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Cable Franchising and the First Amendment

William E. Lee*†

In awarding and regulating cable franchises, cities often extract from cable operators promises and conditions such as access channels in exchange for exclusive use of public rights-of-way. Professor William Lee in this Article argues that this cable franchising process violates the first amendment rights of cable operators. Professor Lee rejects the two rationales for municipal cable regulation by contending that cable is not a natural monopoly in every market and that cable's use of public rights-of-way requires content neutral regulation. The exacting of conditions such as access channels, however, is not content neutral regulation. Furthermore, censorship decisions that municipalities require of cable operators are sufficiently subjective to violate the first amendment. Professor Lee concludes that an open entry policy for cable operators will allow existing law and natural economic forces to regulate the cable market in accordance with the strong first amendment tradition that limits government interference with freedom of expression.

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† After the completion of this Article, the National League of Cities (NLC) and the National Cable Television Association (NCTA) reached a compromise on cable legislation. S. REP. No. 67, 98th Cong., 1st Sess. 13 (1983). The provisions of this compromise form the basis of legislation that the United States Senate approved on June 14, 1983. S. 66, 98th Cong., 1st Sess., 129 CONG. REC. S8325-28 (daily ed. June 14, 1983). Although the compromise reflects a modest change in the NLC's attitudes toward cable regulation, the compromise and legislation do not affect significantly the key constitutional issues that this Article discusses. For a thorough discussion of the legislation, see *infra* note 254.

I. INTRODUCTION

Mayor Charles Royer of Seattle exemplified the lack of municipal concern for the first amendment rights of cable operators when he remarked, "I don't believe the first amendment—and this is a harsh thing to say—I don't believe it is the primary concern of cities."¹ This apathy is manifest in cable franchising; cities exercise the franchising power to extract services such as access channels² from cable companies in exchange for permission to use public rights-of-way.³ Although some commentators characterize this form of franchising as a legitimate exercise of government power,⁴ Harold Farrow, counsel for the petitioner in *Community Commu-*

1. *Diversity of Information: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 199 (1981) (statement of Charles Royer) [hereinafter cited as *Diversity of Information*].

2. Access channels generally are of four types: (1) public access available for noncommercial uses; (2) educational access available for educational authorities; (3) government access available for governmental entities; and (4) leased access available for commercial uses. With the exception of certain categories of expression, see *infra* text accompanying notes 135-80, franchising authorities do not permit the cable operator to deny a request for access on the basis of content. See generally G. GILLESPIE, *PUBLIC ACCESS CABLE TELEVISION IN THE UNITED STATES AND CANADA* (1975); Botein, *Access to Cable Television*, 57 *CORNELL L. REV.* 419 (1972); Harrison, *Access and Pay Cable Rates: Off-Limits to Regulators After Midwest Video II?*, 16 *COLUM. J.L. & SOC. PROBS.* 591 (1981); Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 *S. CAL. L. REV.* 1001 (1981); Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 *COM./ENT. L.J.* 1 (1981); Comment, *Of Common Carriage and Cable Access: Deregulation of Cable Television by the Supreme Court*, 34 *FED. COM. L.J.* 167 (1982); Comment, *Public Access to Cable Television*, 33 *HASTINGS L.J.* 1009 (1982); Comment, *ACLU v. FCC: Are CATV Access Channels Common Carriers?*, 1975 *UTAH L. REV.* 994.

3. A brief survey of recently issued requests for proposals in major markets reveals the awesome power that governments exercise in cable franchising. Philadelphia is requiring bids to provide a minimum of 13 public access channels. *CABLEVISION*, Oct. 4, 1982, at 84. Chicago is demanding that bids provide at least 20% of channel capacity for public access. *BROADCASTING*, Sept. 6, 1982, at 28. Detroit is requiring a minimum of 10 access channels, supported by 3% of the system's gross revenues. *BROADCASTING*, Aug. 30, 1982, at 26. A review of franchises recently awarded indicates that the communities will succeed in obtaining these conditions. For example, Boston awarded its franchise to a firm that promised to dedicate 20% of channel capacity to public access and to support these channels with 5% of gross revenues. *BROADCASTING*, Aug. 17, 1981, at 30-31. For a discussion of the elaborate access provisions in franchises that Tribune Company Cable recently obtained, see *CABLEVISION PLUS*, Dec. 27, 1982, at 21. See generally *CABLEVISION*, Dec. 7, 1981, at 115, 119-20 (listing of access and local origination provisions of recent major market franchises).

4. See *Cable Franchising Investigation: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 515 (1981) (statement of Ernest Morial) [hereinafter cited as *Cable Franchise Investigation*].

nications Co. v. City of Boulder,⁵ stated that the cities' franchising practices are more appropriately "spelled e-x-t-o-r-t-i-o-n."⁶ This Article argues that the current form of municipal cable regulation violates the first amendment rights of cable operators.⁷

Cable franchising promises to be one of the most significant communications policy issues of the 1980's. Major cities currently are awarding new franchises,⁸ and in the coming decade hundreds of cities will relicense existing franchises.⁹ Congressional interest in cable franchising already is intense,¹⁰ and scrutiny of the "complex, difficult, and frustrating" process¹¹ will not likely subside.

5. 455 U.S. 40 (1982).

6. CABLEVISION, Dec. 7, 1981, at 128.

7. This Article does not address significant fifth and fourteenth amendment problems of government-required access channels and the franchising process. See *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1057-59 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980), or all the first amendment problems of municipal cable regulation. See, e.g., Smith, *Local Taxation of Cable Television Systems: The Constitutional Problems*, 24 CATH. U.L. REV. 755 (1975). This Article focuses on municipal regulation instead of FCC regulation of cable. The term "municipal regulation" refers to regulation by unincorporated areas, villages, towns, and counties in addition to regulation by cities. See *infra* note 17.

8. For a report on the status of cable franchising in the top 30 television markets, see BROADCASTING, July 12, 1982, at 37-47.

9. CABLEVISION, Dec. 7, 1981, at 134-36. See *infra* text accompanying notes 27-28.

10. S. 66, 98th Cong., 1st Sess., 129 CONG. REC. S8325-28 (daily ed. June 14, 1983) (discussed at *infra* note 254); See S. 2445, 97th Cong., 2d Sess. (1982); S. 2172, 97th Cong., 2d Sess. (1982). Several subcommittees and committees recently considered cable franchising. See, e.g., *Cable Franchise Investigation, Local Participation: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 2d Sess. (1982)* [hereinafter cited as *Cable Franchise Investigation, Local Participation*]; *Cable Franchise Investigation, supra* note 4; *Cable Television Regulation: Hearings Before the Senate Comm. on Commerce, Science, and Transportation, pt. 1, 97th Cong., 2d Sess. (1982)* [hereinafter cited as *Cable Television Regulation, pt. 1*]; *Cable Television Regulation: Hearings on S. 2172 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, pt. 2, 97th Cong., 2d Sess. (1982)* [hereinafter cited as *Cable Television Regulation, pt. 2*]. See generally *Cable Television Industry: Hearings Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business, 97th Cong., 1st Sess. (1981)* [hereinafter cited as *Cable Television Industry*]; *Diversity of Information, supra* note 1; *Status of Competition and Deregulation in the Telecommunications Industry: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. (1981)* [hereinafter cited as *Status of Competition*]; MAJORITY STAFF OF SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 97TH CONG., 1ST SESS., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY (Comm. Print 1981) [hereinafter cited as TELECOMMUNICATIONS IN TRANSITION].

11. See Johnson & Botein, *The Process of Franchising*, in W. BABR, M. BOTEIN, L. JOHNSON, C. PILNICK, M. PRICE & R. YIN, CABLE TELEVISION: FRANCHISING CONSIDERATIONS 146 (1974) [hereinafter cited as W. BABR].

While great variation exists in franchising procedure,¹² virtually all franchising decisions are intensely political.¹³ Cable franchising at its worst includes improper influence,¹⁴ bribery,¹⁵ and conspiracy,¹⁶

12. The FCC in 1972 adopted a rule requiring municipal governments to award cable franchises through a "full public proceeding affording due process." 47 C.F.R. § 76.31(a)(1) (1973). See generally Cable Television Report and Order, 36 F.C.C.2d 143, 207-08 (1972). The FCC deleted this rule in 1977 but recommended that franchising decisions continue to be part of a public proceeding that affords due process. Applications for Certificates of Compliance, 66 F.C.C.2d 380, 387, 391-92 (1977), *reconsideration denied*, 71 F.C.C.2d 569 (1979). The FCC never clarified what constituted due process; one commentator noted that the Commission was "sluggish and ineffective" in its efforts to assure the satisfaction of the standard. S. RIVKIN, A NEW GUIDE TO FEDERAL CABLE TELEVISION REGULATIONS 38 (1978).

For a discussion of state provisions requiring due process in franchise awards, see P. HOCHBERG, THE STATES REGULATE CABLE: A LEGISLATIVE ANALYSIS OF SUBSTANTIVE PROVISIONS 17-19, 41-45 (1978). A detailed discussion of New York's requirements appears in NEW YORK STATE COMM'N ON CABLE TELEVISION, CABLE TELEVISION FRANCHISING WORKBOOK (1980) [hereinafter cited as NEW YORK STATE COMM'N ON CABLE TELEVISION].

13. See, e.g., *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1004 (S.D. Tex. 1981) (testimony by the mayor that the aim of Houston franchise agreements was to keep politically influential groups content); *Cable Franchise Investigation, Local Participation*, *supra* note 10, at 34 (statement of John Bellamy) (if minorities do not have political clout, they will not receive cable franchises in Chicago); *Cable Television Regulation, pt. 2*, *supra* note 10, at 439 (statement of Trygve Myhren) (refranchising decisions are based purely on politics). For a discussion of campaign contributions by cable firms applying for franchises, see *Metro Cable Co. v. CATV of Rockford, Inc.*, 375 F. Supp. 350 (N.D. Ill. 1974), *aff'd*, 516 F.2d 220 (7th Cir. 1975). Cable companies often seek the assistance of prominent local citizens in their efforts to influence cable franchising decisions. One letter that recruited a citizen to assist a cable firm described the winning of a cable franchise as a political campaign and stated that "[T]he ability of local investors to take the political temperature, make introductions and appointments on a timely basis, and to lend their personal credibility to our formal business proposal is vitally important." *Cable Television Industry*, *supra* note 10, at 214. See generally *Atlanta J. & Const.*, Aug. 12, 1979, at J1, col. 2 (the Harvard Business School case method does not prepare graduates to deal with the political nuances of cable franchising).

14. Noting the great danger of favoritism and improper influence in franchising proceedings, Commissioner Washburn dissented from the FCC's modification of its franchising requirements. Applications for Certificates of Compliance, 66 F.C.C.2d 380, 412 (1977) (Washburn, Comm'r, dissenting). For a discussion of improper influence, see CENTER FOR ANALYSIS OF PUBLIC ISSUES, *CROSSED WIRES: CABLE TELEVISION IN NEW JERSEY* 22-24 (1971); Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685, 691-94 (1972). See generally Leone & Powell, *CATV Franchising in New Jersey*, 2 YALE REV. L. & SOC. ACTION 252 (1972) (cable franchisees frequently hire politically well-connected representatives and law firms).

15. See, e.g., *United States v. Kahn*, 340 F. Supp. 485 (S.D.N.Y. 1971), *aff'd*, 472 F.2d 272 (2d Cir. 1973). For an application of the RICO Act to a bribery claim in a cable franchise case, see *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6, 12-13 (W.D. Pa. 1981).

16. See, e.g., *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991 (S.D. Tex. 1981). The jury in *Affiliated Capital* found that defendants participated in a conspiracy to restrain trade. The judge, however, granted one defendant's motion for judgment notwithstanding the verdict. The judge noted that the evidence could support a second theory of conspiracy, but no connection existed between such a conspiracy and the harm suffered by

and even when free of tainting influences, cable franchising generally entails subjective judgments that violate the first amendment.

A franchising authority awarding a cable franchise¹⁷ generally engages in four steps. First, the authority assesses community needs¹⁸ and policy options¹⁹ through means such as consultant studies and special citizen task forces that hold extensive public hearings.²⁰ Second, the franchising authority adopts a request for proposals (RFP). This document, the result of key decisions concerning needs and policy, describes the cable system and services that the community desires.²¹ The RFP also outlines the information that the franchising authority seeks from applicants concerning their background, financial qualifications, proposed system design, construction plan, rates, and services.²² Third, after firms bid for the franchise, the franchising authority evaluates the bids. Consultants often scrutinize and rank the bids because few elected officials possess the technical expertise necessary to evaluate skillfully the competing bids.²³ The evaluation process also includes investigation of the applicants' background and character, and the

plaintiff. *Id.* at 994. The Fifth Circuit reversed the district court, finding a per se violation of section 1 of the Sherman Act. *Affiliated Capital Corp. v. City of Houston*, 44 ANTITRUST & TRADE REG. REP. (BNA) 666 (Mar. 17, 1983).

17. The franchising authority of the city, town, or county issuing the franchise usually is the chief lawmaking body of the entity. M. HAMBURG, *ALL ABOUT CABLE* § 4.02 (1981).

18. Franchising authorities typically assess the use of cable for home security monitoring and governmental entities' use of cable.

19. Typical policy concerns include whether to engage in districting—the parceling out of areas of the city to different cable firms—and the terms under which the city may purchase the system.

20. In 1981 the National League of Cities adopted a code of cable franchising conduct calling for extensive public participation in the franchising process. NATIONAL LEAGUE OF CITIES, *CODE OF GOOD CABLE TELEVISION FRANCHISING CONDUCT* 2 (1981). Chicago employed an elaborate process of public participation through extensive hearings. *Cable Franchise Investigation, Local Participation*, *supra* note 10, at 4-5 (statement of Edward Vrdolyak). The District of Columbia is using a 28 member design commission to determine the services that are necessary. BROADCASTING, March 15, 1982, at 49.

21. A model ordinance describing the regulatory structure that will govern the selected applicant often accompanies the RFP. A typical cable ordinance appears in *Omega Satellite Prods. Co. v. City of Indianapolis*, 536 F. Supp. 371, 380-94 (S.D. Ind.), *aff'd on other grounds*, 694 F.2d 119 (7th Cir. 1982).

22. A suggested RFP form appears in NEW YORK STATE COMM'N ON CABLE TELEVISION, *supra* note 12, at 58-62. See generally Note, *Cable Moguls and Perplexed Locals: A Model Application Form for a CATV License*, 10 HARV. J. ON LEGIS. 486 (1973) (describing and justifying model form).

23. For a suggested system of evaluation see W. BAER, *CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING* 107-10 (1973). See BROADCASTING, Mar. 8, 1982, at 114 (discussion of consultant's evaluation of bids that applicants submitted for the Alameda, California cable franchise).

franchising authority often holds public hearings to discuss the bids. Last, the authority selects an applicant and executes a franchise agreement incorporating the proposals submitted in the bid.²⁴ Once the franchising authority and the chosen applicant negotiate this agreement, the franchising authority adopts an ordinance or resolution authorizing the agreement.²⁵ Construction of the cable system then may begin.

Most franchise agreements contain cancellation clauses.²⁶ Moreover, since franchises are for a limited term, cablecasters periodically must face the refranchising process.²⁷ Refranchising occurs through either of two processes: Negotiation with the holder of the existing franchise, or solicitation of competitive bids. In either process, the franchising authority may seek to attach conditions to the new franchise that are significantly greater than the conditions that existed previously.²⁸

The assumption that cable is a natural monopoly permeates the franchising and refranchising process in most communities.²⁹ Further, this notion has become a self-fulfilling prophecy since most communities fail to award multiple franchises or to encourage entry of new firms.³⁰ This assumption that cable is a natural mo-

24. For the key components of such agreements, see M. HAMBURG, *supra* note 17, at A-360 to -374; Masters, *Drafting Municipal Franchises for Cable Television Systems*, 4 MGMT. INFOR. SERV. 2 (1972).

25. The resolution and franchise agreement for the southern half of the borough of Manhattan appear in M. HAMBURG, *supra* note 17, at A-289 to -318.

26. For typical cancellation provisions, see *Omega Satellite Prods. Co. v. City of Indianapolis*, 536 F. Supp. 371, 391 (S.D. Ind.), *aff'd on other grounds*, 694 F.2d 119 (7th Cir. 1982); M. HAMBURG, *supra* note 17, at A-311 to -314.

27. S. 2172, 97th Cong., 2d Sess. § 609 (1982) would have created a renewal expectancy for cable operators. For a discussion of this provision, see S. REP. No. 518, 97th Cong., 2d Sess. 19-21 *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS.

28. The high profile of major market franchises stimulates community demand for elaborate services that may not be economically viable in small markets. See BROADCASTING, Jan. 26, 1981, at 58; CABLEVISION, Dec. 7, 1981, at 115.

29. See, e.g., *Diversity of Information*, *supra* note 1, at 125 (statement of Charles Royer) (head-to-head competition between cable operators is technically impossible and economically unrealistic). *But see* S. REP. No. 518, *supra* note 27, at 20-21 (construction of multiple cable systems to serve the same geographical area is becoming increasingly prevalent). The economic studies that cities utilize in franchising decisions generally assume that only one firm will obtain a franchise and therefore evaluate only the capital cost and projected financial operations of a single system. See, e.g., W. BAER, *supra* note 23, at 40-65.

30. Cities arguably have a vested interest in awarding only one franchise because the revenue base of competitive firms would be insufficient to support the nonrevenue-producing services that cities have come to expect. A study by the Touche Ross firm shows that a single franchise should produce a 32.5% rate of return in the fifth year of the franchise. With two firms competing, the rate of return for each in the fifth year of the franchise will be 9.2%. CABLEVISION, Dec. 13, 1982, at 24. See *infra* note 33.

nopoly has several consequences. Since communities award only one franchise, they believe that conditions in the form of access channels and rate regulation in exchange for the franchise are necessary. These conditions are very expensive to the consumer.³¹ Moreover, the terms in some communities have been so extreme that only a few firms have responded to the RFP.³² Nonetheless, the awarding of only one franchise enhances the city's power to extract these conditions. Thus, bids contain offers that companies would not submit if the city were to award multiple franchises.³³

31. A study of a typical cable system in a top 50 television market found that franchise fees, free service to government buildings, local origination, and public access facilities require 21% to 24% of subscriber revenues. If the franchise did not impose these conditions, the cost of a monthly subscription would drop between \$5.00 and \$6.08. *Cable Television Regulation*, pt. 2, *supra* note 10, at 236-37.

The FCC franchise fee regulations actually encourage communities to engage in elaborate regulatory schemes. A municipality may charge a franchise fee of up to 3% of gross revenues without justifying the necessity of the fee. The FCC approves a fee over 3% but not more than 5% if the fee is appropriate "in light of the planned local regulatory program." 47 C.F.R. § 76.31 (1981). See *Hawkeye Cablevision, Inc.*, 46 F.C.C.2d 555, 556 (1974) (5% franchise fee reasonable because city proposed to maintain staff of nine full time employees to implement regulatory program). One commentator noted that this FCC regulation encourages cities to "regulate—even to overregulate." Note, *CATV Franchise Fee: Incentive for Regulation, Disincentive for Innovation*, 30 SYRACUSE L. REV. 741, 743 (1979).

32. For example, Baltimore—one of the nation's largest television markets—attracted only two bidders. *BROADCASTING*, Nov. 22, 1982, at 49; *CABLEVISION*, Nov. 15, 1982, at 20. The RFP demanded a 100 channel interactive system. *BROADCASTING*, July 26, 1982, at 129. Several cable firms noted that the system that the city demanded was not economically viable. *CABLEVISION*, Nov. 15, 1982, at 20. See generally *USA Today*, Nov. 6, 1982, at 1A, col. 3 (discussion of "bad demographics" in communities like Baltimore that affect viability of cable systems). Fairfax County, Virginia, attracted only two bidders in marked contrast to neighboring Montgomery County, Maryland, where eight firms submitted bids. Two cable firms condemned the Fairfax RFP as being too stringent. *BROADCASTING*, Feb. 22, 1982, at 33. One leading cable executive noted that cities ask too much of bidders: "They want 100 channels, community access, minority businesses set up, city hall and the schools wired, 5 percent of the gross, and money pumped into local programming. They come at you from every conceivable direction." *USA Today*, Nov. 6, 1982, at 2A, col. 1. Another cable executive stated that "[u]nrealistic economic demands from municipalities deter responsible bidders, and the ultimate victim is the public, which suffers delays in the institution of service or worse, inadequate service by companies which find they cannot implement a proposal that they had to accept as a condition of the franchise agreement." *Cable Television Regulation*, pt. 2, *supra* note 10, at 484 (statement of Robert Wright). Viacom recently discontinued franchise negotiations with Multnomah County, Oregon, because the provisions that the county demanded were "far too onerous." *CABLEVISION*, Jan. 10, 1983, at 136.

33. The following comments present two contrasting views of the bidding process. First, the Mayor of Lincoln, Nebraska summarized the view of municipal governments:

The franchising process, for example, is a model of the free enterprise system working feverishly. In this instance, local governments, acting as the customer, describe and define the quantities and specifications they seek in the product, the cable television system. The private cable companies then compete for the franchise. Not only do they seek to meet the terms set by the local government, but also as part of the com-

Finally, because communities award a single franchise, they believe that they must select the "best" applicant, which entails a highly subjective evaluation of elements such as the bidder's character and the nature of the offered service. Cablecasters base critical features of bids, such as the monthly subscription fee, on predictions of construction costs and market penetration.³⁴ When those predictions prove to be incorrect³⁵ and the companies raise their fees, subscribers may question whether the city selected the "best" bid.

The first amendment mandates an alternative to the current process of cable franchising—one that encourages competition between cable companies, precludes the subjective evaluation of factors such as service, and confines municipal regulation to public safety concerns.³⁶ Litigation over municipal regulation of cable in-

petitive process they almost always seek to exceed them. Through this procedure, the marketplace insures the best possible cable system which can be sustained by the various jurisdictions.

Cable Television Regulation, pt. 2, at 238 (statement of Helen Boosalis). Second, a cable industry representative countered with the following:

The traditional response to this scenario is that if the operators don't like it, they don't have to bid for the franchises. But that misses the point. To begin with the bidding process has so warped the marketplace that it is difficult if not impossible today to determine what will be economically viable and what will not in major city franchises. The only way to find out is to let the marketplace assume a more normal posture, absent the bidding pressure of franchise promises.

Id. at 244 (statement of Steven Effros). The view of municipal governments fails to acknowledge that firms only have an incentive to offer extensive nonrevenue-producing services when governments are awarding a de facto exclusive franchise. The Phoenix experience illustrates the effect of competition on cable. The number of channels and nonrevenue-producing services that the competing firms offer is substantially less than the number that major market firms facing no competition offer. Gits, *Adrenalin Days*, *CABLEVISION PLUS*, Jan. 17, 1983, at 14. The current Denver situation is also an excellent illustration of the difference between the services that a firm offers under a de facto exclusive franchise and the services it extends under competitive conditions. When *Mountain States* plaintiffs filed suit, see *infra* note 38 and accompanying text, and competition became possible, Mile Hi substantially altered its plans. See *infra* note 39.

34. Penetration means either the percentage of television households in a market that subscribe to cable television service (whether or not the cable service is available to all homes), or the number of households that subscribe to cable service as a percentage of those homes offered service. Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 684 (1980). Marketwide penetration refers to the former measure and systemwide penetration describes the latter.

35. In 1980 Cable Atlanta projected that its systemwide penetration would be 40% at the end of 1982. The company actually attained only 32%. In addition, the company underestimated the costs of construction by \$10 million. The firm consequently is seeking a rate increase from \$8.50 per month to \$12. *Atlanta J. & Const.*, Dec. 11, 1982, at 1B, col. 1. Other firms in the Atlanta area also are requesting rate increases because of a failure to meet systemwide penetration predictions. *Atlanta J. & Const.*, Dec. 30, 1982, at 16A, col. 1.

36. See *infra* notes 241-48 and accompanying text.

creasingly concerns first amendment issues.³⁷ One recently filed case, *Mountain States Legal Foundation v. City of Denver*,³⁸ which challenges the de facto creation of a monopoly on first amendment grounds, has the potential to alter radically the cable franchising process and the cable industry's structure.³⁹ Another recent case, *Century Cable of Northern California v. City of San Buenaventura*,⁴⁰ challenging a franchise renewal process on first amendment grounds, has similar potential.

37. See, e.g., *Community Communications Co. v. City of Boulder*, 496 F. Supp. 823 (D. Colo. 1980), *rev'd*, 660 F.2d 1370 (10th Cir. 1981), *petition for cert. dismissed*, 102 S. Ct. 2287 (1982). The parties recently agreed to a stipulation that sharply restricts the city's authority to regulate the cable system's operation. *Community Communications Co. v. City of Boulder*, No. 80-M-62 (D. Colo. Oct. 29, 1982).

Professor Kreiss states that a lack of first amendment challenges by losing applicants for franchises reveals that cable operators act "as if they have only minimal rights." Kreiss, *supra* note 2, at 1047 n.181. Although cablecasters in the past may have challenged an ordinance or franchising action on grounds other than the first amendment, see, e.g., *Lamb Enterprises, Inc. v. City of Toledo*, 324 F. Supp. 134 (N.D. Ohio 1970), *aff'd*, 437 F.2d 59 (6th Cir. 1971) (cable ordinance violates the commerce clause); *Metro Cable Co. v. CATV of Rockford, Inc.*, 375 F. Supp. 350 (N.D. Ill. 1974), *aff'd*, 516 F.2d 220 (7th Cir. 1975) (antitrust action by an unsuccessful applicant for a cable franchise), the recent litigation indicates that cablecasters increasingly are held in defense of their first amendment rights. See *infra* note 47.

38. No. 82-C-1738 (D. Colo. filed Nov. 1, 1982).

39. If the suit is successful, cities no longer would be able to select the "best" applicant. An open entry policy would prevail. If cable firms compete, cities would be unable to extract extensive nonrevenue-producing conditions from each firm. See *supra* note 33.

Mile Hi Cablevision, the winning applicant in Denver, planned a 110 channel system replete with access channels and a number of nonrevenue-producing elements. In response to the suit, Mile Hi reduced its planned system to 55 channels. BROADCASTING, Nov. 15, 1982, at 35. Mile Hi's lenders demanded a modification of loan agreements because of the suit. The lenders fear the entry of a "lean and mean" competitor that may operate free of the conditions that Mile Hi's contract with Denver mandates. *Id.* See generally CABLEVISION PLUS, Dec. 13, 1982, at 5 (discussing the effects of the *Mountain States* lawsuit). Mile Hi, stating that it did not want to be stuck with a "gold-plated white elephant," CABLEVISION, Nov. 15, 1982, at 10 (statement of Fred Dressler, President of Mile Hi), announced that it would not start construction unless Denver officials agreed to a number of significant revisions that scale down the system. CABLEVISION, Nov. 22, 1982, at 23. Denver officials then approved a revised agreement requiring delivery of \$22 million worth of bid items only if the suit is unsuccessful. CABLEVISION, Feb. 14, 1983, at 10. John Saeman, Chairman of the National Cable Television Association, stated recently that the *Mountain States* suit has enormous "political ramifications" and adds to the uncertainty that the financial community feels about cable's ability to build elaborate systems. BROADCASTING, Nov. 22, 1982, at 26.

40. No. 82-5274-ER (BX) (C.D. Cal. Filed Oct. 12, 1982). When a franchise expires, a city often attempts to impose new conditions upon the existing cable firm. If the firm is unwilling to agree to these conditions, or another firm submits a "better" bid, the city no longer permits the existing firm to engage in cable operations. See *supra* text accompanying notes 26-28. Century Cable is challenging a refranchising attempt; if successful, the firm would be able to operate without the extensive conditions demanded in the city's request for proposal.

Surprisingly, the extensive literature on cable television contains little analysis of the first amendment and cable franchising⁴¹ and instead focuses on issues such as the development and effects of FCC cable regulation,⁴² jurisdiction,⁴³ copyright,⁴⁴ and municipal

41. Until very recently, authors who addressed the first amendment and cable generally failed to examine franchising. See, e.g., Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DEN. L.J. 477 (1976); Simmons, *The Fairness Doctrine and Cable TV*, 11 HARV. J. ON LEGIS. 629 (1974); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971); Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133 (1976). Several recent articles, however, discuss aspects of municipal regulation of cable and the first amendment. See Goldberg, Ross & Spector, *Cable Television, Government Regulation, and the First Amendment*, 3 COM/ENT L.J. 577 (1982); Harrison, *supra* note 2; Kreiss, *supra* note 2; Miller & Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85 (1981).

42. See, e.g., D. LEDUC, *CABLE TELEVISION AND THE FCC* (1973); P. MACAVOY, *Deregulation of Cable Television* (1977); S. RIVKIN, *supra* note 12; L. ROSS, *Economic and Legal Foundations of Cable Television* (1974); Barnett & Greenberg, *Regulating CATV Systems: An Analysis of FCC Policy and an Alternative*, 34 LAW & CONTEMP. PROBS. 562 (1969); Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 VAND. L. REV. 681 (1972); Besen, *The Economics of the Cable Television "Consensus"*, 17 J.L. & ECON. 39 (1974); Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (1981); Botein, *The FCC's Proposed CATV Regulations*, 55 CORNELL L. REV. 244 (1970); Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820 (1970); Comanor & Mitchell, *Cable television and the impact of regulation*, 2 BELL J. ECON. & MGMT. SCI. 154 (1971); Comanor & Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 J.L. & ECON. 177 (1972); Greenberg, *Wire Television and the FCC's Second Report and Order on CATV Systems*, 10 J.L. & ECON. 181 (1967); LeDuc, *The FCC v. CATV et al: A Theory of Regulatory Reflex Action*, 23 FED. COM. B.J. 93 (1969); Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J.L. & ECON. 207 (1972); Pearson, *Cable: The Thread by Which Television Competition Hangs*, 27 RUTGERS L. REV. 800 (1974); Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 VA. L. REV. 541 (1975); Note, *The Collapse of the Consensus: Effects of the Deregulation of Cable Television*, 81 COLUM. L. REV. 612 (1981); Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965); Note, *Community Antenna Television: The New Federal Exercise of Jurisdiction*, 51 IOWA L. REV. 366 (1966); Note, *CATV Franchise Fee: Incentive for Regulation, Disincentive for Innovation*, 30 SYRACUSE L. REV. 741 (1979); Comment, *The FCC's Recission of the 1970 Television-Cable Cross-Ownership Rule*, 26 AM. U.L. REV. 688 (1977).

43. See, e.g., Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501 (1977); Barnett, *supra* note 14; Berman, *CATV Leased-Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 NOTRE DAME LAW. 145 (1975); Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L. SCH. L. REV. 863 (1980) [hereinafter cited as Botein, *JURISDICTIONAL AND ANTITRUST CONSIDERATIONS*]; Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U. L. REV. 816 (1970); Byrum, *Channeling the Energies of Cable Television: A Case for Positive State Involvement*, 5 URB. LAW. 376 (1973); Danielson & Wheeler, *The Status of the Cable Antenna Television Industry in California and a Proposal for State Regulation*, 2 PAC. L.J. 528 (1971); Doerfer, *Community Antenna Television Systems*, 14 FED. COM. B.J. 4 (1955); Hoffer, *supra* note 41; LeDuc, *Control of Cable Television: The Senseless Assault on States' Rights*, 24 CATH. U.L. REV. 794 (1975); Stern, *The Evolution of Cable Television Regulation: A Proposal for the Future*, 21 URB. L. ANN. 179

ownership.⁴⁵ This Article discusses the rationales advanced for municipal regulation of cable, the problems accompanying government-required access channels, and the problem of subjectivity in franchising decisions. Part II of this Article analyzes and criticizes the two major rationales for municipal regulation of cable—monopolistic nature of cable and the system's use of public rights-of-way. Part III argues that the present form of municipal regulation is unconstitutional. The requirement of access channels

(1981); Taylor, *The Case for State Regulation of CATV Distribution Systems*, 23 FED. COM. B.J. 110 (1969); Wallach, *Whose Intent? A Study of Administrative Preemption: State Regulation of Cable Television*, 25 CASE W. RES. L. REV. 258 (1975); Wiley, *Procedural Accommodation of Federal and State Regulatory Interests in Cable Television*, 25 AD. L. REV. 213 (1973); Witt, *CATV and Local Regulation*, 5 CAL. W.L. REV. 30 (1968); Note, *Cable Television in Illinois: The Problems of Concurrent Jurisdiction*, 50 CHI.-[KENT L. REV. 119 (1973) [hereinafter cited as Note, *Cable Television in Illinois*]; Note, *Regulation of Community Antenna Television*, 70 COLUM. L. REV. 837 (1970); Note, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 DRAKE L. REV. 391 (1977-78); Note, *The Federal Communications Commission and Regulation of CATV*, 43 N.Y.U. L. REV. 117 (1968); Note, *The FCC's Cable Television Jurisdiction: Deregulation by Judicial Fiat*, 30 U. FLA. L. REV. 718 (1978); Comment, *CATV Regulation—A Complex Problem of Regulatory Jurisdiction*, 9 B.C. INDUS. & COM. L. REV. 429 (1968); Comment, *Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules*, 1971 DUKE L.J. 1151; Comment, *Regulating CATV: Local Government and the Franchising Process*, 19 S.D.L. REV. 143 (1974); Comment, *Federal, State, and Local Regulation of CATV—After You, Alphonse . . .*, 29 U. PITT. L. REV. 109 (1967).

44. See, e.g., Besen, Manning & Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & ECON. 67 (1978); Botein, *The New Copyright Act and Cable Television—A Signal of Change*, 24 BULL. COPYRIGHT SOC'Y 1 (1976); Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 COM/ENT L.J. 477 (1980); Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 CATH. U.L. REV. 263 (1978); Kachigian, *The New Copyright Law and Cable Television, Interpretation and Implications*, 7 PERF. ARTS REV. 176 (1977); Ladd, Schrader, Liebowitz & Oler, *Copyright, Cable, the Compulsory License: A Second Chance*, 3 COM. & L. 3 (1981); Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L. SCH. L. REV. 545 (1977); Simon, *Local Television Versus Cable: A Copyright Theory of Protection*, 31 FED. COM. L.J. 51 (1978); Note, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 CALIF. L. REV. 527 (1981); Note, *The FCC's Deregulation of Cable Television: The Problem of Unfair Competition and the 1976 Copyright Act*, 10 HOFSTRA L. REV. 591 (1982); Note, *Cable Television's Compulsory License: An Idea Whose Time Has Passed?*, 25 N.Y.L. SCH. L. REV. 925 (1980); Note, *Cable Television and Copyright: Can the States Protect the Broadcasters?*, 32 WASH. & LEE L. REV. 163 (1975); Note, *Cable Television and Copyright Royalties*, 83 YALE L.J. 554 (1974).

45. See, e.g., R. JACOBSON, *MUNICIPAL CONTROL OF CABLE COMMUNICATIONS* (1977); Henderson, *Municipal Ownership of Cable Television: Some Issues and Problems*, 3 COM/ENT L.J. 667 (1981); MacKenna, *The Cabling of America: What About Municipal Ownership?*, 70 NAT'L CIVIC REV. 307 (1981); Synchef, *Municipal Ownership of Cable Television Systems*, 12 U.S.F.L. REV. 205 (1978); Note, *Toward Community Ownership of Cable Television*, 83 YALE L.J. 1708 (1974); Comment, *Community Antenna Television: The Case for Municipal Control*, 22 WAYNE L. REV. 99 (1975).

is not content-neutral regulation, and violates the first amendment. Part IV contends that even if cities did not require access channels, the subjective choices that the municipal regulation of cable often employs nevertheless would violate the first amendment. Part V of this Article advocates an open entry policy in which natural economic forces and existing law would regulate cable franchising within the bounds of the first amendment.

II. THE RATIONALES FOR MUNICIPAL CABLE REGULATION

The dispute over the first amendment rights of cable is intense.⁴⁶ The concern over first amendment limitations on cable regulations has increased at the same time that cable has shed its role as a mere retransmitter of television signals and has become a multifaceted communications enterprise.⁴⁷ The National League of Cities (NLC), the primary advocate of municipal cable regulations, has advanced several rationales for limiting the first amendment rights of cable operators. Only two of the NLC's rationales, cable's monopolistic nature and its use of public rights-of-way, merit serious analysis.⁴⁸

46. During the second session of the 97th Congress, the National League of Cities (NLC) and the National Cable Television Association conducted vigorous lobbying campaigns. See *CABLEVISION*, Oct. 4, 1982, at 86 (grassroots campaign involving local government officials used by the NLC); *CABLEVISION*, Sept. 27, 1982, at 15 (400 cable representatives converge on Capitol Hill). Senator Barry Goldwater called the NLC campaign against S. 2172 "the worst case of lying . . . that I have encountered." *CABLEVISION*, Oct. 4, 1982, at 86.

47. See, e.g., Andrew, *Courts Ponder Status of Cable TV to Rule on Legality of Regulation*, Wall St. J., Dec. 29, 1980, at 11, col. 4 (10 years ago one would have been laughed out of court if he had said that cable was a first amendment organ).

48. The NLC has been very inconsistent in advancing rationales for cable regulation. In its franchising code adopted in February 1981, the NLC advanced the following reasons for regulation: Cable operations have a quasi-monopoly status; cable systems deliver services that the public increasingly desires—services that actually are becoming essential to the public; and cable provides unique opportunities for locally originated and locally oriented programming and uses. NATIONAL LEAGUE OF CITIES, *supra* note 20, at 1. In September 1981 Charles Royer, the Mayor of Seattle, Washington, appeared before a congressional committee on behalf of the NLC, and stated that the following characteristics of cable justified regulation:

First, a cable operator is almost always a monopoly provider of cable services for the area covered by the franchise.

Second, a cable system, which has a large and extensive physical plant, is built largely on public property in other words, the public rights-of-way.

Cable systems at this time provide important public services, mainly entertainment services, but in the future we believe and know they will provide essential services to our citizens.

Cable offers unique opportunities for locally originated and locally oriented programming and services—unique in the whole system of communication.

Cable Television Industry, *supra* note 10, at 4-5 (statement of Charles Royer). In January

1982 Mayor Royer appeared before the Senate Commerce Committee and outlined the rationales that the NLC then was advancing: a cable operator's local monopoly; cable's capacity to provide essential services; and the growth in vertical integration and concentration of ownership. *Cable Television Regulation, pt. 1, supra* note 10, at 9-10 (statement of Charles Royer).

The rationales other than natural monopoly and use of public rights-of-way warrant at least brief consideration. First, cable is not the only communications medium with concentrated ownership and vertical integration. See, e.g., *Concentration in the Book-Publishing and Bookselling Industry: Hearing Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess.* (1980). It is inconsistent for municipalities to regulate cable on the grounds of concentrated ownership and vertical integration when other communications media with similar characteristics are not subject to municipal regulation. Cable is the only form of mass communication that is subject to municipal regulation that requires access to its facilities. Such municipal regulation designed to control the effects of vertical integration and concentration is shortsighted because it is based upon assumptions. For example, leased access channel requirements are based upon an assumption that cable poses a bottleneck problem. Municipal regulation designed to deal with factors such as vertical integration is also simplistic. The NLC treats vertical integration as always justifying regulation, yet the Supreme Court believes that vertical integration is not illegal per se. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173-74 (1948) (the illegality of vertical integration turns on the purpose or intent with which it was conceived, or the power it creates and the attendant purpose or intent). Antitrust suits attacking concentrated ownership and discriminatory practices are a preferable manner of regulation because a trial assures that factors such as market power and discriminatory conduct be proven, not assumed. Cf. *Cable Television Regulation, pt. 2, supra* note 10, at 450 (statement of Stanley Besen) (not sure whether the market power cable systems possess is sufficient to warrant the creation of regulatory schemes to deal with the problem).

Second, cable is not unique in its ability to provide locally oriented programming; radio and television stations may fulfill highly localized needs. Low power television stations whose signals will carry only a small distance will be able to offer highly localized programming. Moreover, two-way communication capability is not unique to cable. TELECOMMUNICATIONS IN TRANSITION, *supra* note 10, at 223. The truly distinctive characteristic of cable is that it is the only medium which cities force to carry locally oriented programming.

Third, the essential services rationale has several shortcomings. Cable is not a significant provider of services such as two-way transmission. Besen & Crandall, *supra* note 42, at 81. Cable today is unlike essential services because a high degree of elasticity of demand in response to a price change characterizes the industry. Goldberg, Ross & Spector, *supra* note 41, at 592 n.81. Why should the possibilities of the future justify regulation of cable today? If cable begins to provide services such as two-way data transmission, alternative providers of the same service, who may not use cable, likely will exist. For example, AT&T's new unregulated subsidiary American Bell plans to move aggressively into the field of home two-way interactive communication. Atlanta Const., Dec. 14, 1982, at 1C, col. 2. Furthermore, even if only one provider of a service exists, whether that service should be regulated is a highly debatable question. See Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968). Finally, classifying the provision of two-way data service as "essential" is questionable. Senator Cannon stated: "I have no reluctance in saying that cable television is not an essential service in any sense similar to products such as gas and electricity. It may be fun, enjoyable, informative, or anything else, but it simply is not essential." S. REP. NO. 518, *supra* note 27, at 44 (additional views of Sen. Cannon). Cf. *Cable Television Regulation, pt. 2, supra* note 10, at 216 (statement of Thomas Wheeler) (to describe cable as essential entails highly subjective judgment, especially when necessities such as food are unregulated). See generally Synchef, *supra* note 45, at 205 (noting the philosophical debate over whether a municipal government should engage in a business that is not a necessity to its citizens). If

A. Cable's Monopolistic Nature

The NLC claims that a cable system is almost always a de facto monopoly because of the economics of cable operations.⁴⁹ This position ignores the following two facts: First, little empirical proof exists that cable is a natural monopoly in all markets, and second, the NLC bases its concern about a cable system's market power on an unrealistic definition of the competitive environment in which cable functions. Furthermore, the lack of head-to-head competition from other cable firms is not a valid reason to impose elaborate municipal regulatory schemes that violate the first amendment rights of cable operators.

1. The Lack of Empirical Proof

The sole proof that the NLC offers to support its position that cable is a natural monopoly is the claim that competition between two operators for the same subscribers occurs in only eight of the more than 6,000 cable systems in operation.⁵⁰ These statistics, however, are affected by the reluctance of municipal authorities to

a compelling interest exists in regulating an essential service that cable delivers, government should narrowly apply the regulation to only the essential service. That cable delivers an essential service as part of its package of services should not justify an elaborate scheme that regulates the entire cable service.

49. *Cable Franchising Investigation*, *supra* note 4, at 521 (statement of Ernest Morial). The NLC also has claimed that competition among cable firms is not technically possible. *See, e.g., Diversity of Information*, *supra* note 1, at 125 (statement of Charles Royer). This claim is erroneous. While the National Electric Safety Code mandates that a certain amount of safety space must remain between power lines and communications cables, these requirements do not prevent the use of poles by more than one cable firm. For example, testimony in the recent Boulder litigation, *see infra* note 62 revealed that the existing poles in Boulder could accommodate as many as four cable companies. 3 Record at 57, *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035 (D. Colo. 1980) (testimony of Nicholas Olson). Poles come in a variety of sizes and poles larger than those in Boulder provide even more communications space. *See generally* Adoption of Rules for the Regulation of Cable Television Pole Attachments, 72 F.C.C.2d 59, 68-71 (1979) (usable space can vary from 11 to 16 feet); *Cable Television Regulation*, pt. 1, *supra* note 10, at 116-20 (statement of Robert Witter and Ira Avant); *Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communications of the House Interstate and Foreign Commerce Comm., pt. 2*, 94th Cong., 2d Sess. 884-85 (1976) (statement of J.C. Cluen) (discussion of communication space available on utility poles). If the existing poles do not accommodate more than one cable system, the new entrant (or entrants) may request that the utility company provide poles which will accommodate multiple cables. This process of changing poles often occurs when cable operators introduce cable in an area and the old utility poles prove inadequate. C. WOODARD, JR., *CABLE TELEVISION: ACQUISITION AND OPERATION OF CATV SYSTEMS* 12 (1974). New entrants also may utilize underground construction.

50. *Cable Franchise Investigation*, *supra* note 4, at 521 (statement of Ernest Morial). *But see infra* text accompanying notes 54-56.

franchise more than one cable firm. Further, a cable firm likely will agree to an elaborate regulatory scheme only if it receives a de facto exclusive franchise. Thus, the lack of competition among cable systems today does not support the conclusion that cable is a natural monopoly in all markets or that cable always will be a natural monopoly.

The NLC attempts to explain further the lack of head-to-head competition by noting that the forty to forty-five percent subscription rate of homes for which cable service is available is only about ten percent higher than the break even point for operating a profitable system.⁵¹ The NLC obtained this data from the Federal Communications Commission (FCC) but failed to note that the FCC qualified the statistic with the statement that the agency could not precisely measure the extent to which pay cable will affect the growth of demand for cable television service.⁵² Most importantly, to the extent that pay cable adds to the profits of cable systems, break even points will tend to decrease.⁵³ Thus, satellite-delivered pay cable services may increase the demand for cable and decrease the break even point for systems.

Changes in technology and economics are eroding any natural monopoly that has existed in cable.⁵⁴ The Senate Commerce Committee, in favorably reporting a bill that contained a provision affirming municipal authority to award multiple franchises,⁵⁵ found that nearly one hundred "overbuilds" exist and that overbuilding

51. Miller & Beals, *supra* note 41, at 95. The authors based their article on an earlier report that the NLC prepared. See National League of Cities, *Cable Communications and the First Amendment: An Analysis by Function* (Sept. 1981) (unpublished report).

52. Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 686 (1980). While analysts may not precisely measure the demand for pay cable, to assume that demand for cable which delivers a distinctive service will be the same as demand for cable that merely provides good reception of network affiliates and independent television stations is fallacious.

53. Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 671 (1979).

54. Cf. R. POSNER, *CABLE TELEVISION: THE PROBLEM OF LOCAL MONOPOLY* 15 (Rand Corp. RM-6309-FF, 1970) (changes in technology may erode a natural monopoly). See generally Panzar & Willig, *Free Entry and the Sustainability of Natural Monopoly*, 8 BELL J. ECON. 1, 21 (1977) (public policy analysis of free entry into a regulated natural monopoly industry should heed considerations of sustainability). Rapid technological change characterizes the cable industry. Pihick, *Technical Considerations in Franchising* in W. BAER, *supra* note 11, at 159. For example, General Electric recently announced an analog bandwidth compression technique that promises to alter significantly the economics of cable. BROADCASTING, Nov. 22, 1982, at 26.

55. S. 2172, 97th Cong., 2d Sess. § 609(b) (1982).

has increased steadily in the past three years.⁵⁶ The Commerce Committee stressed that this trend is a "direct result of changing economic and technological circumstances."⁵⁷ Cities, however, generally assume that cable is a natural monopoly.⁵⁸ If these cities were to study the problem, they might find that their communities could support competitive cable systems. A recent empirical study examining thirty-four cities found that economies of scale and cost subadditivity, while present, are not substantial enough to rule out the possibility of effective actual or potential competition in the

56. S. REP. NO. 518, *supra* note 27, at 21. Phoenix, for example, decided to encourage head-to-head competition; a discussion of its experience appears in Gits, *Adrenalin Days*, CABLEVISION PLUS, Jan. 17, 1983, at 4-14. One commentator discussed the phrase "overbuild" as follows: "The phrase 'overbuild' is . . . sometimes used by cablecasters in a negative way to describe competition. A more appropriate phrase might be 'competitively built.'" Henderson, *supra* note 45, at 675 n.50.

57. S. REP. NO. 518 *supra* note 27, at 21 (1982). Prior to the mid-1970's the programming that competing cable firms offered was barely distinguishable. With the proliferation of satellite-delivered services such as HBO, cable firms now may offer distinct service packages. See NATIONAL ASS'N OF BROADCASTERS, *NEW TECHNOLOGIES AFFECTING RADIO & TELEVISION BROADCASTING* 32-35 (1981) (listing of satellite-delivered cable services); CABLEVISION, Nov. 22, 1982, at 350 (listing of existing and announced satellite-delivered cable services). In addition, many cable firms now are involved in extensive local programming efforts. Little incentive to entry existed when one cable company's programming was nearly identical to the competition's. Entry of competing firms, however, is occurring now that product differentiation is possible. Moreover, construction techniques have changed in the last decade. See *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971) (affirming FCC rules on telephone company lease-back form of cable construction); 47 C.F.R. § 63.57 (1981) (current FCC regulation of conduit rights for cable systems).

58. Proponents of the theory that cable is a natural monopoly often cite Judge Posner's monograph. R. POSNER, *supra* note 54. See, e.g., Note, *Cable Television in Illinois*, *supra* note 43, at 121 (1973). Judge Posner, however, does not base his claim that two or more cable competitors likely could not serve the same subscriber on an empirical study of cable television's cost structure. See also Johnson & Blau, *Single versus Multiple-System Cable Television*, 18 J. BROADCASTING 323 (1974) (theoretical rather than empirical analysis of different cable market structures). Moreover, Posner prepared his study prior to the introduction of features such as satellite-delivered services. See *supra* note 57; *infra* note 64.

Judge Posner later explained more accurately the lack of cable competition. He stated: The immediate cause of this [lack of competition] is not any inherent characteristic of cable television but the fact that a cable company must obtain a municipal franchise Whether it is because they assume that the cable television business is a natural monopoly, and they desire to limit the (surely minor) inconveniences to the public of having several companies using public rights of way to string or lay cable, or alternatively, because they seek a share of monopoly profits in the form of franchise fees, municipalities do not grant more than one cable franchise in any area within their jurisdiction.

Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 BELL J. ECON. & MGMT. SCI. 98, 111 (1972) (emphasis added). Judge Posner currently believes that the *Omega* trial court should determine the presence or absence of a natural monopoly in that case. *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982).

cable industry.⁵⁹

In addition, city officials facing an antitrust suit for awarding only one franchise—a marked possibility in light of the United States Supreme Court's recent ruling in *Community Communications Co. v. City of Boulder*⁶⁰—would have difficulty proving that their market is a natural monopoly.⁶¹ In the recent *Boulder* litigation,⁶² the City of Boulder believed that cable was a natural monopoly because several cable companies declined to enter the mar-

59. B. Owen & P. Greenhalgh, *Competitive Policy Considerations in Cable Television Franchising* 42 (Oct. 1982) (unpublished research report prepared for Economists, Inc.).

60. 455 U.S. 40 (1982) (Boulder ordinance does not constitute the action of the State of Colorado in its sovereign capacity or municipal action in furtherance of clearly articulated state policy). See Susman & Wawro, *State Action Immunity and Antitrust Issues in Cable Television Franchising*, 3 COM/ENT L.J. 645 (1982). See generally Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE W. RES. L. REV. 221 (1975) (state action exemption under *Parker v. Brown* had been overextended by federal courts because of confusion between federal and state regulation).

61. Cf. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 991 (D.C. Cir. 1977) (when a defendant seeks to avoid a charge of monopolization by asserting that the market is unable to support two competitors, the defendant, and not the plaintiff, bears the burden of proof).

One commentator warned franchising authorities that economic proof is critical in actions challenging the creation of de facto monopolies. The commentator stated that governments should avoid the assumption that all markets are natural monopolies:

Economic facts [with cable] vary significantly. For example, in one city, installation of a competing cable system may require expensive and disruptive underground conduit construction. But in another it may require only inexpensive and nondisruptive leasing of available pole-attachment space. The economic facts to support the natural monopoly argument might exist in the first city but not in the second. This means that a city must not automatically rely on the first few cable cases that are decided. Instead, the unique economic facts of each city must be attended to.

Miller, *Regulation of Cable After Boulder*, in ANTITRUST AND LOCAL GOVERNMENT 116 (J. Siena ed. 1982). This perception of cable economics contrasts with the position advanced by the same commentator in 1981. See Miller & Beals, *supra* note 41, at 95 (two systems can rarely survive in the same geographic market).

A municipality should not limit entry to one firm even when the market can support only one. As the First Circuit stated, the public has an interest in competition "even though that competition be an elimination bout." *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 n.4 (1st Cir. 1960). See also *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982) ("[I]f the most efficient method of determining which firm should have the natural monopoly is a competitive process that will inevitably destroy the other firms, the antitrust laws presumably would forbid interference with that process").

62. *Community Communications* challenged city council actions limiting its expansion on two separate grounds. *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035 (D. Colo. 1980), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982) (*Boulder I*), presented antitrust issues. *Community Communications Co. v. City of Boulder*, 496 F. Supp. 823 (D. Colo. 1980), *rev'd*, 660 F.2d 1370 (10th Cir. 1981), *petition for cert. dismissed*, 102 S. Ct. 2287 (1982) (*Boulder II*), raised first amendment issues. The parties' recent agreement sharply restricts the regulatory power of the city. *Community Communications Co. v. City of Boulder*, No. 80-M-62 (D. Colo. Oct. 29, 1982). See *supra* note 37.

ket in head-to-head competition with the existing firm.⁶³ After "extensive, uncontradicted testimony,"⁶⁴ the district court found:

I disagree that the evidence shows that cable television is such a natural monopoly that the only feasible competition is in the process of currying favor with the City Council to obtain a permit to operate. *To the contrary, the evidence is that there can be competition in the marketplace, with the choice of price and service left to the consumers.*⁶⁵

Recently both parties stipulated that competition among cablecasters is economically possible in Boulder.⁶⁶

2. The Definition of the Relevant Product Market

The definition of the relevant product market is as important as the natural monopoly issue in determining whether cable is monopolistic. Various definitions of the relevant product market provide very different perceptions of cable's power. The NLC has never advanced a sophisticated or realistic product market definition for cable; it merely claims that although the consumer may obtain many of the cable services from other sources, no other technology offers the "bundle of communications services provided

63. 496 F. Supp. at 826, 830. The city, however, possessed other information that questioned whether cable was a natural monopoly. The Boulder city attorney pointed out to the city manager and city council that the view of cable as a natural monopoly "has not reached general acceptance." Appendix at 19, *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (memorandum from Joseph N. de Raismes). The district court in *Boulder II* noted that a consultant to the city warned of the "tendency of a cable system to become a natural monopoly," 485 F. Supp. at 1037, but Judge Markey in *Boulder I* pointed out that the consultant also advised the city that competition was feasible. 630 F.2d at 709 (Markey, C.J., dissenting).

64. 630 F.2d at 712 (Markey, C.J., dissenting). Cross-examination of Boulder's expert witness actually helped establish that competition among cable companies was possible; the witness further admitted that the introduction of satellite-delivered cable services improves the climate for head-to-head competition. 2 Record at 105-06, *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035 (D. Colo. 1980) (testimony of Carl Pilnick).

65. 485 F. Supp. at 1039-40 (emphasis added). The district court in *Boulder I* made these two important findings: More than one firm technically can string cable on utility poles, *id.* at 1038, and more than one firm can compete economically for the same subscribers. *Id.* at 1040. The district court in *Boulder II* blended these findings, stating that "competition on the poles" is possible. 496 F. Supp. at 830. The court of appeals in *Boulder II* completely overlooked the findings in *Boulder I* and asked whether the "competition on the poles" statement "was a finding that no economic monopoly exists in Boulder, or whether this was only a finding that no physical law really limits the number of cables that may be laid or strung side by side." 660 F.2d at 1378. When one reads the district court's opinion in *Boulder II* in light of the findings in *Boulder I*, cable competition in Boulder clearly is both technically and economically possible.

66. *Community Communications Co. v. City of Boulder*, No. 80-M-62 (D. Colo. Oct. 29, 1982).

by cable."⁶⁷ The following discussion shows that a more discriminating analysis of the relevant product market substantially lessens the fear that cable is monopolistic.⁶⁸

Market definition depends upon the degree to which consumers view products as interchangeable,⁶⁹ and the critical goal of market definition is to assess power.⁷⁰ Whether a court in striving to define the market and assess power engages in disaggregate analysis of each service that a single firm provides or clusters the services together depends upon whether a high cross-elasticity exists to protect buyers who need a specific service.⁷¹ The Supreme Court has clustered together different products and services offered by a single firm only when it has found either that substitutes did not exist for each product or service or that significant cost advantages were present.⁷²

If the relevant product market for cable includes only cable-delivered services, a cable system generally will have no competitors.⁷³ If the evaluating court, however, assesses each service of-

67. Miller & Beals, *supra* note 41, at 96. At first glance cable confuses the traditional market lines that have separated broadcasting from common carriers. TELECOMMUNICATIONS IN TRANSITION, *supra* note 10, at 221. A discrete analysis, however, separates each service and looks for cross-elasticity.

68. Monopoly power is the power to exclude competition when a firm desires. United States v. Paramount Pictures, Inc., 334 U.S. 131, 173 (1948). For cities to advance this as a rationale for regulation seems strange because they generally have excluded cable competition by not franchising more than one firm. The unwillingness of cable firms, however, to enter into competition with an existing cable system does not demonstrate the existing firm's monopoly power. A city will find it difficult to get a cable firm that is not granted a de facto exclusive franchise to agree to provide extensive nonrevenue-producing services and to subject itself to extensive regulatory controls. In addition, even if scale economies preclude duplication of a cable system's facilities, an interchangeable service such as a television repeater may enter the market and compete with cable.

69. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 380-81 (1956) (the purchase of competing products for similar uses, considering the price, characteristics and adaptability of the competing commodities, measures interchangeability). See generally Schlade, *Proposed Objective Relevant Product Market Criteria Under Section 2 of the Sherman Act and Section 7 of the Clayton Act*, 35 U. CIN. L. REV. 376 (1966) (relevant product market objectively defined by supply and production cross-elasticities).

70. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, § 17 at 60 (1977).

71. *Id.* at 62.

72. See, e.g., United States v. Grinnell Corp., 384 U.S. 563 (1966) (none of the substitutes meets the interchangeability test of *du Pont* (discussed *supra* note 69)); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (some of the products or services at issue are so distinctive that they are free from effective competition; others enjoy cost advantages).

73. Mark Fowler, chairman of the FCC, has cautioned against this approach. He asserts that we should start with the presumption that the "media activities of cable systems take place in a competitive environment and avoid the narrow view that cable services lack competition simply because only one system operated in a particular community." *Cable*

ferred by cable according to its interchangeability with a substitute delivered by a different technology, the power of a cable system often will be substantially less than it would be under a cluster market approach, although the existence of substitutes for each service will vary market by market.⁷⁴ For example, the FCC has found that the quantity and quality of television signals available over the air are key determinants of the demand for cable.⁷⁵ This finding indicates that consumers view the delivery of over-the-air signals to be highly interchangeable with cable delivery of the same signals. Thus, the suggestion that a cluster market definition applies in all markets is ill-advised. The power of a cable system depends not as much on the presence of other cable systems as it does on the presence of alternative providers of an interchangeable service delivered by a different technology.

Cities would adopt an open entry policy if they were truly concerned about the lack of head-to-head cable competition.⁷⁶ Even if the entry did not occur, the threat of entry might deter the negative effects cities believe will accompany a single unregulated cable firm.⁷⁷ By selecting one firm and discouraging new entry, munici-

Television Regulation, pt. 2, *supra* note 10, at 195 (statement of Mark Fowler). For similar views, see *id.* at 212-15 (statement of Thomas Wheeler) (outlining the competition to cable that other distribution technologies present); *id.* at 452 (statement of Stanley Besen) (the market we should be concerned with is not just cable); Botein, *Jurisdictional and Antitrust Considerations*, *supra* note 43, at 881 (1980) (at the very least the product market would include all methods for delivering real-time video programming). See generally H. Sbooshan III, C. Jackson & A. Kahn, *Cable Television: The Monopoly Myth and Competitive Reality* (1982) (unpublished report prepared for the National Cable Television Association) (analyzing the competitive nature of the video marketplace). The Senate Subcommittee on Communications recently heard testimony from a succession of witnesses who claim that other video distribution techniques "create (or will create) a competitive video marketplace that obviates the need for much regulation of cable at either the municipal or federal level." BROADCASTING, Feb. 21, 1983, at 33.

74. For example, Multipoint Distribution Services (MDS) will compete with pay cable programming. Not all markets, however, will have MDS. See *Cable Television Regulation*, pt. 2, *supra* note 10, at 555 (statement of Don Franco).

75. Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 685 (1980).

76. To induce entry of multiple cable firms, municipalities either would have to substantially reduce or eliminate the nonrevenue-producing demands placed upon such firms.

77. Advocates of municipal cable regulation express the common theme that if cities do not regulate rates, the consumer will suffer from price gouging. *Cable Franchise Investigation*, *supra* note 4, at 539 (statement of Thomas Taylor). In contrast, two authors noted that if "franchises are non-exclusive and readily granted, if there are not substantial economies of scale, and if other barriers to entry are low, then an existing monopoly cable system may be effectively deterred from raising price or offering poorer service." B. Owen & P. Greenhalgh, *supra* note 59, at 9. See also L. Johnson, *Cable Communications in the Dayton Miami Valley: Summary Report 37* (Rand Corp. R-942-KF/KF, 1972) (nonexclusive

palities retard the growth of competition that would erode the power of the heavily regulated firm and thus lessen the need for regulation.⁷⁸

3. The Economic Scarcity Rationale

Even if natural monopoly conditions exist in cable markets, those conditions do not justify interference with the operator's first amendment rights. Economic scarcity is not an acceptable rationale for the regulation of any form of mass communication,⁷⁹ including broadcasting.⁸⁰ A high degree of economic scarcity characterizes the newspaper industry,⁸¹ yet the government does not

franchising carries the threat of entry and may stimulate good performance by the cable operator). The former commissioner of cable television for Massachusetts testified that rate deregulation has worked effectively. *Cable Franchise Investigation*, *supra* note 4, at 505 (statement of Jeff Forhes). See also Demsetz, *supra* note 48, at 65 (rivalry of the open market disciplines more effectively than does the regulatory processes of the commission).

78. See Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 636 (1969) (noting that the most pernicious feature of the regulation of natural monopolies is regulation's tendency to retard the growth of competition).

79. Motion picture exhibition markets, for example, are sometimes natural monopolies. See *United States v. Griffith*, 334 U.S. 100 (1948). The government, however, does not regulate motion pictures on natural monopoly grounds. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), Justice Clark briefly mentioned that motion pictures might have a "capacity for evil . . ." *Id.* at 502. Chief Justice Warren in his dissenting opinion in *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), countered this view by stating that "even if the impact of the motion picture is greater than that of some other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression." *Id.* at 77 (Warren, C.J., dissenting). See also *Superior Films, Inc., v. Department of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (the medium having the most enduring effect will vary with the theme and the actors). See Giglio, *Prior Restraints of Motion Pictures*, 69 DICK. L. REV. 379 (1965); Verani, *Motion Picture Censorship and the Doctrine of Prior Restraint*, 3 HOUS. L. REV. 11 (1965).

80. See *NBC v. United States*, 319 U.S. 190, 213 (1943) (a fixed natural limitation exists upon the number of stations that can operate without interfering with one another). The frequency spectrum is an economic resource that differs in no significant way from the other resources available to society. Mecklin, *Management of the Frequency Spectrum*, 1968 WASH. U.L.Q. 26. Numerous commentators have criticized the spectrum scarcity rationale. See, e.g., Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); Goldberg & Couzens, "Peculiar Characteristics": *An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COM. L.J. 1 (1978); Powe, "Or of the [Broadcast] Press," 55 TEX. L. REV. 39 (1976).

81. See, e.g., *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 129 (D. Mass. 1959), *aff'd*, 284 F.2d 582 (1st Cir. 1960) (natural monopoly conditions present in newspaper market in question). Significant economies of scale exist in the daily newspaper industry and the economies have played a pivotal role in the disappearance of multi-newspaper towns. Rosse, Dertouzos, Robinson & Wildman, *Economic Issues in Mass Communications Industries*, in 1 FEDERAL TRADE COMM'N, PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION 77 (1978). In 1978 only 2.3% of cities had more than one daily newspaper. *Id.* at 74. See generally *Economic Concentration in the Media-Newspaper*:

interfere with a newspaper publisher's first amendment rights.⁸²

Several courts have noted the similarity between the economic scarcities characterizing the newspaper and cable industries. In *Home Box Office, Inc. v. FCC*⁸³ the United States Court of Appeals for the District of Columbia Circuit stated that the theory of broadcasting regulation does not apply to cable "since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for the government—is absent."⁸⁴ Citing *Miami Herald Publishing Co. v. Tornillo*⁸⁵ for the proposition that economic scarcity does not justify interference with the first amendment rights of the "conventional press," the court of appeals concluded that "there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point."⁸⁶ In *Midwest Video Corp. v. FCC*⁸⁷ the United States Court of Appeals for the Eighth Circuit noted not only that the absence of spectrum scarcity in cable removed the excuse for FCC abridgment of the first amendment rights of cable operators,⁸⁸ but also that no evidence existed in the case "to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access."⁸⁹

Hearings Before the Senate Select Comm. on Small Business, 96th Cong., 1st Sess. (1979).

82. The Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), clearly rejected economic scarcity as a rationale for infringement upon the first amendment rights of newspaper publishers. The Court, however, does not perceive the application of labor regulations and antitrust laws as violating press freedom. See, e.g., *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) (the publisher of a newspaper has no special immunity from the application of general laws). See generally Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on Structure and Conduct of Mass Media*, 32 VAND. L. REV. 1249, 1276 (1979) (noting the Court's view that the first amendment does not protect the business behavior of the press).

83. 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

84. *Id.* at 45 (footnote omitted).

85. 418 U.S. 241 (1974). See *supra* note 82.

86. 567 F.2d at 46 (footnote omitted).

87. 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

88. 571 F.2d at 1048.

89. *Id.* at 1056. Although the similarity between the first amendment freedoms of newspapers and cable systems permeates the district court's opinion in *Boulder II*, see 496 F. Supp. at 829; *supra* note 62, Judge Seymour's opinion for the Tenth Circuit emphasized the distinction between cable and newspaper technology:

A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails. But a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message.

660 F.2d at 1377. Because some form of permission from the government must precede construction of a cable system, Judge Seymour concluded that government and cable operators

B. *Cable's Use of Public Rights-of-Way: Starting From the Wrong Corner*

Advocates of municipal cable regulation believe that governmental control of rights-of-way permits the government to demand services such as access channels from cable operators.⁹⁰ The con-

"are tied in a way that government and newspapers are not." *Id.* at 1378 (footnote omitted). Judge Seymour's opinion, however, overlooks the first amendment standards governing use of public rights-of-way. *See infra* text accompanying notes 90-127.

In the recent *Omega* case, Judge Posner overlooked the *HBO* and *Midwest Video* decisions in a tentative discussion of cable's first amendment status. He distinguished cable from nontelevision media on the following grounds: Cable interferes with other users of telephone poles and underground ducts; natural monopoly characteristics arguably justify regulation of entry; and cable has access to the home. *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982). These grounds warrant criticism. First, cable does not affect the quality of service offered by other pole or duct users or prevent the installation of additional wires in poles and ducts. *See supra* notes 49 & 65. While the installation of cable may require the rearrangement of existing wires or the substitution of larger poles, that this interferes with other pole and duct users is difficult to perceive. Since *Omega* concerns the illegal installation of a cable, perhaps Judge Posner was worried about public safety matters. The legitimate concern for public safety in the installation and operation of cable surely requires permits, construction schedules, and compliance with safety regulations. *See infra* note 125 and text accompanying note 243. The government imposes safety regulations on all forms of nontelevision media; the regulations range from control of work conditions in newspaper printing plants to prevention of fire hazards in movie theaters. Public safety concerns, however, only justify public safety regulations; these concerns do not justify the diminution of first amendment rights.

Second, whether cable possesses natural monopoly characteristics in all markets is highly questionable. The possibility of cable competition depends upon household density per mile and demographic characteristics; these figures vary from market to market. Assertions that markets currently supporting only one cable firm will be unable to support cable competition in the future also are debatable. *See supra* note 54. Additionally, the concern for cable as a natural monopoly reflects an unrealistic market definition. *See supra* text accompanying notes 67-76. Control of cable entry has several distressing consequences. When the marketplace develops sufficiently to support cable competition, the government may be unwilling to franchise additional firms. *See supra* text accompanying note 30. Since governments believe that they must select the "best" firm, control of cable entry commonly entails evaluation of subjective criteria. *See infra* text accompanying notes 224-40. Finally, the government, rather than consumers, decides the mix of price and product which best suits the public. Preventing the government from regulating cable entry—except for unwillingness or inability to comply with public safety regulations—eliminates these consequences. Many communities can support only one bookstore, one movie theatre, and one newspaper. A market that does not contain government-imposed barriers to entry serves the public's interest in these media. A public interest in competition in the mass media realm exists even when that competition determines which "monopolist" survives. *See supra* note 61; *infra* note 248.

Third, Judge Posner bases his concern for home access upon a superficial consideration of *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), and the characteristics that distinguish cable from broadcasting. *See infra* notes 161-62 and accompanying text.

90. *See, e.g., Cable Television Regulation, pt. 1, supra* note 10, at 89 (statement of Harry Kinney) (use of rights-of-way invokes a very broad power of cities to control that use); *Cable Television Regulation Oversight: Hearings Before the Subcomm. on Communi-*

cept of limiting first amendment rights in exchange for the use of a public resource stems from broadcasting regulation⁹¹ and not from the regulation of streets. Unlike broadcasters, cable operators do not use a public resource in a manner that physically excludes others. This section argues that the strong first amendment doctrine governing the use of streets for other expressive purposes should govern cable's use of streets. Cities simply have been approaching cable regulation from the wrong corner.⁹²

Although some commentators have argued that freedom of the press is distinct from freedom of speech,⁹³ the Supreme Court has

cations of the House Interstate and Foreign Commerce Comm., pt. 2, 94th Cong., 2d Sess. 1006 (1976) (statement of Lois Brown) (cable operator must offer some service in return for use of public rights-of-way).

A franchise generally authorizes cable's use of public rights-of-way. Because the monopoly idea is the basis of nearly all franchise law; 12 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 34.01 (rev. 3d ed. 1970), franchises often impose a variety of extensive conditions upon the firm even when the franchise is not exclusive. *Id.* at § 34.36. One cable company argued that cable firms should not be "franchised," but that a license granted under appropriate police power regulations regarding street use should regulate the firms. Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss at 1 n.2, *TCI Cablevision, Inc. v. City of Jefferson City*, No. 81-4054-CV-C-W (W.D. Mo. filed Apr. 27, 1981). Whether the cities choose to "franchise" or to "license" cable companies, municipal authorities should not award de facto or de jure monopolies and should confine regulation to public safety matters. See *infra* text accompanying notes 243-48.

91. *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966)) (enforceable public obligations burden a broadcaster who receives a license). Professor Barrow notes that just as broadcasters depend upon the public airwaves to send their signals, cable operators depend upon public streets to extend cable lines. Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515, 530 (1975). The use of public streets does not justify interference with first amendment rights. See *infra* text accompanying notes 96-127. If Barrow is correct, government should regulate other forms of communication using public streets, a development that would violate important first amendment principles.

92. Kalven, *Broadcasting, Public Policy and First Amendment*, 10 J.L. & ECON. 15, 37 (1967). One of Professor Kalven's key comments on broadcasting regulation, slightly altered, presents the central issue in municipal cable regulation:

My thesis is that the traditions of the First Amendment do not evaporate because there is licensing. We have been beginning, so to speak, in the wrong corner. The question is not what does the need for licensing permit . . . [a city] to do in the public interest; rather it is what does the mandate of the First Amendment inhibit . . . [a city] from doing even though it is to license.

Id.

93. See, e.g., Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979); Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975). But see Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979); Van Alstyne, *Comment: The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977).

never accepted the distinction.⁹⁴ Therefore, the Supreme Court's decisions concerning public facilities, such as streets, that a city holds in trust for purposes of expression⁹⁵ contain important principles that limit municipal regulation of cable.

Content neutrality is the central principle of governmental regulation of a public facility like a street.⁹⁶ As Justice Jackson stated, the very purpose of the first amendment is to "foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."⁹⁷

The right to use public facilities for expression is not absolute.⁹⁸ Under certain circumstances, limited facilities or public safety concerns necessitate a licensing or permit system.⁹⁹ Cities, however, must not deny or abridge first amendment rights in the

94. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (members of the press have no right of access to government-controlled information and facilities that exceeds the public's right); *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974) (newsmen have no right of access to prisons or their inmates beyond the right afforded the public); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (newsmen have no special right of access to information which is not available to the public). Further, the Court lost its primary advocate of the distinction between press and speech freedom with the retirement of Justice Stewart. See Stewart, *supra* note 93.

95. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

96. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 88 (1978). See also *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981) (the Court long has recognized the validity of reasonable time, place, and manner regulations on public forums so long as the regulation is content-neutral, serves a significant government purpose, and leaves open alternative channels for communication). Of course, certain content neutral regulations, such as franchise fees, pose first amendment problems. See *infra* note 125.

97. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). See also *Martin v. City of Struthers*, 319 U.S. 141, 143-44 (1943) (individuals rather than the government should be free to decide whether they want to exclude door-to-door distributors of literature from their homes); Cf. *Rowan v. Post Office Dep't*, 397 U.S. 728, 737 (1970) (federal statute permitting householders to insulate themselves from erotic mail leaves evaluation of unacceptable material with the individual rather than government officials).

98. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city transit system may refuse to sell bus advertising space to political candidates); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (authorities may prohibit noise that substantially interferes with schools); *Cameron v. Johnson*, 390 U.S. 611 (1968) (government officials may prohibit demonstrations that obstruct free access to public premises); *Adderley v. Florida*, 385 U.S. 39 (1966) (demonstrators may not block driveway of public jail). *Cox v. Louisiana*, 379 U.S. 559 (1965) (government officials may prohibit picketing in or near a courthouse); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (prohibiting the emission of raucous noises by sound trucks is permissible).

99. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

guise of regulation.¹⁰⁰ Governments must narrowly draft those statutes and ordinances regulating the use of public facilities,¹⁰¹ and authorities may not grant or deny use of a public facility in an arbitrary manner. The touchstone for courts should be Justice Frankfurter's statement that a "licensing standard which gives an official authority to censor the content of speech differs *toto coelo* from one limited by its terms or by nondiscriminatory practice, to considerations of public safety and the like."¹⁰² The Court views as prior restraints those licensing standards that give authorities great discretion,¹⁰³ but it regards narrowly drawn statutes and ordinances as adjustments of freedom of expression mandated by the need for public order.¹⁰⁴

Arguably, because cable merely uses a public street to reach individual residences, it differs from other uses of streets, such as parades, that include an expressive act occurring in public.¹⁰⁵ *Schneider v. State*,¹⁰⁶ *Martin v. City of Struthers*,¹⁰⁷ and *Hannegan v. Esquire, Inc.*¹⁰⁸ are instructive on the limited authority of the government in situations in which individuals or organizations use public facilities to reach private residences for communicative purposes. In *Schneider* the Court found unconstitutional an ordinance prohibiting door-to-door canvassing without a police permit. The Court believed that the ordinance gave a police officer discretion to act as a censor in determining "what literature may be dis-

100. *Hague v. CIO*, 307 U.S. 496, 515-16 (1939).

101. See, e.g., *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980) (ordinance prohibiting door-to-door canvassing by certain charitable organizations unconstitutionally overbroad); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (ordinance requiring advance notice to police before one could solicit for charitable or political causes unacceptably vague); *Schneider v. State*, 308 U.S. 147, 163-64 (1939) (ordinance banning unlicensed door-to-door canvassing unconstitutional because of undefined licensing powers which result in censorship).

102. *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

103. Cases in which the Court has held that licensing standards permit arbitrary suppression of first amendment activities include: *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (parade permit); *Kunz v. New York*, 340 U.S. 290 (1951) (use of public streets for religious meetings); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (use of park for religious address); *Saia v. New York*, 334 U.S. 558 (1948) (permit for sound amplification equipment); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (parade permit); *Hague v. CIO*, 307 U.S. 496 (1939) (permit for public meeting).

104. See *Poulos v. New Hampshire*, 345 U.S. 395, 403-04 (1953).

105. This attribute of cable communication actually eliminates some of the negative consequences accompanying expression occurring in public; cable does not lead to hostile confrontations with the speaker or unruly assemblies.

106. 308 U.S. 147 (1939).

107. 319 U.S. 141 (1943).

108. 327 U.S. 146 (1946).

tributed from house to house and who may distribute it. . . . To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."¹⁰⁹ The *Martin* Court found unconstitutional an ordinance prohibiting door-to-door handbill distribution and stressed that freedom to distribute information to willing recipients "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."¹¹⁰ *Hannegan* concerned the revocation of the second class mailing permit of a magazine that the Postmaster General believed detrimental to the public good or welfare. Stressing the limits placed upon government officials, the Court stated that a "requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."¹¹¹ These cases note the limited criteria that governments may employ for the granting of licenses and permits, and the results of the cases indicate the minimal conditions that authorities may attach to those permits.

Proponents of municipal regulations, such as the NLC, frequently attempt to justify abridgment of a cable operator's first amendment rights by insisting that "each medium of communications has its own characteristics that warrant distinct treatment under the First Amendment."¹¹² The following discussion reveals, however, that the distinct problems of cable communication do not warrant content regulation or the imposition of access requirements. The unique problems of cable necessitate specially tailored content-neutral regulations designed only to protect concerns such as public safety.

To support its position, the NLC cites the seminal comments of Justices Jackson and Frankfurter in *Kovacs v. Cooper*.¹¹³ Justice Jackson stated that the "moving picture screen, the radio, the

109. 308 U.S. at 163-64.

110. 319 U.S. at 146-47. Both *Schneider* and *Martin* emphasize the permissibility of reasonable time, place, and manner regulation. *Id.* at 143; 308 U.S. at 160. The Court, however, will examine closely such regulations. *See, e.g.,* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

111. 327 U.S. at 158. *See also* *Blount v. Rizzi*, 400 U.S. 410, 417 (1971) (mail censorship scheme lacks adequate safeguards).

112. *Diversity of Information*, *supra* note 1, at 146 (statement of Charles Firestone). *See also* *Miller & Beals*, *supra* note 41, at 90 (the first amendment affects each communication medium in a unique way).

113. 336 U.S. 77 (1949). *See* *Miller & Beals*, *supra* note 41, at 90-91.

newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers."¹¹⁴ Justice Frankfurter cautioned against the use of oversimplified formulas:

It is argued that the Constitution protects freedom of speech: freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communications; *ergo* that form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories.¹¹⁵

The NLC, however, fails to add that Justices Jackson and Frankfurter placed important limitations upon their statements. Justice Frankfurter further stated that sound amplifiers on trucks may be regulated "[S]o long as a legislature does not prescribe what ideas may be nosily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace"¹¹⁶ Justice Jackson added that sound truck regulation would not present a first amendment problem "unless such regulation . . . undertakes to censor the contents" of the amplified expression.¹¹⁷

Chief Justice Warren's dissenting opinion in *Times Film Corp. v. City of Chicago*¹¹⁸ provides additional support for the narrow construction of the proposition that each form of communication presents "peculiar problems."¹¹⁹ Chief Justice Warren cautioned

114. 336 U.S. at 97 (Jackson, J., concurring).

115. *Id.* at 96 (Frankfurter, J., concurring). The context of Justice Frankfurter's statement is important. His concurring opinion in *Kovacs* is an attack on the preferred position doctrine. See generally Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

116. 336 U.S. at 97 (Frankfurter, J., concurring). Even in *NBC v. United States*, 319 U.S. 190 (1943), Justice Frankfurter noted the first amendment problems posed by certain types of licensing criteria. He stated that if the FCC selected applicants upon the basis of their political, economic, or social views, or upon any capricious grounds, there would be a problem distinct from the one at issue. *Id.* at 226. See generally Lee, *supra* note 82, at 1319-22 (criticizing Justice Frankfurter's analysis of first amendment issues in *NBC*). *NBC* is not a content regulation case and Justice Frankfurter retired from the Court before it faced its first broadcast content regulation case.

117. 336 U.S. at 97 (Jackson, J., concurring).

118. 365 U.S. 43 (1961).

119. This phrase originates in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). When read in context, the peculiar problems Justice Clark was referring to affected time, place, and manner regulations. He added an important qualification to the peculiar problems phrase by noting that the "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. These principles . . . make freedom of expression the rule." *Id.* Subsequent citations of *Burstyn* are curious. Members of the Court who cite *Burstyn* to justify medium-specific content regulation do not quote the qualifying reference to the unvarying principles of the first amendment. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 (1969);

against blind acceptance of this notion: "The Court, in no way, explains why moving pictures should be treated differently than any other form of expression When pressed during oral argument, counsel for the city could make no meaningful distinction between the censorship of newspapers and motion pictures."¹²⁰ He concluded by noting that the Court's decision did not follow from earlier cases that addressed the "peculiar problems" of different methods of communication: "Our prior decisions do not deal with the *content* of the speech; they deal only with the conditions surrounding its delivery. *These* conditions 'tend to present the problems peculiar to each method of expression.' Here the Court uses this magical phrase to cripple a basic principle of the Constitution."¹²¹

The "peculiar problems" posed by cable's use of public rights-of-way are as follows: Unlike a parade, which uses a street for a limited time, a cable system installs its cable permanently; and unlike other communicative activities, some physical disruption occurs because of construction of underground cable facilities, attachment of cable to utility poles, and installation of the cable at residences. Although a cable system makes permanent use of the rights-of-way, the installation of a cable system physically does not prevent the installation of other cable systems.¹²² Thus, cable franchising can differ markedly from broadcast licensing, in which the government bestows to the exclusion of others the use of a public resource upon a broadcaster.¹²³ Cable franchising resembles

Times Film Corp. v. City of Chicago, 365 U.S. 43, 49 (1961). Members of the Court who cite the unvarying principles statement treat content regulation in the medium in question according to standards that apply to other forms of communication. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 63 (1961) (Warren, C.J., dissenting).

120. 365 U.S. at 76 (Warren, C.J., dissenting). Justices Black, Douglas and Brennan joined in this dissent.

121. *Id.* at 78. Chief Justice Warren concluded his dissent: "Of course each medium presents its own peculiar problems, but they are not of the kind which would authorize the censorship of one form of communication and not others." *Id.* at 51.

122. See *supra* note 49. Further, cable does not prevent the use of streets for other expressive purposes, infringe upon the rights of individuals in surrounding areas, or present the problem of a captive audience. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-56 (1975) (outlining the appropriate concerns for public forum regulation).

123. Governmental bestowal of a privilege to use a broadcasting frequency on some to the exclusion of others is central to broadcasting regulation. Since government gives the broadcaster exclusive use of a public resource, that broadcaster is obligated to share the resource at times with others. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969) (broadcasters do not have an unconditional monopoly of the scarce resource that the government has denied others the right to use). Technically, cable does not require use

broadcast licensing only when cities choose to franchise one firm and to establish extensive regulatory provisions that require non-revenue-producing services that create economic disincentives to competitive entry. If cities are willing to franchise more than one firm and do not demand non-revenue-producing services, then entry depends on natural economic conditions—as in the newspaper industry. Newspaper distribution, however, does not pose a health hazard; thus the truly critical problem that cable's use of public rights-of-way poses is the physical disruption caused by construction.

Cable's use of rights-of-way is not an absolute right.¹²⁴ Cities have a legitimate interest in protecting public safety by requiring a permit before construction begins and by attaching certain conditions that require adherence to a construction schedule, restoration of rights-of-way to good condition, and compliance with safety regulations.¹²⁵ Content-neutral regulations that drafters narrowly tai-

of public rights-of-way to the exclusion of others; thus the concept of broadcasting regulation does not transfer to municipal regulation of cable.

124. An assumption that municipalities will retain absolutely no powers to protect safety concerns often accompanies the suggestion that municipal governments lessen cable regulation. *See, e.g., Diversity of Information, supra* note 1, at 201 (remarks of Charles Firestone) (questioning whether a cable company would have a right to lay cable irrespective of any regulation). Municipal cable regulation does not have to be an all or nothing proposition. Chief Judge Markey of the Court of Customs and Patent Appeals is one of the strongest advocates of full first amendment freedom for cable. In his dissenting opinion in *Boulder I*, he noted that cities do not have to grant licenses to cable firms that lack financial integrity and a willingness to comply with police power regulations relating to use of rights-of-way. 630 F.2d 704, 713 n.10 (8th Cir. 1980).

125. The memorandum agreement that Community Communications and Boulder recently signed contains typical public safety requirements. *See Community Communications Co. v. City of Boulder*, No. 80-M-62 (D. Colo. Oct. 29, 1982). *See also Cablevision of Jefferson County, Inc. v. County Capital Corp.*, No. CV182-688-CC-J3 (Jefferson County Mo. Cir. Ct. Sept. 30, 1982) (absent express statutory authority, a county may not impose anything other than public safety regulation upon a cable system).

Many municipal officials view cable systems as a source of additional municipal revenue and attach extensive fee requirements to franchise agreements. John Lindsay, former mayor of New York, termed cable franchises "urban oil wells under our city streets" and insisted that cities "have the right to develop public income from that asset to be used for the public good." *N.Y. Times*, Feb. 6, 1973, at 73, col. 6. The government may impose financial burdens such as permit fees on the exercise of first amendment rights only when the burden is reasonable and directly related to the accomplishment of legitimate governmental purposes. *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941); *Collin v. Smith*, 447 F. Supp. 676, 685 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir. 1978). The fees required of cable systems may be both unreasonable and unrelated to legitimate governmental purposes. A portion of extensive franchise fees may be viewed as an unconstitutional tax imposed as a condition of engaging in expression. *See Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Additionally, extensive fees may constitute discriminatory taxes. *See Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S. Ct. 1365 (1983); *Grosjean v. American Press Co.*, 297

lor to advance public safety concerns are constitutional.

In summary, constitutional guarantees limit a city's police power to regulate the use of rights-of-way.¹²⁶ These guarantees prevent the government from restricting the content of users of public facilities and from employing a vague licensing standard that arbitrarily determines who may use rights-of-way. Moreover, while a city may impose conditions upon a franchise, those conditions must be constitutional.¹²⁷ The next section of this Article explores

U.S. 233 (1936). For a discussion of fees that government commonly assesses for use of rights-of-way, see 12 E. McQUILLIN, *supra* note 90, §§ 34.37, .80.

126. 6 E. McQUILLIN, *supra* note 90, § 24.09.

127. 12 *id.*, § 34.36. Even if one characterizes cable's use of rights-of-way as a privilege rather than a right, a government may not attach unconstitutional conditions to that use. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (the Court has fully rejected the wooden distinction between "rights" and "privileges"); Graham v. Richardson, 403 U.S. 365, 374 (1971) (the Court "has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (the denial of or placing of conditions upon a benefit or privilege undoubtedly infringes upon the liberties of religion and expression). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1446 (1968) (the first amendment forbids the government's conditioning of its largess upon the willingness of an individual to surrender a right that he otherwise could exercise).

Even if a cable system does not have a "right" to utilize public rights-of-way, the government's power to impose conditions is distinct from the power to deny access to the rights-of-way. *See Note, Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1609 (1960). The Court in Perry v. Sindermann, 408 U.S. 593 (1972), noted that although a person has no right to a valuable government benefit, the government may not deny the benefit to a person on a basis that infringes his freedom of speech. *Id.* at 597. *See also* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (the Court uniformly has rejected the theory that government, which certainly is able to deny employment altogether, may subject public employment to any conditions, regardless of how unreasonable). *Cf.* Elrod v. Burns, 427 U.S. 347, 361 (1976) (the government may not use the denial of a public benefit to create an incentive enabling it to achieve what it may not command directly). Anytime that the government attaches conditions to public benefits, it must show that the regulation is the least restrictive means of achieving some compelling state interest. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981). The cities' failure to pursue less restrictive alternatives may prove fatal for municipal regulatory schemes that demand public access channels. *See infra* text accompanying notes 220-23.

The NLC cites *Snepp v. United States*, 444 U.S. 507 (1980) (CIA contract provision requiring prepublication clearance), for the proposition that voluntary agreements limiting constitutional rights are often valid. Miller & Beals, *supra* note 41, at 115 n.135. *Snepp* is of little precedential value for the constitutionality of cable franchising agreements. The Court in *Snepp* carefully noted that the case concerned a special context of government employment and that a compelling interest existed in protecting national security. 444 U.S. at 509 n.3. Cable franchise agreements lack both of these elements. Similarly, the NLC's reliance upon *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (federal personnel), and *Brown v. Glines*, 444 U.S. 348 (1980) (military personnel), is misplaced because the Court noted in both cases that it was rendering decisions for very narrow factual contexts. *See Brown*, 444 U.S. at 360 (emphasizing the special character of the military); *United States Civil Serv. Comm'n*, 413 U.S. at 564 (emphasizing the special

the primary unconstitutional condition that municipalities impose upon cable systems—access channels.

III. THE PROBLEMS OF ACCESS

During the late 1960's and early 1970's proponents of cable sold the benefits of cable television "as peddlers once sold Lydia Pinkham's Vegetable Compound, a veritable elixir for the ills of our time."¹²⁸ The expectation that cable television would have an enormous effect on American life¹²⁹ precipitated an intense governmental interest in access channels, and access formed a central

character of government employment). *See also* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (the state as an employer has interests in regulating the speech of its employees that differ significantly from the interest it possesses in regulating the speech of its citizenry in general).

The mere existence of a contract does not eliminate the need for first amendment analysis. One commentator's discussion of *Snepp* demonstrates the problem of cable franchise agreements:

[C]ontracts are not enforced simply because they are made. Usurious and unconscionable bargains are but two that courts refuse to acknowledge even when they truly reflect the parties' intent. Contracts are enforced only if the promises they embody are substantively compatible with the goals of public policy, however defined. Enforcement thus presupposes substantive inquiry.

Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. Rev. 775, 811-12 (1982). Thus, analysis of a cable franchise agreement should focus on the power of the state to impose the conditions in question and not on the existence of a contract waiving constitutional rights. *Cf. Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (since a "qualification on public employment may not be constitutionally imposed absent an appropriate justification, to accept the waiver argument is to say that the government may do what it may not do").

A major difference exists between a freely negotiated contract and a cable franchise agreement based upon a RFP that establishes minimum conditions for a cable firm to meet or exceed. *See* Goldberg, Ross & Spector, *supra* note 41, at 603 (the local government is largely able to dictate the contract's terms). An applicant for a cable franchise must agree to conditions that limit first amendment rights in order to engage in cable communications. *Cf. Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981) (a burden on religion exists when the state conditions receipt of an important benefit upon conduct that a religious faith proscribes). In addition, that a cable entrepreneur may engage in expression through another form of distribution is irrelevant. *Cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (petitioner's use of a theater other than the city-operated theatre is of no consequence; authorities may not abridge the exercise of liberty in appropriate places on the ground that individuals may exercise the liberty in some other place).

128. Amendment of Part 76 of the Comm'n Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 59 F.C.C.2d 294, 330 (1976) (Robinson, Comm'r, concurring).

129. *See, e.g., SLOAN COMM'N ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE* 4 (1971) (cable's effect on society's most immediate needs might be enormous).

part of the FCC's massive 1972 cable regulations.¹³⁰ En route to the "wired nation," the FCC's plans went haywire;¹³¹ the demand for access was far less than the FCC had anticipated.¹³² After the Supreme Court held that the access rules exceeded the FCC's authority,¹³³ cities assumed the role of requiring access.¹³⁴ Along with that role came blind faith that somehow the benefits of access exceeded the problems. This section, however, reveals the problems of access far outweigh the benefits.

A. Censorship

Perhaps the largest fallacy about access channels is that they are content neutral.¹³⁵ Municipal governments generally require cable operators to prohibit the utilization of access channels by those users seeking to engage in certain classes of expression. This censorship obligation constitutes content regulation and is one of the most unorthodox elements in our system of expression.

For the government to seek prior restraints and postpublication penalties against users and operators who cablecast unprotected expression is constitutionally acceptable; for the government to require a cable operator to act as a censor is constitutionally impermissible.

1. Obscenity

Most franchise agreements forbid the presentation of obscene material on the access channels.¹³⁶ Whether the cable operator or a

130. See Cable Television Report and Order, 36 F.C.C.2d 143 (1972).

131. Amendment of Part 76, 59 F.C.C.2d at 329 (Hooks, Comm'r, concurring and dissenting in part).

132. *Id.* at 314.

133. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979). This case concerned only the FCC's authority to require access channels.

134. For a discussion of access obligations that states and municipalities imposed upon cable operators after *Midwest Video*, see Harrison, *supra* note 2.

135. *But cf. Miller & Beals, supra* note 41, at 114 n.128 (because local governments do not tell cable operator what to transmit on access channels, the franchise agreement contains content-neutral access provisions).

136. For example, the Indianapolis cable ordinance requires that the cable operator prevent use of access channels for "pre-recorded programming which violates the provisions of the Code of Indianapolis and Marion County with respect to obscenity and pornography." *Omega Satellite Prods. Co. v. City of Indianapolis*, 536 F. Supp. 371, 386 (S.D. Ind.) (quoting *INDIANAPOLIS AND MARION COUNTY, INC., GEN. ORDINANCE § 81/2-66(c)(2)* (1979)), *aff'd on other grounds*, 694 F.2d 119 (7th Cir. 1982).

With the exception of the prohibition against libelous material, see *infra* text accompanying notes 171-80, the provisions against obscenity, indecency, and commercial material, see *infra* text accompanying notes 136-70, stem from the FCC's now defunct cable access

community corporation established to administer the access channels evaluates allegedly obscene material, this judgment presents a serious threat to the first amendment.

To prevent the exhibition of an allegedly obscene motion picture, a municipal government would have to utilize stringent procedural safeguards to reduce the danger of suppressing protected expression.¹³⁷ Moreover, the standards of *Miller v. California*¹³⁸ would apply in evaluating the content of the film. If the same film, however, becomes available on videotape for transmission on a cable system's access channels, the cable operator or the community access corporation would be responsible for the determination of obscenity. This burden of censorship poses significant problems.

If a community access corporation established by the municipality's cable ordinance or franchising agreement administers the access channels, any censorship will constitute state action.¹³⁹ The same procedural requirements that cities must follow would apply to the access corporation. Even if the access corporation correctly applied the *Miller* standards for a finding of obscenity, the lack of stringent procedural safeguards would present a serious constitutional defect. In addition, whether an administrative board, given the power of censorship, actually would protect first amendment interests is questionable.¹⁴⁰ The Court's comments in *Southeastern*

service operating rules. See 47 C.F.R. § 76.256(d) (1976).

137. The Supreme Court requires the following procedural safeguards for the proper suppression of unprotected expression:

First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest upon the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546, 560 (1975). See generally Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970) (discusses Supreme Court opinions, primarily in the obscenity area, that impose strict procedural requirements on governmental action controlling the exercise of first amendment rights).

138. 413 U.S. 15 (1973). Under *Miller*, courts will find obscenity only if the trier of fact finds: That the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest; that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

139. See, e.g., *Evans v. Newton*, 382 U.S. 296, 299 (1966) (conduct that is formally "private" may become so intertwined with governmental policies or so impregnated with a governmental character that the conduct is subject to the limitations which the Constitution places upon governmental actions).

140. While these boards do not confiscate and destroy obscene material that individuals or organizations submit for access channel usage, their actions still constitute prior restraint. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (even though

Promotions, Ltd. v. Conrad,¹⁴¹ a case concerning the board of directors of a municipal auditorium, are highly relevant:

An administrative board assigned to screening stage productions . . . may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression. And if judicial review is made unduly onerous, by reason of delay or otherwise, the board's determination in practice may be final.¹⁴²

To give access boards the power of censorship is to step backward to the times when community licensing boards routinely suppressing motion pictures were often in violation of the first amendment.¹⁴³

The censorship obligation takes a perverse and bizarre turn when the cable operator must make the obscenity judgments. As a surrogate of the government, the cable operator would have to comply with the procedural guidelines imposed upon governmental action.¹⁴⁴ Moreover, the cable operator would have the difficult task in court of proving material to be obscene.¹⁴⁵ A more flagrant violation of first amendment rights does not come to mind. The dynamics of cable franchise revocation and nonrenewal would encourage suppression. The safest course that an operator with long term cable aspirations could take when assessing sexually-oriented material that nears obscenity¹⁴⁶ would be suppression.

petitioner could use other facilities for expression, government's denial of access to municipal auditorium constitutes a prior restraint).

Professor Monaghan, *supra* note 137, at 522-24, is especially critical of administrative bodies assessing the constitutional status of expression.

141. 420 U.S. 546 (1975).

142. *Id.* at 560-61 (footnote omitted).

143. For a brief survey of motion picture censorship, see *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 69-72 (1961) (Warren, C.J., dissenting).

144. See *supra* note 137. In *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), the concept of journalistic discretion played a critical role in Chief Justice Burger's finding that a broadcast licensee's refusal to accept editorial advertising did not constitute state action. *Id.* at 117-19. Chief Judge Markey in *Midwest Video Corp. v. FCC* noted the distinction between the conduct at issue in *CBS* and the censorship action that the FCC's access rules required:

In *CBS* . . . the Court said broadcasters are not engaged in government action just because they are permitted to use the airwaves. Here the government *requires* cable operators to censor. The Court [in *CBS*] said the First Amendment does not reach acts of private parties in every instance in which the Commission or Congress merely permitted or failed to prohibit the speech-denying act complained of. . . . Here the Commission has *ordered* such acts.

Midwest Video, 571 F.2d 1025, 1056 n.76 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

145. See *supra* note 137.

146. A majority of the Court does not share Justice Stevens' view, expressed in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-72 (1976) (the government may use the

A determination of obscenity entails a highly subjective judgment regardless of procedural guidelines employed. Although the Court has demanded that censors use sensitive tools to separate protected from unprotected expression,¹⁴⁷ Justice Brennan strongly has criticized the Court for failing to develop a standard that sharply distinguishes the obscene from the nonobscene.¹⁴⁸ He criticized the use of terms such as "prurient interest," "patent offensiveness," and "serious literary value," and argued that the meaning of these concepts "necessarily varies with the experience, outlook, and even the idiosyncrasies of the person defining them."¹⁴⁹

2. Indecency

The problem of subjectivity also is present in the area of indecency. Nonobscene sexually oriented material on pay cable services such as the Playboy Channel angers groups such as Morality in Media.¹⁵⁰ Similarly, the use of access channels in New York City for sexually oriented programming—Midnight Blue or the Ugly George Hour of Truth, Sex and Violence,¹⁵¹ for example—led many communities to ban indecency on access channels. These

content of sexually-oriented motion pictures as the basis for placing them in a different classification from other motion pictures), and *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (broadcast material which is indecent lies at the periphery of first amendment concerns), that nonobscene sexually oriented material warrants less protection under the first amendment than other categories of expression. Recently, though, the Court did hold that the first amendment does not protect nonobscene material depicting sexual acts performed by children. *New York v. Ferber*, 102 S. Ct. 3348 (1982).

147. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

148. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83-84 (1973) (Brennan, J., dissenting).

149. *Id.* at 84.

150. Morality in Media in 1981 sent out 700,000 letters advocating cable censorship. *BROADCASTING*, Sept. 28, 1981, at 50. For an interview with the leader of Morality in Media, see Livingston, *Waging War Against "Cableporn," CABLEVISION PLUS*, Jan. 10, 1983, at 16-22. See generally Schwartz, *The TV Pornography Boom*, N. Y. Times, Sept. 13, 1981, (Magazine) at 44 (discussing the proliferation of sexually oriented material on video-cassettes and cable).

151. Midnight Blue in particular captured a great deal of attention in the mid-1970's and led a Congressman to suggest—contrary to first amendment tradition—that the producer should shoulder the burden of proving that a program is not "a pornographic indecent film." *Cable Television Oversight: Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, pt. 1*, 94th Cong., 2d Sess. 232 (1976) (remarks of Rep. John Murphy) [hereinafter cited as *Cable Television Oversight*]. For a discussion of Midnight Blue, see *id.* at 227-32.

The mayor of Miami proposed a recently enacted ordinance barring obscene or indecent material on the local cable system after he visited New York and saw "naked bodies" on cable television. *BROADCASTING*, Feb. 21, 1983, at 73.

bans are without constitutional precedent and undermine the purpose of access channels.

The "seed crystal" of the public access idea is that access requirements protect users from arbitrary judgments about which programs are acceptable or who can create programs.¹⁵² Access is especially important to those groups whose views are not ordinarily available to the public through the mass media. The outlooks and language of these groups or individuals often depart from community norms. Thus, a prohibition against indecency may discriminate against certain groups because of the content of their expression.¹⁵³

The content-based discrimination stems from the definition of indecency. The FCC, for example, defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience."¹⁵⁴ To determine the indecency of material shown when children likely would not be in the audience, decisionmakers also must assess the material's literary, artistic, political, or scientific value.¹⁵⁵ Assessment of elements such as offensiveness and literary value is highly subjective. Also, measuring offensiveness according to community standards encompasses a preference for the standards of the majority.¹⁵⁶ As Justice Brennan observed in *FCC v. Pacifica*

152. *Cable Television Oversight*, *supra* note 151, at 238 (statement of Charlotte Schiff Jones).

153. See *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (once a forum opens for assembly or speaking by some groups, government may not prohibit others from assembling or speaking because of what they intend to say).

154. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., 56 F.C.C.2d 94, 98 (1975), *rev'd sub nom.* *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd* 438 U.S. 726 (1978). *Morality in Media* advocates that evaluators of indecency on cable use contemporary community standards for their determinations. See *BROADCASTING*, Feb. 21, 1983, at 73; *Livingston*, *supra* note 150, at 18-19.

155. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y. 56 F.C.C.2d 94, 98 (1975), *rev'd sub. nom.* *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

156. See Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915, 951 (1978) ("if 'offensiveness' were the test, majority rule would replace the first amendment"). Although judges in obscenity cases instruct jurors that contemporary community standards mean "their own understanding of the tolerance of the average person in their community," *Smith v. United States*, 431 U.S. 291, 305 (1977), Professor Monaghan has questioned whether courts can expect juries to be sensitive to first amendment interests. *Monaghan*, *supra* note 137, at 527-29.

Foundation,¹⁵⁷ to define indecency according to community standards has the greatest impact on those "who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds."¹⁵⁸ The protection of unpopular minority groups is a central theme of first amendment doctrine,¹⁵⁹ yet the prevention of indecent expression—measured by community standards—strikes hardest at those groups and individuals who most need the opportunity of access.

Finally, no constitutional precedent exists for proscribing indecent material on cable access channels. These channels do not utilize the spectrum as do broadcasters,¹⁶⁰ and most importantly, cable requires a subscription. These differences especially undercut the rationales that the Court in *Pacifica* advanced to justify regulation of broadcast indecency.¹⁶¹ A federal district court that re-

157. 438 U.S. 726 (1978).

158. *Id.* at 776 (Brennan, J., dissenting). Justice Stevens' view that a ban on indecent language causes little harm because it affects the "form, rather than the content," *id.* at 743 n.18, is false. As Justice Brennan noted, "[a] given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image." *Id.* at 773 (Brennan, J. dissenting). Professor Schauer correctly observes that the style of speech that a speaker chooses is as much a part of individualism as the strictly propositional content of the message. F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 148 (1982).

159. This protection makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. See *NAACP v. Button*, 371 U.S. 415, 431 (1963).

160. In discussing the limits upon the FCC's regulatory powers, two courts have noted the distinction between the retransmission of broadcast signals and cablecasting, which does not utilize the airwaves. See *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1054 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Home Box Office, Inc., v. FCC*, 567 F.2d 9, 45 n.80 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

If cable's use of terrestrial and satellite microwave relays for cablecast services such as HBO provides a rationale for content regulation, then the regulation would come from the FCC and not from the cities. See *Home Box Office, Inc., v. FCC*, 567 F.2d 9, 45 n.80 (D.C. Cir.) (expressing no opinion on whether FCC control of microwave links would extend the Commission's constitutionally permitted authority over cable), *cert. denied*, 434 U.S. 829 (1977); 1 FCC NETWORK INQUIRY SPECIAL STAFF, FINAL REPORT, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 269-73 (1980) (discussing FCC jurisdiction over nonbroadcast cable networks that use microwave links). Moreover, newspaper and news services utilize microwave links. USA Today, for example, utilizes a satellite to send its product to geographically dispersed printing plants. If government may regulate content for cable systems because of their use of microwave links, then government could also regulate content of other forms of mass communication. The FCC should confine its regulation in this area to strictly technical matters.

161. 438 U.S. 726, 748-49 (1978) (broadcasting has established a pervasive presence in the lives of Americans; broadcasting is uniquely accessible to children). Justice Stevens emphasized that this opinion represented a narrow application to a very specific set of facts. *Id.* at 750. He added that differences between television and "closed-circuit transmissions" might be relevant. *Id.*

cently found unconstitutional an ordinance punishing indecent material on cable emphasized the technology and subscription differences of cable.¹⁶²

3. Commercial Speech

Municipal authorities generally design public access channels for noncommercial expression.¹⁶³ For example, the Indianapolis cable ordinance forbids the cable operator from carrying on public access channels "any material designed to promote the sale of commercial products or services."¹⁶⁴ The peculiar problem of categorizing hybrid expression that is part commercial and part noncommercial creates the possibility of arbitrary and unconstitutional decisions.

The Supreme Court has never defined carefully commercial speech;¹⁶⁵ blurry lines separate that category of expression from

162. *Community Television of Utah, Inc. v. Roy City*, No. 82-0122J (D. Utah Dec. 22, 1982) (available Apr. 3, 1983, on LEXIS, Genfed library, Dist. file). In finding unconstitutional a city ordinance permitting revocation of a cable license for distributing indecent material, the district court stressed the distinction between broadcasting and cablecasting technology and the necessity of a subscription to receive cable service. The city advanced the argument that cable was "pervasive" like broadcasting because it was widespread in the community. *Community Television of Utah, Inc.*, No. 82-0122J, slip op. at 4. Judge Jenkins disagreed, stating that a cable signal is not "pervasive" in the same sense of "automatic availability to all. It is not in the air, present everywhere, transcending the walls of a house or a building. Cable signals travel over wires, not in the air. Such signals do not travel except upon request. They are asked for. They are invited." *Id.* at 8-9. Judge Jenkins acknowledged the responsibility of a parent to oversee the development of a child, *id.* at 15, and noted that the subscription requirement for cable introduces an element of parental control not present in *Pacifica*. In addressing the city's concern for children, Judge Jenkins found that the ordinance also affected those homes which have no children and pointed out the inappropriateness of "restrict[ing] communication content to that which is only fit for the eyes and ears of children." *Id.* at 3 n.8. See also *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987, 997 (D. Utah 1982) (state cable indecency statute is overbroad because it affects those homes having no children and government should not restrict communication content to that which is suitable for children).

Following the decision in *Community Television*, the Governor of Utah vetoed two bills banning sexually explicit programming on cable television. *Atlanta J. & Const.*, Mar. 31, 1983, at 19B, col. 1. The Utah legislature overrode the veto. *CABLEVISION*, May 23, 1983, at 13.

163. Leased access channels are available for commercial speech.

164. *Omega Satellite Prods. Co. v. City of Indianapolis*, 536 F. Supp. 371, 386 (S.D. Ind.) (quoting *INDIANAPOLIS AND MARION COUNTY, INC., GEN. ORDINANCE § 81/2-66(c)(1)* (1979)), *aff'd on other grounds*, 694 F.2d 119 (7th Cir. 1982).

165. See generally Lee, *The Problems of "Reasonable Access" to Broadcasting for Noncommercial Expression: Content Discrimination, Appellate Review, and Separation of Commercial and Noncommercial Expression*, 34 U. FLA. L. REV. 348, 387-98 (1982) (discussing the development of the Court's commercial speech doctrine and the problems posed by attempts to distinguish commercial expression from noncommercial expression).

noncommercial expression. Consider the difficulty that a cable operator would have in categorizing the following message under the vague standards of the Indianapolis ordinance: "Joe says to support dairy price supports; they mean lower prices for you at his Shoppe."¹⁶⁶ No objective standard exists for the cable operator to use in categorizing ambiguous expression.¹⁶⁷ Operators of public access channels may arbitrarily forbid any speech bordering on commercial.

Franchises in certain instances give municipal officials the authority to determine the commercial nature of programming. The franchise for the southern half of Manhattan permits the director of franchises to force the cable operator to prohibit or discontinue a public access channel program that the director finds "essentially promotional."¹⁶⁸ Justice Stevens recently voiced disapproval of an arrangement that gave a state public service commission the authority to categorize a regulated power company's expression, noting that the Commission did "not possess the necessary expertise in dealing with these sensitive free speech questions."¹⁶⁹ Similarly, a municipal official such as the director of franchises does not possess the expertise to categorize expression in a consistent fashion; furthermore, by ordering a cable operator to deny access to a particular message, a municipal official violates the first amendment.¹⁷⁰

4. Libel

California requires that cable operators establish access rules incorporating "restrictions on libelous" programs.¹⁷¹ This require-

166. Justice Brennan used this example to illustrate the difficulties that a city would experience if government prohibited commercial speech from billboards but permitted non-commercial speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 538 (1981) (Brennan, J., concurring in the judgment).

167. For a discussion of the difficulties of categorizing hybrid expression, see Lee, *supra* note 165, at 393-98.

168. M. HAMBURG, *supra* note 17, at A-324.

169. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 581 n.4 (1980) (Stevens, J., concurring in the judgment).

170. A cable operator, subject to nonrenewal or revocation of a franchise, likely would not disobey the municipal official in such circumstances. Also, a cable operator likely would not disagree with the franchise director's categorization of expression that falls close to the line between commercial and noncommercial speech.

171. Act of Sept. 21, 1982, ch. 1256, S. 53066.1(k), 1982 Cal. Legis. Serv. 6713, 6723 (West). The California statute may be read in either of two ways: the statute requires rules that warn potential speakers not to engage in libel, or the statute requires screening mechanisms and the denial of access when appropriate. Although the language of the statute is unclear, the act's intent probably is to establish screening and prior restraint mechanisms.

ment is an assault on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁷² The provision accomplishes through government surrogates what the state by itself could not do. The California statute falsely assumes that the first amendment does not protect libel. The Supreme Court, however, believes that since erroneous statements are inevitable,¹⁷³ the first amendment must protect some falsehood in order to protect "speech that matters."¹⁷⁴ Thus, the first amendment protects defamatory statements concerning public officials and public figures¹⁷⁵ unless the plaintiff proves that the defendant acted with "actual malice."¹⁷⁶

The Supreme Court developed the actual malice standard to reduce the chilling effect that fear of postpublication penalties causes.¹⁷⁷ Restrictions on access to a cable system, based on an evaluation by an operator or access board of the presence of libel, create a disincentive to engage in constitutionally protected expression. The mere knowledge that an operator or board is carefully screening material and may deny access might deter altogether some speakers or cause them to revise their messages. Because of the heavy costs and complexities involved in an evaluation of whether a third party's statements are defamatory and

The FCC's initial access rules also required that operators develop rules prohibiting certain classes of expression. Cable Television Report and Order, 36 F.C.C.2d 143, 194 (1972). The Commission later stated that it intended to require that systems keep certain classes of content off the channels. Clarification of Section 76.256 of the Comm'n's Rules and Regulations, 59 F.C.C.2d 984 (1976).

Since the agreement to the California rules is voluntary and in exchange for rate control exemption, whether state action is present when a cable operator denies access to a speaker is arguable. The government, however, creates a great incentive to turn channels over to access uses and establishes the criteria for their use; thus a denial of access is intertwined with governmental policy. A denial under this statute violates the first amendment rights of potential speakers by discriminating among speakers according to the content of their message.

172. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

173. *Id.* at 271-72.

174. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

175. The Court permits states to distinguish between private individuals and public officials or figures. *Id.* at 347-48. In those jurisdictions in which private figures must prove negligence, rather than actual malice, the inquiry often is as complicated as the proof of actual malice. If a cable operator has to assess whether the speaker is acting negligently, the operator's burden is not necessarily easier than it would be in a jurisdiction requiring proof of actual malice.

176. This term means knowledge of falsity or reckless disregard of the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

177. *Id.* at 279.

whether actual malice is present,¹⁷⁸ some cablecasters may use minimal screening mechanisms and place the burden of proving truth and the absence of actual malice upon the potential speaker.¹⁷⁹ The imposition of restrictions on libel hardly fosters the open debate for which access channels are designed.

The California statute's incorrect assumption that all defamatory statements evade first amendment protection results in unjustifiable censorship. If a cable operator assesses only falsity, then the operator may deny access to constitutionally protected speech. If the operator assesses actual malice, then the disincentives to engage in expression are great. The ban on libelous material, even when actual malice is present, counters the constitutional tradition of punishing such material through postpublication penalty rather than prior restraint.¹⁸⁰

B. *Compelled Subsidy and Dissociation*

If government no longer required cable operators to censor access channels, access requirements nevertheless would cause first amendment problems of compelled subsidy and dissociation. The cable access ideal stems in part from the dazzling abundance of channels that cable technically is able to deliver.¹⁸¹ Nevertheless, although users of public, educational, and government access channels incur little or no cost, cable access is not free. Governments require cable operators, as a condition of receiving a franchise, to spend significant amounts of money constructing and operating access facilities.¹⁸² Subscribers, as a prerequisite of receiving cable

178. A cable operator's task to assess a potential access user's state of mind—required under the actual malice standard—is much more difficult than the task for an editor who evaluates work submitted by reporters who operate under carefully defined news gathering and confirmation procedures.

179. *Cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to . . . 'self-censorship.'" *Id.*

180. *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697, 713-15 (1931) (a prior restraint is not the appropriate punishment for libel). *See supra* note 171.

181. Professor Barron, a leading access advocate, observed that while the problems of space and costs of newsprint present difficulties to a newspaper access system, cable "has the capacity to meet the demands of an access system." *Diversity of Information, supra* note 1, at 9-10. Professor Barron's failure to acknowledge the economic considerations affecting cable access is strange.

182. The Denver franchise agreement, for example, entails an estimated expenditure of \$7.3 million on access studios and equipment. *Agreement Between the City and County of Denver and Mile Hi Cablevision*, app. B, at 35 (1982) (copy on file with author). When capital is diverted into such uses an opportunity cost exists beyond the cost of building and operating access channels and facilities.

service, must subsidize the operation of access channels. This subsidy violates the first amendment rights of cable subscribers and operators. In addition, access may compel the cable operator to dissociate himself from the views or actions of access users.

The Supreme Court in *Abood v. Detroit Board of Education*¹⁸³ concluded that the Board of Education could not require as a condition of holding a job that teachers contribute to a union for the support of an ideological cause they may oppose.¹⁸⁴ Although teachers were free to express their opposition to the union's views,¹⁸⁵ the Court found the government coercion to be unconstitutional. Writing for the Court, Justice Stewart stated:

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.¹⁸⁶

The first amendment prohibits government from forcing workers who may object to a particular ideological view to finance expenditures for the expression of that view.¹⁸⁷

Although cable does not concern government employment, governmental coercion of cable access is similar to the coercion in *Abood*. The government requires that the cable operator construct and subsidize access facilities as a condition of receiving a franchise. Since operators predictably pass the cost to the subscribers, the government in effect forces a cable subscriber to subsidize the expression of ideologies that he may oppose. The freedom of the cable subscriber and operator to express their opposition to the view that access users present does not alter the presence of governmental coercion. Furthermore, a subscription to

183. 431 U.S. 209 (1977).

184. *Id.* at 235. The Court distinguished between dues used for collective bargaining, which are constitutional, and dues that ultimately finance campaign contributions and the expression of political views. *Id.* at 236.

185. *Id.* at 230. *Cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 98 n.2 (1980) (Powell, J., concurring in part and in the judgment) (even if a right of access to a person's property does not affect his own speech, a requirement that he lend support to the expression of a third party's views may burden impermissibly the first amendment freedoms of association and belief).

186. *Abood*, 431 U.S. at 234-35 (footnote omitted).

187. *Id.* at 236. In *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), the state public service commission claimed that a ban on policy-oriented utility bill inserts was necessary to prevent ratepayer subsidization of the inserts. *Id.* at 543. The Court found no basis for the commission's assumption that the cost of bill inserts could not be excluded from the utility's rate base. *Id.*

a cable system is distinct from a subscription to a magazine that may carry material with which the subscriber ideologically disagrees. The editor and publisher alone determine the choice of material in a magazine. With cable, however, the government requires that the operator and subscriber provide facilities and money for the expression of views they might oppose.¹⁸⁸

To assume that access to the cable system does not burden impermissibly the system's first amendment rights because cable operators are free to express themselves on other channels is dangerous.¹⁸⁹ The views or acts of the access user are so repugnant to the cable operator in some circumstances that the operator simply must respond. This coercion violates the liberty of the operator to determine the topic and circumstances of his expression.

The Court, in *Pruneyard Shopping Center v. Robins*¹⁹⁰ found that compelled access to a shopping center does not interfere with a property owner's first amendment rights. The Court reasoned in

188. With the exception of the access censorship provisions, which may discriminate in subject and viewpoint, the government does not specify the subjects and viewpoints that cable users may express on access channels. This lack of specification, however, does not minimize government coercion. In *Abood* the government was not specifying which candidates and political ideologies the union and its members could or could not support. Nevertheless, the requirement that teachers contribute to union funds that the organization was using for political purposes violated the first amendment. Requiring a cable system to provide access as a condition of holding a franchise constitutes similar government coercion.

An argument exists that the portion of a subscriber's fee that subsidizes access channels is similar to the portion of a product's price that supports the operation and maintenance of shopping center facilities which individuals or organizations use for purposes of expression. Shopping centers, however, are generally open to the public, and the result in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), would have been entirely different if the private property in question had not been open to the public. *See id.* at 77-78 (emphasizing the openness of the shopping center). A cable system's facilities generally are not open; the government directs their availability. The NLC ignores this fundamental distinction when it cites *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town may not violate the first amendment rights of those using its property), for the proposition that a cable system's denial of access may violate the first amendment rights of citizens. National League of Cities, *Cable Communications and the First Amendment: An Analysis by Function* 46 (Sept. 1981) (unpublished report). As the *Marsh* Court noted, the more a private property owner "opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506. Miller & Beals, *supra* note 41, at 109-10, in their rewrite of the NLC document wisely deleted the reference to *Marsh*. The absence of editors also distinguishes shopping centers from cable systems. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980) (access to privately owned shopping center obviously does not intrude upon the function of editors).

189. *But cf.* Miller & Beals, *supra* note 41, at 102 n.67 (governments never require cable operators to carry a certain message and operators can present their own views on different channels and disclaim sponsorship of views on the access channels).

190. 447 U.S. 74 (1980).

part that the public likely would not identify the views expressed by third parties with the views of the property owner.¹⁹¹ Whether viewers, however, dissociate the ideas of cable access users from the views of the system operator is debatable. At least one group of cable operators, for example, claimed that viewers attribute responsibility for offensive cablecast material to the system operator and not to the access user.¹⁹²

Whether or not viewers associate the views that the access user expresses with the system operator, the problem of a compelled response nevertheless remains. The Court in *Pruneyard* believed that the property owner could disavow any connection with the expression of third parties by posting signs disclaiming sponsorship.¹⁹³ No evidence existed in the record for the Court in *Pruneyard* to perceive that some views might be offensive enough to necessitate more than a disclaimer.¹⁹⁴ Justice Powell, however, in his concurring opinion addressed the possibility that the views expressed by users of private property may compel a response by the private property owner. Justice Powell's concern was that the powerful emotions which access users evoke may create an overwhelming coercive effect on the property owner.¹⁹⁵ He argued that

191. *Id.* at 87. See generally Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995, 1014 (1982) (when the level of personal involvement is so minimal and the resulting nexus between the individual and the message is remote, no infringement of first amendment interests occurs).

The Court in *Pruneyard* made no attempt to reconcile its position with the decision in *Abood* even though the public would be unlikely to identify the views of the union with individual members. *Cf. Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring in the judgment) (we should pause before assuming that particular bar members hear their own voices when the state bar speaks as an organization). Perhaps the key to understanding the different results in *Pruneyard* and *Abood* is the *Pruneyard* Court's emphasis upon the fact that the "shopping center by choice of its owner is not limited to the personal use of appellants." 447 U.S. at 87. This draws immediate reference to the key principle from *Marsh v. Alabama*, 326 U.S. 501 (1946), which states that the more a property owner opens up his property for use by the public in general, the more do his rights become circumscribed by the constitutional rights of those who use it. *Id.* at 506. Since cable systems are unlike the property at issue in *Marsh* and *Pruneyard*, see *supra* note 188, the principles of *Abood* should apply to government-required access channels.

192. See *Cable Television Regulation, pt. 2, supra* note 10, at 587 (statement of Cox Cable Communications *et al.*). Insufficient evidence exists on this question to develop a firm conclusion.

193. 447 U.S. at 87. The court was addressing a shopping center, a facility that lacks an editor. See *id.* at 88. Whether a similar disclaimer for a cable system violates the first amendment is questionable. Courts might view a mere disclaimer as a permissible burden upon expression. *Cf. Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (1973) (ban on sex-designated want ads is a minimal interference with freedom of expression).

194. 447 U.S. at 101 (Powell, J., concurring in part).

195. *Id.* at 99-100. Justice Powell stated:

coercion to respond violates the property owner's right to control his speech even when the public does not associate the messages expressed by third parties with the views of the property owner.¹⁹⁶

Cable access presents the problem that Justice Powell addressed in *Pruneyard*. For example, several years ago an access channel audience in New York City saw an access user shoot a dog and watch it die.¹⁹⁷ A disclaimer such as "what you have just seen does not represent the position of this company" is an insufficient response when access is used for such reprehensible purposes.¹⁹⁸ The pressure to respond also will be acute when a cable system editorially opposes the view that the access user is expressing.¹⁹⁹

A minority-owned business confronted with leaflet distributors from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion, or a union compelled to provide a forum to right-to-work advocates could be placed in an intolerable position if state law requires it to make its private property available to anyone who wishes to speak. *The strong emotions evoked by speech in such situations may virtually compel the proprietor to respond.*

Id. (emphasis added).

196. *Id.* at 100.

197. S. Simmons, Remarks at Perspectives on the First Amendment, University of Georgia, Athens, Georgia (Apr. 10, 1981).

198. Most access users would not evoke emotions strong enough to compel the cable system to respond. Cable access, however, presents the possibility of situations in which the coerced response that Justice Powell feared could arise. *See supra* note 195. Suppose, for example, that as happened in Skokie a request for a permit for a Nazi parade inflames the community. Would the cable system treat an access appearance by Nazis, complete with films of World War II concentration camps, with only a disclaimer? Suppose that the cable system's employees are on strike and appear on the public access channel to state their side of the labor dispute. Would the system's management be content to treat that appearance with a mere disclaimer?

A broadcasting station's experience with the equal opportunities requirements of the Communications Act, 47 U.S.C. § 315 (1976), illustrates the reality of the compelled response problem. During a 1972 election, one candidate's broadcast advertisement included the following:

I am J.B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs away from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J.B. Stoner into the run-off election for U.S. Senator. Thank you.

Atlanta NAACP, 36 F.C.C.2d 635, 636 (1972). The management of WSB, Atlanta, introduced Stoner's advertisement with a disclaimer stating that the law required the station to carry the advertisement unedited and that Stoner's views were repugnant to the management. Nonetheless audience response to the advertisements was so strong that the management felt compelled to broadcast editorials countering Stoner's views on integration. Telephone interview with Elmo Ellis, former WSB general manager (March 14, 1983).

199. *Pruneyard Shopping Center v. Robins*, 447 U.S. at 100 (Powell, J., concurring in part).

An access system mandating that an operator must cablecast even those views that compel a response from the operator violates the first amendment.²⁰⁰

C. Access and Editorial Freedom

If government eliminates a cable operator's censorship and subsidy obligations, and access does not compel responses by the system operator, a government-mandated access system still must overcome a major obstacle—interference with editorial control.

A discussion of access obligations is difficult because freedom issues exist on both sides of the argument.²⁰¹ Access fosters first amendment and antitrust goals by diversifying control of mass communication facilities and guaranteeing third parties the opportunity to use the facilities. Access, however, also infringes upon the freedom of the cable operator to determine how to use his facilities. The ideas that proponents of access advance to justify their position are laudable, but Justice Brandeis warned that society should be especially wary of laudable goals advanced to restrict freedom. Experience should teach society, he stated, "to be most on [its] guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."²⁰² Advocates of cable access mean well, but they lack understanding of important first amendment principles.

Two crucial assumptions support cable access. First, a cable system with a de facto monopoly over cable service will not open its facilities to third parties who are unable to build their own cable systems. Second, government-required access is constitutionally acceptable because it promotes a presentation of views that is more diversified than an unregulated cable operator would offer. The first assumption presents both antitrust and first amendment issues; the second assumption concerns only first amendment issues.

Cable access as a response to the first assumption resembles

200. See *supra* note 195 and accompanying text. Cf. Lee, *supra* note 165, at 364 (protection from prior restraints and chilling effects does not exhaust the first amendment's protection; the amendment also prohibits coercive effects).

201. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43 (1975).

202. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

the essential facilities doctrine of antitrust law under which a court may order an entrepreneur to allow third parties the use of certain facilities.²⁰³ Courts base their decisions in essential facilities cases on proof, not assumption, of elements such as harm to competition. Because these rigorous antitrust standards apply to non-broadcast communication, the goals of the first amendment have never provided sufficient grounds for a successful challenge to the structure and conduct of the nonbroadcast mass media.²⁰⁴ Courts should not permit cities to base access requirements on a mere assumption of harm. If denial of cable access presents an antitrust violation, the constitutionally preferable solution is to rely upon the antitrust laws.²⁰⁵

When the denial of access is not a violation of the antitrust laws, the Court has found a right of access to a privately owned

203. See, e.g., *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), cert. denied, 344 U.S. 817 (1952).

204. Although the Communications Act's concern for competition incorporates the goals of antitrust law, the Court does not require the FCC to apply antitrust standards in determining the public interest. See generally *Lee, supra* note 82, at 1340 (the Court's most serious error in economic regulation of the press has been in granting the FCC wide-ranging authority to engage in regulation that might exceed the scope of the antitrust laws). *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), is an example of the FCC's promotion of first amendment goals without applying antitrust standards. Storer claimed that the FCC's multiple ownership rules conflicted with antitrust laws because the rules assumed, rather than proved, the harmful effects of acquisitions exceeding certain numerical limits. See *Lee, supra* note 82, at 1324. The Supreme Court sustained the authority of the FCC to issue the rules. See also *id.* at 1329 (FCC bases its ban on formation of newspaper/broadcasting combinations to operate in the same community upon first amendment concerns). Courts should not permit cities to pursue their conception of antitrust and first amendment goals with no requirement of proof of harm. The Eighth Circuit in *Midwest Video* sharply criticized the FCC's uninhibited pursuit of goals. The court of appeals noted that the FCC did not base its access rules upon an adequate record:

In wresting from cable operators the control of privately owned facilities . . . the Commission makes no effort to show that action to have been necessary to protect a "clear public interest, threatened not doubtfully or remotely, but by clear and present danger," or to show "the gravest abuses, endangering paramount interests [which would] give occasion for permissible limitation."

Midwest Video, 571 F.2d 1025, 1053-54 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979).

205. See *Lee, supra* note 82, at 1276 (the Court does not believe the current antitrust laws violate press freedom). Just as first amendment problems stem from antitrust prosecutions, first amendment problems also stem from legislation establishing special regulations for the conduct and structure of a medium or the media as a whole. Cf. *id.* at 1337 (the breadth of regulation permissible under the public interest standard of the Communications Act may pose a threat to press freedom). See generally *id.* at 1339-40 (arguing that the antitrust laws should apply uniformly to all forms of mass communication and insisting that regulation of the media should be substantially the same as governmental monitoring of nonmedia firms). See *supra* note 48.

facility under only two conditions: First, the facility by the decision of the owner generally is open to the public,²⁰⁶ and second, the facility lacks an editor.²⁰⁷ Cable systems generally are not open to the public by the decision of the owner, and cable systems have editors.²⁰⁸

The second assumption supporting cable access concerns the nature of editorial discretion and whether the government may interfere with that discretion to create a more diversified marketplace of ideas. Chief Justice Burger described editorial discretion as the selection and choice of material.²⁰⁹ This definition extends beyond the selection of a topic and viewpoint for employees of the communications enterprise to express; editorial discretion also encompasses a firm's decisions affecting the use of its facilities by third parties.²¹⁰ An editor not only assigns topics and makes deletions in the stories that the firm's employees prepare, but also he establishes and supervises the policies governing the entire package of information that the system offers to the public.

A cable operator must judge what kind of service to offer for all channels that federal or municipal regulations do not control.²¹¹

206. See *Amalgamated Food Employees Union Local 490 v. Logan Valley Plaza*, 391 U.S. 308 (1968) (peaceful picketing in a shopping center parking lot that generally is open to the public); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town, generally open to the public, may not ban the distribution of literature). The continued validity of *Logan Valley* is questionable. See *Hudgens v. NLRB*, 424 U.S. 507 (1976) (labor picketers do not have a first amendment right of access to the shopping center in question); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (first amendment does not require private shopping center to allow distribution of handbills that are unrelated to the shopping center's operations).

For a narrow exception to the "openness" characteristic of private property, see *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (labor organizers may have access to private property under the National Labor Relations Act).

207. In *Pruneyard Shopping Center v. Robins*, 447 U.S. at 88, the Court emphasized that a state access scheme did not violate the first amendment rights of the property owner because the scheme did not intrude upon the functions of an editor.

While courts have found constitutional legislation restricting the constitutional rights of broadcast editors, see, e.g., *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), the rationales for broadcasting regulation do not apply to cable.

208. See *infra* text accompanying notes 211-213.

209. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973).

210. See *id.* at 118 (a broadcaster uses his journalistic judgment of priorities and newsworthiness in deciding whether to accept or refuse editorial advertisements). Senior Circuit Judge Bazelon has advanced the view that decisions affecting third party use of a broadcast station warrant less protection than decisions concerning the content of those segments in which a broadcaster "speaks." For discussion and criticism of Judge Bazelon's view, see Lee, *supra* note 165, at 359 n.75. See also *infra* note 213.

211. The FCC requires that cable systems carry certain television station signals. 47 C.F.R. § 76.51-.61 (1981). *Miller & Beals, supra* note 41, at 101-02, claim that the cable operator has no first amendment rights when providing a channel for information created by

The choices are whether to originate programming, offer a special service such as electronic shopping, or offer programming from other sources.²¹² When a cable operator selects programming packaged by other sources, for example, the Cable News Network or Home Box Office, the operator does not exercise his journalistic discretion to select individual story segments. The editorial discretion to select a program package is similar to the discretion to choose a radio station format, which the Supreme Court believes to be a part of journalistic discretion.²¹³

others because the cable operator is not "speaking." Their analysis ignores the fact that the lack of "speech" by the cablecaster generally is a result of government regulation, and that the government has restricted the cablecaster's freedom of choice by turning the cablecaster into a conduit for the communication of speech. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (holding that a drive-in theater operator had a first amendment right to show motion pictures even though he was merely a conduit through which motion picture producers, actors, and creators could convey their messages).

212. Before a cable system decides to lease a channel to a programmer, the system will assess the nature of the content that the programmer will offer. Governments, however, require leased access channels to be available without analysis of proposed content. A difference exists between denial of access to a facility for anticompetitive reasons and denial because of the proposed content. See *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Lee*, *supra* note 82, at 1262-64. Even if court-ordered access occurs under the "essential facilities" doctrine, content should be a consideration in the selection of access channel lessees. Cf. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir.) (an essential facility when allocating space may utilize criteria that do not violate the Sherman Act), *cert. denied*, 344 U.S. 817 (1952).

213. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). *Miller v. Beals*, *supra* note 41, advance the view that selection of services such as Home Box Office should receive only limited first amendment protection because the operator's purpose in selecting such programming "is not to participate in public discussion or to express ideas Rather, the operator is merely exercising a business judgment as to which product will sell best." *Id.* at 103 (footnote omitted). Several shortcomings plague this view. First, the authors premise this view on a belief that a discussion of a "public issue" by the cable operator is of greater constitutional value than the content of a service such as HBO. The Supreme Court, however, has rejected the idea that "entertainment" is constitutionally less valuable than the discussion of ideas. See *Winters v. New York*, 333 U.S. 507, 510 (1948) (the first amendment does not apply only to the exposition of ideas; the line between informing and entertaining is too elusive); Cf. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection"). Second, cable is not unique in permitting third parties to utilize its facilities. Any reader of a Sunday newspaper can attest to the tremendous volume of material, which the newspaper itself does not generate, that accompanies the newspaper. Unless a decision concerning such access violates the antitrust laws, *see supra* note 212, or deals with an intensely regulated class of content, the first amendment strictly protects the operator's decision. Third, cable operators are not the only mass communicators that merely retransmit the expression of others without adding to the message. The august New York Times often merely reprints speeches and documents. A decision to carry the expression of others contributes as much to the marketplace of information as a decision by a cable firm to express its own views. Cf. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)

Cable access channels interfere uniquely with journalistic discretion because an important distinction exists between making a choice and exercising that choice. Under traditional first amendment doctrine, the character of an *exercised* choice affects its regulation.²¹⁴ The government, however, may not require a deci-

(the value of speech does not depend upon the identity of its source). Fourth, whether a product will sell is a determination that the news media consistently use in the selection of content. Saleability is especially important in newspaper selection of syndicated material. See generally H. GANS, *DECIDING WHAT'S NEWS* (1979) (analysis of factors influencing the selection of news content). The Court in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952), rejected the idea that profit motive affects first amendment rights. Fifth, *Miller & Beals* rely upon *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), for the proposition that speech relating to the speaker's economic interests receives only limited first amendment protection. *Central Hudson* is a commercial speech case in which the Court defined commercial speech as speech relating solely to the economic interests of the speaker and the audience. *Id.* at 561. This definition of commercial speech obviously is overbroad and raises the problem of motive analysis. Justice Stevens criticized the Court's definition:

Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.

Id. at 579-80 (Stevens, J., concurring). While commercial speech only enjoys diminished protection under the first amendment, see *Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976), speech that services such as Home Box Office offer is not commercial speech under the second definition that the *Central Hudson* Court presented—speech proposing a commercial transaction. 447 U.S. at 562. The second definition of commercial speech in *Central Hudson* conforms to the definition that the Court generally offers. See, e.g., *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385 (1973) (expression that does no more than propose a commercial transaction constitutes commercial speech).

Perhaps the most disturbing aspect of *Miller & Beals'* view is its lack of historical foundation. The framers of the first amendment were familiar with a newspaper press that often reprinted stories and essays which others originated. See B. WEISBERGER, *THE AMERICAN NEWSPAPERMAN* 20 (1961) (discussing colonial news exchanges). Professor Schlesinger's description of the colonial press is accurate:

Not until the rise of the troubles with Britain did the editor come to think of himself as a maker of opinion as well as a transmitter of news and literary offerings. Yet he unwittingly did something, however little, in that direction by the very act of deciding what to put in or leave out of his paper, and once in a great while he offered a terse comment of his own.

A. SCHLESINGER, *PRELUDE TO INDEPENDENCE* 61 (1958). Although the intent of the framers is not clear, see, e.g., Chafee, *Book Review*, 62 *HARV. L. REV.* 891, 898 (1949) (the framers had no clear idea of what they meant by freedom of speech or freedom of the press), no historical evidence exists that they intended to offer diminished protection to press decisions concerning the retransmission or republication of expression generated by third parties.

214. For example, a decision to carry libelous material may result in a post-publication penalty, and a refusal to deal may result in an antitrust action. Courts require very stringent standards in these cases before they will punish the exercise of a choice. A heavy presumption exists against the constitutional validity of prior restraints—actions that seek to pre-

sionmaker to surrender his opportunity to make choices.²¹⁵ Thus, a

vent the *exercise* of a decision to engage in a particular class of expression. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). The Court has stated that it bases the presumption against the validity of prior restraints on a "theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original). Although the regulation and limited prohibition of the exercise of one's choices affects the degree of freedom when making those choices, the government may not strip away one's right to make choices in the first amendment realm. The element of choice distinguishes constitutional freedoms from other constitutional protections. See Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1757-58 (1981) (a freedom protects from state-imposed constraint individual choices to perform or not perform certain actions; other constitutional provisions protect a certain action or condition against state interference but do not permit a claimant to choose to pursue an opposite action or condition).

215. The exception to this principle is broadcasting. The rationales for imposing such conditions on broadcasters do not apply to cable. See *supra* note 123.

The Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), addressed the first amendment's barrier to a compelled surrender of the freedom to make choices. The Court found unconstitutional the contingent access statute in question because it "operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter." *Id.* at 256. Although *Miami Herald* concerned a contingent access scheme, the Court's hostility to government action that compels a surrender of the freedom to make choices is relevant to affirmative access schemes for cable. As previously discussed, a cable system's use of public rights-of-way does not justify a surrender of constitutional rights. See *supra* notes 93-127 and accompanying text. The argument that the operator may exercise editorial discretion on other channels and that access affects only a limited number of channels cannot justify affirmative cable access schemes. *But see* Meyerson, *supra* note 2, at 40 (although cable operators lose control of access channels, they retain the power to use the remaining channels to express their opinions). The statute in *Miami Herald* only affected a very small portion of the newspaper's columns, and the newspaper was able to control freely all other columns. These attributes, however, did not save the statute. See 418 U.S. at 256. The Court in declaring the statute unconstitutional emphasized the interference with the newspaper editors' process of choice. *Id.* at 258. Similarly, the Court in *Midwest Video Corp. v. FCC*, 440 U.S. 689 (1979), did not find relevant the number of channels affected and the ability to exercise discretion over nonaccess channels. The Court found the character, rather than the scope, of the government's action to be significant. *Id.* at 708 n.17 (compelling cable operators to accept indiscriminately access programming will interfere with their determinations regarding the total service offered to their subscribers).

One commentator argues that the Court's position in *Miami Herald* does not apply to cable because cable systems are largely "passive receptacles." Meyerson, *supra* note 2, at 20-21. The commentator, however, incorrectly interprets *Miami Herald*. The Court in *Miami Herald* stated that newspapers were more than "passive receptacles" because of their ability to exercise editorial choice. 418 U.S. at 258. The Court included in its definition of editorial discretion those decisions affecting publication of expression generated by third parties. *Id.* (editorial discretion encompasses the *choice* of material to go into a newspaper). A cable system's decision to retransmit the expression of others does not mean that the system is a passive receptacle that is unable to make editorial choices. The commentator who views cable systems as passive receptacles fails to perceive the central theme in *Miami Herald*. The Court was proscribing governmental action that compels a surrender of the freedom to make choices. The Court was not assessing the constitutionality of the actual exercise that the decisionmaker chooses.

A faulty reading of *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974), and Fort-

constitutional difference exists between a cable operator's decision to become a passive conduit for the expression of others and the government's requirement that the operator assume that status. Municipally required access removes the freedom of the cable operator to exercise judgment on the channels dedicated to access.²¹⁶ That municipally required access schemes do not cause self-censorship²¹⁷ and do not mandate the expression of a particular message²¹⁸ does not alter the presence of this critical constitutional defect. Access restricts the freedom of the cable operator in order to enhance the freedom of access users.²¹⁹

The analysis that this Article develops shows that monopoly

nightly Corp. v. United Artists Televisions, Inc., 392 U.S. 390 (1968) (cable retransmission of broadcast signals is not a copyright violation), also may lead one to view cable systems as passive receptacles. While these opinions portrayed cable as a "passive beneficiary," see *Fortnightly Corp.*, 392 U.S. at 399, they do not suggest that cable systems do not make choices regarding the content that the system will offer subscribers. Close analysis of *Teleprompter* and *Fortnightly* shows that the Court recognized that cable operators make such choices. See *Teleprompter Corp.*, 415 U.S. at 410; *Fortnightly Corp.*, 392 U.S. at 397-99. For purposes of copyright liability, however, the Court distinguished the programming choices that broadcasters make from the retransmission choices which cable operators decide. *Teleprompter Corp.*, 415 U.S. at 410; *Fortnightly Corp.*, 392 U.S. at 399.

216. Except for the censorship obligations, see *supra* notes 135-80 and accompanying text, access obligations require that operators "allow use of their facilities, for transmission toward their paying subscribers, of any program material, no matter the quality, interest, relevance, taste, context, beauty, or scurrilousness. . . ." *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

217. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (editors may engage in self-censorship to avoid triggering the access scheme). In their defense of access channels, *Miller & Beals*, *supra* note 41, at 116, cite *Younger v. Harris*, 401 U.S. 37, 51 (1971), for the proposition that courts will uphold a minimal imposition on first amendment rights if the imposition furthers an important purpose. *Younger*, however, concerned chilling effects and does not apply to affirmative access schemes that do not create chilling effects. Governmental action causing a chilling effect differs fundamentally from governmental action that takes away the choice-making opportunity.

218. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87-88 (1980) (access scheme distinct from the impermissible government action found in *Wooley v. Maryland*, 430 U.S. 705 (1977), or *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), because government did not dictate specific messages). While the government does not dictate specific messages to accept, access schemes require cable operators to engage in censorship of certain classes of expression. See *supra* text accompanying notes 135-80. Government power compelling publication of a specified message differs only in degree from the power that imposes censorship obligations on the operator and otherwise restricts the operator's opportunity to make choices.

219. Cf. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) (the ability of government to restrict the speech of some in order to enhance the relative voice of others is wholly foreign to the first amendment). To base an argument against the current level of access obligations on the fear that these requirements ultimately will lead to even greater obligations is unnecessary. Cable access' problem is not that regulation will grow to some impermissible level; the current level of interference with editorial freedom is impermissible.

characteristics and use of public rights-of-way do not justify municipal limitations on first amendment rights. Also, while precedents exist for regulating the exercise of editorial discretion no relevant case authority supports government interference with the process of making editorial choices. Even if the interest in a diverse marketplace of ideas was sufficient to justify interference with the right of a cable operator to make editorial choices, first amendment doctrine requires that the government use the least intrusive measures to advance that interest.²²⁰ Cable access fails to meet the least intrusive standard. Alternative measures, such as the introduction of new communications technologies,²²¹ diversification of ownership of mass communication facilities,²²² and open entry policies encouraging head-to-head cable competition promise diversity without directly impinging upon a cable operator's editorial freedom.²²³

IV. SUBJECTIVE EVALUATIONS IN FRANCHISING

The problem of determining the criteria that cities should employ in granting use of public rights-of-way would exist even if the government no longer required cable operators to provide access channels. This section analyzes the subjective evaluations of character and programming that currently occur in cable franchising.²²⁴

220. See, e.g., *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620, 636-37 (1980).

221. See generally NATIONAL ASS'N OF BROADCASTERS, *supra* note 57 (description of new video delivery systems that compete with cable).

222. Commentators commonly note the similarities between access channels and ownership provisions. See, e.g., TELECOMMUNICATIONS IN TRANSITION, *supra* note 10, at 376. Ownership provisions, like access channels seek to diversify control of mass communication. Access channels, however, reach inside the operation of a cable system. Ownership provisions affect only the number of entities a firm may control.

223. Recent commentators have accepted the value of a diversified marketplace of ideas while rejecting content regulation as a means of achieving diversity in broadcasting. Fowler & Brenner, *supra* note 80, at 239; Lee, *supra* note 165, at 363.

224. In addition to the subjective evaluation of criteria such as character and programming service, subjectivity exists in evaluating the monthly subscription price and the number of channels offered in a bid. For example, the two bidders in Baltimore offer the following:

	<u>Basic Service</u>	<u>Expanded Service</u>
Caltech	35 channels @ \$5.95	81 channels @ \$7.50
Cox	51 channels @ \$6.95	74 channels @ 11.95

BROADCASTING, Nov. 22, 1982, at 49. Which of the Baltimore bids is better? Consumers routinely make choices such as this one in purchasing other products and services, but with cable communications, the government "must attempt to infer the consumers' preference, and, failing that, to substitute its own." R. Posner, *supra* note 54, at 21. Moreover, companies base the monthly subscription fee in a bid on predictions about elements such as con-

Franchising authorities commonly assess the "morals and characters" of cable franchise applicants.²²⁵ The imprecision of these terms²²⁶ violates the first amendment. The Supreme Court repeatedly has emphasized that the first amendment does not permit governmental evaluation of subjective criteria in granting a permit to use a public facility for expression.²²⁷ Justice Stewart summarized the position of the Court when he stated that a permit system "without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."²²⁸ The fear that underlies this constitutional doctrine is that subjective evaluations of elements like character permit the government to discriminate among prospective users of public facilities based on their proposed messages.²²⁹

Even if "good character" had a precise definition, a logical fallacy exists in the justification for the use of good character in franchising decisions. Cities are unwilling to provide a cable franchise to someone with "bad character" because the cities fear that the "bad" individual's programming would not contribute to the public welfare. Two commentators, however, observed of broadcasting that "the equation of good character with service in the public interest is not necessarily valid."²³⁰ Moreover, the first amendment prevents the government from assessing whether the use by a speaker of public rights-of-way contributes to the public interest.²³¹ Nevertheless, franchising authorities commonly assess the nature of programming that cable franchise bidders propose.²³² This assessment violates a central doctrine in the regulation of public facilities because under the fourteenth amendment's equal

struction costs and systemwide penetration. The companies generally must raise subscription fees when those predictions prove too optimistic. *See supra* note 35.

225. *Cable Television Regulation, pt. 2, supra* note 10, at 349 (statement of Morris Tarshis) ("we have an obligation to our citizens to ascertain a cable applicant's moral qualifications"). The FCC recommends that franchising authorities assess the character of cable franchise applicants. 47 C.F.R. § 76.31 n.(1) (1981).

226. *See Sharp & Lively, Can the Broadcaster in the Black Hat Ride Again? "Good Character" Requirements for Broadcast Licensees*, 32 *FED. COM. L.J.* 173, 180 (1981) (the definition of character is unclear and its measurement is imprecise).

227. *See, e.g.,* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

228. *Id.* at 151 (footnote omitted).

229. *See, e.g.,* *Schneider v. State*, 308 U.S. 147, 163-64 (1939).

230. *Sharp & Lively, supra* note 226, at 179.

231. *See, e.g.,* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969) (the first amendment prohibits the granting or withholding of parade permits on the basis of a city commission's evaluation of the public welfare).

232. *See, e.g.,* *CABLE TELEVISION INFORMATION CENTER, HOW TO PLAN AN ORDINANCE* 55 (1972) (suggesting programming as a criterion for the selection of a cable franchisee).

protection clause and the first amendment, the government may not grant the use of a public facility "to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."²³³ Although franchising authorities generally do not judge the viewpoints that cablecasters plan to express on specific issues, the authorities impermissibly assess the nature of the proposed programming service. For example, the great concern over sexually oriented television programming that a group like Morality in Media expresses through an intensive lobbying campaign may affect the bid of an applicant who proposes a service like the Playboy Channel.²³⁴

Two recent developments emphasize the problem of viewpoint-based assessments. First, newspapers increasingly are interested in leasing channels from cable operators to supply a news service.²³⁵ If the local newspaper opposes the policies of the city council, the proposal by an applicant to lease a channel to that newspaper may affect negatively the applicant's bid.²³⁶ Second, a group of liberals recently announced plans for a satellite-distributed "advocacy oriented" news service.²³⁷ Unfortunately governments are not unbiased,²³⁸ and a proposed service that violates the local sense of decency or fails to conform to the prevailing political philosophy may influence the franchise decision. The first amendment, however, prohibits the government from evaluating the "appropriateness" of constitutionally protected expression when determining who uses public rights-of-way.

Unconstitutional consideration of programming content also

233. *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972). *See also Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (the right to equal protection has a firmer foundation than the whims or personal opinions of a local governing body).

234. For a discussion of the tactics employed by Morality in Media, see Livingston, *supra* note 150, at 16-22. The president of the Playboy Channel recently claimed that although the Playboy Channel has been shown to increase cable subscriptions, many cable operators do not carry or propose to offer the channel because of a fear of an adverse reaction from franchising authorities. *CABLEVISION*, Mar. 28, 1983, at 17-18.

235. Witt, *The Handwriting on the Screen*, *CABLEVISION PLUS*, June 31, 1983, at 19-22; *PRESSTIME*, Nov. 1981, at 22-25.

236. Cable franchise applicants are very aware of the prevailing political climate, *see supra* note 13, and may try to avoid alienating the city council by not including such provisions in their bids.

237. *CABLEVISION*, Dec. 13, 1982, at 23-24.

238. James Madison's perception of the nature of government is appropriate: "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." *THE FEDERALIST* No. 51, at 356 (J. Madison) (B. Wright ed. 1961).

pervades the refranchising process. A municipal government often bases its decision to renew a franchise or to seek a new operator on the government's evaluation of the programming of the existing operator. This evaluation produces a chilling effect; a cable operator likely will not present programming that will alienate city hall. A cable company, for example, that produces a local news show²³⁹ may suppress news of corruption in city hall if franchise renewal time is approaching. Because the mayor and city council may at will solicit bids to obtain a different cable operator with "better" programming, a cable operator with a multi-million dollar investment at stake likely will not display the independence of the unregulated press. Under current franchising standards cable operators can be captives of city hall.²⁴⁰

V. CONCLUSION

The framers of the first amendment rejected the theory of the Tudor and Stuart monarchs that protecting the welfare of society justified control of the press,²⁴¹ yet today municipalities generally limit cable service to one firm and impose elaborate controls and requirements upon that firm ostensibly to protect the public welfare. An alternative exists to this "highly paternalistic" approach.²⁴²

Governments should adopt an open entry policy for cable

239. See BROADCASTING, July 26, 1982, at 42 (an increasing number of cable companies are producing local news programs). For a discussion of one cable system's extensive local news operation, see CABLEVISION PLUS, March 7, 1983, at 4-8.

240. At a recent seminar for newspaper publishers that are considering leasing cable channels to provide a news service, one speaker stated that a cable franchise holder is a creature of city hall who will be nervous about the news service's coverage of city governance. Radolf, *Cable and low-power tv risks*, EDITOR & PUBLISHER, Nov. 13, 1982, at 56. Judge Posner in *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116 (7th Cir. 1982), noted the extent to which cable franchise holders fear adverse reactions from city hall. Peoria, which has been receiving a yearly franchise fee of 10% of its cable system's gross revenues, is challenging the FCC regulation that limits such fees to 3-5%. See *supra* note 31. GECCO in response to the litigation claims to be indifferent to paying 10% of gross revenues instead of 3%. Judge Posner commented:

We are not so naive as to suppose that GECCO really is indifferent between paying 10 percent of its gross revenues to the City of Peoria and 3 percent; no doubt GECCO is cooperating in the city's efforts to get the rule waived in order to increase the probability that the city will renew its franchise, which expires in four years.

City of Peoria, 690 F.2d at 119.

241. See F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776* 5-6 (1965 ed.).

242. Cf. *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748, 770 (1976) (state statute based on a fear of misuse of information is highly paternalistic and violates the first amendment).

franchising. A city, instead of selecting one firm to provide cable service, should issue a franchise to any firm that is willing and able to adhere to a construction schedule, comply with public safety standards, and return the streets to good condition.²⁴³ Characteristics other than a willingness and a capability to comply with these three requirements are not permissible criteria for issuing a franchise. In addition, once a cable company installs a system, a government should revoke the franchise only for failure to comply with public safety requirements or for abandonment of the system.²⁴⁴

An open entry policy would change radically municipal cable regulation. Cities could not "exact tribute"²⁴⁵ in the form of access channels as a condition of using rights-of-way. Also, considerations such as the character of a cable company and the nature of its programming would not be permissible criteria for issuing or denying a franchise.²⁴⁶ An open entry system still would allow general laws, such as antitrust law, labor relations law,²⁴⁷ and libel law, to

243. The public safety concerns that distinguish cable's use of streets from other forms of public communication, *see supra* text accompanying notes 121-22, require an analysis of an applicant's capability to comply with public safety regulations. Part of this analysis entails consideration of a franchise applicant's financial resources; the availability of financial resources is constitutionally acceptable as a narrow and objective criterion in the city's franchising decision. Although cablecasters may not be able to predict precisely actual costs, cities reasonably and objectively can estimate construction and operation costs to fall within a given range.

Judge Posner recently expressed doubt that the award of cable television franchises can be "managed with the precision and simplicity appropriate to granting access to public parks for speechmaking." *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 128-29 (7th Cir. 1982). The analysis of public safety concerns for cable is more complex than decisions concerning the use of a park, but the contention that cable franchising should not entail the application of narrow, objective criteria is wrong. Subjective criteria pose significant first amendment problems. *See supra* text accompanying notes 224-40.

244. If the system is sold after construction, the government must assess whether the new owner is willing and able to comply with public safety requirements. Antitrust laws rather than municipal regulations should regulate antitrust problems that cable ownership and operation pose. *See supra* note 48.

245. *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1040 (D. Colo. 1980).

246. When a portion of the cable operator's service consists of constitutionally unprotected expression—a very unlikely event—a court may direct a prior restraint at that portion. This limited action is constitutionally distinct from refusals to issue or renew a franchise because the system's programming is not "good." Even if a cable operator has been convicted of transmitting constitutionally unprotected expression, the conviction should not provide a permissible ground for nonissuance, cancellation, or nonrenewal of a franchise. *See Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) (statute enjoining future exhibition of films on a showing that a theater exhibited obscene films in the past is unconstitutional).

247. *See supra* note 82.

apply to cable systems. Most importantly, the open entry policy would advance the interests of society. A belief that an unfettered marketplace is preferable to one in which the government restricts competition²⁴⁸ and selects the best speaker forms the basis of an open entry policy; the structure of cable competition under the open entry policy would depend on natural economic forces rather than on decisions of a city council.

The analysis of the justifications that proponents of regulation advance reveals that these justifications actually buttress the right of a cable operator to be free from government control. First, no evidence exist that cable is a natural monopoly in all markets, and even if natural monopoly conditions exist, these conditions do not justify interference with the first amendment rights of cable operators. Second, municipalities logically may not justify cable regulation on the ground of economic scarcity and at the same time fail to regulate other economically scarce mass communications enterprises. Last, the first amendment prohibits the government from attaching unconstitutional conditions to the use of public facilities or utilizing subjective criteria in deciding who uses public facilities for expressive purposes.

Judge Seymour in *Boulder II* stated one of the most interesting justifications for the current form of municipal cable regulation when she explained that cable was distinct from other forms of mass communication because it had no tradition of freedom from government control.²⁴⁹ A history of ill-advised governmental control certainly is no justification for continued regulation,²⁵⁰ but

248. See *Community Communications Co. v. City of Boulder*, 630 F.2d 704, 714 n.11 (10th Cir. 1980) (Markey, C.J., dissenting) (to protect the interests of the public Boulder should have granted additional cable licenses instead of limiting competition to the "best" monopolist). An important lesson from the FCC's massive attempt to restrict cable is that "[it] is difficult to make a sustainable and convincing case for protecting the public from competition. Virtually all of the premises upon which the Commission regulated cable television have been shown to be invalid." Besen & Crandall, *supra* note 42, at 78-79. Just as the FCC's fears of the effects of unregulated cable growth have proven to be exaggerated, municipal fears of a cable market that only economic forces and the antitrust laws regulate may well be exaggerated.

249. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1379 (8th Cir. 1981), *petition for cert. dismissed*, 102 S. Ct. 2287 (1982). The other distinguishing characteristics of cable that Judge Seymour mentioned were its use of public domain and its monopolistic nature. 660 F.2d at 1379.

250. Customary practice should not dictate the protection of a medium or its regulation. Rather, the first amendment's hostility to government regulation of expression should be the basis for the protection of all forms of communication. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 161 (1973) (Douglas, J., concurring in the judgment) (the first amendment requires that the government keep its hands off the press, including radio and

Judge Seymour's view indicates that governmental monitoring of cable is part of a recurring social phenomenon. The fear of new technology historically affects adversely the first amendment status of the new technology. Technology generally overcomes this discrimination only after generations. Motion pictures, for example, originated during the closing decade of the nineteenth century,²⁵¹ but the Supreme Court did not afford motion pictures first amendment protection until 1952.²⁵²

Cable regulation is at the threshold of a revolutionary change. The City of Boulder, Colorado, and a cable operator stipulated on October 29, 1982, that cable differs greatly from the broadcast medium and that the right of a cable company to disseminate information may not be "conditioned by the City on compliance with such controls as format requirements, access requirements, interference with management discretion, or payment obligations not borne by other members of the media, all of which would be impermissible controls on First Amendment expression."²⁵³ Any standard more restrictive than this open entry policy violates the first amendment rights of cable operators.²⁵⁴

television as well as more conventional methods of disseminating news); *Superior Films, Inc. v. Dep't of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (motion pictures are a different medium of expression than speech, radio, novels, or magazines, but the first amendment draws no distinction between the various methods of communicating ideas).

Mere tradition also may be insufficient to protect a medium when changing circumstances create strong rationales for regulation. This country several years ago, for example, faced the possibility of government allocation of "scarce" fuel supplies. The fuel shortage presented an interesting problem for the newspaper industry: "Newspaper publishers . . . distribute their products via fossil fuel powered vehicles. In the event of a critical fuel shortage resulting in government allocation of fuel supplies, would the government be able to constitutionally impose public interest regulations on newspapers in return for their use of a scarce resource?" *Lee, supra* note 82, at 1340. The pressures for regulation under such circumstances may overwhelm the "tradition" of newspaper freedom. The first amendment's hostility to government regulation of expression should protect a traditionally unregulated medium when its circumstances change and also should protect new communications media that have yet to develop a tradition of freedom.

If the existence of a tradition of freedom is what protects a medium from regulation, the government only must regulate expression in a new medium to prevent the development of a tradition of full first amendment freedom. No shortage of rationales exists to assert control over any communications medium. The best and safest course, however, is to rely upon the first amendment and refuse to permit interference with freedom of expression.

251. T. BOHN & R. STROMGREN, *LIGHT AND SHADOWS: A HISTORY OF MOTION PICTURES* 13-16 (1975).

252. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

253. *Community Communications Co. v. City of Boulder*, No. 80-M-62, slip op. at 6 (D. Colo. Oct. 29, 1982).

254. Although the Cable Telecommunications Act of 1983, see 129 CONG. REC. S8325-28 (daily ed. June 14, 1983), contains some benefits, the legislation does not significantly

correct the constitutional problems discussed in this Article. The bill, premised in part on the belief that cable functions in a competitive environment, *see* S. REP. NO. 67, 98th Cong., 1st Sess. 20 (1983); *supra* note 73, has the following benefits:

1. It grants franchising authorities the power to issue more than one franchise. S. 66, 98th Cong., 1st Sess. § 604(2) (1983); *see supra* text accompanying notes 76-78 & 122-23.
2. It prevents franchising authorities from establishing cross-ownership or multiple ownership restrictions. S. 66, 98th Cong., 1st Sess. § 605(a); *see supra* notes 48 & 244.
3. In certain circumstances, franchising authorities may not control rates for basic service. S. 66, 98th Cong., 1st Sess. § 607(d); *see supra* note 77.
4. Only material unprotected by the first amendment may be specified as impermissible in franchising agreements. S. 66, 98th Cong., 1st Sess. § 607(h).
5. Cable operators receive a renewal expectancy. *Id.* § 609.
6. Cable operators are not liable for the content of programming on access channels. *Id.* § 612.
7. Franchising authorities may not require the provision of particular programming. *Id.* § 613(a).
8. Certain services are immune from common carrier regulation. *Id.* § 614; *see supra* note 48.

The key defect of the Act is that the problems of interference with editorial discretion, state action in the operation of access channels, and compelled subsidy of expression would continue to be a significant part of municipal cable regulation. The Act provides that franchising authorities may require operators to dedicate access channels for public, educational, and governmental users. S. 66, 98th Cong., 1st Sess. § 606(a); *see supra* text accompanying notes 128-223. The Act further provides that the government and the operator may establish rules and procedures for the use of access channels. S. 66, 98th Cong., 1st Sess. § 606(b); *see supra* text accompanying notes 139 & 144. For franchises in effect on the date of enactment, the Act does not limit the fees required to support access channels. S. 66, 98th Cong., 1st Sess. § 608(b)(2); *see supra* text accompanying notes 181-88. Finally, the Act grandfathered all access, service, facility, and programming requirements in all franchises in effect on the day of enactment. S. 66, 98th Cong., 1st Sess. § 613(f).

Another significant defect of the Act is that franchise fees may amount to 5% of gross revenues with no requirement that the fee reflect the actual cost of use of rights-of-way or the costs of regulation. *Id.* § 608. To the extent that franchise fees represent rents for the use of rights-of-ways and are fees reasonably related to the accomplishment of legitimate governmental purposes, they are constitutional. Fees exceeding this figure, however, may be discriminatory and operate as a tax imposed as a condition of engaging in expression. *See supra* note 125.

Nothing in the Act prevents the use of subjective criteria in franchising decisions. *See supra* text accompanying notes 224-40. For example, while the Act precludes franchising authorities from requiring the provision of certain programs, the Act does not prevent such authorities from considering the nature of an applicant's programming proposal when making franchising decisions.

Although the Act contains a renewal expectancy, franchising authorities may mandate an upgrading of the system and access channels at renewal time. Renewal may be denied if the franchising authority finds the existing operator's proposal to upgrade the system is "unreasonable." S. 66, 98th Cong., 1st Sess. § 609(a)(3). The mere threat of protracted litigation over such issues may diminish substantially the autonomy of cable operators and give the franchising authority power to affect significantly the operation of the system. *See Lee, supra* note 165, at 364 n.95 (discussing the coercive effects of broadcast regulation). Finally, the franchising authority may deny renewal if the operator has not complied substantially with the terms of the franchise. S. 66, 98th Cong., 1st Sess. § 609(a)(1). If, for example, the

franchise specifies that obscene material may not be distributed and the operator subsequently is convicted for such distribution, the Act permits nonrenewal. To refuse to renew a franchise under such circumstances obviously sweeps too broadly and constitutes an impermissible form of governmental action. *See supra* note 246.

While the Act does not permit franchising authorities to mandate leased access channels, Representative Timothy Wirth, Chairman of the House Telecommunications Subcommittee, views leased access as a key cable issue. *BROADCASTING*, June 20, 1983, at 56. Additionally, the United States Conference of Mayors opposes the Act. *Id.* at 36. That the legislation will emerge from the House in a form that approaches the policy advocated in this Article is unlikely.