Cable Television: A New Challenge for the "Old" First Amendment

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CABLE TELEVISION: A NEW CHALLENGE FOR THE "OLD" FIRST AMENDMENT

Cable television has ushered in a new era in the technology of communications media. As with other media, questions have arisen regarding the appropriate first amendment treatment of cable television. Most recently, courts have reviewed the constitu-

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1 See G. Shapiro, P. Kurland, & J. Mercurio, "Cablespeech": The Case for First Amendment Protection 1-4 (1983); Wheeler, Cable Television: Where It's Been, Where It's Headed, 56 Fla. B.J. 228, 228-30 (1982). A cable television system is a nonbroadcast facility which transmits broadcast signals to subscribers along cable paths. See 47 C.F.R. § 76.5(a) (1984). These broadcast signals are transmitted to a "head-end" site, processed for transmission, and then carried by cable or optical fibers into homes wired for cable television reception. See Wheeler, supra, at 229.

Cable television has been described as a communications medium with "virtually unlimited possibilities and uses." Id. at 228. Improvements in cable technology have made possible greatly expanded capacity, from the first 12 channel systems in the 1960's to a current 54 channel capacity. See G. Shapiro, P. Kurland & J. Mercurio, supra, at 1. It is projected that dual cable systems of the future will enable delivery of 108 cable channels. Id. Fiber optic technology may provide new growth possibilities, including text services on both a one-way and a two-way basis, alarm and security services, merchandise ordering, and electronic fund transfers. Id. at 3.

2 See Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1, 22-25 (1976); see also Lively, Fear and the Media: A First Amendment Horror Show, 69 Minn. L. Rev. 1071, 1074-91 (1985) (fear of potential evil of new forms of media has given rise to regulation which circumscribes first amendment rights of such media).

The first amendment states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. amend. I. New methods of communication are often the battleground for renewed conflict over first amendment issues. See Bollinger, supra, at 24. For example, motion pictures were initially given no first amendment protection because they were viewed solely as business ventures, and not as part of the press. See, e.g., Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 242-47 (1915). Thus, in Mutual Film, the Supreme Court upheld an Ohio statute permitting censorship of motion pictures. See id. In 1951, however, the Court overruled Mutual Film, and held that motion pictures are protected by the first amendment. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1951). Nevertheless, the Joseph Burstyn Court limited its holding by stating that the Constitution does not require "absolute freedom to exhibit . . . motion picture[s] of every kind at all times and . . . places," nor does the Constitution subject motion pictures to the same rules governing other modes of expression. Id. at 502-03.

The various broadcast media have been scrutinized to determine the first amendment protection appropriate to each. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (radio); Columbia Broadcasting System, Inc. v. FCC, 453 U.S. 367 (1981)
tionality of cable regulations such as franchising ordinances,\(^3\) public access requirements,\(^4\) and must-carry regulations.\(^5\) The resulting court opinions have focused on the nature of the cable medium and its similarities to other media, and thus present a somewhat piecemeal approach to cable television regulation.\(^6\) A clear and

\(^3\) See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 387 (1969) (review of regulation of broadcast media). In National Broadcasting Co., the Court held that because radio is not inherently available to all speakers, it may be subject to government regulation. See National Broadcasting Co., 319 U.S. at 226. This rationale, now called the "scarcity doctrine," became the basis for later decisions concerning the regulation of the broadcast media. See, e.g., Red Lion Broadcasting, 395 U.S. at 388-89; see also Bollinger, supra, at 7 n.21 (criticizing "scarcity doctrine").

Cable television initially was given the same first amendment status as broadcast television. See Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968). Later, however, courts began to distinguish cable from broadcast television. See, e.g., Midwest Video Corp. v. FCC, 571 F.2d 1025, 1053-57 (8th Cir. 1978) (FCC authority to intrude on cable operator's first amendment rights is less than its authority over broadcasters), aff'd on other grounds, 440 U.S. 689 (1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-46 (D.C. Cir.) (first amendment theory applied to broadcasting is not directly applicable to cable television since physical scarcity element is absent), cert. denied, 434 U.S. 829 (1977).

\(^4\) See, e.g., Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1339 (D.C. Cir. 1985) (first amendment claim stated by cable operator who was refused access to Air Force base to provide cable services); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1411 (9th Cir. 1985) (granting only one cable television franchise when more could be physically accommodated violated first amendment), cert. granted, 106 S. Ct. 380 (1985); see infra notes 22-29 and accompanying text.

\(^5\) See, e.g., Berkshire Cablevision, Inc. v. Burke, 571 F. Supp. 382 (D.R.I. 1983) (public access regulations held constitutional), vacated as moot, 773 F.2d 382 (1st Cir. 1985); see infra notes 38-44 and accompanying text.


The disagreement as to whether cable television most resembles print or broadcast media is not confined to the courts. Compare Comment, Cable Television: The Constitutional Limitations of Local Government Control, 15 Sw. U.L. Rev. 181, 182 (1984) (no distinction between cable television and publishing for first amendment purposes) [hereinafter cited as Constitutional Limitations of Local Control] with Comment, Hit or Myth?: The Cable TV Marketplace, Diversity and Regulation, 35 Fred. Com. L.J. 41, 42 (1983) (cable should be regulated in ways that print is not). See generally Comment, Berkshire Cablevision v.
consistent first amendment analysis of cable television has not yet been developed, resulting in conflicts among the federal courts of appeals. The Cable Communications Policy Act ("the Act"), passed in 1984, raises additional questions about the first amendment status of cable television, and demonstrates the need for the Supreme Court to establish first amendment guidelines for the cable medium.

This Note will address the need for a comprehensive first amendment approach to cable television by discussing three interrelated areas. First, the Note will examine the first amendment treatment of franchising, must-carry, and public access regulations in three recent cases, and describe the common analytical approaches of the courts. Second, the meaning and purposes of the first amendment and its shifting twentieth century interpretations will briefly be examined. Third, the Note will critique recent first amendment developments, which, it is submitted, have compromised basic constitutional values and enlarged governmental regulation of the press. This Note will recommend that even though a more traditional, laissez-faire first amendment approach might invalidate many existing cable television regulations, such an ap-

Burke: Toward a Functional First Amendment Classification of Cable Operators, 70 Iowa L.J. 525, 543 (1985) (cable television performs functions similar to broadcast, print, and common carriers and should be regulated according to each function) [hereinafter cited as Functional First Amendment Classification].

* See infra notes 46-58 and accompanying text.


10 Cf. infra notes 28-29, 37, 44 and accompanying text.
Cable is preferable to expanding government control of speech into the cable medium.

THE REGULATORY HISTORY OF CABLE TELEVISION

Cable television was established in the 1940's to serve viewers in areas with poor broadcast reception. In the early years of cable television, the Federal Communications Commission (FCC) hesitated to regulate cable television, questioning whether it possessed jurisdiction over this medium. However, in light of the fact that cable television retransmits broadcast signals, the FCC eventually determined that pursuant to its regulatory authority over broadcast television, it had jurisdiction to impose minimal rules on cable operators. This jurisdiction was based on the need to ameliorate...

11 See M. HAMBURG, ALL ABOUT CABLE § 1.02 (Supp. 1985). The number of homes subscribing to cable television increases continually as more and more urban and suburban areas become wired for cable. See COMMITTEE ON ENERGY AND COMMERCE, 97TH Cong., 1ST Sess., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 290 (H.R. Print 97-V 1981) [hereinafter cited as H.R. Print 97-V]. It is projected that by 1990, nearly 50% of U.S. households will be wired for cable. See id.

12 See CATV and TV Repeater Servs., 26 F.C.C. 403, 404 (1959). The FCC initially stated that it had "no present basis for asserting jurisdiction . . . over CATV's" other than its minimal regulation of CATV's radiation of energy. Id. at 431. This denial of jurisdiction was a response to the request of broadcasters for regulation of CATV's because of their alleged "adverse impact upon broadcasting" and their tendency to "thwart" the FCC's responsibility to "foster nationwide radio and television service." Id. at 430. However, the FCC did recommend that two of the broadcasters' suggestions be enacted by Congress. Id. at 441. These proposals required that the CATV's obtain consent of the broadcasters to transmit their signals, and that the CATV operators carry the signal of local stations if requested to do so by the station. Id. The latter suggested regulation is the forerunner of the present must-carry rules. See infra note 31. For further discussion of early regulatory questions, see M. HAMBURG, supra note 11, at § 1.03-.04.

13 See First Report and Order, 38 F.C.C. 683, 713 (1965). The FCC determined that the Communications Act of 1934 vested it with rulemaking authority over all CATV systems. See id. at 685. This determination represented a shift from the position taken in the 1959 ruling. See supra note 12. The FCC found that changed circumstances in the interim period made it necessary to regulate CATV to protect the financial health of broadcast stations. First Report and Order, supra, at 713. This shift in the FCC's position was foreshadowed in 1962 when the agency refused a common carrier's request for a license to construct a system to transmit television signals to CATV's based on the adverse economic impact such a system would have on a local broadcast station. See Carter Transmission Corp., 32 F.C.C. 459, 465 (1962), aff'd sub nom. Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963); see also Second Report and Order, 2 F.C.C.2d 725, 733-34 (1966) (carriage and non-duplication rules extended to all CATV systems, expanding scope of FCC jurisdiction). For further discussion of the development of FCC regulation of cable television, see Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1439-42 (D.C. Cir. 1985), petition for cert. filed sub nom. National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 54 U.S.L.W. 3229 (U.S. Sept. 23, 1985) (No. 85-502); Smith, Primer on the Regulatory Devel-
any possible adverse impact of cable television on broadcast television.\textsuperscript{14} In 1968, the Supreme Court upheld the FCC's jurisdiction over cable retransmission of broadcast as "reasonably ancillary" to its regulation of broadcast.\textsuperscript{15} However, in 1979, the Court refused to extend FCC jurisdiction to allow the regulation of cable television as a common carrier.\textsuperscript{16}

As federal regulatory policies shifted, local governments established their own cable television regulations.\textsuperscript{17} In 1984, Congress finally addressed the issue with the passage of the Cable Communications Policy Act.\textsuperscript{18} This legislation has clarified the division of

\textsuperscript{14} First Report and Order, \textit{supra} note 13, at 713. When the FCC first asserted its jurisdiction over cable television, the rules promulgated related only to the operations of CATV that involved the reception and transmission of broadcast signals. \textit{See} Smith, \textit{supra} note 13, at 741.

\textsuperscript{15} \textit{See} United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). In \textit{Southwestern Cable}, the Court held that the FCC could regulate CATV systems because it had authority over all "interstate [and foreign] communication by wire or radio." \textit{Id. at} 178 (quoting 47 U.S.C. § 152(a)). The Court held, however, that the FCC's authority was restricted to that required for the effective regulation of television broadcasting. 392 U.S. at 178. \textit{See generally} Note, \textit{supra} note 13, at 241-48 (history of FCC regulation of cable television).

\textsuperscript{16} \textit{See} FCC v. Midwest Video Corp., 440 U.S. 659, 708-09 (1979). In \textit{Midwest Video}, the challenged rules had been promulgated by the FCC and required, \textit{inter alia}, that cable operators serving 3500 or more subscribers develop at least a 20 channel capacity and provide four access channels on those systems with sufficient activated capacity to do so. \textit{See} Report and Order in Docket No. 20508, 59 F.C.C.2d 294, 297 (1976). The four access channels were to be for "public, educational, local government and leased channel use." \textit{Id. at} 294 n.1. These rules were intended to promote diversity in programming and a sense of participation in the video medium. \textit{Id. at} 296.

The Court held that the rules were beyond the FCC's statutory authority because they were not "reasonably ancillary" to the effective regulation of broadcast television. 440 U.S. at 708-09. This holding was based only on statutory grounds; the Court did not rule on the constitutionality of the regulations except to note that the constitutional question was "not frivolous." \textit{Id. at} 709 n.19.

\textsuperscript{17} \textit{See}, e.g., \textit{Cal. Gov't Code} § 53006 (West Supp. 1984) (requiring operators to obtain local franchises before laying cables); \textit{Del. Code Ann.}, tit. 26, § 609(A) (1980) (cable company cannot cease service or transfer ownership unless permitted to do so by local government); \textit{N.Y. Exec. Law} § 819 (McKinney Supp. 1984-1985) (requiring cable operators to obtain franchise before using city's streets to lay cable); \textit{see also} Albert, \textit{The Federal and Local Regulation of Cable Television}, 48 U. Colo. L. Rev. 501, 508-13 (1977) (discussing role of state and local governments in regulation of cable television). Local jurisdiction over cable television is usually predicated upon the locality's power to regulate its streets, or to protect the health and safety of its citizens, or upon a specific state grant of authority to issue franchises. \textit{See} Albert, \textit{supra}, at 509.

federal, state, and local regulatory authority over cable television.\(^9\) Although the constitutionality of this legislation has yet to be tested,\(^2\) both FCC regulations and state and local ordinances have been challenged on constitutional grounds.\(^21\)

**Franchising Ordinances**

The constitutionality of a local franchising ordinance was tested in *Preferred Communications, Inc. v. City of Los Angeles.*\(^2\) In *Preferred Communications,* the United States Court of Appeals for the Ninth Circuit held that a city ordinance granting only one cable franchise per region when more could be physically accommodated on public utility poles violated the first amendment.\(^23\) Us-
ing the standard of review for incidental restrictions on noncommunicative aspects of speech set out by the Supreme Court in *United States v. O'Brien*, the Court of Appeals for the Ninth Circuit concluded that the franchise ordinance was not the least restrictive means by which the city could protect its public resources. In addition, reasoning that the utility structures in question were a "kind of public forum," the court determined that the franchising scheme went beyond the reasonable time, place, and manner regulation of speech permissible in a public forum. The court suggested that the Cable Communications Policy Act, which specifically provides that local authorities have the power to award "one or more franchises within its jurisdiction," was not intended

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24 391 U.S. 367 (1968). In *O'Brien*, the Court created a test for determining the reasonableness of regulations aimed at controlling the noncommunicative aspects of speech:

[a] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377; *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-50 (D.C. Cir.) (applying *O'Brien* test to pay-cable rules), *cert. denied*, 434 U.S. 829 (1977).

25 See 754 F.2d at 1405-06. The least restrictive means approach used by the *Preferred Communications* court has been described as requiring that the "government, when it has available a variety of equally effective means to a given end, . . . choose the measure which least interferes with individual liberties." *Note, Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 464 (1969); *see also* United States v. Robel, 389 U.S. 258, 268 (1967) (statute barring Communists from defense employment not least drastic means); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960) (statute requiring teachers to disclose membership in all organizations not least drastic means). See generally L. Tribe, *American Constitutional Law* 682-88 (1978) (discussion of least restrictive alternatives and content-neutral abridgements of speech).

26 754 F.2d at 1409. The Ninth Circuit's classification of utility poles as a type of public forum was based on the state's policy of dedicating "surplus space" on poles for cable television use. *Id.; see Cal. Pub. Util. Code § 767.5(b) (West Supp. 1984).* When a public forum is involved, the state is not only forbidden from regulating on the basis of content, it may not regulate speech-related conduct at all except in a limited manner when a compelling governmental interest exists. *See L. Tribe, supra* note 25, at 689.

27 See 754 F.2d at 1409.

28 47 U.S.C. § 541(a)(1) (1982 & Supp. II 1984). In § 541, Congress established the basis for state and local regulation of cable systems through franchising power. *See id.* The legislative history suggests that this was done to grant local authorities the "discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area." *H.R. Rep. No. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & Ad. News 4656, 4696.

The *Preferred Communications* court discussed provisions of the Act in several footnotes, but did not rule on the constitutionality of any of the cited provisions. *See 754 F.2d at 1400 n.3, 1401-02 n.4, 1411 n.11.* However, it did note that the mandatory and leased
to give local authorities broad discretionary power to determine the number of cable operators in a particular area.\textsuperscript{29}

\textit{Must-Carry Rules}

In \textit{Quincy Cable TV, Inc. v. FCC},\textsuperscript{30} the United States Court of Appeals for the District of Columbia Circuit considered the constitutionality of the FCC "must-carry" regulations,\textsuperscript{31} which require cable operators to transmit upon request the signals of all broadcast television stations within thirty-five miles of the community served and the signals of any other stations "significantly viewed in the community."\textsuperscript{32} In its first amendment analysis of these regulations, the court, applying the \textit{O'Brien} test, determined that the FCC had failed to demonstrate a substantial government interest in protecting local broadcasting,\textsuperscript{33} and that the rules were "grossly
overinclusive.”

Although the District of Columbia Circuit used the less stringent O'Brien standard of review, it strongly suggested that the must-carry regulations were actually a form of content regulation, interfering with the editorial discretion of the cable operator. As such, the court suggested, without deciding, that a stricter standard of review was in fact more appropriate. The court did not refer to the Cable Communications Policy Act; nevertheless, its decision calls into question the constitutionality of the intent of the Act to leave intact the FCC must-carry rules.

**Public Access Rules**

A third area of first amendment concern is the application of public access regulations to cable television. In *Berkshire Cablevision of Rhode Island, Inc. v. Burke,* the United States District Court for Rhode Island upheld local mandatory public access regulations, finding no first amendment violation. Declaring...
the O'Brien test to be applicable, the Berkshire court held that the regulations involved were no broader than necessary to further the important governmental objective of community participation in cable television production and programming.\(^4\) Underpinning this view was the court's conclusion that cable television is not entitled to the same treatment accorded to the print media because of its burden on the public domain and its natural monopoly characteristics.\(^4\) The court viewed the public access requirements in question as content-neutral even though their "incidental effect" was to intrude on the cable operators' editorial control over their channels.\(^4\) Berkshire notwithstanding, these access provisions still present first amendment questions.\(^4\)

**Common Areas of Analysis**

An examination of recent cable cases dealing with the first amendment reveals several common analytical threads. As a starting point, courts have held that some first amendment protection is available to operators of cable television.\(^4\) The discussion thus

\(^4\) See id. at 988.

\(^4\) See id. at 985-86.

\(^4\) Id. at 987. But see FCC v. Midwest Video Corp., 440 U.S. 689, 707-08 n.17 (1979) (public access regulations significantly compromise editorial discretion). When government regulations are content-neutral, courts will often apply a balancing approach, comparing the degree to which communication is actually inhibited with the public interests served by such restrictions. See L. Tribe, supra note 25, at 683. Two variables have been found important in this weighing process: the degree to which the regulation of communication falls unevenly on different groups, and the degree to which the regulation shuts down speech in a traditional public forum. Id. at 683-84.

\(^4\) See FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979). The Midwest Video Court, while not deciding the constitutionality of public access provisions, acknowledged that such questions were not "frivolous." Id.; see also Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1401 n.4 (9th Cir.) (mandatory and leased access requirements are constitutionally problematic), cert. granted, 106 S. Ct. 380 (1985); supra note 28 (discussing Preferred Communications).

Despite the questionable constitutionality of public access regulations, the Cable Communications Policy Act of 1984 specifically grants franchising authorities the power to require public access channels for "public, educational or governmental use." 47 U.S.C. § 531(a) (1982 & Supp. II 1984). Comparing public access channels to the "speaker's soap box" or the "printed leaflet," the legislative history declared that access channels "contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work." H.R. Rep. No. 934, 98th Cong., 2d Sess. reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4656, 4667. The Act continues the policy of allowing the local franchiser to require public access channels. Id.

\(^4\) See Quincy Cable TV, 768 F.2d at 1444; Tele-Communications, Inc. v. United States, 767 F.2d 1339, 1336 (D.C. Cir. 1985); Preferred Communications, 754 F.2d at 1403; Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 127-29 (7th Cir. 1982); Berk-
far has centered around three basic issues relating to the nature of the cable medium. First, courts and commentators have struggled to determine which of the already established media cable most resembles, analogizing cable television to both the print and broadcast media for purposes of first amendment analysis. This has become a threshold question, the answer to which often determines the outcome of the discussion. While analysis by analogy can be a helpful approach, it must not be done mechanically without regard for the first amendment theory underlying the different regulatory approaches.

A second point of analysis involves the alleged natural monopoly characteristics of cable television. Although a natural monop-

shire Cablevision, 571 F. Supp. at 980.

46 Compare Quincy Cable TV, 768 F.2d at 1450 (broadcast approach inapplicable to cable television, which shares more qualities of print media) and Preferred Communications, 754 F.2d at 1403 (declining to apply broadcast standards to cable television) and Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977) (in terms of economic scarcity, there is nothing to suggest constitutional distinction between cable television and newspapers) with Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-79 (10th Cir. 1981) (refusing to apply newspaper analysis to cable television because of cable's disruption of public domain and "medium scarcity" due to natural monopoly), cert. dismissed, 456 U.S. 1001 (1982) and Berkshire Cablevision, 571 F. Supp. at 985-86 (because cable television and newspapers cannot be equated, economic scarcity is constitutionally sufficient basis of regulation). See generally COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, 98th Cong., 1st Sess., PRINT AND ELECTRONIC MEDIA: THE CASE FOR FIRST AMENDMENT Parity (S. Print 98-50) 34-38 (1983) [hereinafter cited as S. Print 98-50]; Wheeler, supra note 1, at 230-31 (cable operators should be treated like newspapers for first amendment purposes); Constitutional Limitations of Local Control, supra note 6, at 182 (no significant distinctions between print media and cable television for first amendment purposes).

It has been suggested that cable operators perform a function more like common carriers. See Miller & Beals, Regulating Cable Television, 87 WASH. L. REV. 85, 91-93 (1981); see also Functional First Amendment Classification, supra note 6, at 543 (proposing functional analysis utilizing print, broadcast and common carrier models).

47 See Quincy Cable TV, 768 F.2d at 1453 ("if Miami Herald supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end"); see also Price & Nadel, supra note 20, at 50, col.3. (if first amendment standard in Miami Herald is applied to cable television, a number of provisions of Cable Policy Act would be of questionable constitutionality).

48 Cf. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (broadcast television must be assessed by standards suited to it); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (must be sensitive to "differing natures, values, abuses and dangers" of each new form of expression).

49 See R. Posner, ECONOMIC ANALYSIS OF LAW 251-52 (1977). A "natural monopoly" exists when fixed costs (those that do not vary with output) are very large in relation to demand. Id. at 251. As a consequence, one firm can supply the entire output required more
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oly has been described as a kind of economic scarcity,\(^5\), the Su-
preme Court has expressly rejected the notion that the print media
can be regulated because of economic scarcity.\(^6\) However, a scar-
city rationale has been applied to the broadcast media, and radio
and television are regulated specifically because of the "physical
scarcity" of the airwaves.\(^7\) The economic scarcity issue ultimately
efficiently that two firms "each of which incurs the same fixed costs but spreads them over
only one half the output." \(\text{Id. at 252.}\)

Posner contends that if there were no limitations on entry into the cable market, com-
panies would compete for franchises, with the company offering the best service package
and price signing up the most subscribers. \(\text{Id. at 283.}\) This competition would benefit con-
sumers since franchises would be granted on the basis of the best contract for the sub-
scriber. \(\text{Id. at 284.}\) However, he notes that franchising authorities are often more interested
in extracting concessions from the cable operator than determining who will provide the
best consumer services. \(\text{See id.}\)

It has been contended by at least one commentator that while cable television has some of
the characteristics of a natural monopoly, competition in a given area may yet be possible.
\(\text{See Meyerson, The First Amendment and the Cable Television Operator: An Unpro-
tective Shield Against Public Access Requirements, 4 COMM/ENT 1, 6-10 (1981).}\) Meyerson
argues that cable is more of a "natural oligopoly" than a natural monopoly. \(\text{See id. at 10.}\) This
conclusion is based in part on Phoenix's cable franchising system which authorized
three companies to compete for consumers. \(\text{Id. at 9-10.}\)

Other commentators dispute the notion of cable television as a natural monopoly. \(\text{See, e.g., G. Shapiro, P. Kur-
land & J. Mercurio, supra note 1, at 10-13 (so-called "natural mo-
nopoly" is caused by FCC restrictions of newly developing technology, limitation on number
of franchises by municipalities and imposition of obligations on franchise by municipality);}
Lee, \(\text{Cable Franchising and the First Amendment, 36 VAND. L. REV. 867, 872 (1983) (as-
sumption that cable television is natural monopoly is self-fulfilling prophecy because munic-
ipalities rarely award more than one franchise, thus creating monopoly); see also Harmon,}
\(\text{Cable Television: A Changing Medium Raises New Legal Issues, 13 GOLDEN GATE}
L. REV. 123, 133-34 (1983) (natural monopoly argument erroneously treats cable like public utility).}\)
\(^5\) See Preferred Communications, 754 F.2d at 1404; Community Communications Co.
Herald,}\) the Court struck down a Florida "right of reply" statute which provided that a
candidate for election or nomination whose character or official record was attacked had the
right to demand free space for a reply in the newspaper issuing the attack. \(\text{See id. at 244.}\)

The Court rejected arguments by proponents of access to the newspaper that control of
the print media had become concentrated in the hands of a few interests. \(\text{Id. at 248-54.}\) Access
proponents claimed that this concentration of control was exacerbated by economic
factors that made entry into the newspaper market prohibitively expensive, \(\text{id. at 251,}\) and
that the government had an obligation to ensure that a variety of views were made available
to the public, \(\text{id. at 248.}\)

\(^7\) See National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943) (radio may
be regulated without violating first amendment because it is not inherently available to all).
The scarcity rationale for broadcast regulation was reiterated in Red Lion Broadcasting Co.
v. FCC, 395 U.S. 367 (1969), in which the Court upheld the regulation of broadcast television
as a resource "whose scarcity impelled its regulation," \(\text{id. at 399.}\) The \(\text{Red Lion}\) Court
held that the fairness doctrine, \(\text{id. at 373-74,}\) which creates a right to reply similar to the statutory right involved in \(\text{Miami Herald, see id. at 373-74; see also Miami Herald, 418 U.S.}\)
leads back to the threshold question of whether cable television more resembles print or broadcast media, with the implication that analogizing cable television to the print media would preclude regulation of the speech of the cable operator even if the cable medium were found to be a natural monopoly.53 The interference with public rights caused by stringing cable on utility poles and burying cable underground has been used as another argument against analogizing cable to the print media.54

The third component surfacing in recent cases dealing with the first amendment rights of cable operators is the use of the O'Brien test to determine the constitutionality of challenged regulations.55 The appropriateness of using this test, which assumes that the particular regulation in question only incidentally restricts noncommunicative aspects of speech, has been questioned.56

Up to this point, the first amendment analysis of cable television has focused on analogizing cable to print or broadcast media.57 Although courts have routinely examined the factors discussed above, those factors have lead them to reach divergent conclusions

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53 See Preferred Communications, 754 F.2d at 1404-05.
54 See Berkshire Cablevision, 571 F. Supp. at 985. The court refused to equate cable television with newspapers, in part because of cable's use of public streets and utility poles. Id. For the same reason, the court viewed government franchising of cable as "virtually indispensable." Id.; see also Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981) (cable television different from newspapers because it has significant impact on public domain).
55 See Quincy Cable TV, 768 F.2d at 1451-54; Preferred Communications, 754 F.2d at 1405-06; Berkshire Cablevision, 571 F. Supp. at 987; see also supra notes 24-25, 33, 41 and accompanying text.
56 See Quincy Cable TV, 768 F.2d at 1451-54. The Quincy Cable TV court stated that "[a]lthough the goal of the [must-carry] rules . . . can be viewed as unrelated to the suppression or protection of . . . ideas, [the rules] nonetheless profoundly affect values that lie near the heart of the First Amendment." Id. at 1453. These rules limit the cable operator's editorial discretion, prevent him from reaching his intended audience, and favor broadcasters as speakers over cable operators. See id. at 1453-56. However, because the must-carry rules failed the less exacting O'Brien test, the court declined to apply a stricter content-based analysis. See id. at 1454.
57 See supra notes 46-48 and accompanying text.
as to the first amendment status of cable television.\textsuperscript{68} It is submitted that a cogent approach to the first amendment status of cable television is necessary, and can be developed only by analyzing fundamental first amendment concepts.

\textbf{FIRST AMENDMENT HISTORY AND PURPOSES}

In attempting to determine the meaning of the first amendment, courts and commentators often resort to divining the intentions of the Framers.\textsuperscript{69} This approach is complicated by the fact that freedom of speech and freedom of the press were not initially provided for in the Constitution.\textsuperscript{60} It has been suggested that the Framers did not have a clear notion of what they meant by free-

\textsuperscript{68} Compare Quincy Cable TV, 768 F.2d at 1453 (must-carry rules interfere with cable operators' editorial discretion) with Berkshire Cablevision, 571 F. Supp. at 987 (incidental effect of public access regulations is to limit cable operators' editorial control). The differing views of these two courts on the editorial discretion issue can be viewed as related to the print-broadcast analogy. Compare Berkshire Cablevision, 571 F. Supp. at 985 (rejecting the newspaper-cable comparison) with Quincy Cable TV, 768 F.2d at 1453 (comparing the two media more favorably).

\textsuperscript{69} See, e.g., Mills v. Alabama, 384 U.S. 214, 218 (1966) (Framers intended to keep society free by providing for freedom of press to criticize public officials); New York Times v. Sullivan, 376 U.S. 254, 273-76 (1966) (controversy surrounding Sedition Act of 1798 crystallized Framers' intent that free speech was freedom to criticize government and its officials). Commentators also refer to the Framers when attempting to support a particular reading of the first amendment. See, e.g., Emerson, \textit{Legal Foundations of the Right to Know}, 1976 \textit{WASH} U.L.Q. 1, 1 (quoting Madison on need for informed public, to support "right to know" under first amendment); Lange, \textit{The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment}, 52 N.C.L. REV. 1, 12-14 (1973) (little historical evidence to suggest that Framers sought "balanced" press such as that advocated by proponents of access to media).

The focus on the intent of the Framers has been attacked recently. See Taylor, \textit{Brennan Opposes Legal View Urged by Administration}, N.Y. Times, Oct. 13, 1985, at 1, col. 2. Justice William Brennan criticized attempts to divine the intentions of the Framers as "little more than arrogance cloaked as humility," contending that "[i]t is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions . . . . Those who would restrict claims of right to the values of 1789 . . . turn a blind eye to social progress." Id. at 36, col. 3.

\textsuperscript{60} See Z. CHAFEE, \textit{FREE SPEECH IN THE UNITED STATES} 4-6 (1941). The Bill of Rights, guaranteeing, \textit{inter alia}, freedom of speech and of the press, was proposed for adoption by the states at the first session of Congress and eventually became part of the Constitution on December 15, 1791. See id. at 5. The Bill of Rights adopted was the result of a compromise between Federalists and Anti-Federalists when several states demanded these amendments as a condition for their entry into the union. See id. at 5-6. See generally R. A. RUTLAND, \textit{THE BIRTH OF THE BILL OF RIGHTS} 159-89 (1983) (discussing compromise battle). Discerning the Framers' intent is further complicated because there was little debate on the passage of the Bill of Rights. J. NOWAK, R. ROTUNDA & J. YOUNG, \textit{CONSTITUTIONAL LAW} 861 (2d ed. 1983).
Freedom of speech and of the press, although they regarded that freedom as an absolute necessity. Thus, looking to the Framers for the meaning of the first amendment today is practically and philosophically problematic, especially because most first amendment jurisprudence is of twentieth century origin.

Underlying twentieth century conceptions of the first amendment are several differing views of the purposes of freedom of speech. The theory of John Stuart Mill, which envisions the purpose of freedom of speech to be the discovery of truth, underlies the doctrine of the marketplace of ideas. This marketplace concept, permeates twentieth century first amendment theory, and

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61 See Chafee, Book Review, 62 Harv. L. Rev. 891, 898 (1949) (reviewing A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948)). It appears that even in colonial times, the meaning of free speech guarantees was not clearly understood. See R. A. Rutland, supra note 60, at 91 (quoting Benjamin Franklin: "few of us, I believe, have distinct Ideas of [the] Nature and Extent [of freedom of the press] . . . . If it means the Liberty of . . . defaming one another, I, for my part, own myself willing to part with my Share of it . . . .").

62 See Anti-Federalists versus Federalists, Selected Documents 142 (J. Lewis ed. 1967); P. Murphy, The Meaning of Freedom of Speech 13 (1972); Z. Chafee, supra note 60, at 16.

63 Cf. Z. Chafee, supra note 60, at 14 (conditions in 1791 "do not arbitrarily fix the division between lawful and unlawful speech for all time"); Taylor, supra note 59, at 36, col. 3 (impossible to gauge accurately the intentions of Framers).

64 See T. Emerson, Toward a General Theory of the First Amendment vii-viii (1966) [hereinafter cited as General Theory]; see also Z. Chafee, supra note 60, at 15 (prior to Schenck v. United States, 249 U.S. 47 (1919), Court opinions contained little discussion of freedom of speech).

65 See J. S. Mill, On Liberty 15-16 (E. Rapaport ed. 1978). Mill's argument for freedom of expression ran along three lines: (1) an opinion which is silenced may in fact be true; (2) even if the silenced opinion is erroneous, it may contain a portion of the truth; (3) even opinions containing the whole truth suffer if not contested, with the danger that doctrine becomes diluted or misunderstood. See id. at 50.

66 See Mininberg, Circumstances Within Our Control: Promoting Freedom of Expression Through Cable Television, 11 Hastings Const. L.Q. 551, 562 (1984); see also L. Tribe, supra note 25, at 576-77 (most familiar theory of free speech is image of truth and falsehood grappling in free marketplace); Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 964 (1978) ("classic marketplace of ideas model argues that truth . . . can be discovered through robust debate, free from governmental interference"). The classic articulation of the marketplace doctrine is found in Abrams v. United States, 250 U.S. 616 (1919), in which Justice Holmes, dissenting, declared that "the theory of our Constitution" is that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Id. at 630 (Holmes, J., dissenting).

has been used both to support and to strike down government regulation of the press.88

Alexander Meiklejohn takes a different approach to first amendment theory, categorizing the search for truth as only a secondary and individualistic concern.89 Meiklejohn contends that the primary purpose of the first amendment is to educate citizens so that they may “understand the issues which bear upon our common life.”90 Viewing the purpose of free speech to be the maintenance of democracy, Meiklejohn contends that freedom of speech exists not to guarantee “unregulated talkativeness,” but to ensure that “everything worth saying shall be said.”91 Significantly, Meiklejohn contends that Congress is not constitutionally prohibited from acting upon the freedom of speech, but rather may take affirmative steps to promote free speech.92

An approach that concentrates on free speech as an end rather than a means is that developed by Thomas Emerson.93 For Emerson, the right to freedom of expression is a good in itself94 because such freedom is an essential element of self-fulfillment.95 While

be “uninhibited, robust, and wide open”); Associated Press v. United States, 326 U.S. 1, 20 (1945) (first amendment rests on assumption that “widest possible dissemination” of diverse information is essential).


89 See A. MEIKLEJOHN, POLITICAL FREEDOM 74 (1960).

70 Id. at 75.

71 See id. at 26. For Meiklejohn, the first amendment does not guarantee the freedom of all kinds of speech, only political speech—i.e. that which “bears, directly or indirectly, upon issues with which voters have to deal.” Id. at 79. For a critique of this aspect of Meiklejohn’s theory, see Baldasty & Simpson, The Deceptive “Right to Know”: How Pessimism Rewrote the First Amendment, 56 WASH. L. REV. 365, 370-74 (1981).

72 See A. MEIKLEJOHN, supra note 69, at 19-20. Meiklejohn has proposed that the first amendment be rewritten to express this affirmative view, suggesting that the first amendment read: “‘Congress, acting in cooperation with the several states and with nongovernmental organizations serving the same general purpose, shall have power to provide for the intellectual and cultural education of all citizens . . . .’” Note, supra note 13, at 249 n.78 (quoting Ferry, Masscom as Educator, 35 AM. SCHOLAR 293, 301 (1966)).

73 See T. EMERSON, GENERAL THEORY, supra note 64, at 4-7; see also F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 47-50 (1982) (speech is autonomous value, not merely instrumental to social objectives).


75 Id. at 6; see also Baker, supra note 66, at 990-92 (people must be respected as ends and not just means).
recognizing the societal values derived from the freedom of expression, Emerson views these values as secondary, contending that because the state exists to serve the individual, any limitation of expression is an affront to the person's dignity. While the state may not control expression as a means to accomplish other societal goals, Emerson argues, it may seek to encourage freedom of expression because society tends to work against self-expression.

The Role of First Amendment Theory in the Regulation of the Media

It is submitted that because the first amendment theory of the last seventy years has developed alongside the technological revolution in the communications media, theory and technology have impacted on each other in such a way as to shift our basic understanding of the first amendment.

History of Broadcast Regulation

The development and growth of radio in the 1920's led to the reexamination of the proper application of the first amendment to the press. Traditionally, the press, in the form of print media, was assumed to be protected from government regulation and intervention. However, with the enactment of the Communications Act of 1934, which set up a temporary Federal Radio Commission to handle applications for station licenses, failed to achieve its quasi-regulatory objectives. Recognizing the disarray of radio regulation, President Roosevelt ordered a study of this problem in 1933, and the recommendations that resulted provided the impetus for the Communications Act of 1934.

See T. Emerson, General Theory, supra note 64, at 3. Free speech serves valuable social goals such as the "attainment of truth," id. at 7-8, the enhancement of participation in democracy, id. at 8-11, and stabilization of the community, id. at 11-14.

See id. at 5.

See T. Emerson, Freedom of Expression, supra note 74, at 6.

See T. Emerson, General Theory, supra note 64, at 115.

See F. Rowan, Broadcast Fairness 27 (1984). Three radio stations provided regular programming in 1920; this number grew to nearly 600 in 1925. Id. Until 1927, however, the only relevant congressional action taken was the Radio Act of 1912, the primary purpose of which was the regulation of ship-to-shore and other maritime communications. See E. Krasnow & L. Longley, The Politics of Broadcast Regulation 8-9 (1978). The Radio Act of 1927, which set up a temporary Federal Radio Commission to handle applications for station licenses, failed to achieve its quasi-regulatory objectives. Id. at 11-12.

See, e.g., Herbert v. Lando, 441 U.S. 153, 168 n.16 (1979) (prior to publication no government agency at any level can affect newspaper's decision to publish); Miami Herald...
Act of 1934, Congress created the FCC to regulate broadcast media, perhaps in part because broadcasting was not really viewed as part of the "press." The FCC was empowered to grant a license to broadcast if it determined "that public interest, convenience, and necessity would be served." This regulatory power was predicated upon two qualities unique to the broadcast medium: the need to allocate airwaves to prevent signal interference, and the scarcity of airwaves upon which to broadcast.

In 1943, the Supreme Court agreed that the physical scarcity of airwaves justified the licensing of broadcasters. But government control did not end with licensing, for once the government had designated who could speak over the airwaves, it also assumed some control over what could be said. Those granted licenses become public fiduciaries with an obligation to broadcast views representative of the community. Thus, although the FCC is specific-
cally denied the right of censorship,\textsuperscript{90} it has power to regulate the discussion of public issues through use of the equal time and fairness doctrines. These doctrines purport to preserve an open forum by requiring access to the airwaves for particular speakers in certain situations.\textsuperscript{91}

change for their licensing privilege, see Functional First Amendment Classification of Cable Operators, supra note 6, at 528, and they must operate within the conditions set forth in their licenses, see 47 U.S.C. § 309(h) (1982). The FCC has the power to ensure that the licensee fulfills the fiduciary duty to present views representative of the community. See E. Krasnow & L. Longley, supra note 80, at 21-22; see also 47 U.S.C. § 315 (1982) (fairness doctrine provisions).

\textsuperscript{90} See 47 U.S.C. § 326 (1982). Section 326 has been construed to deprive the FCC of power to subject material to prior restraint, but generally has been held to allow the FCC to “take note of past program content when considering a licensee’s renewal application . . . .” FCC v. Pacifica Foundation, 438 U.S. 726, 736 (1978); see also Anti-Defamation League of B’nai B’rith v. FCC, 403 F.2d 169, 174 (D.C. Cir. 1968) (refusing to renew license because of repeated libels is not prohibited censorship), cert. denied, 394 U.S. 930 (1969). See generally S. Print 98-50, supra note 46, at 35-38 (discussing FCC content-related standards for granting and renewing licenses).

\textsuperscript{91} See 47 U.S.C. § 315 (1982). The equal time requirement mandates that any broadcast licensee who permits a candidate for public office to appear on his station must “afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.” Id. at § 315(a). This provision also applies to a CATV system. See id. at § 315(c)(1). “Equal time” is required for all candidates for office, and during the time immediately prior to elections, the broadcaster must sell candidates time at the station’s lowest unit charge. See E. Krasnow & L. Longley, supra note 80, at 90-91.


Many commentators have suggested that the equal time requirement and fairness doctrine are at best chilling inhibitors of speech, and at worst, unconstitutional. See, e.g., H. Ashmore, \textit{Fear in the Air} 22 (1973) (fairness doctrine allows government to reduce or eliminate criticism of government); R. Liston, \textit{The Right to Know: Censorship in America} 134-36 (1973) (fairness regulation insults journalists by imposing principle that ranks high in journalists’ professional code, fairness in presentation of views); Lively, supra note 2, at 1083 (fairness doctrine hinders diversity by discouraging broadcasters from presenting controversial programming).

The Supreme Court has recently hinted that it would reconsider the constitutionality of the fairness doctrine if the FCC could prove that it inhibits rather than enhances free speech. See Functional First Amendment Classification, supra note 6, at 529 n.28 (citing FCC v. League of Women Voters, 104 S. Ct. 3106, 3117 n.12 (1984)); see also Lively, supra note 2, at 1083 & n.70 (FCC proposed repeal of fairness doctrine in 1983). Nevertheless, the FCC announced in August, 1985, that although it believed that the fairness doctrine no longer served the public interest, it would continue to enforce the rule. See Stuart, Broadcast Groups Plan Fairness Rule Challenge, N.Y. Times, Oct. 22, 1985, at C18, col. 1. A group of broadcast organizations has asked the District of Columbia Circuit to find the fairness doctrine unconstitutional because of its “chilling” effect on speech and the diversity of
The constitutionality of the fairness doctrine was upheld by the Supreme Court in *Red Lion Broadcasting Co. v. FCC.* The *Red Lion* opinion, however, went far beyond justifying FCC regulation solely in terms of the scarcity rationale, stating that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” Justice White, declaring that the purpose of the first amendment is “to preserve an uninhibited marketplace of ideas,” introduced the notion that those who monopolize the communications market may be forced to share air time with others. Paradoxically, the first amendment, which forbids government abridgement of freedom of speech or of the press, is thus construed to mandate government regulation of broadcast speech.

**Shifting First Amendment Views**

Increased government control over the broadcast media has developed alongside a shifting view of the first amendment. One such shift in first amendment jurisprudence is the view that the “marketplace of ideas” has failed. In this view, the laissez-faire

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voices. *Id.*

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*See Baker, supra note 66, at 981-85. Belief in the marketplace of ideas, wherein truth
approach to speech has permitted the monopolization of the channels of communication by a few, with the result that the flow of information to the public has become impeded.\textsuperscript{99} As a corollary, advocates of this view believe that the electronic media exert a pervasive and perhaps even dangerous influence on the public.\textsuperscript{100} Therefore, proponents of the failed marketplace theory advocate governmental intervention to open communication channels to the public.\textsuperscript{101}

may be discovered by an exchange of divergent views, has declined in part because modern society tends to reject the notion that absolute truth exists. \textit{Id.} at 974. Another view discounts the doctrine as based on a faulty premise of rationality, and contends that the free interchange of ideas is impossible because people are not rational, but are manipulated by government and the media. \textit{See} T. \textit{Carter}, M. \textit{Franklin} & J. \textit{Wright}, \textit{The First Amendment and the Fourth Estate} 24 (1985) (citing Marxist philosopher Herbert Marcuse).

Claiming that the marketplace has failed and is controlled by private monopolies, another commentator noted that a free marketplace does not exist when free expression "can be exercised only at the sufferance of the managers of mass communications." Barron, \textit{Access to the Press — A New First Amendment Right}, 80 \textit{Harv. L. Rev.} 1641, 1648 (1967). The Court in \textit{Red Lion} also assumed that an unregulated free marketplace of ideas will not work, and that it is the government's role to create such a marketplace. \textit{See} 395 U.S. at 390.

\textit{See} J. \textit{Barron, Freedom of the Press for Whom? The Right of Access to Mass Media} xiv, 126 (1975). Because of certain economic factors causing the monopolization of the media, it is argued, broadcast regulations would be needed even if there were no physical scarcity. \textit{See id.} at 146-47; \textit{cf.} Barron, \textit{supra} note 98, at 1646-47 (mass media should be regulated because of its tendency to avoid controversy).

\textit{See} Radio Corp. of America \textit{v. United States}, 341 U.S. 412, 426 (1951) (Frankfurter, J., dubitante) ("broadcasting is capable of increasing perhaps the most serious of all dangers which threaten democracy and free institutions today—the danger of passivity—of acceptance by masses of orders given to them and of things said to them"); \textit{see also} Lively, \textit{supra} note 2, at 1072-73 (fear of "potential for evil" of news media has been rationale for limiting first amendment rights). \textit{See generally Lange, supra} note 59, at 16-21.

Because the media impact has been deemed negative, it has been assumed that the government should step in—a conclusion at odds with the first amendment. \textit{See} Note, \textit{Cable Television and the First Amendment}, 71 \textit{Colum. L. Rev.} 1008, 1020 (1971). Professor Jaffe contends that the "hysterial overestimation of media power and underestimation of the good sense of the American public" should not be used as the basis for the development of constitutional doctrine. \textit{Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access}, 85 \textit{Harv. L. Rev.} 768, 787 (1972).

\textit{See} 1 Z. \textit{Chafee, Government and Mass Communications} 26-27 (1947). Expressing concern that the laissez-faire system of speech was not working, Chafee warned that if the press did not manage the discussion of public affairs, the government would. \textit{See id.} at 27.

It has been argued that government management of access is necessary to "promote the societal interests underlying the first amendment," which may outweigh the broadcaster's right to freedom of expression. \textit{See} Barron, \textit{supra} note 98, at 1655. Proponents of a right of access to the electronic media argue that governmental action prevents one from starting his own broadcasting facility, while economic constraints notwithstanding, anyone can publish a newspaper. \textit{See F. Schauer, supra} note 73, at 126-27. For a description of the different forms of access suggested by proponents, see Baker, \textit{supra} note 66, at 981-85.

Opponents to a right of access argue that "liberty and the conditions for its exercise are
A second shift in first amendment theory has been an increased emphasis on the rights of listeners and viewers.\textsuperscript{102} The right of the public to receive information necessary to make informed choices is emphasized by Meiklejohn, who suggests that "the point of ultimate interest is not the words of the speakers, but the minds of the hearers."\textsuperscript{103} In Meiklejohn's view, therefore, the government may organize the "town meeting" so that opposing points of view are heard.\textsuperscript{104} This concept supports continued regulation of broadcasting, but has been unable to force compromises in the traditional laissez-faire treatment of the print media.\textsuperscript{105}

It is suggested that both of these shifts in first amendment philosophy are problematic. Those operating from the failed marketplace perspective tend to exhibit little confidence in the ability of the public to reflect critically on information presented by the media,\textsuperscript{106} and assume that all views have a right to be expressed in the mass media.\textsuperscript{107} It may well be that the pure marketplace of

\textsuperscript{102} See Red Lion, 395 U.S. at 390.

\textsuperscript{103} A. MEIKLEJOHN, supra note 69, at 26. The essence of Meiklejohn's theory was endorsed by the Supreme Court in Red Lion, see 395 U.S. at 390; see also supra notes 92-96 and accompanying text, and is still judicially-viable first amendment theory, cf. Columbia Broadcasting Sys., Inc. v. FCC, 453 U.S. 367, 396 (1981) (quoting Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)) (first amendment requires that candidates can make their views known so "electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues"). But see G. SHAPIRO, P. KURLAND & J. MERCURIO, supra note 1, at 90-93 (right to receive information is not absolute).

\textsuperscript{104} See A. MEIKLEJOHN, supra note 69, at 24-26. Meiklejohn's "town meeting" approach has been criticized by Emerson, who noted that by placing the government in the role of the moderator of the meeting, Meiklejohn "injects the government into decisions on the content, political relevance, and worth of the speech, an area that is no business of government in a free system." Emerson, supra note 59, at 5. By focusing on the public's right to know, and making the government the guardian of that right, the danger exists that the government will also decide "what the public does not have a right to know." Goodale, Legal Pitfalls in the Right to Know, 1976 WASH. U.L.Q. 29, 34 (emphasis in original).


\textsuperscript{106} See Baldasty & Simpson, supra note 71, at 385; supra note 100.

\textsuperscript{107} See Midwest Video Corp. v. FCC, 571 F.2d 1025, 1054 (8th Cir. 1978) (rights of cable operators arise from first amendment, but public's "right" to get on 'television"

[Editor's Note: The text continues with legal citations and analysis, but the full document exceeds the context view limitations.]

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ideas exists today more in theory than reality, but this does not mean that there is no diversity of views expressed across the spectrum of the different media. Although the first amendment protects free expression so that such a marketplace may emerge, it clearly does not mandate governmental intervention to provide that it will.

The first amendment approach emphasizing the public's right to know, which is related to the failed marketplace notion, also assigns to government a role in enlarging speech rights. This approach requires the government to set the tone of a "balanced" debate. The government thereby becomes the guardian of a right to know derived from the first amendment—yet the first amendment was intended to protect the people from the government. It is submitted that making the government the guardian of free speech is like leaving the fox to guard the henhouse.

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108 See supra note 98; see also L. TRUE, supra note 25, at 576-77 (when wealthy people have more access to communications, it is questionable whether "marketplace" is appropriate metaphor).


110 See Lange, supra note 59, at 11; see also F. SCHAUER, supra note 73, at 126 ("bizarre" to suppose right to free speech guarantees "a right to virtually everything that might advance the condition of some people").

111 See A. MEIKLEJOHN, supra note 69, at 19. In Meiklejohn's view, Congress is not barred from all action upon the freedom of speech, it may legislate "to enlarge and enrich it." Id. Advocates of this view contend that Congress should cultivate the general intelligence upon which the "success of self-government so obviously depends" by promoting the freedom of speech. Id. at 20; see also T. EMERSON, FREEDOM OF EXPRESSION, supra note 74, at 627-29 (government should take affirmative approach to enhance citizen's right to hear and know).

112 See Lange, supra note 59, at 77. There is little evidence that the Framers, who were accustomed to a very partisan press, intended the first amendment to achieve a balanced debate. See id. at 12-13. In Madison's view, abuse of speech rights was to be tolerated as a part of the system. See id. at 77. In contrast, access proponents claim that the media owe "positive obligations" to viewers to provide opportunity to express diverse opinions. See J. BARRON, supra note 99, at 148. But cf. Hagelin, supra note 81, at 523 (danger of government promoting variety of views is that power to decide what public has right to know is also power to determine what public should not know).

113 See "Media and First Amendment in a Free Society," 60 Geo. L.J. 867, 992 (1972). The assumption behind regulation of the media is that the government will act in the best interests of the public—yet this idea was repudiated by the Founders. See id.; see also Thomas v. Collins, 323 U.S. 516, 645 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, [and] speech . . . ").
The right to know is actually a derivative of the right to speak.\textsuperscript{114} It has been questioned whether a right to know even exists when it interferes with the rights of the speaker.\textsuperscript{116} The overemphasis on the right to know, it is submitted, has led to the dilution of the right to speak and thus has modified first amendment analysis in an insupportable way.

Both the right to know concept and the failed marketplace theory view free speech only as a means to an end.\textsuperscript{116} However, if society exists to enhance the good of individuals, the important right of free speech cannot be relegated to the role of a mere instrument of democracy.\textsuperscript{117}

This shift in first amendment values, coupled with technological advancements in communications, has led to an abandonment of the traditional laissez-faire approach in the area of broadcast

\textsuperscript{114} See Frissell v. Rizzo, 597 F.2d 840, 848 (3d Cir.), cert. denied, 444 U.S. 841 (1979); Baldasty & Simpson, supra note 71, at 784. In Frissell, the Third Circuit, noting that the right to speak and the right to hear are “two sides of the same coin,” nevertheless concluded that “[t]he two rights are not, however, completely coequal: the right to hear flows from and depends upon the right to speak. Generally, there can be no right to hear what a speaker does not choose to say.” Frissell, 597 F.2d at 848 (quoting Kleindienst v. Mandel, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting)); see also Board of Educ., Island Trees v. Pico, 457 U.S. 853, 867 (1982) (“right to receive ideas follows ineluctably from . . . sender’s First Amendment right to send them”) (emphasis in original).

Making the right to know the “sole touchstone” of first amendment interpretation is an unacceptable approach because it disregards the role of the first amendment in “protecting the right of the speaker to personal self-fulfillment.” Emerson, supra note 59, at 4. Although the right to speak is “substantially absolute,” the right to know is only qualified; therefore, the danger in overemphasizing the right to know is that courts may begin to apply qualifications appropriate for the right to know to the right to speak and thus dilute first amendment guarantees. Goodale, supra note 104, at 31; see also G. Shapiro, P. Kurland & J. Mercurio, supra note 1, at 90-93 (discussing right to “receive” information).

\textsuperscript{116} See B. Owen, supra note 84, at 25; see also Emerson, supra note 59, at 6 (right to know is normally secondary to right to speak).

\textsuperscript{117} See T. Emerson, General Theory, supra note 64, at 4-7. The state does not exist to be served as an end in itself, but rather exists to serve the individual. Id. at 5. Free speech is not merely to be tolerated to achieve social goals; in fact, social goals cannot be reached if individual needs are not first satisfied. See Mininberg, supra note 66, at 569-70; supra notes 73-79 and accompanying text.
speech.\textsuperscript{118} Intended to promote diversity of expression, compromises between freedom and regulation such as those embodied in \textit{Red Lion} instead have engendered much criticism of the broadcast media as a "wasteland" of bland sameness.\textsuperscript{119} Calls for the deregulation of broadcast media are heard from a number of critics today.\textsuperscript{120} Rather than mechanically applying the broadcast regulatory approach to the emerging cable medium, the time has come to develop a first amendment view which reestablishes the right of the speaker as paramount, and acknowledges the listener's right as derivative.\textsuperscript{121}

It is submitted that the traditional laissez-faire approach best establishes the preeminence of the speaker's rights, and is consistent with what is known about the Framers' notion of free speech. The Framers were not interested in a fair press that reported events in a balanced manner,\textsuperscript{122} and it is clear that any prior restraint on the press violated freedom of speech as they understood it.\textsuperscript{123} Thus, in the traditional first amendment view, licensing re-

\textsuperscript{118}See Hagelin, \textit{supra} note 81, at 439; see also \textit{Red Lion}, 395 U.S. at 389-90 (government may restrain broadcast licensees to enhance rights of viewers and listeners); National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943) (speech rights of radio broadcasters may be abridged because medium not inherently available to all). See \textit{generally supra} notes 80-94 and accompanying text (discussing history and rationale for broadcast regulation).

\textsuperscript{119}See, e.g., Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 155 (1973) (Douglas, J., concurring) ("nauseating mediocrity" used to describe radio and TV); N. Minow, \textit{Equal Time} 52 (1964) (television described as "wasteland").

\textsuperscript{120}See, e.g., Fowler, \textit{The Public's Interest}, 56 Fla. B.J. 213, 215-16 (1982) (calling for elimination of trusteeship approach to regulation of electronic media); B. Owen, \textit{supra} note 84, at 102-06 (broadcast regulation fails to recognize role of economic incentives); W. Van Alstyne, \textit{supra} note 88, at 87 (recommending that "bid-auction" method of allocating licenses replace present government regulation); Lively, \textit{supra} note 2, at 1093-85 (discussing flawed rationale supporting broadcast regulation).

\textsuperscript{121}See B. Owen, \textit{supra} note 84, at 136-37. Cable television provides an opportunity to reform broadcast regulation by increasing competition and enhancing freedom of expression through elimination of the government's control of content. \textit{Id}.

\textsuperscript{122}Cf. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 153 (1972) (Douglas, J., concurring). Douglas argues for a free press even when "base and obnoxious," agreeing with Jefferson that even a "vulgar," "mendacious" press is the basis of liberty. \textit{Id.} (Douglas, J., concurring) The risk that debate will not always be comprehensive, nor all viewpoints expressed, is the risk that a free society must take. See \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 214, 260 (1974) (White, J., concurring); see also Lively, \textit{supra} note 2, at 1096-97 (Framers accepted that speech might at times be offensive or discomforting).

\textsuperscript{123}See L. Levy, \textit{Emergence of a Free Press} 12 (1985). The common law English requirement of licensing prior to publication was lifted in 1694. \textit{Id}. According to Blackstone, freedom of the press at common law meant no prior restraints on publications. See W. Blackstone, \textit{Commentaries on the Law} 814 (B. Gavit ed. 1941). It is highly doubtful that
strictions on the press such as those imposed on broadcasters are impermissible. \textsuperscript{124} The rights of the people are protected by the diversity of interests existing in the community, not by a government fostered diversity of speech. \textsuperscript{125}

A FIRST AMENDMENT ANALYSIS OF CABLE TELEVISION

It is submitted that the proper starting point in the first amendment analysis of cable television is the traditional laissez-faire approach typical of the print media. \textsuperscript{126} It does not apply because of any supposed resemblance of print to cable, but because the laissez-faire analysis represents what is closest to the original view of freedom of speech. \textsuperscript{127}

Each medium of expression must be assessed according to its own unique characteristics. \textsuperscript{128} Nevertheless, the first amendment remains the standard of permissible regulation, \textsuperscript{129} and according to a traditional reading of the first amendment, the government’s primary obligation is to protect the right of individuals to speak

\begin{footnotesize}
\textsuperscript{124} Cf. Preferred Communications, 754 F.2d at 1409 (licensing of cable operators based on who government conceives to be “best” applicant is akin to licensing “best” newspaper to serve community; both are constitutionally impermissible); Lively, supra note 2, at 1061 (regulation applied to electronic media would be unconstitutional if applied to print).

\textsuperscript{125} See The Federalist No. 51, at 324-25 (J. Madison) (C. Rossiter ed. 1961). In Madison’s view, individual rights would not be threatened by “interested combinations of the majority” because the federal republic was “broken up into so many parts, interests and classes of citizens.” Id. at 324. Thus, the multiplicity of factions would prevent a majority from uniting on anything but principles “of justice and the general good.” Id. at 325.

\textsuperscript{126} Cf. Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 162 (1973) (Douglas, J., concurring) (“it is anathema to the First Amendment to allow Government any role of censorship over newspapers . . . TV, radio, or any other aspect of the press”).

\textsuperscript{127} See Hagelin, supra note 81, at 439-40 n.51.


\textsuperscript{129} Cf. Times Film Corp. v. Chicago, 365 U.S. 43, 77-78 (1960) (Warren, C.J., dissenting) (although each medium presents its own unique problems, content regulations are still prohibited by first amendment).

It has been suggested that the emphasis on the “peculiar characteristics” of the broadcast media has brought about content regulation of these media with no objective standards “to distinguish between permissible and impermissible regulation.” Goldberg & Couzens, “Peculiar Characteristics”: An Analysis of the First Amendment Implications of Broadcast Regulation, 31 Fed. Com. L.J. 1, 41 (1978). Broadcast regulation seems to be based more on a “rationalization of a desired outcome than a convincing principle of first amendment adjudication.” Id.
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freely. The government has no obligation to protect either the content or the balance and diversity of the discussion.

Under such an approach, any attempt to regulate cable television must undergo close scrutiny to determine its constitutionality because of the strong presumption against any regulation of the press. If the regulation in question has an impact on free speech, it must be analyzed to determine how much of an intrusion is involved, and that intrusion must be balanced against any existing state interest. The analysis ranges from strict scrutiny when content regulation is involved to a balancing approach when regulation of non-communicative aspects of speech are involved. Each

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131 See supra note 126. The first amendment was not intended to correct “abuses” of the press. See Bazelon, supra note 87, at 234. Therefore, government attempts to balance discussion in the media are inappropriate because “[t]ruth and fairness have a too uncertain quality to permit the government to define them.” Id. at 236; see also Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971) (quoting Madison) (no remedies for correcting abuses of press exist “which might correct without enslaving the press”). But cf. A. Meiklejohn, supra note 69, at 26-27 (what is important is that “everything worth saying shall be said,” and to that end government may regulate discussion).


Freedom of speech and of the press are fundamental liberties; any legislation limiting these freedoms is to be subjected “to a more exacting judicial scrutiny.” United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

133 See G. SHAPIRO, P. KURLAND & J. MERCURIO, supra note 1, at 24. The balancing approach, it has been argued, requires “that the thumb of the Court be on the speech side of the scales.” Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 SUP. CT. RSV. 1, 28; see also Cox v. Louisiana, 379 U.S. 536, 578 (1965) (court should “weigh the circumstances in order to protect, not to destroy, freedom of speech”).


Content-neutral regulations generally receive less scrutiny than those that are content-based. See Village of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 646, 637 (1980). Much attention has focused on the distinction between content-based and content-neutral regulation of speech, but this distinction has been called “theoretically questionable and difficult to apply.” Redish, The Content Distinction in First Amendment Analysis, 34 STAN.
form of cable television regulation can be submitted to this first amendment scrutiny.

Cable television franchising has a definite impact on the speech rights of cable operators because their speech is conditioned on obtaining a license from local authorities.\textsuperscript{155} This licensing process is in effect a prior restraint on speech,\textsuperscript{156} which if imposed on a newspaper would clearly be unconstitutional.\textsuperscript{157} Franchising ordinances may also be analyzed as a form of content regulation, because such ordinances typically vest broad discretion in an administrative body to determine which applicants will get franchises. This has the potential to chill controversial speech of the applicants.\textsuperscript{158}

Franchising regulations that regulate content must be narrowly drawn and serve a compelling state interest.\textsuperscript{139} Although local authorities may have a compelling interest in protecting the public rights of way, franchising ordinances generally are not drawn with the requisite degree of specificity to pass this level of constitutional scrutiny.\textsuperscript{140} It is submitted that to pass constitu-

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L. Rev. 113, 113 (1981). Redish suggests that early Supreme Court opinions did not make such a distinction, and in fact invalidated many content-neutral regulations. \textit{Id.} at 121. He contends that inasmuch as content-neutral laws can inhibit free discussion as much as content-based restrictions, content-neutral regulations should receive the same degree of scrutiny. \textit{Id.} at 129-30.

\textsuperscript{155} \textit{See} Tele-Communications of Key West v. United States, 757 F.2d 1330, 1339 n.4 (D.C. Cir. 1985); Miller & Beals, supra note 46, at 108; \textit{cf.} Lee, supra note 49, at 886-97 (cable operators have no absolute right to use public roads and facilities but may only be restricted in such use by content-neutral regulations designed to protect public safety, convenience, and condition of public streets).

\textsuperscript{156} \textit{See} supra note 123 (discussing common law view of prior restraint).

\textsuperscript{157} \textit{See} Miami Herald Publishing Co. v. City of Hallandale, 754 F. 2d 668, 675 (11th Cir. 1984). \textit{See generally} T. Emerson, \textit{Freedom of Expression}, supra note 74, at 667-71 (regulations applied to broadcast would be unconstitutional if applied to print media).

\textsuperscript{158} \textit{See} Preferred Communications, 754 F.2d at 1409; \textit{see also} 47 C.F.R. \textsection 76.31 n.1 (1984) (FCC recommends that as part of local franchising process, "[t]he franchisee's legal, character, financial, technical, and other qualifications . . . should be approved by the franchising authority"). The Cable Communications Policy Act leaves the terms and conditions of franchising to local authorities. \textit{See} H.R. Rep. No. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 4656, 4696.

Ordinances which leave wide discretion in administrative bodies to determine the awarding of licenses must be precisely drawn to guard against arbitrary actions by officials. \textit{See} Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969); \textit{see also} Barnett, \textit{State, Federal and Local Regulation of Cable Television}, 47 Notre Dame Law. 685, 692-94 (1972) (lack of procedures for granting cable franchises compromises public interest).


\textsuperscript{140} \textit{See} Preferred Communications, 754 F.2d at 1409.
tional muster, a franchising ordinance must allow as many franchises as the market will bear or that can reasonably be accommodated physically. It is suggested that such an ordinance would merely reasonably control how, when, and where cable could be installed, consistent with public safety and convenience and, therefore, would be nothing more than a reasonable time, place, and manner restriction.

It is submitted that when must-carry and public access regulations are subjected to the standards traditionally applied to regulation of the press, similar issues of content regulation appear. Cable regulations require the operator to transmit the speech of others regardless of whether it is consistent with the operator's editorial policy. Operators of relatively small cable systems in areas where mandatory carriage rules saturate the system may be prevented from programming as they choose. Such an interference with editorial discretion would certainly violate traditional first amendment protection of the press.

Inasmuch as public access and must-carry rules interfere with editorial discretion and thus affect content, they must be justified by some compelling government interest. The FCC has failed to demonstrate conclusively such a compelling interest with regard to the must-carry rules. Public access requirements, although appearing to be based on a more compelling rationale, nonetheless rest on two questionable bases: that everyone should have access to mass media, and that such access is necessary to bring about the

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141 See Wheeler, supra note 1, at 230. The cable operator acts as an editor, in a similar fashion as a newspaper editor does, and should be accorded the same degree of discretion. Id.

142 See Quincy Cable TV, 768 F.2d at 1451-52.

143 See Buckley v. Valeo, 424 U.S. 1, 48-49 (1975). In Buckley, the Court stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Id.; see also Quincy Cable TV, 768 F.2d at 1453 (court may not favor some speakers over others).

144 See supra note 143 and accompanying text.

145 See Quincy Cable TV, 768 F.2d at 1463. The FCC appears to doubt the compelling need for some of its cable regulations. See 79 F.C.C.2d 663, 795 (1980); see also supra notes 12-13 (discussion of FCC's shifting approach to cable television regulation).

146 See 47 U.S.C. § 521(4) (1982 & Supp. II 1984). One purpose of cable regulation is to provide for the dissemination of diverse information to the public. Id. The Quincy Cable TV court claimed that public access rules "serve countervailing First Amendment values by providing a forum for public or governmental authorities." Quincy Cable TV, 768 F.2d at 1452 (dictum).
expression of a diversity of views in a failed marketplace.\textsuperscript{147} Insofar as they also emphasize the rights of viewers over the rights of speakers, public access rules distort the purpose of the first amendment.\textsuperscript{148} It is submitted that must-carry and public access rules also fall short of the requirement that content-based regulation of speech be narrowly tailored to achieve its end. Must-carry rules restrict the cable operators to protect local broadcasting whether or not such protection is needed.\textsuperscript{149} Public access requirements are similarly problematic, granting public access whether or not there is a demonstrated need for it.\textsuperscript{150}

CONCLUSION

The first amendment has effectively served as a barrier to the suppression of speech and the press by the government for almost two hundred years. Constitutional guarantees of free expression have been extended to new media forms, such as cable television, as these media have developed. However, the first amendment treatment of the cable medium to date has proceeded from the assumption that because cable television has a history of regulation, it should continue to be regulated. This approach has hindered the development of a cohesive first amendment analysis of cable television. It is submitted that the time has come for the Supreme Court to develop a coherent constitutional approach to the speech rights of cable operators. This Note has suggested that the development of such an analysis must begin with the traditional laissez-faire approach to the press, which would give precedence to the cable operator's right to speak and would not assign to government the task of regulating the balance and diversity of the press. It is submitted that such an approach is best suited to enhancing the quality and diversity of public discussion by allowing cable technology to develop free of stifling government regulation.

Christine Gasser

\textsuperscript{147} See Lange, supra note 59, at 77, 90-91; see also supra notes 108-109 and accompanying text (discussing the marketplace metaphor).

\textsuperscript{148} See supra note 147; see also Emerson, supra note 59, at 4 (freedom of expression rests more on right to speak than on desire to listen).

\textsuperscript{149} Quincy Cable TV, 768 F.2d at 1463; see also supra note 33 and accompanying text.

\textsuperscript{150} Cf. Midwest Video Corp. v. FCC, 571 F.2d 1025, 1054 (8th Cir. 1978) (rights of cable operators to speak rest on first amendment, right of the public to "get on television" rises from the FCC's desire to create that "right"), aff'd, 440 U.S. 689 (1979).