deserving of "air" time, which viewpoints will be represented, and what spokesmen will appear.

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<sup>63</sup>567 F.2d 9,46 (D.C.Cir. 1977).

<sup>64</sup>Broadcast television stations must all use a scarce resource: the airwaves. Only a limited number of stations may broadcast their signals without interfering with each other. If there were no regulatory limitations imposed, the result might be that no one could communicate over the airwaves. This state of affairs has served as the basis for the FCC's regulation of television and radio. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, at 376, 388 (1969). Cable television systems, however, do not use the airwaves, and thus are not constricted by the scarcity of that resource.

<sup>65</sup>See note 13 *supra* for description of the fairness doctrine.

<sup>66</sup>The Eighth Circuit notes in *Midwest Video Corp. v. FCC* that present technology enables a cable system to carry as many as 80 channels, and that future replacement of cable by the laser-ray may allow an unlimited number of channels. 571 F.2d 1025, 1030n.6 (8th Cir. 1978). See Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419, 424 (1972); Note, *Cablecasting: A Myth or Reality - Authority of the Federal Communications Commission to Regulate Local Program Origination on Cable Television - An Evaluation of the Commission's Cablecasting Rules After United States v. Midwest Video Corporation*, 26 RUTGERS L. REV. 804, 804-05 (1973).

A final comment on the relevance of the apparently unlimited capacity of cable television is suggested by Justice Stewart's remark in his *CBS* concurrence. It is the scarcity of broadcast frequencies, Stewart declared, that necessitates regulation in order to insure diverse programming.<sup>67</sup> The implication is that if there is no scarcity of the communicative resource, then diversity will develop naturally and regulation for that purpose is unnecessary. However, as shall be discussed further below, it is not at all certain that such diversity will develop under the business practices of cable operators in the absence of an enforceable right of access.

In assessing the acceptability of the cable access rules in relation to the first amendment, it may be helpful to consider the relative public or private character of the cable television "forum." Clearly, the cable system situation is distinct from that present in the traditional public forum cases.<sup>68</sup> In the latter, the Supreme Court balanced the first amendment rights of the listener against the private property rights of property owners. In the cable situation, however, the Court must balance the listener's right against the first amendment right of the cable operator to exercise editorial discretion and control. The balance is one of first amendment interests; thus, the listener's right, while foremost, faces a stiffer challenge than it did from the owners of private property in the public forum cases.<sup>69</sup>

But is cable television somehow more "private" than broadcast televi-

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<sup>67</sup>412 U.S. 94, 135 (1973).

<sup>68</sup>The public forum cases consist of a line of Supreme Court decisions determining when private property is so "public" in nature that citizens who have entered the property have an interest in speech protected by the first amendment. The line begins with *Marsh v. Alabama*, 326 U.S. 501 (1946). *Marsh*, a Jehovah's Witness, distributed religious literature on the streets of a town privately owned by the Gulf Shipbuilding Corporation. *Marsh* was arrested and convicted under Alabama's criminal trespass statute. The Supreme Court overturned the conviction as violative of the first amendment. The property on which *Marsh* was passing out literature was privately owned, but had all the characteristics of a town. The Court stressed that citizens, including citizens of a company town, need to be informed. Twenty years later, in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), the Court considered a state court injunction banning the peaceful picketing of a store in a privately owned shopping center. Finding the shopping center to be the equivalent of the *Marsh* company town's business district, the Court held the injunction to be inconsistent with the first amendment. However, soon after *Logan Valley*, the Court came out differently in another shopping center case. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court upheld a state injunction banning anti-war leafleteers from passing out handbills at a privately owned shopping center. The Court reached this result in spite of the fact that the *Lloyd* shopping center was larger than that involved in *Logan Valley*, included a wider range of stores and services, and was considerably intermingled with public streets. The Court minimized the "business district" language of *Logan Valley*, and limited *Marsh* to its unique fact setting, that of the company town. The shopping center, in the view of the Court, was essentially private in character, the public being invited only for designated purposes. Those purposes did not include communication concerning issues and events unrelated to the center.

<sup>69</sup>The Court's opinion in *Marsh* stated that "[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." 326 U.S. at 509. Thus, the first amendment interest of the listener was weighed more

sion? Cable systems serve a fairly small percentage of the population.<sup>70</sup> A substantial subscription charge is required,<sup>71</sup> resulting in reduced availability to the general public. However, cable television is theoretically as available to anyone as broadcast television, it is a forum clearly dedicated to the purpose of communication,<sup>72</sup> and its subscribers can reasonably be expected to increase in number as the cost of subscription declines.

Nevertheless, there remain two factors which might persuade the Court that cable television is in some sense too "private" for the imposition of access requirements. Cable systems, unlike broadcast television stations, do not use the airwaves, which constitute a public resource. Moreover, cable operators, unlike broadcasters, have not achieved a preferential position as a result of governmental involvement.

Whether cable systems are ultimately characterized as public or private in nature, the constitutional validity of the cable access rules will still depend primarily on a finding that they serve the first amendment interests of the viewing public and that these interests outweigh those of the cable operators. The Court has consistently followed this balancing approach.<sup>73</sup> Clearly, the access rules impinge upon the cable operators' exercise of editorial discretion. Moreover, they impose a potentially substantial economic cost on the cable operators by requiring all cable systems with 3,500 or more subscribers to carry at least twenty channels,<sup>74</sup> four of which must be designated for access use.<sup>75</sup> However, the FCC has attempted to reduce this burden. The 1976 revision of the earlier rules extends, for most systems, the deadline for compliance with the twenty channel requirement until June 21, 1986.<sup>76</sup> Moreover, the rules provide that until demand exists for full time use of the four access channels, access programming may be combined on just one or more

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heavily than the rights of the private property owner. However, the viewer enjoys no such advantage in the cable television context, where his interests are balanced against other first amendment interest, *i.e.*, those of the cable operator.

<sup>70</sup>As of 1975, 15.3% of American households with television sets subscribed to cable television. This percentage, however, represented 10.8 million households. Robinson, *Introduction and General Background* in DEREGULATION OF CABLE TELEVISION 6 (P. MacAvoy ed. 1977), quoting National Cable Television Association release, November 12, 1975.

<sup>71</sup>A typical installation fee ranges from \$10 to \$15, while monthly subscription rates average between \$6 and \$10. *Id.*

<sup>72</sup>One of the tests employed by the Court in the public forum cases, note 68 *supra*, was whether the property on which the would-be speakers attempted to exercise their first amendment rights had a general purpose and use "consonant" with such an exercise. *E.g.*, *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, at 319-20. The Court found this to be so in the company town case (*Marsh*) and in one of the supermarket cases (*Logan Valley*). Clearly, the purpose of cable television systems is communication, and thus such systems are, at least in this respect, "public" forums which may be required to accommodate the first amendment rights of others.

<sup>73</sup>*E.g.*, *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

<sup>74</sup>47 C.F.R. §76.252(a) (1976).

<sup>75</sup>47 C.F.R. §76.254(a) (1976).

<sup>76</sup>47 C.F.R. §76.252(b) (1976).

channels.<sup>77</sup> Furthermore, while a system must provide at least one full access channel, any system which had insufficient activated channel capacity on June 21, 1976 need only provide portions of those channels currently available for access use.<sup>78</sup> Thus, the economic cost imposed on cable operators may be less serious than the Eighth Circuit supposed. This conclusion is further supported by evidence that future expansion of cable facilities not designed to carry more channels may be very expensive and time-consuming.<sup>79</sup> Thus, the rules encourage the operators of large cable systems to construct expandible systems, which may save them future expense.

Therefore, in balancing the cable operator's rights against those of the viewer,<sup>80</sup> it appears that while there is a substantial impingement on the former's editorial discretion, the economic burden imposed may not be so great. In any event, the Supreme Court, since *Red Lion*, has consistently adhered to the notion that the viewer's right is paramount<sup>81</sup> and must prevail in the balancing of first amendment interests. Indeed, as the Eighth Circuit concedes in *Midwest Video Corp. v. FCC*, "[i]f, in broadcasting where viewing is free, 'the interest of the viewer is paramount,' [citations omitted] it would appear more so in cable systems, where subscribers must pay."<sup>82</sup>

The key to the fate of the FCC's cable access rules may thus lie in the Supreme Court's finding as to whether they do, in fact, serve the viewer's interest. As a practical matter, the rules may fail to achieve the goal of diverse programming.<sup>83</sup> The rules' requirements may prove so burdensome that they would inhibit the anticipated expansion of cable television. There may be insufficient funds for cable access programming,<sup>84</sup> free production being provided only for the first five minutes.<sup>85</sup> In either event the rules would fail to promote the viewer's interest in "the widest possible dissemination of information from diverse and antagonistic

<sup>77</sup>47 C.F.R. §76.254(b) (1976).

<sup>78</sup>47 C.F.R. §76.254(c) (1976).

<sup>79</sup>Most cable systems begin with 12 channels. These channels use the low and high portions of the MHz spectrum. Additional channel capacity requires use of the middle portion, and would necessitate the reconstruction of a system originally designed to carry only 12 channels. See *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1030n.6 (8th Cir. 1978).

<sup>80</sup>It should be noted that, to date, the Supreme Court has been unimpressed with arguments for a right of access which stress the first amendment rights of the would-be speaker. See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973). Obviously, should the speaker's interests find a place in future balancing by the Court, they would add weight to the side of a right of access to cable television.

<sup>81</sup>See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>82</sup>571 F.2d 1025, 1046 (8th Cir. 1978).

<sup>83</sup>A good brief discussion of the first amendment goal of diversity appears in Note, *Anti-Siphoning Rules for Pay Cable Television: A Public Right to Free TV?*, 53 IND. L.J. 821 (1978).

<sup>84</sup>See Note, *supra* note 66, at 828, 831.

<sup>85</sup>47 C.F.R. §76.256(c)(3) (1976).

sources."<sup>86</sup>

Beyond this, there is the critical question of whether there will be any viewers: will anyone watch access programming? If a subscriber has paid a substantial price in order to see the year's best motion picture, or most X-rated picture, how often will he tune in the access channel to hear his mailman's views on municipal finance or school desegregation? One suggested means of insuring an audience is to require cable operators to promote access by seeking out potential users and by advertising access programs to subscribers.<sup>87</sup> However, this would increase substantially the economic burden on the cable operators without assuring the existence of an audience whose first amendment interests are supposed to be at stake. Thus, the Eighth Circuit's insistence on a showing that access programming will receive an audience appears well taken.<sup>88</sup>

Even if there is an audience, it is necessary to question whether the rules will in fact tend to promote diverse programming. The Court must find whether allowing any member of the public access to a cable channel will result in a broader range of information and ideas, or merely provide additional outlets for self-promotion and show business. Although Justice Brennan has made clear his belief that, at least in the broadcast context, public access would indeed promote desirable diversity,<sup>89</sup> it is uncertain whether a majority of the Court would find this to be true in the cable television context.

The Supreme Court has expressed a concern, shared by the Eighth Circuit, that the implementation of any right of access would risk the dangers of increasing governmental control of the communications media.<sup>90</sup> One possible trouble area is the battle that may develop among potential users for the best time slots on the access channels.<sup>91</sup> Some determination will be necessary as to who can use the channels at what times. These decisions might be left entirely in the hands of the cable operators themselves. However, leaving this much control to the cable operators might hinder the achievement of diverse programming. The

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<sup>86</sup>Associated Press v. United States, 326 U.S. 1, 20 (1945). In order for the FCC's cable access rules to further the communication of information and ideas from a variety of viewpoints, the rules must not inhibit the growth of cable television systems. If the rules impose too many costs on cable operators, the industry may not prove profitable enough to expand so as to reach a large percentage of the population. In this event, the rules would prove counterproductive, by limiting the number of cable systems which could communicate diverse viewpoints to their subscribers. Similarly, the rules may not significantly advance the goal of diverse programming if many potential users of the free access channel are deterred by the production costs imposed on programming exceeding five minutes. Thus, it is possible that the rules may not serve the viewer's interest in diverse programming due to these practical economic factors.

<sup>87</sup>See *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1046 n.53 (8th Cir. 1978), citing Brief of Intervenors, National Black Media Coalition at 46.

<sup>88</sup>571 F.2d at 1059-63.

<sup>89</sup>*CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 184 (1973) (dissenting opinion).

<sup>90</sup>See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1054 (8th Cir. 1978).

<sup>91</sup>See Botein, *supra* note 66, at 444; Note, *supra* note 83, at 832.

argument is that since cable operators will still be running other channels on a commercial basis, it will be in their interest to draw the largest possible audience for those channels.<sup>92</sup> Thus, while required to designate public access channels available at no charge or reduced lease rates, operators may discourage their subscribers from watching those channels by scheduling the least attractive access programming during prime-time hours. Under these circumstances, the Commission might well find it necessary to regulate the assignment of access time slots, both to promote diverse programming and to fulfill its duty under the access rules to provide for first-come, non-discriminatory access. In this event, the danger of a level of governmental intrusion inimical to the first amendment would be substantial.<sup>93</sup> The assignment of access time slots would involve the Commission in the day-to-day operations and editorial decisions which should, if possible, remain with the cable operators.<sup>94</sup>

Yet, it may be that governmental involvement in the cable situation would only be equivalent to or even less than that existent in the broadcast area. Under the fairness doctrine, the Commission must review broadcast programming content to satisfy itself that "worthwhile" issues are covered and "representative" viewpoints receive exposure. The Commission must, if petitioned, determine what editorials broadcasters must accept, and what replies they must broadcast. These determinations would seem unnecessary in an access setting,<sup>95</sup> and whether

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<sup>92</sup>See Botein, *supra* note 66, at 423; Note, *supra* note 83, at 832-33.

<sup>93</sup>This is evidenced by the sort of procedure proposed in Botein, *supra* note 66, at 444-48, which requires the Commission to become far too extensively involved in what are essentially matters of editorial discretion.

<sup>94</sup>Further potential for increased governmental intervention in the operation of cable systems lies in the possibility of Commission regulation of rates charged for the leased access channel or for the production costs of programming on the free access channel which exceeds five minutes and is thus subject to charge. See Note, *supra* note 83, at 829-30.

Another question raised by the problem of governmental involvement is whether the provisions for leased access (47 C.F.R. §76.256(d)(3)) and free access (47 C.F.R. §76.256(c)(2)) might fare differently under constitutional analysis. Free access, of course, circumvents the concern of the CBS majority, that the viewpoints of the affluent would predominate under the right of paid editorial access examined in that case (412 U.S. 94, 123). The leased access provision, on the other hand, comes squarely within the ambit of the Court's concern. Yet, application of the fairness doctrine to the leased access channel might counter this objection by insuring that all viewpoints, not just those of the wealthy, are expressed. The CBS majority argued that the fairness doctrine only permits the poor to respond to the issues that the affluent have chosen to raise, and that application of the doctrine to editorial advertising, at least, might create more problems than it would solve. 412 U.S. at 123. The Court may have overstated its position, however, as it failed to acknowledge the doctrine's requirement that issues of public interest generally receive coverage. Thus, the choice of issues would not remain wholly in the hands of the affluent who purchase editorial time. The fairness doctrine may or may not have a useful role to play in the cable access area. But it is by no means clear that we ought to abandon its use, and its continued application would place the Commission's leased access requirement on the same constitutional footing as its free access provision, each requiring some degree of governmental involvement in programming decisions.

<sup>95</sup>However, it is uncertain what role the fairness doctrine might continue to play where public access to cable television is concerned. See, e.g., *Midwest Video Corp. v. FCC*, 571

the extent of government control would be greater under an access right than it already is under the fairness doctrine remains an open question.

Finally, in this attempt to assess the probable fate of the cable access rules, it is worth noting that these regulations are the FCC's own creation. As we have seen, the Supreme Court has in the past adopted a deferential posture toward the Commission's judgment.<sup>96</sup> Here, the Commission has departed from its traditional position in the broadcast area by endorsing a relatively substantial right of access to cable television.<sup>97</sup> The Court may respond by departing from past practice and brushing the cable access rules aside. However, if previous deference to the Commission has been sincere, and that posture is maintained in this situation, then the Court may take the Commission's position into account in resolving an otherwise equal balance of considerations.

### CONCLUSION

The FCC's cable television access rules, invalidated by the Eighth Circuit on jurisdictional grounds in *Midwest Video Corp. v. FCC*, will soon be reviewed by the Supreme Court. The purpose of this note has been to examine the first amendment considerations which ought to guide the Court, should the Court reach the constitutional issue.

It has been argued here that many of the considerations that the Court has found persuasive in reviewing the access regulation of other communications media support the validity of the cable access rules. On the other hand, cable television is, in some ways, a more private forum than broadcast television; also, there is an absence of resource scarcity, which the Court has required previously in upholding FCC regulations. Yet, the potential abundance of cable television channels has implications which cut both ways, and the cable rules clearly have not been precluded by Court decisions in the broadcast area. Deference to the FCC's judgment lends strength to the access proponents' case, as does the fact that the economic burden imposed by access requirements may be less for cable operators than for broadcasters or newspaper publishers.

Nevertheless, the most important question for the Court is whether the rules ultimately serve the interest of the cable television viewer in receiving information and ideas from a variety of viewpoints. It is the viewer's interest which the Court has found must prevail in the balancing

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F.2d 1025, 1054-55 (8th Cir. 1978). The FCC regulations currently apply the fairness doctrine to cable systems which cablecast original programming. 47 C.F.R. §76.209(a). While application of the doctrine would seem inappropriate in the context of public access programming, the courts have yet to resolve the question.

<sup>96</sup>See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

<sup>97</sup>That is to say, the current cable television access rules are considerably broader in concept and impact than the very limited individual right of access established by the personal attack doctrine upheld in *Red Lion*, *supra* note 96.



of first amendment rights, and the cable viewer's interest is particularly deserving of precedence, as he directly supports the cable system through his subscription. Thus, the Court will have to determine whether the rules will in fact promote program diversity and whether there will be an audience for access programming to benefit from such diversity.

The Court indicated in *CBS* that some sort of limited access right might meet with its approval in the future. But whether that approval will come in *Midwest Video Corp. v. FCC* remains to be seen. The Court has approached the access question cautiously in the broadcast context, and presumably will do so with regard to cable television as well. In this connection, it is of significance that should the Court find the rules do serve the viewer's interest, it would be unnecessary to go so far as to weigh the *speaker's* rights or recognize a right to *effective* free speech in order to uphold the rules as consistent with the first amendment.

Yet, it may be that the Commission's approach is not cautious enough. Mandated public access to certain cable channels is an encroachment, however modest, upon the cable operator's first amendment right to exercise editorial discretion. The Court has upheld such intrusions with great reluctance, and only in order to protect the viewer's first amendment interest in exposure to a variety of viewpoints. Moreover, it may prove easier to implement a right of access in the future than to rescind it once it has proved unnecessary or undesirable. Thus, it seems advisable to withhold constitutional sanction of the cable access rules until such time as a convincing showing is made of their necessity and effectiveness. The Commission has, of course, provided for minimal compliance until there is sufficient viewer demand to justify four full access channels. Their impact thus modified, the rules may prove modest enough to win Court approval, perhaps on some sort of trial basis. But the minimal compliance provision only serves to reduce the burden imposed on cable operators, whereas the threshold question, when dealing with first amendment rights, must be whether any burden at all is justified. The right of access to cable television adopted by the FCC appears to meet many of the first amendment requirements which a right of access to broadcast facilities might not. Nevertheless, judicious flexibility in an area of fundamental rights and rapid technological change suggests that a constitutional sanction of the cable access rules depends upon a showing that the rules will in fact serve the cable television viewer's interests, that potentially less drastic means such as the fairness doctrine are inadequate to serve those interests, and that a level of governmental involvement inimical to the first amendment would not necessarily result.

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