Local Taxation of Cable Television Systems: The Constitutional Problems

David W. Smith

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As the cable television industry matures,¹ so do its problems. The latest, and one of the most important, involves consideration of the ever increasing tax burden laid on cable by state and local governments, and whether or not such taxation violates the United States Constitution.

The problem was highlighted and summarized in a recent Federal Communications Commission decision,² issued as a result of applications filed by a California cable television company and the Florida Cable Television Association which sought a declaratory ruling that certain taxes³ were in violation of the Commission’s regulations.⁴ Without expressing its rationale, the Com-

* Member, Pryor, Cashman & Sherman, New York City; Adjunct Associate Professor of Political Science, C.W. Post College; Adjunct Assistant Professor of Paralegal Studies, New York University School of Continuing Education. B.A., University of Pennsylvania, 1955; J.D., Fordham University, 1958. The author is indebted to Henry G. Ferraioli, Associate, Hawkins, Delafield & Woods, for his invaluable assistance in the preparation of this article.

¹ From 1963 to 1973 the industry showed a 22.6 percent compounded growth rate in total number of systems. As of January 1974 there were 3,033 cable systems serving about 25 million people, or roughly 11 percent of the households in America. CABLE TELEVISION INFORMATION CENTER, CABLE DATA 1 (1974).

² Cable TV Taxes, 32 P & F RADIO REG. 2d 457 (1975) [hereinafter cited as CATV Taxes].

³ The taxes at issue were a five percent use tax imposed upon subscribers to municipal cable television service, Stockton, Cal., Ordinance 1837-C.S. § 8-076, June 26, 1969, and a tax by municipalities upon purchasers of cable television service of up to 10 percent of the purchase price as authorized by a Florida statute, FLA. STAT. ANN. § 166.231 (Supp. 1975).

⁴ The petitioners sought to have the tax declared invalid as a violation of the franchise standards established by the FCC. See 47 C.F.R. § 76.31 (1975). The provision reads, in relevant part:

(b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds 3 percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of Federal regulatory goals in the field of cable television, and, by the franchising authority that it is appropriate in light of the planned local regulatory program.

47 C.F.R. § 76.31(b) (1975).
mission declared that such taxes do not violate the franchise compensation
limitations.

The opinion went beyond this holding, however, to discuss the more basic
problem of whether similar kinds of taxation violated the equal protection
clause, commerce clause, or free speech provisions of the Constitution. The
Commission's concern stemmed from the fear that imposition of such taxes
could severely limit the development of cable and prevent it from becoming
an effective contributor "in furthering the objectives of the Communications
Act."5

It is apparent, at least at present, that the sympathies of the Commission
are on the side of cable. As a result, the opinion oversimplifies the issues
and tends to paint the situation in black and white rather than in various
shades of grey, a treatment which would be more befitting of the complex
constitutional issues involved.6

The purpose of this article is to elaborate and clarify the very difficult
questions raised by the Commission in its decision in Cable TV Taxes. To
understand and analyze the problem fully, it is first necessary to explore the
true nature of cable television. In the first section, it is suggested that cable
as it exists today is the functional equivalent of an over-the-air broadcaster.
This conclusion results from viewing cable through the integrated perspective
of the Commission's regulatory scheme, the approach of the courts to cable
systems, and the types of service the system itself provides.

The second section deals with the constitutional issues raised by local taxa-
tion of cable. The regulatory rationale of state and local legislatures appears
to be that cable is identical to various utilities. That such an approach
denies cable equal protection of the law is demonstrated by the system's
broadcast nature; thus, laws which equate cable with telephone, gas, and

5. CATV Taxes 460. The Commission also has said:
Broadcast signals are being used as a basic component in the establishment
of cable systems, and it is therefore appropriate that the fundamental goals of
a national communications structure be furthered by cable—the opening of new
outlets for local expression, the promotion of diversity in television pro-
gramming, the advancement of educational and instructional television, and in-
creased informational services of local governments.
Cable Television Report and Order, 36 F.C.C.2d 143, 190 (1972).

6. While the majority opinion oversimplifies the issues in favor of cable, Commis-
sioner Hook's concurrence, which challenges the majority's view of the possible infirmi-
ties of state taxation of cable systems, likewise does not provide a complete analysis of
the applicable constitutional principles. See CATV Taxes 467 (Robinson, Comm'r, con-
curring and dissenting). Chairman Wiley's separate statement can be viewed as sup-
port for "the majority position that judicial review is necessary. . . ." CATV Taxes
476.
electric companies are unreasonable. Indeed, any economic regulation of cable is arbitrary if it does not also include over-the-air broadcasters.

Application of the commerce clause to these problems is not an easy matter. Cable is engaged in interstate commerce, and there does not appear to be any doubt that state and local taxes inhibit the growth of cable systems. Moreover, there is ample precedent showing that local taxation of companies engaged in interstate communications violates the commerce clause. Nevertheless, there is also ample precedent establishing that companies engaged in interstate activity must still bear their share of local taxes. Thus, the outcome of this question will depend on the type of tax or taxes involved and the ability of the system to show that real economic harm has occurred to itself and, perhaps, to the rest of the industry in the same state.

Economic impact is an integral part of the first amendment question of whether or not local taxes infringe upon free speech. At least two facets of free speech, the right of the cable system to disseminate news and information and the right of the public to receive it, are involved. A review of recent Supreme Court decisions indicates that there may be a third aspect of free speech applicable only to cable: the constitutional right of the public to use cable's access facilities as a means of self-expression. Again, the cable system will have to establish that the effect of the local taxation is regressive and that it inhibits or prevents further development of the system. The courts will then have to balance the local government's right to tax against the impairment of free speech which results.

I. THE NATURE OF CABLE TELEVISION

Cable television is the functional equivalent of the broadcast medium. In an analysis of cable's past history and present circumstances, even with regard to the telephonic and data transmission services which are speculated upon for the future, its broadcast nature predominates.

Except for two copyright cases which are limited in their applicability,

8. See p. 767 & notes 67, 68 & 78 infra.
9. The essence of cable service is broadcasting. The Communications Act of 1934 defines broadcasting as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1970). A cable system disseminates broadcast signals which it either originates itself or picks up off-the-air. The fact that a viewer must subscribe to the cable service before he or she can receive these signals does not make the cable system any less a broadcaster than the fact that the viewer must buy a television set to receive over-the-air signals.
there has not yet been a clear judicial definition of cable. The Commission itself has ducked the issue by describing cable as a "hybrid." But certain things are clear: cable competes directly with over-the-air broadcasters; the right of the FCC to regulate the industry is based on its authority to regulate broadcasters; and even the Commission now refers to cable as an alternative to over-the-air broadcasting.

The Commission's equivocation in trying to define cable television parallels its overall efforts in trying to regulate the industry. Despite the fact that such history is marked by inconsistency, contradiction, and uncertainty, it does reflect, in a not unfavorable light, the attempt of a regulatory agency to grow and to maintain flexibility as new technology rapidly changed the face of the industry being regulated.

Originally the Commission determined that it did not have jurisdiction over the cable industry. But as the competitive nature of cable grew more troublesome, the Commission sought congressional guidance. With no guidance forthcoming, but with a growing realization of how serious, and possibly destructive, the competition with over-the-air broadcasters could become, the Commission exercised indirect jurisdiction by imposing restrictions on common carrier microwave facilities serving cable systems.

11. "We reaffirm our view that cable systems are neither broadcasters nor common carriers within the meaning of the Communications Act. Rather, cable is a hybrid that requires identification and regulation as a separate force in communications." Cable Television Report and Order, 36 F.C.C.2d 143, 211 (1972).

12. In such a situation, where some television service is available over-the-air, cable television operations must compete in the marketplace by supplementing the existing over-the-air television service. Thus, cable television systems may offer their subscribers better reception, more signals, origination cablecasting, etc. It is for this supplemental service that cable television subscribers pay. And, where over-the-air reception is available, cable television and local broadcast television must compete for the attention of the viewing public.


14. "Where, as in Florida, cable television is classified as a public utility and substantial taxes are levied on the service on the basis of that classification, and the alternative service, broadcasting, is excluded from such tax liability, serious questions are raised." CATV Taxes 465-66.


17. See Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963), in which the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's denial of an application to build microwave facilities on the ground that the granting of the application would place an economic burden on a local television station.
As a result of rulemaking proceedings which commenced in 1962, the Commission eventually promulgated a series of rules governing cable systems served by microwave.\textsuperscript{18} Although these rules were limited, the Commission did recognize the full extent of cable's competitive thrust against over-the-air broadcasters\textsuperscript{19} and declined to regulate cable as a common carrier, choosing instead to regulate it in such a way as to control its competitive impact on over-the-air broadcasters.\textsuperscript{20}

Such a hesitant mode of regulation, however, did little to resolve the problems regarding competition. Finally, in 1968, the Commission reversed its original position that it had no jurisdiction over cable and promulgated a comprehensive regulatory scheme for the entire industry.\textsuperscript{21} This reversal reflected an awareness that cable was not merely a competitive threat, but an independent communications force engaged in the origination and transmission of broadcast signals.

The Commission's regulatory scheme is a recognition of cable's position in broadcasting. Systems are made subject to many of the same rules that apply to over-the-air broadcasters. These include the equal time provisions,\textsuperscript{22} the fairness doctrine requirements,\textsuperscript{23} lottery and gambling restrictions,\textsuperscript{24} and prohibitions against the broadcast of obscene and indecent material.\textsuperscript{25} In addition, there are rules governing the kinds of broadcasting a cable system can transmit. These rules are attributable to its unique technology and in-

\textsuperscript{18} First Report and Order on Microwave-Served CATV, 38 F.C.C. 683 (1965).

\textsuperscript{19} "[T]he likelihood or probability of [cable's] adverse impact upon potential and existing [broadcast] service has become too substantial to be dismissed." \textit{Id.} at 713-14.

\textsuperscript{20} See Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966), in which the court upheld the position taken by the Commission that regulating cable systems as an adjunct of the broadcasting industry rather than as common carriers was appropriate. The court stated:

\textit{In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.}

\textit{Id.} at 284.

\textsuperscript{21} Second Report and Order on CATV, 2 F.C.C.2d 725 (1966). This exercise of regulatory jurisdiction eventually was affirmed by the Supreme Court in United States v. Southwestern Cable Co., 392 U.S. 157 (1968). The rules remain subject to continuing review and revision. \textit{See}, e.g., Cable Television Report and Order, 36 F.C.C.2d 143 (1972); Reconsideration of Cable Television Report and Order, 36 F.C.C.2d 326 (1972).

\textsuperscript{22} 47 C.F.R. \textsection 76.205 (1975).

\textsuperscript{23} \textit{Id.} \textsection 76.209.

\textsuperscript{24} \textit{Id.} \textsection 76.213.

\textsuperscript{25} \textit{Id.} \textsection 76.215.
clude “pay-cable” regulations, signal carriage and nonduplication rules, and access channel requirements.

Nowhere was the Commission's attitude that cable is a broadcast medium more pronounced than in its mandatory origination requirement. Systems having 3,500 or more subscribers were obligated to originate a significant amount of their own programming. Even though this rule has since been revoked, the substitute rule promulgated by the Commission requires systems to provide a certain amount of origination equipment and facilities for the users of access channels. Thus the rules still emphasize the broadcast nature of cable.

The authority of the FCC to regulate cable grows out of those powers which are “reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.” It has used these powers to assert rather than deemphasize the broadcast nature of cable. Thus the Supreme Court, in upholding the Commission's authority to mandate origination, appears to have impliedly adopted the functional equivalency concept when it stated: “More important, CATV systems, no less than broadcast stations . . . may enhance as well as impair the appropriate provision of broadcast services.”

Courts have never had difficulty in finding that cable systems, like over-the-air broadcasters, are engaged in interstate commerce. This is true regardless of whether the signals carried by the system are interstate or intrastate or whether all of the system's equipment is located in the same state. Nor has the resemblance of cable's physical plant to that of a tele-

26. Id. § 76.225.
27. Id. §§ 76.54-76.65.
28. Id. § 76.251.
34. See, e.g., United States v. Southwestern Cable Co., 392 U.S. 157 (1968), in which the Court stated:

Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same state in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other states. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as
phone system altered the basic character of cable’s business. Early decisions uniformly refused to equate cable with telephone service.35 Methodology and technology have been considered irrelevant; rather, the character of the communication has been deemed probative of the nature of the business.36

The Supreme Court has sought to distinguish cable systems from broadcasters in only two decisions, both of which involved questions of copyright infringement.37 These cases, however, did not deal with the nature of cable. The narrow commercial issue was whether the reception and retransmission function of cable constitutes a “performance” of over-the-air signals within the meaning of the Copyright Act.38 Other services offered by cable were deemed irrelevant; the Court isolated, examined, and discussed only the retransmission function.39 Yet it is elementary that in defining the nature of a business one does not examine each part separately.

Cable television is the sum of all its parts, as the Commission itself recently recognized.40 At this moment, the sum of cable’s parts—retransmission, origination, importation, access, pay cable—reflects a system which is the functional equivalent of a broadcaster. That services such as data transmis-

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35. See, e.g., United States v. Community TV, Inc., 327 F.2d 797 (10th Cir. 1964); Pahoulis v. United States, 242 F.2d 345 (3d Cir. 1957); Lilly v. United States, 238 F.2d 584 (4th Cir. 1956). Both Lilly and Pahoulis presaged the Supreme Court’s approach in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), in which the Supreme Court treated CATV as an extension of the television set.


37. See cases cited note 10 supra.


39. See Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974), in which the Court stated that “we hold that the Court of Appeals was correct in determining that the development and implementation of these new functions . . . are simply extraneous to a determination of copyright infringement liability. . . .” Id. at 405.

40. In Cable Television Service Rules, 49 F.C.C.2d 1078 (1974), the Commission noted:

That cable is an “organic whole” should be obvious. Without the broadcast signal complement allowed by our rules, there would be no cable. It is also becoming clear to this Commission that without the additional services including leased access, either mandated or allowed by our rules, cable will not be able to develop a strong enough package of services to achieve our goal of a nationwide broadband communications grid.

Id. at 1083.
sion, meter reading, and the like may be added to cable in the future might make some of the services it offers similar to that of a telephone company, but at present, with its services geared solely for television, the organic whole of cable is broadcasting.

II. CONSTITUTIONAL LIMITATIONS

A. Equal Protection

Among other things, the equal protection clause protects an individual from discriminatory state action that imposes a tax liability on one person while not imposing the same tax on others of the same class. It requires that in defining a class subject to legislation the distinctions made to separate this class from any other similar class have “some relevance to the purpose for which the classification is made.”

Because a cable system is essentially a broadcaster, it is deceptively easy to assume that any attempt to tax it which did not also tax over-the-air broadcasters and possibly other forms of mass communication, would be a denial of equal protection. State statutes dealing with fiscal and tax regulation are accorded a presumption of constitutionality, however, and accordingly the

42. Baxstrom v. Herold, 383 U.S. 107, 111 (1966). See also Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). In Lindsley, the Court expressed four criteria used to measure legislation against the equal protection clause:

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id. at 78-79.
43. See, e.g., McGowan v. Maryland, 366 U.S. 420, 425 (1961); Madden v. Kentucky, 309 U.S. 83, 88 (1940). In McGowan, the Court described the scope of this presumption, saying:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425-26 (citations omitted).
burden of proving the statute unconstitutional is upon the challenger.\textsuperscript{44} This presumption of constitutionality makes it extremely difficult, if not impossible, to upset a taxing statute on equal protection grounds.\textsuperscript{45}

Since legislative action differs from state to state, the focus of an equal protection analysis will vary from case to case. Depending on the draftsman-ship and the intent of the statute, apparently similar enactments may be valid in one jurisdiction and void in another. In essence, then, the central concern of an equal protection analysis will be whether the legislature has classified cable in an arbitrary manner. Cable will carry the substantial burden of both educating the courts on the nature of its business and establishing the contention that it has been afforded discriminatory treatment.\textsuperscript{46}

Thus far, taxing statutes seem to regularly classify cable with the telephone, gas, and electric industries.\textsuperscript{47} The rationale for including cable systems with these utilities is never made explicit. Three theories for inclusion, all of which are based on characteristics shared by each of the industries, seem plausible: the legislators view cable either as a utility, a monopoly, or a form of communication by wire. Each of these must be examined to distinguish cable for purposes of taxation.

Cable is not a utility in the traditional sense, as is telephone, gas, or electric service. Unlike a true utility that furnishes a necessity and receives a fair rate of return on its investment, a cable system's income is uncertain and its rate of return generally zero. While it can be argued that cable is a utility in the sense that it is engaged in a business impressed with a public interest,\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{44} See, e.g., Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).
\item \textsuperscript{46} In evaluating the challenge to the statute at issue in Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911), the Supreme Court stated:
\begin{quote}
In thus criticising the bill [in equity], we do not mean that its allegations are alone to be considered, for due regard also must be had for what is within the range of common knowledge and what is otherwise plainly subject to judicial notice. . . . But we rest our criticism upon the fact that the bill is silent in respect of some matters which, although essential to the success of the present contention, are neither within the range of common knowledge nor otherwise plainly subject to judicial notice. So, applying the rule that one who assails the classification in such a law must carry the burden of showing that it is arbitrary, we properly might dismiss the contention without saying more.
\end{quote}
\textit{Id.} at 79-80 (citations omitted).
\item \textsuperscript{47} See, e.g., ordinance and statute cited note 3 \textit{supra}.
\item \textsuperscript{48} See, e.g., TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), aff'd, 396 U.S. 556 (1970); Staminski v. Romeo, 62 Misc. 2d 1051, 310 N.Y.S.2d 169 (Sup. Ct. 1970). In the \textit{TV Pix} decision, the district court noted that the apparatus of the community antenna system is an appendage to the primary
\end{itemize}
the same may be said of the over-the-air broadcaster.\textsuperscript{49}

Nor is cable a true monopoly. While the economics of the cable business make it unlikely that there will be two cable companies competing with each other on the same block,\textsuperscript{50} cable does compete with over-the-air broadcasters. Gas, electric, and telephone companies do not compete with other similar companies or associated entities that provide the same service. These companies possess a true monopolistic status; the balance sheet alone belies that status for cable service. While an over-the-air broadcaster may be considered to have a monopoly over the airwaves it uses,\textsuperscript{51} it does not enjoy a monopolistic status in the marketplace. A cable system operates in the same marketplace as the broadcaster; the two systems compete for viewers.

While cable provides communication by wire as does telephone, this observation immediately excludes a similar analogy to gas and electricity, and does not give consideration to the dissimilar character of the types of communication at issue. A cable system deals exclusively in broadcast signals while telephone delivers all variety of messages. The courts and the FCC have recognized the distinction between the two types of communication by holding that cable does not provide telephone services.\textsuperscript{52}

interstate broadcasting facilities with incidents much more local than national, involving cable equipment through the public streets and ways, local franchises, local intra-state advertising and selling of services and local intra-state collections. In this perspective, a community antenna system is essentially a local business.

304 F. Supp. at 463.

49. See Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), in which Judge Burger, speaking for the majority, stated:

True it [an over-the-air broadcaster] is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency. A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law.

Id. at 1003. Cf. Sanders Bros. Radio Station v. FCC, 106 F.2d 321 (D.C. Cir. 1939), rev'd on other grounds, 309 U.S. 470 (1940); Pulitzer Pub. Co. v. FCC, 94 F.2d 249 (D.C. Cir. 1937); State ex rel. Pruzan v. Redman, 60 Wash. 2d 521, 374 P.2d 1002 (1962). In the Pruzan case, the Washington Supreme Court decided that a radio broadcasting station was “a public utility in a limited sense impressed with a public interest.” Id. at 527, 374 P.2d at 1006. There were, in fact, efforts during the passage of the Radio Act of 1927, ch. 169, § 1, 44 Stat. 1162, the forerunner of the Communications Act of 1934, to make radio a full public utility. See H.R. REP. No. 404, 69th Cong., 1st Sess. (1926) (minority report); 67 CONG. REC. 5483 (1926) (remarks of Representative Davis).

50. This has happened, however. See Application of Babylon TV Cable Corp., No. 10508 (N.Y. State Comm'n on Cable Television, 1974), wherein a municipality authorized two cable companies to compete in the same area and the State Commission approved.


52. See cases cited note 35 supra.
The "communication by wire" classification raises a number of other issues which suggest that it is inaccurate. One question goes to the breadth of the classification, since the logic that would equate cable with telephone could extend to include a simple master antenna setup in an apartment or office building or even to a hotel that shows closed circuit movies to its patrons. In each instance, there is "communication by wire." Other questions raised by this grouping concern the importance of ownership of the "wire" used to communicate. Does it make a difference whether the system owns the wire or merely leases it, and if it does matter, is this a rational difference for purposes of taxation? If the use of telephone wire by a cable system is sufficient to make the analogy for legislative purposes, should not the same treatment be given to the over-the-air broadcaster who uses telephone lines to carry a signal from point of origination to transmitter? A last major problem with this classification is that it depends on physical characteristics while ignoring the true nature of the communication. Clearly it is arguable that over-the-air broadcasters can be described as bringing communications into the home by wire. While such a "wire" may not be physical, it is nevertheless a "line" of communication. It therefore seems unreasonable to use the physical characteristic of the wire to differentiate between two almost identical means of communication which perform the same function and, in many instances, carry the same information.

By arguing that it cannot be classified with telephone, the cable industry argues by implication that whatever its class for taxing purposes, over-the-air broadcasters must be included. This gives rise to a situation sometimes referred to as under-inclusion. The effect of under-inclusion is to impose a burden on a person in a manner which, while it may further a legitimate purpose of the state, does not impose the same burden on other persons who are similarly situated.

53. A parallel argument in both copyright cases, cited note 10 supra, was that if a cable system "performed" the over-the-air signals it carried, then so did a master antenna system, thereby making the owner of the building liable for copyright violations. The apparent ridiculousness of such a result appears to have made a significant impact in the CATV system owners' favor. In Fornightly, the Court discussed this analogy:

If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur. 392 U.S. at 400. In its decision, the Teleprompter Court quoted this language with approval. 415 U.S. at 408.

The Supreme Court has been ambivalent in its general acceptance of the under-inclusion argument. It has voided a statute requiring defendants who were sentenced to jail to repay the cost of a transcript which the state had furnished, but has sustained other types of under-inclusion because of administrative convenience even though the impact of the statute was more harsh upon certain members of the same class than upon others. Nevertheless, when under-inclusion occurs, the state must advance persuasive reasoning to justify it. Since television is a vital and important medium of communication, the state should be required to sustain a heavy burden when the effect of under-inclusion discriminates against the growth and development of a new and more accessible type of television communication, while overlooking a substantial and legitimate part of the state’s tax base.

Cable’s victory under an equal protection argument is hardly assured. Among other things, it will require considerable evidence regarding the similarity in nature, function, and equipment of cable and over-the-air broadcasting. The outcome will also depend heavily on both the particular statute and the overall taxing scheme of the state. That cable should not be penalized because it is a new or unique medium of broadcast is for the system to demonstrate with comprehensible and persuasive evidence.

B. The Commerce Clause

The degree to which the commerce clause affects a state’s ability to tax interstate commerce is far from clear. Until the late 1930’s, the Supreme Court took a straight-line approach in cases in which states attempted to tax communications companies engaged in interstate commerce. It was uniformly held that a state tax levied against gross receipts derived from interstate commerce was in violation of the commerce clause. Thus, among those taxes voided were an occupation tax on telephone instruments used for both interstate and intrastate messages, a tax on the privilege of owning a radio receiving set, and a tax on the revenue a radio station derived from the sale of advertising.

60. See Station WBI, Inc. v. Poulnot, 46 F.2d 671 (E.D.S.C. 1931).
This straight-line approach ended, however, with *Western Live Stock v. Bureau of Revenue*, in which the Supreme Court upheld a state tax which was measured by the gross receipts a magazine publisher derived from advertising revenues. The decisions in *Western Live Stock*, and two later cases, *McGoldrick v. Berwind-White Coal Mining Co.* and *Freeman v. Hewit*, stand as the principal decisions defining the present relationship between the commerce clause and state taxation of interstate commerce.

Although the magazine in *Western Live Stock* had both an interstate and intrastate circulation, the Court felt that the burden on interstate commerce generated by the New Mexico tax was not sufficient to void the tax. To arrive at this result, the Court created what has been called the "multiple burden test" which purports to measure the validity of a tax by determining if a similar tax could be imposed "with equal right by every state which the commerce touches." The lack of the possibility of such a multiple tax led the Court to uphold the tax in *Western Live Stock*.

Rather than overrule prior decisions that voided similar taxes when the risk of a multiple tax burden was minimal or nonexistent, the Court sought to harmonize these decisions. For example, it explained the decision in *Fisher's Blend Station, Inc. v. State Tax Commission* with the rationale that "[i]f broadcasting could be taxed, so also could reception." This explanation is not sound if the "multiple burden" refers to duplicate taxes on the same receipts, however, since the station's entire operation was confined to a single state and there was no suggestion that because its radio waves reached into other states a sufficient nexus was present to allow the other states to tax the station's gross receipts. If, on the other hand, the Court were addressing the possibility of multiple taxation on the process of interstate communication, such as a gross receipts tax on the sender and a use tax on the receiver, then it is meaningful to explain *Fisher's Blend* in terms of the multiple burden test, and the Court's discussion of *Fisher's Blend* in *Western Live Stock* is applicable to cable communication today.

Since the signals it carries can originate locally or across the country, it is clear that a cable television system is engaged in interstate commerce.

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62. 303 U.S. 250 (1938).
63. 309 U.S. 33 (1940).
64. 329 U.S. 249 (1946).
65. 303 U.S. at 259.
66. Id. at 256.
67. 297 U.S. 650 (1936). In *Fisher's Blend*, the court voided a state occupation tax which was measured by the gross receipts from radio broadcasting of stations within the state.
68. 303 U.S. at 260.
69. See note 34 supra.
therefore would seem possible to attack attempts to tax both the system and its viewers as precisely the multiple burden described in the *Fisher's Blend* situation. Another multiple burden possibility with direct applicability to cable systems today stems from the new technology that permits systems in two different areas to join together to share the same program origination simultaneously via a microwave connection.\(^\text{70}\) If the two systems are in different states, a side effect of this technology would be to allow each state to tax gross receipts derived from the sale of the same programming. While it is true that the taxes would be imposed upon two different systems, the liability would stem from simultaneous use of the same product. This may not be precisely the multiple tax envisioned in *Western Live Stock*, but it does appear to be a possible application of the doctrine in the context of a new technology.

The Court's decision in *Berwind-White*, which sustained a tax levied directly on gross receipts derived from interstate sales, destroyed the last vestige of a straight-line approach in applying the commerce clause to taxation in such instances. The case, however, did not bury forever the original rule that interstate commerce cannot be directly taxed. While the tax at issue in the case was not such a tax, Chief Justice Stone, writing for the majority, noted that there was still a prohibition against state taxation that could be "the instrument of impeding or destroying interstate commerce."\(^\text{71}\)

The opinion in the *Freeman* case, which voided an Indiana tax on receipts from the sale of stock listed on the New York Stock Exchange as too direct a burden on interstate commerce, referred to both the *Western Live Stock* and *Berwind-White* decisions and served to modify somewhat the impact of the two cases by suggesting greater emphasis on case-by-case analysis. The Court noted that the multiple burden test was extremely difficult to apply and was not limited to situations in which multiple taxes had been applied, but was fully applicable when a possibility of such taxation existed.\(^\text{72}\) The Court also dismissed the suggestion that the *Berwind-White* decision allowed states "one single-tax-worth of direct interference with the free flow of commerce."\(^\text{73}\)

The divergent results of the great wealth of litigation concerning state taxation of interstate commerce, and these three cases in particular, are inconclusive. While once there were too few approaches to the complex question

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\(^{70}\) For a discussion of the technology involved in such a system, see Cable Television Information Center, Cable Television Interconnection (1974).

\(^{71}\) 309 U.S. at 48.

\(^{72}\) 329 U.S. at 256-57.

\(^{73}\) Id. at 256.
of striking the balance between a state's right to tax and the prohibition against allowing the several states to unduly burden interstate commerce, there now may be too many. The only conclusions that can be drawn with any certainty are that companies engaged in interstate commerce are not thereby immune from bearing their fair share of local taxes and that the company seeking immunity under the commerce clause has the burden of establishing the exemption. As the Court noted in Freeman, "especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

As with equal protection arguments, then, the form and structure of the state or local tax structure is critical in evaluating the chances of success in seeking to have a tax declared invalid as a violation of the commerce clause. The courts have upheld property taxes measured by gross or net income, particularly when they are imposed in lieu of other taxes. So, too, have they allowed franchise taxes when those taxes are measured by income or levied in lieu of other taxes, although these same taxes have been struck down when determined to be privilege taxes. And finally, even when individual taxes may be valid, if the cumulative result is an overly oppressive burden, one or more of the taxes may fall.

In arguing that a tax singly or cumulatively burdens interstate commerce, it should be remembered that when the courts speak of such burdens they appear to focus on the point at which the liability arises rather than the actual burden imposed on the taxpayer. The consequent effect of the tax upon the cable system's ability to do business also should be of substantial importance in determining whether commerce is burdened. The cable industry is capital intensive with most of its dollars spent up front before the system is even sure that there exists a market for its service. Economics dictate that construction must continue even though customer acceptance lags because under many cable franchises, the company is obligated to build all of its

76. 329 U.S. at 252.
77. See, e.g., Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918); United States Express Co. v. Minnesota, 223 U.S. 335 (1912). But see Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954), in which the Court invalidated as a "privilege tax" an alleged property tax assessed on the going concern value of a business.
80. See, e.g., Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403 (1936) (dictum); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919); cf. Meyer v. Wells, Fargo & Co., 223 U.S. 298 (1912), in which there was already an ad valorem property tax, and a gross receipts tax was voided.
franchised area regardless of whether there is a demand for such service. And because its competition with over-the-air broadcasters is so stiff, cable does not have the luxury of adding to its services as demand increases. It must go on the air initially with as much importation and origination as possible.

Because the type of service cable generally offers is nonessential, the success of the system is not assured. With substantial start-up costs plus the severe financial pressures of continued construction and marketing, it is not unusual for systems, depending on their size, to wait five years or more before beginning to break even. Any tax, regardless of whether it is imposed on the system or the viewer, makes the service less desirable, slows down marketing, diverts cash, impairs the system's ability to meet its budget projections, and weakens the company's financial underpinnings.

Nor can the company automatically pass this cost on to its customers. A telephone company can go to its local utility commission and demonstrate how increasing taxes are eroding its rate of return. A broadcaster has the discretion, tempered by competitive conditions, of increasing its advertising rates. But many states have little or no state-wide rate regulation of cable. Rather, the system is left to the distinctly political task of returning to the local municipal board which granted its franchise to try to obtain a rate increase.81 The company is put in the awkward position of asking elected officials to increase the expenses of their own constituency. Political expediency, coupled with a general lack of ratemaking expertise in these local bodies, puts the outcome of such a request very much in doubt. The effect of the procedure can place the growth of a national communications system at the whim of local political bodies.

Even if a rate increase is granted, economic factors would limit the extent to which the tax could be passed on to customers; the demand for cable television is much more elastic than that for gas or electric service. There is a point at which people will either cancel or not buy cable because it is simply too expensive. Local taxation places the system right in the middle of an unpleasant dilemma: it must either absorb the tax, which may be impossible, or pass it on to customers and take the substantial risk of a drop in subscriptions. Either way, the system has a difficult task and the resulting burden on interstate commerce is evident.

The weapons with which a cable system can fight to invoke the commerce clause will be found only partially in law books. The most potent weapons will be budget figures, cash flow projections, market studies, and penetration

81. See, e.g., N.Y. EXEC. LAW § 825 (McKinney Supp. 1974), which provides in part: "such rates [as those specified in the franchise] may not be changed except by amendment of the franchise."
rates. While the industry does not yet know a great deal about its customers, why they buy or what they like, cable nevertheless must educate the courts about the economics of its business. The trial record must be effective and imaginative, demonstrating in detail the financial and marketing problems of making a system viable as well as the oppressive consequences of the challenged tax. In this way, cable's nature and potential can be translated into the kind of hard evidence against which a court can intelligently measure application of the commerce clause.

C. Freedom of Speech

The probability of a cable system's success in trying to invoke the first amendment as a shield against local taxation is no greater, nor offers more solace, than its chance of invoking either the equal protection or the commerce clause. But there are at least two, and perhaps three, facets of free speech which apply to cable. Since the courts will ultimately balance the right of local government to tax against the abridgement of free speech which results, the more broadly applicable that cable can make its first amendment argument, the greater its chance for relief.

One obvious application of the first amendment relates to the system's ability to disseminate news, information and entertainment. Although its method of dissemination, like that of broadcasters, depends upon electronic and microwave transmission, it is nevertheless included in the press, whose freedom is guaranteed by the first amendment. To the extent that local taxes threaten to damage the system, free speech and dissemination of news is thereby curtailed and abridged.

Another first amendment argument holds that people have a right to receive information. In metropolitan areas which have many media outlets, the tax troubles of one cable system, or even its eventual loss, may not be viewed as significant. But in rural areas where cable has its largest penetration these systems may be the only means of communication available. Loss or substantial retardation of such a system can substantially abridge the ability of people to obtain information.

82. Although the prohibition against abridging the freedom of speech expressly applies to Congress, it has been applied to state and local governments through the fourteenth amendment. See, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963).


The last argument, and the one which at this point is only speculative, involves a constitutional right of access on behalf of the public to the facilities of a cable system. The decisions in *Red Lion Broadcasting Co. v. FCC* and *Columbia Broadcasting System, Inc. v. Democratic National Committee* may have planted the seed for such a right by their recognition that such an argument exists, but excessive local taxation will literally freeze that seed before its slightest growth.

The first amendment is designed to preserve an "uninhibited marketplace of ideas." In furtherance of this purpose, the Supreme Court in *Red Lion* held that the "personal attack" and "editorializing" regulations promulgated by the FCC, which grant certain members of the public a limited right to broadcast time under specified circumstances, were not an abridgement of the broadcasters' free speech.

Stretching *Red Lion* to its limits, the United States Court of Appeals for the District of Columbia Circuit held, in *Business Executives Move for Vietnam Peace v. FCC*, that under the first amendment broadcasters could not refuse to sell time to various groups for editorial commercials. In effect, the court gave every citizen a limited constitutional right of access to the broadcast media. The Supreme Court, however, reversed this holding in *Columbia Broadcasting System, Inc. v. Democratic National Committee*. Three Justices reasoned that no government action was involved in the broadcasters' refusal, while three others opined that such a refusal was not a violation of the first amendment. Although *Democratic National Committee*
did not overrule *Red Lion*, the Supreme Court did refuse, at least for the present, to turn a public right of reply granted by the FCC fairness doctrine into a constitutional right of access.

In both cases, the single characteristic of broadcasting that seems to have had the most impact upon the Court's refusal to establish a constitutional right of access was the lack of channel capacity available in over-the-air broadcasting. The Court in *Red Lion* noted that this lack of capacity resulted in a practical limitation upon the number of people who can have access to broadcast time.\(^95\) Read together, the two opinions reflect an attitude on the part of the Court that traditional applications of the first amendment may not automatically fit broadcasting's unique capabilities. There is a strong inference, however, that if the channel capacity of a broadcaster were larger, then the Court might "posit an unbridgeable First Amendment right to broadcast"\(^96\) for the public.

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Justices Blackmun and Powell separately concurring, 412 U.S. at 147, found no violation of the first amendment.

95. 395 U.S. at 388. Some of the language in *Red Lion* is so broad that it is reasonable to speculate that if the FCC had not codified the fairness doctrine, the courts eventually would have found such a doctrine mandated by a combination of the first amendment and spectrum scarcity. One example of the sweeping nature of the argument occurs in the opinion of Justice White who, writing for the Court, stated:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish. . . .

> . . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.

395 U.S. at 388, 390.

Chief Justice Burger expressed similar thoughts on the impact of the scarcity of available frequencies in *Democratic National Committee* when he wrote:

> With broadcasting, where the available means of communication are limited in both space and time, the admonition of Professor Alexander Meiklejohn that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said" is particularly appropriate.


96. 412 U.S. at 101, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). In the *Democratic National Committee* opinion, Chief Justice Burger took note of cable's potential importance in providing greater channel capacity, stating:

> Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues.

412 U.S. at 131.
Recognizing that cable can make a permanent contribution to the marketplace of ideas, FCC regulations mandate such access by requiring cable systems to provide at least one free access channel\(^9\) and one or more leased access channels.\(^8\) The system must also promulgate operating rules for the channels\(^9\) and be prepared to expand their number as channel capacity grows.\(^10\) Thus if taxes eat away at the limited capital of developing systems, they are also impairing the ability of the systems to provide a public broadcast forum.

In analyzing cable’s chances of success with the various first amendment arguments, it is important to note that few cases have dealt directly with the effect of taxation upon a free press. In the leading case of *Grosjean v. American Press Co.*,\(^101\) the Supreme Court voided a tax against a newspaper which the taxing statute itself described as “a license tax for the privilege of engaging in [the selling of advertising] in this State.”\(^102\) Similar privilege, occupational or license taxes have generally not fared well in the courts because of their burden on interstate commerce; the Court in *Grosjean* also made clear that such taxes are not favored when they are imposed in a direct manner on the exercise of free speech.\(^103\) It is important to realize, however, that the Court took notice of the historical misuse of the particular tax in *Grosjean* as a tool to suppress free speech, for this had a significant impact on the decision.\(^104\)

Nevertheless, if a cable system were to face a tax described by the taxing authority as a license or privilege tax which is tied to the number of customers in a system, *Grosjean* will stand as strong precedent for overturning such a levy. In addition, the *Grosjean* Court described the appropriate test in measuring a first amendment violation which could be of particular help to a cable system: the Court noted that it was not only complete cen-
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Sorship that was forbidden, but "any action of the government by means of which it might prevent . . . free and general discussion of public matters." This statement was limited to exclude a prohibition against "the ordinary forms of taxation for support of the government," so a cable system seeking to rely on Grosjean would need to establish that the tax in question was not ordinary. One possible approach to establish the character of the tax might be similar to that discussed as an equal protection argument, that a tax on a cable system as a disseminator of news information and the public view without a similar tax against over-the-air broadcasters and newspapers should not be classified as normal or ordinary. Additionally, since cable is the only medium that provides effective public access, selective taxation can only thwart such access and thereby violate the first amendment.

Under normal circumstances, local taxation, if it impinges upon free speech at all, does so only indirectly. When a court is faced with an indirect abridgment of free speech, it must balance such abridgment against the state's right to tax. Numerous courts have emphasized that the power to tax is the power to destroy; inherent in taxation is the risk that it may be used to oppress. Taxes valid when levied can be increased to a point that they exceed not only the state's constitutional authority, but become a means of control. Cable is not only a more enticing target for local taxation than over-the-air broadcasters but also, at this stage in its development, a much easier one to hit.

If the balance is a delicate one between the state's right to tax and abridgment of speech, equally delicate is the ability of the cable system to survive too heavy a tax burden. Cable is an innovative form of communication. It will be up to the cable system to convince the courts that the kinds of taxes imposed on cable have a direct and lasting impact on the public's ability and right to use this new medium.

III. Conclusion

That the tone of this article is not overly optimistic about the chances of

105. Id. at 249-50, quoting 2 COOLEY'S CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927).
106. Id. at 250.
107. See p. 762 supra.
108. See, e.g., American Communications Ass'n v. Douds, 339 U.S. 382 (1950), in which the Court described the balancing required:
When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demand the greater protection under the particular circumstances presented.

Id. at 399.
defining suitable litigation strategy for cable under the Constitution is not so much the reflection of an attitude as a refraction caused by the complexity and seriousness of the issues involved. Very few constitutional problems are susceptible of easy or quick opinion and there is nothing about cable's problems that makes it any different.

If it is possible for an industry to have an identity crisis, cable is such an industry. Taking that crisis into the courtroom will render its constitutional arguments confusing, inconsistent, and ultimately insufficient. Cable is a unique service with untapped and perhaps unimagined potential. To cloak itself with the protections afforded by the Constitution, it must educate and enlighten the courts about its technology, economics and function. While application of equal protection, the commerce clause and the first amendment are interrelated, they are not necessarily interdependent. They do, however, uniformly require that cable establish the nature of its business.

The FCC itself has already expressed its willingness to appear as amicus in any constitutional challenge brought by cable which it deems to be an “appropriate action.”110 Such help can go a long way towards establishing a permanent identity for cable and the place envisioned for it in a national communications system.

110. CATV Taxes 466. The Commission went beyond this position to suggest that if “those interested parties not be forthcoming, it may be incumbent upon this Commission to consider . . . direct recourse to the judicial process.” Id. (footnote omitted).