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CABLE, CONTENT REGULATION AND THE FIRST AMENDMENT*

Henry Geller**
and
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Cable television's growth in the last five years has been explosive. Penetration has increased from under 20% to 35% of television households and is predicted to be 50%-60% by the end of the decade.1 Pay services are the engine largely responsible for driving cable's growth in the major markets.2 Advertising revenues have risen to approximately $283 million with predictions of $4.6 billion by 1990.3 Available programming has gone far beyond the simple retransmission of broadcast television. Cable with its "narrowcasting" approach, now has channels with, for example, all sports, Spanish-language, news, and children's programming.4 Numerous text services have been tested and many are now in the developmental stage.5 Interactive cable and addressable converters are in the offing and cable is even being thought of as an alternative to the telephone company in some significant respects.6 Not all the proposed or existing cable services will

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* The views expressed in this article are those of the authors and do not necessarily reflect the position of the Washington Center for Public Policy Research.
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2. Fifteen pay cable services are currently available. The Home Video and Cable Network Yearbook 1982-83.
4. See supra note 2.
5. Cox Cable, Inc., for instance, is currently engaged in a test of its INDAX cable text service in San Diego, Cal. and is marketing the service commercially in Omaha, Neb. For a complete listing of text services, see International Videotext News, No. 36, Dec. 1982.
6. Interactive, or two-way cable, allows audience members to provide feedback on programs or other services. Addressable converters will allow viewers to request specific programming (e.g., pay per view services). As part of the franchising process, cable companies in the large markets pledge to construct institutional networks that pass many businesses. These networks thus can serve the needs of banks for data communications or an
succeed. As shown by the demise of CBS Cable and the Entertainment Channel, there will surely be a “shake-out,” with inevitable winners and losers. Nonetheless, cable is an increasingly potent communications medium.

This growth of cable makes it all the more important to resolve the first amendment strains and puzzles that have arisen. Each different medium poses new and unique first amendment issues, and cable is no exception. This article addresses the general problem of content regulation of cable television, with particular focus on the first amendment issues.

The initial and most important constitutional question can be stated simply: Can Congress or the FCC regulate the program content of cable television consistently with the first amendment—as is now done with broadcasting—or are controls requiring fairness constitutionally prohibited as in the realm of print media? To answer the basic question, current cable content controls are analyzed, as are the regulatory models which now apply to broadcast and print media. The telephone (common carrier model) is also briefly discussed. Cable is then compared with the other media to determine whether there are sufficient similarities to justify adoption of their regulatory models. The article concludes that while cable is a hybrid, broadcast-type regulation such as fairness requirements cannot constitutionally be applied to its nonbroadcast operations (i.e., activities that do not involve carriage of broadcast signals). In any event, such con-

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9. Several constitutional issues have arisen in the cable television field. Questions of municipal ownership and the constitutionality of waiver of first amendment rights to gain a franchise should be discussed. The requirement of free public access channels raises due process issues. In fact, the Constitution is invoked almost routinely for every imaginable claim. See, e.g., Avenue TV Cable Serv. v. City of San Buenaventura, 82-5274-ER (BX) (C.D. Cal., filed Nov. 1, 1982); Century Cable v. City of San Buenaventura, 82-5274-ER (BX) (C.D. Cal., filed Oct. 12, 1982); Catalina Cablevision Assoc. v. City of Tucson, Civ. No. 82-455 TUCAC (D. Ariz. 1982, filed July 1982); Mountain States Legal Foundation v. City of Denver, 82-1738 (D. Colo., filed Oct. 18, 1982). These problems, and their substantial constitutional dilemmas, are beyond the scope of this article.
trols should not be applied as a matter of sound policy. Common carrier requirements (leased channel access), on the other hand, can be constitutionally imposed, and should be, in order to attain first amendment goals.

I. BACKGROUND

A. Current Content Regulation

FCC content regulations distinguish between programming that is carried on a cable system subject to the "exclusive control" of the cable operator—"origination cablecasting"—and programming which the cable operator does not control. On origination channels, Commission regulations require that equal opportunities be afforded legally qualified candidates in the use of the stations' facilities, that the cable system afford reasonable opportunity for the discussion of conflicting views on controversial issues of public importance (the fairness doctrine) and that the cable operator notify a person or group who was personally attacked in a discussion of a controversial issue and offer reasonable time to respond. In addition, origination channels cannot carry lottery information—except state run lotteries—or advertising which lacks sponsorship identification. The Commission also bars the transmission of obscene or indecent material on cable origination channels.

11. "Exclusive control" is not defined by the Commission.
13. Id. § 76.209 (1981). Although it is often assumed to apply in full, no guidance has been given by the FCC as to the application to cable of both parts of the fairness doctrine, as stated in 47 U.S.C. § 315(a) (1981) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969) (i.e., (1) to adequately cover issues of public importance, and (2) to do so fairly, so as to reflect opposing views). This first part of the doctrine is poorly enforced by the Commission in the broadcast area. See Simmons, The Fairness Doctrine and Cable TV, 11 Harv. J. on Legis. 629 (1974). There are clearly large unaddressed questions concerning cable and content rules.
15. Id. § 76.213.
16. Id. § 76.221.
17. Id. § 76.213. The attempts of some states and localities to proscribe "indecent" material on cable have been struck down as overbroad. See, e.g., HBO v. Wilkinson, 531 F. Supp. 986 (C.D. Utah 1982). The same court recently struck down a Roy, Utah, municipal ordinance which barred distribution by cable of any "indecent material" on the grounds that the statute failed to meet Miller standards, Miller v. California, 413 U.S. 15 (1973) and was overbroad, and that cable was different than broadcasting. The city has appealed. U.S. Judge Says Utah City Ordinance Censoring Cable is Unconstitutional, Broadcasting, Jan. 17, 1983, at 86. But see Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 125, 127-28 (8th Cir. 1982). Significantly, the constitutional propriety of such narrowly drawn regulations emanating from the Commission has not been passed upon as it has been in the broadcast context. Cf. FCC v. Pacifica, 438 U.S. 726 (1978) concerning indecency in broad-
The FCC adopted equal opportunities and fairness requirements in 1970 under its general authority in the cable area.\textsuperscript{18} The regulations now appear to have statutory backing. In 1972, when Congress ordered that broadcasters make available to candidates the lowest unit advertising rate, it also amended section 315 of the Communications Act to provide that for the purposes of the section “the term ‘broadcasting station’ includes a community antenna television system.”\textsuperscript{19} Since section 315 specifies equal opportunities and fairness in subsection (a),\textsuperscript{20} the statutory change made these broadcast concepts applicable to cable. There is no explanation or reference to this in the legislative history.

There is also a substantial issue whether the reasonable access provision of section 312(a)(7)\textsuperscript{21} of the Communications Act applies to cable. When Congress amended the Communications Act to require that broadcasting stations give candidates for federal elective office reasonable access to their stations,\textsuperscript{22} it also stipulated that the term “broadcasting station” has the same meaning as in section 315 of the Communications Act.\textsuperscript{23} This cross-reference would appear to make the reasonable access provision, which was a part of the 1971 Federal Election Campaign Act, applicable to cable, and the Commission so stated in its 1972 primer.\textsuperscript{24} However, the Commission has never enforced the access requirement against cable operators and now appears to question whether it can do so.\textsuperscript{25}

\begin{footnotes}
\textsuperscript{18} See Obscene or Indecent Matter on Access Channels, 59 F.C.C.2d 984 (1976); Cable TV Access Channels, 83 F.C.C.2d 147, 148 n.1 (1980).
\textsuperscript{19} See infra text accompanying notes 32-35.
\textsuperscript{20} Pub. L. No. 92-225, 86 Stat. 3 (1972). The provision was originally designated § 315(f), but was recodified without change, as § 315(c).
\textsuperscript{21} See Red Lion, 395 U.S. at 380.

The above report is also interesting in its indication of increasing fairness or equal time problems for cable systems. The problems are now infrequent because of cable’s small penetration in comparison with television. But they do arise, with, for example, Cable News Network, FCC Report at 31-33, or other news/public affairs cable operations, and will undoubtedly increase, as cable’s importance does, \textit{id.} at 1-2.
\end{footnotes}
This tendency to lump cable with broadcasting is further illustrated by the ban on cigarette advertising. That ban apparently applies to cable as well as to broadcasting since cable is a "medium of electronic communication." Again there is no consideration or discussion of this facet in the legislative history.

Not all broadcast regulations apply to cable, however. There are no ascertainment requirements for cable as there are for broadcast television; nor are there percentage guidelines for local or nonentertainment programming. Federal access requirements for cable were discontinued in 1979.

B. The Development of Cable Regulation

A brief discussion of FCC jurisdiction over and regulation of cable is instructive. Although cable has evolved from a "community antenna television system" into a versatile broadband communications delivery mechanism, the rules by which cable has been governed have not kept up.

In 1968, the Supreme Court first upheld the Commission's authority to regulate cable, then called CATV or community antenna television. The Court found that CATV systems constituted "communication by wire or radio" within 47 U.S.C. §§ 153(a), (b), and were "interstate" within the meaning of the Communications Act. The Court's jurisdictional holding was no broader than necessary and was limited to the regulations then before it, all involving the carriage of broadcast signals. Instead of spelling


28. In 1972 the FCC prescribed access regulations which required cable operators, among other things, to devote a number of channels to public, governmental, educational, and leased access. See Cable Television Report and Order, 36 F.C.C.2d 143 (1972); Report and Order in Docket No. 20528, 59 F.C.C.2d 294 (1976); 47 C.F.R. §§ 76.252-76.258 (1976). These regulations sought to promote the first amendment goal of diversity through the "multiplicity of viewpoints" which should occur if all are given access. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.), aff'd, 326 U.S. 1 (1945). See generally Lange, The Role of Access Doctrine in Regulation of the Mass Media: A Critical Review and Assessment, 52 N.C.L. REV. 1 (1973); Note, The Future of Content Regulation in Broadcasting, 69 CALIF. L. REV. 55, 556 n.15 (1981); Report, 59 F.C.C.2d at 296. In 1979, however, the Supreme Court in FCC v. Midwest Video Corp. (Midwest Video I), 440 U.S. 689 (1979), held that the access rules impermissibly imposed common carrier obligations on cable operators. See infra text accompanying note 42. Since then, there have been no federally imposed access requirements for cable systems.


30. Id. at 168; Communications Act of 1934, § 3(e), 47 U.S.C. 153(e) (1976).
out the limits of the Commission's authority, the Court stated: "It is
enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Thus was born the "reasonably ancillary" test which has ruled cable ever since.

In 1969, in its First Report and Order in Docket No. 18,397, the Commission first applied the fairness doctrine and equal opportunities provisions of section 315(a) to cable as "necessary in the public interest for origination conducted in conjunction with carriage of broadcast signals." The Commission stated that the provisions of section 315 and the congressional policy expressed therein, would be thwarted unless the rules were applied to cable. The FCC noted that "placing broadcast signals in a setting of inequality, unfairness, and hidden sponsorship... would destroy the signals' integrity and defeat the purposes of the obligations imposed on broadcasters in the public interest." Under this rationale, cable systems that do not carry broadcasting signals incur no fairness or equal time obligations.

When the FCC addressed the first amendment implications of the fairness rules, it emphasized that there is no right to provide broadcasting signals to the public in a manner which is contrary to the public interest. Further, it said that the regulations promote the first amendment interests

31. Southwestern Cable Co., 392 U.S. at 178.
32. 20 F.C.C.2d 201, 220 (1969) [hereinafter cited as First Report and Order].
33. First Report and Order, supra note 32, at 219. Enforcement of the rules was simple: Unless the rules were complied with, no system was to carry broadcast signals. The Commission could assert jurisdiction over cable on several other bases, in light of the broad definitions in the Act. Id. at 219-21. It has never sought to do so, however, and thus the "reasonably ancillary" criterion has continued to govern.
34. Id. at 220.
35. Id. (citation omitted). The Commission's actions belied its rationale, however. In its 1972 report, 36 F.C.C.2d at 196-97 (par. 145), the Commission eliminated fairness doctrine requirements for the access channels (public, governmental, or leased). This meant that cable viewers would receive TV channels, some subject to fairness obligations (i.e., the TV stations and cable channels over which the system exercises "exclusive control"—whatever that may mean) and some not (the access channels). The Commission's 1972 action was sound, since the purpose of fairness is to afford the opportunity to provide conflicting views, which by definition the access channel does. But the Commission failed to recognize that the access channel fulfills that function for the entire system. Stated differently, the Commission did not recognize the difference between broadcasting, with its single channel, and cable, with its multiple channels, including access ones. Significantly, a petition is pending before the Commission filed by the National Telecommunications and Information Administration to make fairness inapplicable to any system with public access channels (RM 3526, filed May 13, 1980).
articulated in *Red Lion Broadcasting Co. v. FCC*\(^37\): "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."\(^38\) The Commission concluded that the content regulations are not barred by the first amendment because they are related to the public interest, even though there is no scarcity of frequencies with cable.\(^39\)

Two significant Supreme Court cases address the nature and extent of the Commission’s ability to regulate cable content, and to a lesser degree, the first amendment problems which arise. These cases are *United States v. Midwest Video Corp. (Midwest Video I)*,\(^40\) and *FCC v. Midwest Video Corp. (Midwest Video II)*.\(^41\)

In *Midwest Video I*, the Court upheld FCC regulations requiring large cable systems to originate programming. The rules were deemed reasonably ancillary to broadcasting, since they contributed to the Act’s goal of effective local outlets. As noted, this origination programming is subject to fairness and equal opportunities regulations as long as the cablecaster has “exclusive control.” In *Midwest Video II*, however, the Court held that Commission regulations requiring cable operators to provide access channels for government, public, educational or leased use were beyond the Commission’s “reasonably ancillary” jurisdiction since such common carrier-type regulations could not be imposed on broadcasters under section 3(h).\(^42\) Thus, the Court still perceived cable as a medium which is regulated only in relation to broadcast television; that it has become “enmeshed in the field of television broadcasting” and is the “functional equivalent of broadcasting.”\(^43\) The Court declined to decide first amendment questions raised by the regulations, except to say that the issue was “not frivolous.”\(^44\)

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38. *Id* at 390 (citations omitted).
39. *First Report and Order, supra* note 32 at 222 n.27.
43. 440 U.S. at 700. See also Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979) (“[T]he FCC may regulate cable TV if its regulation will further a goal which it is entitled to pursue in the broadcast area.”).
44. 440 U.S. at 709 n.19. It should be noted, however, that the Eighth Circuit did touch upon the first amendment argument to a greater extent. That court stated in dictum: "If the Commission has any authority to intrude upon the First Amendment rights of cable operators, that authority . . . is less, not greater than its authority to intrude upon the first amendment rights of broadcasters." *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff’d*, 440 U.S. 689 (1979).
One case that considered the first amendment issue is *Home Box Office, Inc. v. FCC*,45 where the United States Court of Appeals for the District of Columbia Circuit invalidated FCC rules restricting cable's access to pay programming. The court found that "an essential precondition" of the *Red Lion* approach—"physical interference and scarcity requiring an umpiring role for government"—is inapplicable to cable, with its abundance of channels and wire method.46 While the court recognized that cable may be "a natural economic monopoly," it stated that "scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press . . . , and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point."47 The court then considered whether the regulations were valid under the *O'Brien* test48—whether the regulations further an important or substantial governmental interest unrelated to the suppression of free speech, and the incidental restriction of alleged first amendment freedoms is no greater than is essential to the furtherance of the interest. It found the particular regulations invalid because, although not designed to suppress free speech, they were overbroad and, on the record before it, did not serve the necessary governmental interest.49

II. THE REGULATORY MODELS

In part due to increasing criticism of the content regulations from the cable industry,50 and in part due to the rapidly evolving new technologies which raise the issues once again (e.g., teletext/videotext), there is currently much debate about what type of content regulations can constitutionally be applied to various electronic media.51 While the range of


46. *Home Box Office, Inc.*, 567 F.2d at 45.

47. *Id. at 46* (citations omitted).


51. There is considerable controversy even in the broadcast field, where it must be assumed that the fairness doctrine and its progeny are constitutional when applied to conventional broadcasting. *See*, e.g., *Sulzberger Urges Solidarity on First Amendment and Paley Renews Call for First Amendment Equality with Print*, *Broadcasting*, Nov. 22, 1982, at 29-30, 49. There is extensive literature on the subject. *See*, e.g., Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Should They be Retained?*, 1 COMM/ENT L.J. 65
preferred solutions tracks the various industry interests, the relevant regulatory models must be carefully considered and the nature of the cable medium compared to that of other regulated media. The first amendment requires such an analysis rather than the simplistic generalizations and analogies that have been made to date. We must return to square one.

As noted, differences in the characteristics of media justify different first amendment standards and what passes first amendment muster can vary depending upon the content of the expression (i.e., commercial speech, obscenity, “fighting words”). Three basic models for regulating media are relevant: broadcast, print and common carrier.

None of these regulatory models is completely appropriate for cable. The United States Court of Appeals for the Eighth Circuit in Midwest Video II noted: “Neither the basic rationale for regulation of common carriers (to ensure fair and equal access to the carrier’s service) nor that for regulation of broadcast transmissions (to preclude bedlam on broadcast frequencies), is applicable to cable systems per se.” Nor is the print model of regulation automatically applicable to cable. Nevertheless, it is most helpful to examine those regulatory models as a starting point, since often “[l]aw . . . is determined by a choice between competing analogies.”

A. Broadcast

No other medium exists that could be constitutionally regulated to the


53. This list does not cover all media of expression. Different standards apply, for example, to billboards, movies, and soundtracks. See generally supra note 52 and accompanying text.

54. 571 F.2d 1025, 1036 (8th Cir. 1978), aff’d, 440 U.S. 689 (1979).

55. Boulder, 660 F.2d at 1376.

same degree and in the same way as the broadcast medium. Broadcasters are licensed for short terms, and must periodically satisfy the government that their overall operations serve the public interest. The Communications Act requires local and informational programming and the FCC enforces these requirements through the ordinary and comparative renewal process. Broadcasters are subject to content regulations such as the fairness doctrine and equal time requirements. Indecency is not permitted. Reasonable access for federal candidates for elective office is required. Network affiliates in the top fifty markets must eschew network or off-network programming from seven p.m. to eight p.m., with specified exceptions for children’s programming or documentaries (public affairs). In short, the broadcaster’s freedom is substantially restricted as compared with all other media.

Courts have upheld all of the above requirements as being consistent with the first amendment. Two basic rationales are used to explain the constitutionality of such policies. First, the Supreme Court has upheld the public trustee regulations because of the scarcity inherent in the broadcast medium. Second, indecency regulations have been upheld because of the unique impact of broadcasting.

I. Scarcity Theory

Congress established the Federal Radio Commission in 1927 to allocate radio frequencies because not all who wished to speak could do so due to the great number of voices and the scarcity of channels. Scarcity describes the condition where demand exceeds supply. “[S]carcity may exist despite the existence of many channels just as there may be no scarcity though there were but one channel—which no one had the slightest interest in exploiting.” No scarcity would exist, however, if the party who

59. 47 U.S.C. § 315(a) (1976); Red Lion, 395 U.S. at 377 (upholding the fairness doctrine).
62. National Ass’n of Indep. Television Prod. & Distrib. v. FCC, 516 F.2d 526 (2d Cir. 1975); see also Goldberg & Couzens, supra note 51, at 19-23.
63. Red Lion, 395 U.S. at 388-89.
64. Pacifica, 438 U.S. at 748.
65. During debates prior to enactment of the Radio Act of 1927, Congressman White, its sponsor, stated that the legislation was necessary because in the “present state of scientific development there must be a limitation upon the number of broadcasting stations . . . .” 67 Cong. Rec. 5479 (quoted in Red Lion, 395 U.S. at 376 n.5).
66. Freedom of Expression and the Electronic Media: Hearings Before the Senate Com-
could not get a channel could acquire a channel in the same or an adjacent area without cost or interference to the existing channels. This situation exists with newspapers. With broadcasting, however, there is no automatic ability to provide additional channels.67

Congress chose to give exclusive, short term licenses on the condition that the licensee act in the public interest.68 The Court noted in Red Lion, however, that Congress could have chosen other bases for its licensing scheme, such as the common carrier or partial access models.69 The Court stressed in Red Lion:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.70

Based on this view of the first amendment, the Court in Red Lion upheld the constitutionality of the FCC’s fairness doctrine, which requires broadcasters to devote a reasonable amount of time to the airing of controversial issues, and to be “fair” in their efforts.71 The Court found “no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.”72 The goal of the first amendment, according to the Red Lion Court, is to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopol-

mittee on Commerce, Science and Transportation, 97th Cong., 2d Sess. 20 (1982) (mimeo) (statement of William Van Alstyne) [hereinafter cited as Hearings]. Scarcity still exists despite 10,000 broadcast stations. There are no AM, FM or VHF channels open in the top 100 markets, and if one did become available in the larger markets, there would be a dozen applicants. See infra note 77.

67. Hearings, supra note 66, at 22.
69. Red Lion, 395 U.S. at 390-91; see also Home Box Office, 567 F.2d at 44; Kalven, supra note 56, at 30-32.
70. Red Lion, 395 U.S. at 394.
71. Id. at 389.
72. Id. at 392.
zation of that market, whether it be by the Government itself or a private licensee.\textsuperscript{73} In an oft-quoted passage, the Court added: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."\textsuperscript{74} The Court considered the claim that the FCC regulations would have a chilling effect on broadcasters, but found that the possibility was "at best speculative."\textsuperscript{75} It decided that the Commission could take remedial steps to require broadcaster treatment of controversial issues\textsuperscript{76} and that the Court could revisit the issue if and when such effects might be definitively shown.

The \textit{Red Lion} Court based its opinion on the physical scarcity of frequencies which then existed and still persists in all large markets.\textsuperscript{77} This scarcity must be distinguished from economic scarcity, a term often used in attempts to justify regulations which affect first amendment rights. Economic scarcity is sometimes referred to as "scarcity of investment capital" as opposed to physical scarcity which is "scarcity of frequencies on which to communicate."\textsuperscript{78} While physical scarcity and the need for government licensing can support a regulatory structure which restricts editorial autonomy, economic scarcity must be tolerated because the first amendment guarantee of freedom of expression is based on \textit{laissez faire}.\textsuperscript{79} Therefore, the fact that not everyone can speak through a given medium, because each individual cannot afford to do so, will not justify government intervention in the speech area.\textsuperscript{80}

\textsuperscript{73.} \textit{Id.} at 390.

\textsuperscript{74.} \textit{Id.}

\textsuperscript{75.} \textit{Id.} at 393.

\textsuperscript{76.} The Court stated that "if present licensees should suddenly prove timorous [because of fairness obligations], the Commission is not powerless to insist that they give adequate and fair attention to public issues." \textit{Id.} But the Court is here relying on more content regulation to cure a problem of content regulation—a dubious proposition. Further, a government agency cannot really set an agenda for robust, wide-open debate; the licensee necessarily chooses the issues and the manner of treatment. How then, would the FCC deal with licensees that choose to cover school vandalism rather than some "hot" local issue that might raise difficult fairness problems?

\textsuperscript{77.} \textit{See also} CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Much of this persisting scarcity stems from faulty allocation schemes adopted by the FCC. \textit{See Hearings, supra} note 66, at 1 (statement of Sen. Jackson). This criticism has considerable validity as a matter of policy. But as a legal matter, the courts must deal with the practical situation before them, and that is one of scarcity. More people want to broadcast than there are channels available. The judiciary cannot wave a magic allocation wand and change the present engineering limitations.

\textsuperscript{78.} Bazelon, \textit{supra} note 51, at 223.


2. **Unique Impact Theory**

The second basis for some unique regulation of broadcasting is the impact theory. Regulation of broadcasting is justified because of that medium's special impact upon the American public. A subset of this theory is the "captive audience" concept—that broadcasting is pervasive and therefore regulation is necessary to prevent an unwarranted intrusion.

In *FCC v. Pacifica Foundation*, the Court upheld the Commission's power to regulate "indecent" speech on broadcasting—to bar the use of "seven dirty words." Such speech is clearly protected by the first amendment in other contexts. The plurality relied on two factors, both of which are facets of the impact theory: broadcasting is pervasive and it is uniquely accessible to children. Justice Stevens' opinion found that broadcasting intrudes upon the privacy of the home and is therefore inescapable, so that the Commission's interpretation of 18 U.S.C. § 1464, prohibiting the indecent—as well as the obscene—from being broadcast, is constitutional.

The impact theory can be attacked in several ways. First, it is difficult to argue that broadcasting today has a greater impact than did newspapers in 1789 when the first amendment was adopted. It was precisely because newspapers had such great impact that freedom of the press and of speech were so important then. Further, it is absurd to argue that The New York Times does not have far greater impact than its radio station, WQXR-FM.

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81. See, e.g., Bazel on, *supra* note 51, at 222. Judge Bazel on believes that the scarcity rationale can only be justified in terms of the impact of broadcasting. The only reason scarcity is a problem, he argues, is because it produces less diversity, necessitating regulation to produce diversity. He argues that those who claim there is a dearth of diversity do so because they are looking only at broadcasting rather than at all media, electronic or not. This focus, says Judge Bazel on, demonstrates that the real concern is the potency of broadcasting communications. *Id.* at 228. See also Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 73-74 (D.C. Cir. 1972) (Bazel on, J., dissenting); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

82. 438 U.S. 726 (1978). *Pacifica* involved the use of "seven dirty words" in a serious discussion program that clearly had no prurient appeal. The FCC construed the applicable statute, 18 U.S.C. § 1464, to give a meaning to "indecent" separate from "obscene"—namely, that if material was patently offensive, it met the test of indecency. There was no need to consider the other two elements of the obscenity test set out in *Miller v. California*, 413 U.S. 15 (1973).

83. *Pacifica*, 438 U.S. at 738, 747-51. But see dissenting opinion of Justice Brennan. *Id.* at 762 (radio is a public medium).

84. Judge Bazel on has stated that the real fear is the power of the telecommunication press obtained by oligopoly in the production of news and entertainment programming rather than power inherent in the medium itself. Bazel on, *supra* note 51, at 222. But when Justice Stevens speaks of the pervasiveness of the broadcast media in *Pacifica*, he is talking about the power inherent in the medium, whether it is controlled by one entity, several, or a large number of entities. 438 U.S. at 748.
one of forty-five stations in the New York area. Second, it is wrong to talk about broadcasting viewers or listeners as a “captive audience” in the same way bus riders are when messages are transmitted on a bus.85 Just as those who do not want to see the slogan “Fuck the Draft” are free to avert their eyes,86 those who listen to radio or watch television can always twist the dial or turn off their sets.87 Finally, as to accessibility of broadcast messages to children, it is wise to bear in mind an earlier Supreme Court admonition that we cannot reduce adults to the level of children in order to protect children.88

The impact theory is most deficient as a justification for content regulation of broadcasting. Significantly, it is not cited by the Supreme Court as a basis for fairness. It appears rather to be confined to the area of indecent programming, and to reflect a determination by a majority of the Court to “protect” the broadcast audience, whatever the constitutional costs. It is significant, however, because of its possible application to cablecasts of “offensive” material.89

B. Print Model

Unlike broadcasting, the printed press enjoys the greatest first amendment protection of all media. A privately owned newspaper may “advance its own political, social, and economic views . . . bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to ensure financial success; and, second, the journalistic integrity of its editors and publishers.”90 In the lead case, Miami Herald Publishing Co. v. Tornillo,91 the Court held that a Florida right of reply statute was an unconstitutional infringement of the first amendment. The Court

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89. See infra note 127; but see Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 128 (7th Cir. 1982) (“This consideration [Pacifica] is independent of whether the television signal comes into the home over the air or through a coaxial cable.”).
found that enforcement of a right of reply imposes additional costs on the newspaper (i.e., either expanding the size or omitting content), and that this might deter treatment of issues which could trigger the reply. But even more significantly, the Court stated that the right of reply statute intruded into the editorial function of newspapers and, as such, violated the first amendment.

How does one square Red Lion and Tornillo? Both cases involve similar right of reply regulations. In Red Lion, the regulation promotes the first amendment values of balanced, vigorous debate, and any "chilling" costs are deemed "speculative." In Tornillo, the costs are found to exist (with no more evidence than in Red Lion), and, in any event, the regulation violates the first amendment because of its interference with editorial autonomy. Significantly too, there is no citation of Red Lion or discussion of the broadcast press in Tornillo. The Court deliberately ignored the conflict.

Red Lion and Tornillo must be resolved, however, to determine cable's constitutional niche with regard to fairness requirements. That broadcasters must be licensed does not justify the constitutionality of fairness requirements. Although licensing may be necessary to avoid destructive interference, it does not follow that licensing can be employed to impose unconstitutional burdens. If Tornillo is accepted, fairness interferes with editorial autonomy and has "chilling" costs. Therefore, some other basis must be used to establish the constitutionality of fairness requirements. Nor can the impact theory be used. It was not employed by the Court in Red Lion, and makes no sense: as noted, WQXR-FM has much less impact than The New York Times—yet it is under a fairness doctrine, and the Times is not.

To use the title of a song from "Fiddler on the Roof," the answer to the puzzle appears to be tradition. The tradition in print is clear: no public

92. Id. at 256-57.
93. Id. at 258.

Even if a newspaper would face no additional costs to comply with a compulsory access law . . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. (citations omitted).

interest licensing, and no government interference with editorial judgment to ensure or promote fairness. That is the norm in the United States. But in broadcasting in the 1920's, a different pattern was tried, without too much thought as to its first amendment consequences: licensing was necessary to prevent engineering chaos, and the licensing scheme was based on the public trustee concept. That concept, in turn, embodies a fairness doctrine—a public trustee clearly cannot present only views with which it agrees. When the constitutionality of the public interest scheme came before the Supreme Court in 1943, there was again little analysis. Justice Frankfurter simply recited that an action, if related to the public interest, did not violate the first amendment, because radio is not inherently open to all. The fairness doctrine first came before the Court in 1969—four decades after the public trustee scheme was instituted. To invalidate the scheme, upon which a multi-billion dollar industry had been built, would have been most disruptive. If this analysis is correct, the explanation for the different treatment of broadcast and print lies in the famous aphorism of Justice Holmes: "The life of the law is not logic, but it is experience."

Others have advanced more ingenious explanations. Professor Bollinger, for example, has argued that the first amendment permits legislative experimentation with access, but only within a segment of the mass media. Such a "partial system," he argues, has obvious advantages. It promotes balance and diversity, but at the same time, the unregulated system affords protection against errors or abuses arising in the regulatory enterprise. He noted that "above all a partial system preserves our first amendment tradition of an autonomous press and makes the reform an exception to that tradition." Under this explanation, Red Lion is permissible only

95. The historical basis for print media protection was noted in the Tornillo opinion by Justice White when he stated that "[W]e have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials." 418 U.S. at 261 (White, J., concurring). See also Boulder, 660 F.2d 1370, where the court stated in reference to Tornillo:

The Court was writing about newspapers, a communication medium protected by a long-standing and powerful tradition that keeping government's hands off is the best way to achieve the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . .' 660 F.2d at 1379 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).


97. O. Holmes, THE COMMON LAW, 1 (1881). Or, in the words of Judge Bazelon, we have long since gone down the "slippery slope" of broadcasting and cannot start again at the top. See Banzhaf, 405 F.2d at 1094.


because it is the partial experiment; the Florida statute is not permitted because there is already the one exception to the tradition.

Professor Bollinger's approach is really an after-the-fact rationalization for the system that has been established in the last half-century. It remains most difficult to square Tornillo's findings of "chilling" effects and the strong policy of editorial autonomy with Red Lion's conclusions. Is the Court really saying, "One lollapalooza a century"? In any event, under this approach, the tradition is editorial autonomy; the exception is a fairness doctrine. This is a most important consideration as to our inquiry: cable's niche.

 Finally, if experimentation is the key, it is important to evaluate its efficacy. It is not the purpose of this article to treat the merits of the fairness doctrine. That has been the subject of many books and articles. Certainly the doctrine has its plusses: eliminating the presentation by a station of only one view on issues such as segregation, or preventing the affluent from far out-purchasing their opposition on ballot issue advertisements. But experience has also shown that it is most difficult for the government to intervene to insure fairness, and that such difficulties extend to every facet of the fairness doctrine. Questions have been raised as to what is a controversial issue, what is reasonable balance as to overall time, frequency, or audiences reached, what is a personal attack, and so on. It

100. See, e.g., Simmons, supra note 13; H. GELLER, THE FAIRNESS DOCTRINE IN BROADCASTING (1973); see also supra note 51.


102. See, e.g., Public Media Center v. FCC, 587 F.2d 1322 (D.C. Cir. 1978).


104. Public Media Center, 587 F.2d 1322; Geller, supra note 100; Simmons, supra note 13.

thus can and does have chilling effects.106 The upshot of this difficult process of enforcing a fairness doctrine action is that a different audience hears a little more on the issue about eight months after the initial broadcast, on the average.107 Such content access requirements, designed to promote a diversity of ideas or views, thus raise serious constitutional and policy questions.108

In sum, Tornillo appears to represent the sound tradition, Red Lion the aberration.109 This conclusion is reinforced by the explosion of new media and technology. That explosion means greater diversity through the operation of the marketplace, and thus even less justification for governmental intervention to make up for failures "of the market place of ideas to operate according to the original plan . . . ."110

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106. See, e.g., the KREM incident, described in detail in Geller, supra note 100, at 40-43, where it took the Commission over two years to resolve the fairness complaint in the licensee's favor and entailed 480 man-hours of station time and $20,000 in legal expenses; Simmons, supra note 13, at 657, where, after analysis, the author concludes that the doctrine should be called "the unfairness doctrine."

107. See Geller, supra note 100, at 37.


109. The aberration shows no signs of disappearing. Thus, in the last opinion dealing with this general area, FCC v. National Citizens Comm. For Broadcasting, 436 U.S. 775 (1978), the Court again stated that "[i]n light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized." Id. at 799. The Court stated further that as Buckley (Buckley v. Valeo, 424 U.S. 1 (1976)) recognized, "the broadcast media pose unique and special problems not present in the traditional free speech case." Id. at 50 n.55, (quoting Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. at 101). Thus efforts to "enhance[e] the volume and quality of coverage of public issues" through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be. Buckley, 424 U.S. at 50-51 n.55 (quoting Red Lion, 395 U.S. at 393); compare Tornillo, 418 U.S. 241 (1974). Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the "public interest" does not restrict the speech of those who are denied licenses; rather, it preserves the interests of the "people as a whole . . . in free speech." Red Lion 395 U.S. at 390.

110. Emerson, supra note 79, at 795. The focus of this analysis has been on the leading cases (Red Lion; Tornillo) rather than on first amendment scholarship. See, e.g., T. Emerson, The System of Freedom of Expression, 660-67 (1970); A. Meiklejohn, Political Freedom (1960); Barton, Access to the Press—A New First Amendment Right, 80 HARV. L. REV. 1641 (1967); Robinson, supra note 51. Such an approach is, of course, valuable, but this article's focus has been more limited in order to avoid undue length.

The underlying principle of the first amendment is to promote robust, wide-open debate, and a marketplace of ideas from which it is hoped that truth will emerge to an informed electorate. "[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." Associated Press v. United States, 326 U.S. 1, 20 (1945). There remains, however, the argument whether the first amendment speaks to diversity of sources (content neutral) or to diversity of ideas (which, as shown by the fairness doctrine, is not content neutral). Is the amendment an affirmative sword or is it a shield against governmental interference? This debate has long raged, and no useful pur-
C. Common Carrier Model

While the common carrier structure of regulation has in the past been rejected as a model for cable television, it nonetheless continues to be a relevant regulatory scheme. It is relevant both because cable is beginning to function more like traditional common carriers, and because it still remains an alternative feasible way of regulating. Common carriers, unlike other communication media, exercise no control over the content of what is communicated over their facilities; neither are they subject to any content regulation.

The fundamental characteristic of regulation under the common carrier model is that the service provider offers the communications facilities on a first-come, first-served basis; carriage for all people indifferently is the sine qua non of a common carrier. Nondiscriminatory access must be available regardless of the message content, and, indeed, if the carrier did seek to make individualized decisions in particular cases based upon content, it could not be classified as a common carrier. This is in sharp contrast to newspaper publishers and broadcasters who are accorded discretion to keep messages off their systems because they are deemed in "poor taste" or express "erroneous viewpoints." Telephone companies, the largest group of telecommunications common carriers, have no freedom to restrict access or edit conversations based upon message content.

Because common carriers have no control over who speaks on their system and what a speaker says, carriers are not subject to any kind of content regulations. Not even liability for a slanderous or libelous statement attaches. This is consistent with the general notion that an entity that does pose would be served by here reviewing that ground. Rather, this article deals more pragmatically with the issues at hand.

112. See supra note 6.
113. See generally Noam, supra note 111.
114. National Ass'n of Regulatory Util. Comm'r's (NARUC II), 533 F.2d 601, 608 (D.C. Cir. 1976). See also § 201(a) of the Communications Act, 47 U.S.C. § 201(a) (1976 & Supp. 1981): "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ."
117. One commentator has suggested that common carriers can nevertheless be subject to governmental influences regarding programming content due to the system of rate regulation which usually accompanies common carriage. See Noam, supra note 111, at 220.
not control content should be immune from liability for content.  

II. THE CABLE TELEVISION MODEL

A. Cable and Other Media

Jurisdiction over cable television originally was based upon cable being a medium ancillary to broadcasting. Agency regulations and congressional actions were based on the notion that cable was a broadcast-type source. Indeed, in cable’s early stages, the view that cable was just another type of television was justified. Video services were almost solely limited to broadcast programming with perhaps a few primitive text services offered on whatever excess channels existed. The must-carry rules (mandating carriage of most local TV signals) perpetuated the situation due to the low channel capacity of most cable systems. Yet, as the uses of cable began to change, the perception of the medium as an arm of broadcasting television did not.

It can be argued, on the basis of Midwest Video II, that cable is “enmeshed in broadcasting” and is the “functional equivalent of broadcasting”, that the “variant technology” does not make inapplicable the fairness/equal time provision of section 315(a). Or, to put it differently, since “the FCC may regulate cable TV if its regulation will further a goal which it is entitled to pursue in the broadcast area,” it may adopt fairness/equal time regulations for cable.

If this issue were presented to the courts in the context of a twelve-channel cable system, the above argument would carry considerable weight. But the issue is much more likely to arise in the case of a new cable system in the larger market, where a single operator may have as many as 100 TV channels. While it still carries TV signals, cable’s main impetus in the

118. See, e.g., Farmers Educ. & Coop. Union, N.D. Div. v. WDAY, Inc., 360 U.S. 525 (1959) (broadcast licensees who have no power to censor are immune from liability) and Memorandum Opinion and Order in Docket No. 20508, 87 F.C.C.2d 40 (1981) (differences in editorial control over access and origination justify different levels of regulation).

119. See supra notes 29-31 and accompanying text.

120. 47 C.F.R. §§ 76.51-76.54 (1981). The must-carry rules themselves are readily supported to the extent that cable is a medium enmeshed in television broadcasting. See Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). Note that a Washington State cable system recently filed suit contesting the constitutionality of the must-carry rules. It contends, among other things, that the rules violate the first and fifth amendments. See Cable System Fights Over Must Carry Rules, Broadcasting, Apr. 11, 1983, at 161.

121. See supra notes 40-44 and accompanying text.

122. Brookhaven Cable TV, 573 F.2d at 767.

123. Cf. Omega Satellite Products Co., 694 F.2d at 128.

124. Because of new decisions by the Copyright Royalty Tribunal, there is apt to be less
major markets is pay, with many new advertiser-based, satellite services.\textsuperscript{125} Cable provides many other services such as videotext, security, and marketing, some of them dependent on its two-way communications nature. Cable also has substantial possibilities as a local distribution device competitive with the telephone.\textsuperscript{126} In short, cable is a different animal than TV broadcasting. The scarcity rationale employed to justify television regulation is absurd in the case of cable. Indeed, cable not only does not use the frequency spectrum but it is heralded as bringing an end to the television scarcity. Nor does the impact theory justify content regulation of cable systems.\textsuperscript{127}

Because traditional regulatory themes, such as scarcity and special impact, are inapplicable to cable, broadcast concepts such as fairness should not be mechanically applied to the new medium. Indeed, if the foregoing analysis is correct, and \textit{Tornillo} is the norm, the cable operator should be accorded the same editorial autonomy as the newspaper. This is illustrated by examining just one facet of cable—videotext.

Suppose, for example, that a newspaper company transmitted a videotext service over the telephone lines into the home. In this case, content control clearly is improper, for the reason that content regulation of newspapers is barred by the first amendment.\textsuperscript{128} The clearest example is newspaper facsimile, in which an image of the newspaper is transmitted into the home. If the \textit{Washington Post} were transmitted in facsimile form, there would be no way to distinguish the video from the printed copy and the text would deserve the same first amendment protection.\textsuperscript{129} Furthermore,
the means of transmission is the telephone wire, a common carrier system. Content regulation has no part in such a system.

If the same text service were transmitted via cable instead of the telephone wire, the result should be the same. The text is still newspaper text and therefore not the proper subject of content regulation. The fact that cable is now the delivery mechanism should not matter. It would be wholly illogical to subject a news story delivered to the home via cable to the fairness doctrine or equal time requirements while permitting the same story to enter the home through a telephone wire unburdened by any content controls. Except for the means by which they enter the home, they are indistinguishable. The principles of editorial autonomy should still govern.

Now suppose that the videotext transmitted over the cable is generated by the cable operator itself rather than by a newspaper. Again, the result should not differ. The content consists of printed words which are identical to the newspaper-generated text. It would make no sense if, for example, a newspaper-generated story on nuclear arms was free from any obligation to present both sides of the issue but the cable-generated story on the same subject was so required. From the viewpoint of the video consumer they are identical and from a first amendment viewpoint, they are likewise identical.

From the above examples it is only a small step to video pictures transmitted over cable and generated by the cable operator. Why should content which is substantially similar be subject to varying levels of content regulation solely because it is presented wholly (or mostly) in pictures rather than words? Again there is no rational explanation for such differing treatment save that it has been done that way for other media in the past. This is an insufficient basis for such an illogical result. A coherent regulatory scheme cannot produce such irrational results.

B. Franchise—De facto Monopoly Basis

Cable systems exist by virtue of the franchises awarded by local governments. Cable television requires laying coaxial cable which necessarily disrupts the public domain, and governmental permission must be obtained for the cable operator to proceed. "Thus government and cable operators are tied in a way that government and newspapers are not."130

130. Boulder, 660 F.2d at 1378. The court held that "[s]ome form of permission from the government must, by necessity, precede such disruptive use of the public domain." Id. at 1377-78.
There is "a sheer limit" physically on the number of cables that can use the existing poles or underground conduits or the streets.\textsuperscript{131} Thus, although cable operators are not the "public trustees" as are broadcasters under the Communications Act, neither are they the telepublishers they assert.\textsuperscript{132}

It is also important to consider the fact that cable systems are \textit{de facto} monopolies. There will generally be only one cable system in any city, or in large cities like New York, in any one area of the city. Cities do not often grant a cable franchise to more than one operator even if the grant is deemed "non-exclusive." Further, even if municipalities allowed multiple systems, economics currently dictate that only one system is feasible due to high construction costs.\textsuperscript{133} Because the public trustee scheme for broadcasting is based on the combination of government licensing and scarcity, it could be argued that a similar system with all it entails could be justified for cable in light of this monopolistic situation.\textsuperscript{134}

The new cable does present the compelling or substantial justification for governmental intervention required under United States v. O'Brien.\textsuperscript{135} The government has a legitimate interest in intervening either to deal with monopoly\textsuperscript{136} or the unhealthy first amendment situation which exists where one entity can control the content of 80-100 TV channels into the home in the large cities.\textsuperscript{137} Yet, it does not follow that regulation as a public trustee (with all it embodies such as fairness, equal time, etc.) is permissible. It is well settled that such regulation, when accomplishing its

\begin{itemize}
  \item \textsuperscript{131} \textit{Id.} at 1378.
  \item \textsuperscript{132} Report to Sen. Packwood, \textit{supra} note 50, at 45-46.
  \item \textsuperscript{133} \textit{But see} Owen & Greenhalgh, \textit{Competitive Policy Consideration in Cable Television Franchising}, Oct. 1982, Washington, D.C.
  \item \textsuperscript{134} \textit{See Boulder}, 660 F.2d at 1378. The cable industry argues strongly that there is no monopoly, even if there is no competing system, in light of alternative means of delivering the programming material (over-the-air TV, multipoint, cassettes, discs, direct broadcast satellite, etc.). \textit{See} Report to Sen. Packwood, \textit{supra} note 50, at 26-29. But in so far as the TV viewer is concerned, he or she is locked to the cable system. Thus, if cable obtains 55%-60% penetration (the usual estimated figure), it means that the only way to reach this substantial number of TV viewers is via cable. Under this analysis, "churn" (subscribers dropping cable) is not of great significance, so long as cable maintains a substantial penetration figure (e.g., 30% or more).
  \item \textsuperscript{135} 391 U.S. 367 (1968).
  \item \textsuperscript{136} \textit{Omega Satellite Products Co.}, 694 F.2d at 125-26.
  \item \textsuperscript{137} \textit{See Home Box Office, Inc.}, 567 F.2d at 48 (applying incidental restriction test in United States v. O'Brien, 391 U.S. 367 (1968)).
\end{itemize}
independent purpose, should do so by the narrowest possible means, with the least impact on first amendment freedoms. Thus, adopting public trustee regulation for cable would repeat the same mistake that was made without forethought in 1927 as to broadcasting.

Cable regulation should be structural rather than behavioral. The government should require that some significant number of cable channels be available on a leased channel basis—the common carrier model. Government intervention would then not be keyed to the content of any cable programming. Because this alternative is much less likely to unduly interfere with editorial decisions, the leased channel approach, rather than the public trustee approach, must be used to deal with the legitimate and substantial problem here involved. This alternative would accomplish the governmental purpose of diversifying the sources of information in a content neutral manner.

Opponents of this approach argue that a newspaper could not be constitutionally required to turn over some number of its pages to common carrier access, even in monopoly situations. They point out that newspapers make use of the city's streets for delivery, but that such use does not justify subjecting them to content or common carrier-type regulation. But unlike newspapers which simply use the streets in the way many businesses do, cable requires a government franchise to run its wires over or under the streets and government assistance to gain access to buildings. The proper analogy is thus to telephone companies, which also must obtain a franchise for their wire systems. It cannot be seriously disputed that the local government can grant authority to the telephone operator on condition that the business be conducted on a common carrier basis (regardless of whether there was a monopoly or two phone companies were authorized). Why then cannot the government similarly condition a cable authorization to require that the cable operator, at least to a substantial extent, make available channel capacity on a common carrier basis? The

138. See, e.g., Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Gooding v. Wilson, 405 U.S. 518 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); see also United States v. Robel, 389 U.S. 258 (1967); NAACP v. Button, 371 U.S. 415 (1963). In this specific context of cable and the first amendment, see Boulder, 660 F.2d at 1379 ("the power to regulate is not one whit broader than the need that evokes it").

139. See supra notes 111-18 and accompanying text.

140. This approach may entail other governmental problems of an economic nature—such as regulation of the rates charged for the leased channels, or the use of compulsory arbitration processes in the event of a deadlocked dispute. But that possibility does not raise difficult first amendment issues.

Cable operator can exercise its first amendment rights on fifty, sixty, or seventy TV channels, and although it cannot control the content of another twenty to thirty channels, it will still earn a fair return.

Congress also can require cable operators to provide a significant amount of leased access capacity because of cable's interstate nature (due to extensive satellite services). Congress can base any such conditions on the great concentration of control resulting from the government-granted cable franchise and its undesirable effects on underlying first amendment principles. Leased access requirements would implement the Associated Press principle underlying the first amendment by diversifying the sources of information.

In *FCC v. National Citizens Committee for Broadcasting*, the Court upheld a prospective ban on newspaper-broadcasting combinations located in the same community as a reasonable means of furthering the highly valued goal of diversified information sources. The governmental interest was the same as that articulated in *Associated Press*. And, like the leased access proposal, the regulations were "not content related" and "their purpose and effect [was] to promote free speech, not to restrict it." Consequently, the leased channel, common carrier alternative proposed in this article should pass constitutional muster under this precedent and the *O'Brien* and *Home Box Office, Inc.* test.

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142. An earlier version of the Cable Telecommunications Act of 1982, S. 2172, 97th Cong., 2d Sess. (1982), did specify 10% leased channel capacity, but, under pressure from the cable industry, this requirement was dropped in the later bill, which died with the expiration of the 97th Congress. This version in the 98th Congress (S.66) contains a provision explicitly proscribing common carrier regulation of cable except where it is engaged in basic telephone service.

143. In *Associated Press*, 326 U.S. at 20, the Court stated that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

144. 436 U.S. 775 (1978).


146. 436 U.S. at 801.

147. We recognize that the *O'Brien* standard evolved out of the case of "symbolic speech" conduct and this, is arguably inapplicable to the pure speech situation here considered, despite its use by the *Home Box Office* court. In any event, however, the fact that cable uses the city streets and is awarded a municipal franchise supports the content-neutral regulation suggested.

148. Courts and commentators alike have recognized that if cable television were a public forum, there would be a government-guaranteed right of access. See, e.g., *Midwest Video II*, 571 F.2d at 1054; Emerson, *supra* note 79, at 807-11. While the government involvement in cable operations arguably makes it a public forum, however, it is not likely that the present Supreme Court would apply the doctrine. The Court has been relatively consistent in its recent refusals to expand the public forum doctrine, and in fact has contracted it signifi-
C. Summary of the Cable Model—Functional Analysis

The foregoing discussion leads to several conclusions about cable and its regulation. First, cable is a unique medium and therefore, cannot be neatly shoeboxed into the regulatory models for broadcasting or print. While there are similarities, there are great differences in the actual and potential uses of cable. Second, regulation which is imposed solely because of the transmission medium produces illogical results. Thus, controlling the content of a text service simply because it is transmitted via coaxial cable rather than telephone lines makes little sense. Finally, and most important, the first amendment generally calls for editorial autonomy rather than government-mandated fairness. While regulation may impinge on speech to serve an important governmental purpose, such regulation should be narrowly tailored to achieve its purpose. Specifically, the amendment favors structural regulations which promote a “multitude of tongues” as opposed to behavioral regulations which directly intrude upon program content. Any regulatory scheme for cable should take into account these general conclusions while acknowledging the special attributes of the medium.

The proposed regulatory structure follows the different functions of cable. These functions fall into three groups: (1) retransmission functions, (2) origination functions, and (3) conduit functions. The retransmission function entails carriage of broadcast signals. The origination function consists of all programming activities in which the cable operator fulfills an editorial function. The conduit function describes those activities where the cable system is simply a means of transmission, similar to the telephone or an MDS system. This latter function is the key to the first amendment problems involving cable.

1. Retransmission Function

All retransmission functions (broadcast-based) should be subject to regulation under the broadcast regulatory model. When a cable operator per-
forms such retransmission functions, it is truly "enmeshed in . . . broadcasting" and indeed, simply is "forwarding" the broadcast signal within the definition of section 2(a) of the Communications Act. Regulation of the retransmission functions of cable along the lines of the broadcast structure is therefore "reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting." Clearly, cable stands in a unique position with regard to broadcasting when it retransmits broadcast signals. It could not properly retransmit the use of a station's facilities by one candidate and then drop the signal when rival candidates were afforded equal opportunities. In short, broadcasting regulation should apply with equal weight when those same channels are transmitted via cable. This retransmission aspect of cable television gives it "the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations . . . ."

2. Origination Functions

All origination channels should be free from the content regulations to which they are currently subject. Origination cablecasting is defined as programming subject to the exclusive control of the cablecaster. Currently, a cable operator engages in origination functions on all channels other than must-carry channels (and public access/governmental channels which usually are required and excluded from operator control by the franchise agreement). Cable should, however, be subject to a substantial leased access requirement which would ensure that the first amendment diversity of sources principle is satisfied.

As illustrated above, cable functions and newspaper functions often are similar—the operators select content and edit it to suit their needs. The content can be text or pictures; there is little that distinguishes them. Editorial autonomy should be just as strong a guiding principle in the

150. Midwest Video II, 440 U.S. at 700.
152. Southwestern Cable Co., 392 U.S. at 178.
153. Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968).
154. While the 1976 Copyright Act may have practical consequences, this article is concerned with content regulation required by the Communications Act (e.g., 47 U.S.C. § 315(a) (1976), with its equal opportunities and fairness requirements).
155. Black Hills Video, 399 F.2d at 69.
156. 47 C.F.R. § 76.5 (1976).
157. See supra text accompanying notes 124-25.
158. See Home Box Office, Inc., 567 F.2d at 46.
Freeing cable from content regulation in its origination functions further the *Associated Press* principle provided a right of leased access is granted. The leased access grant reconciles to some extent the unavoidable tension between access and editorial autonomy for the press in the special circumstances of cable. Cable systems would enjoy unfettered discretion as part of the nation’s electronic press. At the same time, the public’s right to speak freely would not be “snuffed out.”\(^\text{159}\) Cable’s large channel capacity makes such an accommodation possible.

3. Conduit Functions

Where cable functions solely as a conduit—whether as a local distribution line for SBS or MCI or a data transmission mechanism between banks—\(^\text{160}\) the cable operator has no legitimate interest in selecting or altering the content of transmissions. Consequently, under the model proposed in this article, cable systems, like common carriers, would be prohibited from controlling the message content of a given transmission. Since the operator has no first amendment interest in editing such content anyway, this regulation cannot be considered an infringement of its first amendment rights.

In addition to this requirement of nondiscrimination, the leased access requirement described above should be adopted. Under this requirement, a cable system would serve all comers indifferently and with a complete separation of content and conduit.\(^\text{161}\)

III. Conclusion

Cable represents a growing medium of great importance to the United States society and economy. The 1974 Cabinet Committee Report\(^\text{162}\) strongly urged that the United States policy in cable should not repeat the mistakes made with broadcasting, subjecting it to intrusive governmental intervention. The report concluded that a sounder policy is to require a separation of content and conduit (the common carrier model), with video publishing over the multiple channels (the print model). This policy was

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159. The Court stated in *Red Lion* that “[t]he right of free speech . . . does not embrace a right to snuff out the free speech of others.” 395 U.S. at 387 (citation omitted).


161. See Leased Access Petition of Henry Geller and Ira Barron, FCC RM-3294, for one possible method of implementing an overall access requirement.

to be implemented when cable obtained 50% penetration, and with the cable operator maintaining control over two channels.

The 1974 report was never implemented or indeed even the subject of a congressional hearing. Cable will approach 50% penetration in about five years—and with complete control over 80, 100, or 119 channels. The issue now is whether government will act to promote essential first amendment goals with respect to a substantial number of cable channels. The FCC appears indifferent, and Congress seems to be marching to the cable industry's tune. Behavioral regulation of a broadcast nature now applies to cable, and so far at least, the nation seems to be headed down the same "slippery slope" with cable that it did with broadcasting.

It is time—indeed long past time—that we focus on the issues raised by the 1974 report. The proper functioning of democracy depends on sound application of first amendment principles to our important media. In cable, that approach is sorely lacking today.