Expanding the Scarcity Rationale: The Constitutionality of Public Access Requirements in Cable Franchise Agreements

Debora L. Osgood

University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Communications Law Commons, and the First Amendment Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol20/iss1/11

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
EXPANDING THE SCARCITY RATIONALE: THE CONSTITUTIONALITY OF PUBLIC ACCESS REQUIREMENTS IN CABLE FRANCHISE AGREEMENTS

In 1984, Congress passed the Cable Communications Policy Act (the Cable Act), 1 which authorizes local governments to impose public access requirements in their cable franchise agreements. 2 Despite Congress' explicit approval of public access requirements in the Cable Act, considerable debate exists over the constitutionality of such requirements. Cable operators contend that the imposition of access requirements unconstitutionally restricts their editorial discretion, while access proponents insist that public access to the cable medium advances the goals of the first amendment. 3

This Note argues that public access requirements should be upheld because they are constitutional and because they further the goals of the first amendment. As background for the debate over public access, Part I provides a brief description of cable television's history and regulation and discusses the case law concerning public access requirements. Part II examines the nature of the first amendment interests at stake in public access requirements. Before resolving the question of which interests should be protected, Part III argues that an expanded scarcity rationale should be used to justify cable regulation under the first amendment. Part IV asserts that public access require-

3. "Congress shall make no law ... abridging the freedom of speech, or of the press ... . . ." U.S. CONST. amend. I.
ments are constitutional under the expanded scarcity rationale and that they further the goals of the rationale. Finally, this Part emphasizes the effectiveness of public access channels in promoting the goals of the first amendment and the limited nature of the intrusion on editorial discretion posed by public access requirements. This Note concludes that public access requirements are not only constitutional, but that they offer a sensible compromise of the first amendment interests of both cable operators and the public.

I. OVERVIEW OF CABLE REGULATION AND PUBLIC ACCESS REQUIREMENTS

In Berkshire Cablevision v. Burke, the Rhode Island district court upheld the constitutionality of public access requirements in state regulations. A year later, Congress established similar public access requirements in the 1984 Cable Act. Before assessing the constitutionality of these requirements, it is necessary to review the history of cable television, the regulation of cable television under the Cable Act, and the case law concerning the constitutionality of public access requirements.

A. A Brief Description of Cable Television

In contrast to older communications technologies, such as print, radio, and broadcast television, cable television first appeared in the United States in the 1940's. In those early days, the purpose of cable television was to provide residents of rural areas with better reception than they were receiving from over-the-air broadcast signals. Today, the nature of cable television has changed dramatically. Viewed as the "medium of abun-

8. "Nearly half of all U.S. homes with televisions are wired for cable television, and the proportion is expected to increase." Cable TV Operators May Be Required to Carry Local Broadcast Stations, Wall St. J., July 23, 1986, at 50, col. 1.
dance," cable television now offers more channels than conventional television broadcasting is capable of providing. Unlike broadcast television, cable does not rely upon the limited space of the electromagnetic spectrum. Rather, a cable operator receives signals from such sources as local and national broadcasters and converts them into an electronic impulse that is delivered to cable subscribers over a coaxial cable. Finally, a cable operator creates the cable service offered to the public by selecting from various programming services, producing local programming, and, usually, providing space for access channels.

B. The Cable Communications Policy Act of 1984

The 1984 Cable Act established the first national policy for cable television in the United States. Congress passed the legislation to remedy the existing "patchwork" of state, municipal, and federal cable regulations. Legislators viewed cable television as a medium that was trapped by a haphazard, illogical regulatory scheme and that possessed vast, untapped potential for

10. While some estimates set current cable capacity at 100 to 200 channels, a more typical figure ranges from 12 to 36 channels. Quincy Cable TV v. FCC, 768 F.2d 1434, 1439 & n.8 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); see also K. Beck, Cultivating the Wasteland 8-9 (1983).

The abundant quality of cable television is also evident in cable's capacity to provide a diversity of services in addition to entertainment, including: "fire, medical, alarm, and alert services; data transmission; text services, home shopping and banking services; traffic signalization; meter reading; and highly specialized programming." Buske, Status Report on Community Access Programming on Cable, in 3 The Cable/Broadband Communications Book 102, 102-03 (M. Hollowell ed. 1983).

Cable operators generally rely upon three basic operating structures for the administration of access: (1) the cable company itself may provide facilities and support mechanisms for access; (2) an institution, such as a local library, school, or college, may serve as the facility for access programming; or (3) a nonprofit corporation may manage the access facilities. Buske, supra note 10, at 106-07.

Congress first considered cable legislation over 25 years ago. See, e.g., H.R. 6840, 87th Cong., 1st Sess. (1961); S. 2653, 86th Cong., 1st Sess. (1959); see also Meyerson, supra note 2, at 544 n.4.
revolutionizing the communications world. Senator Goldwater, chairman of the Senate Subcommittee on Communications, argued that Congress needed to establish a national policy for cable "if the cable industry, the cities, and most of all, the consumers, are to ever reap the benefits of cable's potential."  

The Cable Act delegates most of the authority for regulating cable to local governments. A cable operator must obtain a franchise from the franchising authority, usually a state or municipality, in order to provide cable services. The franchising authority lists the conditions for receiving a franchise in a "Request for Proposals." After the submission of applications, an auction or similar process generally follows; the local government then awards the cable franchise to the winning applicant. Once awarded a franchise, the cable operator may begin to provide cable services for the community. The Cable Act's access provisions—both public and commercial—mark the first explicit congressional approval of third-party access to cable television.

---

16. 130 Cong. Rec. H10,435 (daily ed. Oct. 1, 1984) ("Cable television, perhaps more than any other medium, has the potential to deliver the benefits of the information age into the homes of our citizens.") (statement of Rep. Wirth); see id. at H10,444 (statement of Rep. Markey); see also Cabinet Comm. on Cable Communications, Cable Report to the President 9 (1974).


19. 47 U.S.C. § 541(b) (Supp. III 1985). The Cable Act defines "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise." Id. § 522(9).


21. For a description of an auction, see Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1400-01 (9th Cir. 1985), aff'd and remanded, 106 S. Ct. 2034 (1986).

22. The cable system operator may be a lone operator or may be part of a larger company, such as a multiple systems operator (MSO), which owns several cable operations. K. Beck, supra note 10, at 10-11.

23. 47 U.S.C. §§ 531-532 (Supp. III 1985). In addition to the public access provision, the Cable Act has a commercial access provision, which states that a cable operator "shall designate channel capacity for commercial use by persons unaffiliated with the operator." Id. § 532.

S. 2172 contained the first public access provision for cable television to be introduced into Congress. The Senate bill would have imposed a strict requirement that certain cable operators set aside 20% of their available channels: 10% for PEG channel programmers and 10% for other channel programmers. S. 2172, 97th Cong., 2d Sess. § 606(a) (1982). The Senate report accompanying the bill indicated that the provision
Section 611 allows franchising authorities to include public access requirements in their franchise agreements.\(^2^4\) Cable operators may be required to set aside entire channels or channel capacity (only a portion of a particular channel).\(^2^6\) The Cable Act delegates responsibility for enforcing any requirement regarding the use of public, educational, and government (PEG) channel capacity to the local franchising authority.\(^2^6\)


24. 47 U.S.C. § 531 (Supp. III 1985). The Cable Act authorizes franchising authorities to require, as part of a franchise or renewal proposal, "that channel capacity be designated for public, educational, or governmental [PEG] use." Id. § 531(b). Although the Cable Act uses the language of "public use" rather than "public access," Congress apparently intended the terms to be interpreted synonymously. Meyerson, supra note 2, at 585-86.

A franchising authority may also require that channel capacity on an institutional network be designated for educational and governmental use. 47 U.S.C. § 531(b) (Supp. III 1985). The Cable Act defines an "institutional network" as a communications network that is generally available to nonresidential subscribers. Id. § 531(f).

25. H.R. Rep. No. 934, supra note 7, at 46, reprinted in 1984 U.S. CODE CONG. & AD. News at 4683. A specifically-designated channel may be a crucial factor in the success of public access programming. When access programming appears only on a portion of a particular channel or fills space on several channels, "[i]t is very difficult to establish an identity and a viewership." Buske, supra note 10, at 107 (emphasis omitted).

26. 47 U.S.C. § 531(c) (Supp. III 1985). The Cable Act contains several provisions, aside from § 611, that discuss public access channels. First, § 622 allows a franchising authority to require a cable operator to pay a franchise fee. The fee may not exceed five percent of the operator's gross revenues derived from the cable operation. Id. § 542. Some payments, however, are excluded from the definition of a franchise fee and, thus, from the five percent ceiling. For example, for franchises in existence on the effective date of the law, payments made "for, or in support of the use of" PEG access "facilities" are exempted. Id. § 542(g)(2)(B). For franchises granted after that date, the Cable Act excludes capital costs associated with PEG facilities from the definition of franchise fee. Id. § 542(g)(2)(C). See generally Meyerson, supra note 2, at 555-59; Ciamporcero, Is There Any Hope for Cities? Recent Developments in Cable Television Law, 18 URB. LAW. 369, 375 (1986). Furthermore, the House Report explicitly states that the franchise fee includes "only monetary payments made by the cable operator, and does not include as a 'fee' any franchise requirements for the provision of services, facilities or equipment." H.R. Rep. No. 934, supra note 7, at 65, reprinted in 1984 U.S. CODE CONG. & AD. News at 4702. The language of the House Report leaves unclear whether expenses associated with new equipment would be excluded from the franchise fee and the five percent ceiling. See Meyerson, supra note 2, at 558 (arguing that only specific requirements for cash payments are subject to the ceiling). But see Ciamporcero, supra, at 375 (suggesting that creative municipal officers could characterize certain expenses as a facilities grant and thus count these expenses within the franchise fee).

Second, § 624 allows the franchising authority to establish requirements for facilities and equipment in its requests for franchise proposals—for both new franchises and renewals—and to enforce these requirements. 47 U.S.C. § 544(b) (Supp. III 1985).

Third, the Cable Act contains a grandfather provision, § 637, which retroactively validates any PEG requirements set forth in a franchise in existence on the effective date of the Act, or in any state law or regulation in effect on the date of enactment, even if the franchise has not expressly adopted that law or regulation. Id. § 557(a)(1)-(2); see also
C. Challenges to Public Access Requirements

Case law addressing the constitutionality of public access requirements for cable television remains scarce. The Supreme Court's only review of public access regulations came in *FCC v. Midwest Video Corp.*, in which the Court found that the FCC had exceeded its jurisdiction under the Communications Act of 1934. The Court declined to address the first amendment issues involved in mandatory access requirements, noting only that the question of whether the rules might be unconstitutional was "not frivolous."


Finally, the Cable Act sets forth procedures for modification of public access obligations under § 625. 47 U.S.C. § 545 (Supp. III 1985). The statute prohibits franchise modification for "services" relating to PEG access, but allows modification under certain circumstances for PEG "facilities or equipment." *Id.* § 545(a)(1)(A). To qualify, a cable operator must demonstrate that it is commercially impracticable to comply with such requirements, and must demonstrate the appropriateness of the proposed modification. *Id.*

27. Challenges to the franchising process itself currently make up a large portion of the first amendment attacks on cable regulation. See, e.g., *City of Los Angeles v. Preferred Communications*, 106 S. Ct. 2034 (1986). The franchise selection process raises several first amendment issues because of the restrictions it imposes upon cable operators, including: (1) the award of a single franchise in a particular area and prevention of access by other cable services; (2) the evaluation of the content of cable programming; and (3) the imposition of certain programming requirements, such as public and commercial access. *Note, Cable Television: The Constitutional Limitations of Local Government Control*, 15 Sw. U.L. REV. 181, 186-87 (1984).


29. *Id.; see also Preferred Communications*, 106 S. Ct. at 2036 n.2 (declining to address other conditions, including public access requirements, imposed upon a successful franchise applicant). At the appellate court level, however, the Ninth Circuit noted that the mandatory and leased access requirements contained in § 611 and § 612 of the Cable Act "pose[d] particularly troubling constitutional questions" because "[i]mposing access requirements on the press would no doubt be invalid." *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1401 n.4, *aff'd and remanded*, 106 S. Ct. 2034 (1986).

30. 440 U.S. at 709 n.19. At the appellate level, the Eighth Circuit held that the FCC had exceeded its jurisdiction by imposing public access requirements on certain cable operators. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979). Although finding it unnecessary to decide the issue, the court also engaged in an extended first amendment analysis of public access requirements. The court found nothing to distinguish cable systems from newspapers and determined that the same first amendment protection should apply to both media. *Id.* at 1055-56. The court concluded that if it had to decide the issue, it would find the requirements unconstitutional. *Id.* at 1056. The Supreme Court's subsequent and rather abrupt consideration of the first amendment issue thus left the appropriateness of the Eighth Circuit's analysis as an open question. For the argument that cable systems should not be equated with newspapers, see *infra* notes 100-12 and accompanying text.
More recently, in Berkshire Cablevision v. Burke, a cable television company presented a direct first amendment challenge to public access requirements. Berkshire Cablevision challenged state regulations, promulgated by the Rhode Island Division of Public Utilities and Carriers (DPUC), that required cable operators to provide public access channels as a condition for receiving a franchise. The district court upheld the regulations as constitutional. On appeal, however, the First Circuit vacated the lower court's decision because the DPUC had awarded the cable franchise to an applicant who, unlike Berkshire Cablevision, did not object to the public access requirements.

The district court's opinion in Berkshire remains the most recent interpretation of the constitutionality of public access regulations and retains an important vitality because of its first amendment analysis. The court equated the first amendment rights of cable operators with those of broadcasters, arguing that Rhode Island's "[m]andatory access requirements are even less intrusive on First Amendment freedoms than the fairness doctrine [imposed on broadcasters and] upheld by the Supreme Court in Red Lion." Under this analogy to broadcasters, the court upheld the public access regulations and concluded that the requirements represented "a sensible accommodation of the rights of individuals to express themselves, the editorial freedom...


32. The DPUC regulations required that cable operators provide at least one PEG channel and construct an institutional network for use, at a fee, by community organizations such as schools and religious groups. 571 F. Supp. at 978.

33. Id. at 988.

34. The First Circuit remanded the case with instructions to dismiss the complaint as moot. 773 F.2d at 386.

35. The vitality of Berkshire can be seen in the FCC's reliance on the case to avoid extensive comment on the Cable Act's public access provision. In its 1985 Report and Order, the FCC set forth regulations for certain portions of the Cable Act including those relating to access. The FCC's Report, however, gives only cursory attention to § 611, stating that questions as to the section's constitutionality had been resolved in Berkshire. 50 Fed. Reg. 18,637, 18,642 (1985).

36. Berkshire, 571 F. Supp. at 988 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)). For a comparison of the fairness doctrine and public access channels, see infra notes 131-35 and accompanying text.
of cable television operators and the rights of viewers to receive information.”

II. FIRST AMENDMENT INTERESTS AT STAKE IN THE PROVISION OF PUBLIC ACCESS CHANNELS

In the debates over the 1984 Cable Act, Congress characterized public access channels as “the video equivalent of the speaker’s soap box or the electronic parallel to the printed leaflet.”

Although Congress viewed public access as an important means for furthering first amendment “speech,” cable operators contend that the first amendment should protect their interests in a regulation-free cable medium. It is thus important to examine the first amendment interests of both the public and cable operators in the provision of public access channels.

A. First Amendment Interests of the Public

Public access channels further many of the goals of the first amendment.

First, public access channels provide the public with an opportunity to use the cable medium to express their views and ideas and to convey information. Public access thus contributes to the first amendment goal of enhancing the marketplace of ideas. The influx of additional viewpoints also in-

37. Id.
39. The House Committee on Energy and Commerce explicitly noted in its report on H.R. 4103 that although it was “aware that access provisions ha[d] been challenged in the court[s] as inconsistent with the First Amendment rights of cable operators,” the Committee felt that these provisions were “consistent with and further[ed] the goals of the First Amendment.” Id. at 31, reprinted in 1984 U.S. Code Cong. & Ad. News at 4668.
creases the diversity of expression within society and thus fulfills the democracy rationale, which asserts that freedom of speech must be protected in a self-governing society so that the people can make enlightened political decisions. The characterization by Congress of public access channels as "the video equivalent of the speaker's soap box" clearly exemplifies this belief that public access channels help to foster a robust public debate.

Public access channels aid the first amendment goal of self-expression by providing members of the public with an opportunity to "speak" through the cable medium. By making free ac-

43. H.R. REP. No. 934, supra note 7, at 30, reprinted in 1984 U.S. CODE CONG. & AD. News at 4667. The legislative history of the Cable Act is replete with additional references to Congress' intent to use cable legislation and, specifically, the public access provision to further the first amendment goals of fostering diversity of expression and fulfilling the democracy rationale. For example, the Cable Act lists as one of its central purposes assuring "that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4) (Supp. III 1985). An earlier cable bill, H.R. 4103, included a statement of purpose for its "diversity of information sources" section that stated: "It is the purpose of this [section] to assure the widest possible diversity of information sources for the public through cable telecommunications . . . ." H.R. 4103, 98th Cong., 1st Sess., pt. 2, § 611 (1983).
44. See T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); see also CABINET COMM. ON CABLE COMMUNICATIONS, supra note 16, at 15-16 (noting that cable has much to offer in the marketplace of goods and ideas because it combines television and active participation); SLOAN COMM'N ON CABLE COMMUNICATIONS, supra note 9, at 123-24.
access available to all on a nondiscriminatory basis, public access provisions also provide an opportunity for the expression of minority views within society. Access offers a "television voice to the dissenter, the unpopular, and the minority as well as to [public interest] organizations." Finally, by providing an additional outlet for public expression, public access may fulfill the first amendment goal of allowing the expression of speech to act as a safety valve for discontent within society.

B. First Amendment Interests of Cable Operators

Cable operators, in contrast to access proponents, argue that public access requirements violate their first amendment rights. By requiring cable operators to offer access to the public, public access provisions limit the operators' control over the composition of their cable services, and deprive the operator of a channel that, otherwise, could be used for different purposes.

45. K. Beck, supra note 10, at 113. Financial concerns, however, may limit the use of public access channels by unorganized groups. "Ambitious and imaginative access programming probably will become the preserve of organized interest groups that can use access to further their general aims. Unaffiliated persons and groups without cohesion or resources may not be able to produce imaginative programming." B. Schmidt, Freedom of the Press Versus Public Access 210 (1976); see also infra notes 63-64 and accompanying text.


To date, the Supreme Court has not explicitly defined the first amendment rights of cable operators. Recently, in City of Los Angeles v. Preferred Communications, 106 S. Ct. 2034 (1986), the Court declined to address the first amendment issues in a cable franchise scheme without a more fully developed factual record. Id. at 2038.

48. See G. Shapiro, supra note 47, at 82; see also Quincy Cable TV v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985) ("The more certain injury stems from the substantial limitations the [must-carry] rules work on the operator's otherwise broad discretion to select the programming it offers its subscribers."); cert. denied, 106 S. Ct. 2889 (1986); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1055-56 (8th Cir. 1978) (stating that access requirements "strip" cable operators of "all rights of material selection, editorial judgment, and discretion"), aff'd on other grounds, 440 U.S. 689 (1979); Note, supra note 27, at 211-12; infra note 58 and accompanying text. See generally Comment, Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment, 70 Cal. L. Rev. 1393 (1982).
To this extent, public access requirements obviously intrude upon a cable operator's editorial discretion.

At least one commentator, however, has questioned the sincerity of the cable operators' reliance on the first amendment for protection of editorial discretion. Although cable operators may produce some original programming, they fill most of their channels by selecting between various programming services, including whole networks such as Cable News Network (CNN) and full-time programs like Music Television (MTV). As a result, cable operators often appear less like traditional first amendment "speakers" than they do businessmen, and, accordingly, some argue that they should not receive complete first amendment protection.

To date, however, courts have refused to view the cable operator's editorial discretion so narrowly. The United States Supreme Court recently reaffirmed that the activities of cable operators, including the production of original programming and exercise of editorial discretion over which stations or programs to use in a particular system, "plainly implicate" first amendment interests. In addition, lower courts have repeatedly noted

49. Barnett, Franchising of Cable TV Systems To Get Airing at Supreme Court, Nat'l L.J., Apr. 21, 1986, at 42, col. 3, 44 n.20, col. 3.

Another commentator has questioned whether the mass media's first amendment argument against access is "pretense or reality." Barron, supra note 46, at 1663 (quoting Ginzburg v. United States, 383 U.S. 463, 470 (1966)). Alexander Meiklejohn similarly expressed disappointment with radio: "It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money." A. MEIKLEJOHN, POLITICAL FREEDOM, supra note 42, at 87.

50. See Bollinger, supra note 6, at 290-91 (noting that the new media, such as cable, are often part of large corporations and that, as a result, "in the freedom of press area, we may be losing the sense . . . of a 'speaker' ").

51. In light of the commercial nature of much of the speech of the mass media, one commentator argues, "When commercial considerations dominate, often leading the media to repress ideas, these media should not be allowed to resist controls designed to promote vigorous debate and expression by cynical reliance on the first amendment." Barron, supra note 46, at 1663. Another commentator argues that it is "perverse" to allow the cable operator, "in the name of the First Amendment, to stand astride the cable gateway and prevent those speakers from reaching the public except at his pleasure." Barnett, supra note 49, at 44 n.20, col. 3.

52. Recent cases have instead noted that the editorial discretion of cable operators has dramatically expanded since the cable industry's infancy. See, e.g., Quincy Cable TV v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1410 n.10 (9th Cir. 1985), aff'd and remanded, 106 S. Ct. 2034 (1986); see also Comment, Economic Scarcity, supra note 31, at 260-62.

53. Preferred Communications, 106 S. Ct. at 2037 (noting that cable television "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers").
the first amendment interests of cable operators and have declined to set limits on this editorial discretion. These courts have refused to accord less first amendment protection on the basis of a speaker's identity or purposes in speaking. Instead, the courts have recognized the difficulty of drawing any line between the various possible purposes of a speaker's expression and have reaffirmed the importance of the first amendment rights at stake. Thus, although the commercial concerns of


Certain activities of the cable operator fall outside the protection of the first amendment, including: the construction of the system; the provision of noncommunicative services, such as transactional services; and the transmission of signals. Recent Developments—Aid or Obstruction? Government Regulation of Cable Television Meets the First Amendment, 61 WASH. L. REV. 665, 688 (1986).

55. Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 106 S. Ct. 903, 907 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."); Preferred Communications, 754 F.2d at 1410 n.10 (denying that plaintiff could lose its first amendment rights "merely because its judgment is tempered by commercial considerations"); First Nat'l Bank, 435 U.S. at 756, 783 (1978); see Preferred Communications, 754 F.2d at 1410 n.10 (denying that plaintiff could lose its first amendment rights "merely because its judgment is tempered by commercial considerations"); First Nat'l Bank, 435 U.S. at 777 ("The inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual."); id. at 804 (White, J., dissenting) ("There is now little doubt that corporate communications come within the scope of the First Amendment."); Midwest Video, 571 F.2d at 1053 ("Government control of business operations must be most closely scrutinized when it affects communication of information and ideas . . . ").

56. Midwest Video, 571 F.2d at 1053 ("The line between informing and entertaining is too elusive for the protection . . . of First Amendment rights to turn on that distinction.") (quoting Winters v. New York, 333 U.S. 507, 510 (1948)); see Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 124-25 (1973) (stating that even though newspaper and broadcast editors can and do abuse their editorial discretion, there is no reason to deny first amendment protection because "[c]alculated risks of abuse are taken in order to preserve higher values"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973):

If [a] newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.

See also Cohen v. California, 403 U.S. 15, 25 (1971) ("[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves
cable operators may taint the sincerity of their reliance on the first amendment, courts properly have not weakened first amendment protection because of this factor.

By intruding upon the editorial discretion of cable operators, public access regulations necessarily increase the risk of creating dangers that the first amendment was intended to prevent. Most importantly, public access requirements intrude upon a cable operator’s free expression—the right to create a cable service without government restrictions—and, therefore, essentially deprive cable operators of control over their own channels. Government regulation also increases the risk of discrimination against a franchise applicant on the basis of the views or content of proposed programs.

Finally, public access requirements threaten operators with direct government censorship of the programming on their channels. For instance, the Cable Act itself explicitly prohibits cable operators from exercising any editorial control over public access channels. Yet the statute does not address whether matters of taste and style so largely to the individual.”); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (“The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.”); United States v. Paramount Pictures, 334 U.S. 131, 166 (1948) (concluding that moving pictures are protected by the first amendment).

57. See Dworkin, Is the Press Losing the First Amendment?, N.Y. REV. BOOKS, Dec. 4, 1980, at 49, 50 (“[T]he historically central function of the First Amendment ... is simply to ensure that those who wish to speak ... are free to do so.”).

58. See K. Beck, supra note 10, at 115; see also Pacific Gas & Elec. Co., 106 S. Ct. at 908 (“Compelled access ... forces speakers to alter their speech to conform with an agenda they do not set.”). The House Report expressly states that there is no limitation on the government’s control over the channels set aside for governmental purposes. H.R. REP. No. 934, supra note 7, at 47, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4684. Governmental channels are “to be programmed as the government sees fit” so long as the uses relate to governmental access. Meyerson, supra note 2, at 587; see also H.R. REP. No. 934, supra note 7, at 47, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4684. Both the cable operators and the franchising authority may, however, prohibit cable services that are “obscene or are otherwise unprotected by the Constitution.” 47 U.S.C. § 544(d)(1) (Supp. III 1985). See generally Note, The Cable Communications Policy Act of 1984 and Content Regulation of Cable Television, 20 NEW ENG. L. REV. 779 (1984-1985).

59. See Preferred Communications, 754 F.2d at 1406 (holding that an auction created a serious risk that city officials would discriminate among franchise applicants because of the views or content in their proposed programs); Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 128 (7th Cir. 1982); see also Pacific Gas & Elec. Co., 106 S. Ct. at 910 (finding that the Commission’s order “discriminates on the basis of the viewpoints of the selected speakers”).

60. See Midwest Video, 571 F.2d at 1054; see also Comment, supra note 48, at 1415-16.

61. 47 U.S.C. § 531(e) (Supp. III 1985). The Cable Act specifically addresses the control of “fallow time,” which is time when the designated channels are not being used for their public access purposes. Section 611(d) authorizes the franchising authority to pre-
outside parties, such as the franchising authority or another governmental entity, may restrict what goes on a public access channel. This may lead to editorial control by a governmental entity over access programming. The attempts by some communities to prevent the broadcasting of the access programs created by extremist groups clearly demonstrates the threat of such censorship. Furthermore, even if a community does not block the telecast, a cable operator may feel compelled to arrange additional programming to counter the extremist programs. Public

scribe rules and procedures to allow the cable operator to use fallow time for nonaccess purposes until needed for public access purposes. Id. § 531(d). The Cable Act thus creates a device for keeping PEG channels from going unused, which Congress believed would better serve the needs and interests of cable subscribers. H.R. Rep. No. 934, supra note 7, at 47, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4684; see also Options for Cable Regulation Hearings, supra note 43, at 168 (statement of Charles Royer, President, National League of Cities) (“The public interest question is whether it is best to have noise or lines on a vacant channel or to have something on there.”).

62. The Cable Act authorizes the franchising authority, however, to establish the rules and procedures for using public access channels or channel capacity. 47 U.S.C. § 531(b) (Supp. III 1985). In addition, the House Report explicitly states that the statute imposes no limitation “on a franchising authority’s or other government entity’s editorial control over or use of channel capacity set aside for governmental purposes.” H.R. Rep. No. 934, supra note 7, at 47, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4684.

63. See, e.g., Turner, Extremist Finds Cable TV Is Forum for Right-Wing Views, N.Y. Times, Oct. 7, 1986, at A23, col. 1 (noting that the Pocatello (Idaho) Human Relations Council previewed the tape of “Race and Reason,” produced by the White American Resistance, an organization led by a former Ku Klux Klan member, but “decided it was unable to block the telecast” because the franchise agreement only forbid the use of access programming for advertising and for displaying pornography); Ross, “And Now, a Word from the Klan...”: Is Public-Access TV Working?, L.A. Daily J., May 16, 1985, at 4, col. 1 (describing the former requirement by the City of Dallas that public access programming satisfy community standards before being permitted to air); see also Note, Quincy Cable and Its Effect on the Access Provisions of the 1984 Cable Act, 61 NOTRE DAME L. REV. 426, 439 n.105 (1986) (suggesting that Congress more narrowly tailor the Cable Act’s access requirements by requiring the FCC to monitor cable broadcasting to assure access and diversity opportunities).

Communities correctly hesitate to prevent extremist telecasts because of constitutional considerations. For example, in Southeastern Promotions v. Conrad, 420 U.S. 546 (1975), the directors of a municipal theatre refused to allow a production of the musical “Hair” in their theatre because of their determination that the production would not be “in the best interest of the community.” Id. at 548. The Supreme Court found this refusal unconstitutional. See also Ciamporcero, supra note 26, at 376 (suggesting that it seems “unlikely” that a governmental body could retain editorial control over PEG channels).

64. See Sibary, The Cable Communications Policy Act of 1984 v. The First Amendment, 7 COMM/ENT 381, 406-07 & n.201 (1984-1985) (explaining that a San Francisco cable operator felt it necessary to provide programming to counter the telecast of the “Race and Reason” series); Turner, supra note 63 (describing a call-in program conducted by the Pocatello Human Relations Council following the “Race and Reason” telecast); Ross, supra note 63 (noting the efforts of Austin Community Television to schedule antiviolence programs and interviews with figures such as Stokely Carmichael and Ramsey Clark in order to counterbalance the right-wing broadcasts).
access requirements thus cost cable operators a considerable amount of control over their channels and expose access programming to the risk of government censorship.

In the debate over public access, the first amendment has a double-edged quality as both opponents and proponents of access claim that, in theory, the Constitution protects their interests.\textsuperscript{66} While public access furthers the first amendment goals of enhancing the marketplace of ideas, fulfilling the democracy rationale, and promoting self-expression, it also intrudes upon the editorial discretion of cable operators by limiting their choice over the composition of their cable services. To resolve the question of whether public access channels should be required, however, a more fundamental question must first be answered as to whether it is constitutional under the first amendment to regulate cable television.

III. THE CONSTITUTIONALITY OF CABLE REGULATION UNDER THE EXPANDED SCARCITY RATIONALE

As the \textit{Berkshire} case reveals, deciding the constitutionality of public access requirements necessarily requires determining whether cable television can be regulated \textit{at all} under the first amendment.\textsuperscript{66} The \textit{Berkshire} court used an analogy to broadcasting and concluded that public access requirements fell under the umbrella of constitutionality established for the fairness doctrine. Courts and commentators have offered several theories in addition to the broadcasting analogy to justify and evaluate the regulation of cable television. These theories include the public disruption rationale,\textsuperscript{67} the public forum doctrine,\textsuperscript{68} the


\textsuperscript{66} See Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985); Rice, \textit{Emerging Issues in Cable TV}, in \textit{3 THE CABLE/ BROADBAND COMMUNICATIONS BOOK}, \textit{supra} note 10, at 81, 85 (stating that "[t]he debate on providing access is commingled with the classification of cable services").

the number of times that the installation of cable tears up its streets and inconveniences its citizens. Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1406 (9th Cir. 1985), aff'd and remanded, 106 S. Ct. 2034 (1986); Community Communications Co., 660 F.2d at 1378; Berkshire, 571 F. Supp. at 985; see also Tele-Communications of Key West v. United States, 757 F.2d 1330, 1339 n.4 (D.C. Cir. 1985); Meyerson, supra note 46, at 27. Proponents of this view also argue that the cable wires constitute a "permanent visual blight" and that the installation process poses significant safety problems because of the resulting traffic delays and other hazards. Preferred Communications, 106 S. Ct. at 2037.

This rationale falters, however, because other forms of communication, such as newspapers, also use public ways for distribution and other purposes, but are not subject to regulation. G. Shapiro, supra note 47, at 106-10; Saylor, Commentary, Municipal Ripoff: The Unconstitutionality of Cable Television Franchise Fees and Access Support Payments, 35 CATH. U.L. REV. 671, 695-96 (1986). Furthermore, even if cable television can be distinguished from other communications mediums, the public disruption rationale only supports regulation of the installation process when the government may be legitimately concerned for the protection of its property and citizens. Requiring that installation take place within a certain period of time and that a bond be placed to ensure restoration of any damaged property could appropriately serve these government interests. Note, supra note 27, at 207. After installation, further regulation cannot be justified under the public disruption rationale. Quincy Cable TV v. FCC, 768 F.2d 1434, 1449 (D.C. Cir. 1985) ("No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as the basis for dictating what must be placed in such machines would surely be invalid."). cert. denied, 106 S. Ct. 2889 (1986); see also McDavid, The Eyesore War, COLO. JOURNALISM REV., Nov.-Dec. 1985, at 10 (discussing the controversy over vending machine regulations).

68. Under the public forum doctrine, the government may enforce certain regulations that limit access to governmental property depending upon the nature of that property. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). With traditional or designated public forums, the government may enforce content-neutral, narrowly-tailored time, place, and manner restrictions on speech to serve a significant governmental interest. Id. at 45. The government may impose content-based restrictions only when necessary to serve a compelling state interest and narrowly drawn to achieve that end. Carey v. Brown, 447 U.S. 455, 461 (1980). For nonpublic forums, government restrictions on speech "need only be reasonable." Cornelius v. NAACP Legal Defense & Educ. Fund, 105 S. Ct. 3439, 3453 (1985) (emphasis in original).

In the context of cable regulation, cable companies have used the public forum doctrine when seeking access to government property—utility poles and conduits—to provide cable services. See, e.g., Tele-Communications, 757 F.2d at 1337-38 (finding that the complaint—alleging "no reasons, practical or legal" for government restrictions on access to public rights-of-way by a cable company—adequately stated a first amendment cause of action under any form of the public forum doctrine) (emphasis in original); Preferred Communications, 754 F.2d at 1407-09 (using the public forum doctrine as an "aid" in its first amendment analysis without conclusively determining which category of the public forum doctrine characterized the utility poles and conduits in the case); see also G. Shapiro, supra note 47, at 175-84; Note, Preferred Communications, Inc. v. City of Los Angeles: Impact on the First Amendment Rights of Cable Television Companies, 35 CATH. U.L. REV. 851, 874-80 (1986); Recent Developments, supra note 54, at 674-86. But see G. Shapiro, supra note 47, at 111-22 (rejecting the characterization of cable systems as public forums because cable systems are privately-owned and because such a characterization would ignore the editorial discretion of cable operators).

In the context of cable regulation, however, the usefulness of the public forum doctrine is limited because exclusions from public forums may be invalid if a person denied access cannot speak effectively elsewhere. See Tele-Communications, 757 F.2d at 1339 n.4; see also Cornelius, 105 S. Ct. at 3453; Members of the City Council v. Taxpayers for Vin-
common carrier model, the O'Brien standard, the functional
cent, 466 U.S. 789, 812 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); Perry, 460 U.S. at 45; Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 646, 654-55 (1981); Barnett, supra note 49, at 43. The District of Columbia Circuit observed that the situation of cable operators differs from that of other speakers because the cable television medium "often requires the use of government-owned property in order to communicate." Tele-Communications, 757 F.2d at 1339 n.4 (emphasis in original). Here, "the 'particular piece' of government property forms the crucial gateway to an entire [communications] medium." Barnett, supra note 49, at 43 (footnote omitted). Consequently, cable regulation does not fit comfortably within the public forum doctrine because the government's denial of access to the medium does not leave the operator with an alternative place to speak. But see Note, supra, at 879-80 (arguing that, under Cornelius, the use of another cable company's wiring to transmit programming represents a reasonable alternative).

Finally, the use of the public forum doctrine to evaluate restrictions on access to government property could lead, more generally, to the adoption of the public forum doctrine as the first amendment standard for all cable regulation. This development would be troublesome for two reasons. First, the categorization of the particular government property involved—utility poles and conduits—may be a very difficult task. The Tele-Communications and Preferred Communications cases reveal that it is not clear whether such government property should be categorized as a traditional public forum, a public forum by designation, or a nonpublic forum. See also G. Shapiro, supra note 47, at 178-80. Second, the public forum doctrine was developed to address the first amendment claims of speakers seeking access to government property. Thus, it is not clear that the underlying rationale and standards for this doctrine are appropriate for resolving the first amendment issues involved in other cable regulations—such as PEG requirements—that do not concern the initial issue of access to government property. Furthermore, the public forum doctrine represents a "geographical" approach to first amendment analysis in which the location of a speaker determines the outcome of a case. See Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 VA. L. REV. 1219, 1220 (1984). This approach seems particularly inappropriate as the first amendment standard for an entire communications medium because it allows constitutional protection to depend upon a speaker's physical location, and not upon an evaluation of the relevant first amendment considerations. Id. at 1234 ("[T]he first amendment 'protects people, not places.' Constitutional protection should depend not on labeling the speaker's physical location but on the first amendment values and governmental interests involved in the case.") (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

69. Under the common carrier rationale, commentators have argued that the cable medium should be treated as a "common carrier." This analysis views cable as a mere conduit that lacks any editorial control over the programming it carries. Like other communications common carriers, such as telephone systems and communications satellites, cable would have to provide services at reasonable rates on a nondiscriminatory basis. Comment, Functional Classification, supra note 31, at 535-40; see also Sloan Comm'N on Cable Communications, supra note 9, at 146-48; Spitzer, Controlling the Content of Print and Broadcast, 58 S. CAL. L. REV. 1349, 1401 (1985). According to Professor Spitzer, the advantages of this system are that "[t]he broadcaster would have neither the ability nor the incentive to blunt criticism of the government or fail to cover controversy." Id. at 1402.

To date, no court has accepted the common carrier rationale for cable regulation. Comment, Functional Classification, supra note 31, at 535. This rationale assumes that the cable operators, in choosing programming for their services, exercise no editorial discretion that the first amendment must protect. Courts have not accepted such a limited view of the editorial responsibility of the cable operator. See supra notes 52-56 and accompanying text; see also Comment, Economic Scarcity, supra note 31, at 260 ("The
characterization of cable as a conduit simply does not reflect the technological advances in cablecasting."); Fein, Constitutional Cloud Cast over Cable Regulation, LEGAL TIMES, June 16, 1986, at 10, cols. 1, 2. ("[The Preferred Communications case] categorically rejected . . . a widespread view that cable television could be regulated on a par with non-communication enterprises, such as pipelines or taxi companies . . . ."). Accordingly, because the common carrier model proposes to divest operators of editorial discretion, the rationale offers little promise.

Finally, it is unclear that public access regulations would pass constitutional muster even if cable were categorized as a common carrier because of the recent Supreme Court decision in Pacific Gas & Electric Co. v. Public Utilities Commission, 106 S. Ct. 903 (1986). The Supreme Court held that a California Public Utilities Commission order requiring a privately-owned utility company to include speech of a third party—within which the utility disagrees—in its billing envelopes violated the utility's first amendment rights. Id. at 914.

70. United States v. O'Brien, 391 U.S. 367 (1968). Several courts have used the O'Brien first amendment standard for symbolic speech to evaluate the reasonableness of cable regulations. See, e.g., Preferred Communications, 106 S. Ct. at 2038 (citing O'Brien for the proposition that "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing social interests," but refusing to evaluate the first amendment complaint at issue without a fuller development of the disputed issues in the case); see also Quincy Cable TV v. FCC, 768 F.2d 1434, 1450-54 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); Preferred Communications, 754 F.2d at 1405-07; Home Box Office, Inc. v. FCC, 567 F.2d 9, 48 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977); Carlson v. Village of Union City, 601 F. Supp. 801, 810 (W.D. Mich. 1985); Berkshire Cablevision v. Burke, 571 F. Supp. 976, 987 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985); Note, supra note 63, at 439 (arguing that "O'Brien furnishes a fitting first amendment framework for cable"). O'Brien established a two-track approach to first amendment analysis. On the first track, when a regulation does not aim at the communicative impact of a cable operator's speech—i.e., as when regulation is unrelated to the suppression of speech—the court balances the government's interest in regulation against the infringement on first amendment rights. The court asks whether the restriction furthers substantial governmental interests and whether the restriction is sufficiently tailored—"no greater than is essential"—to suit those interests. On the second track, when the government regulation concerns the communicative impact of an operator's speech, the court applies a strict level of scrutiny. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 580-84 (1978).

In Berkshire, for example, the court upheld the public access regulations because they served substantial governmental interests in promoting community participation in cable television programming and production, and in producing a more informed public. 571 F. Supp. at 987-88. Furthermore, the court deemed the incidental restriction on the rights of cable operators to be a "minimal intrusion" that was no greater than was "essential" to further the government's objectives. Id. at 988.

The use of the O'Brien test in the context of cable regulation is problematic. See Quincy, 768 F.2d at 1453 (expressing "serious doubts" about the appropriateness of using O'Brien's interest-balancing formulation to examine the constitutionality of the FCC's must-carry rules); see also Note, supra note 68, at 872-74. For example, the characterization of access regulation—as aimed, or not aimed, at the communicative impact of an operator's speech—will inevitably vary according to the viewpoint of the speaker. See Quincy, 768 F.2d at 1451-52; Note, supra note 68, at 873-74. See generally Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 HARV. L. REV. 1482, 1496-97 (1975). The government will argue that its restrictions are unrelated to the communicative impact of the cable operator's speech, but, rather, seek to minimize disruption of public property and promote free expression through the provision of public access channels. In contrast, cable operators will argue that regulations, such as public access restrictions, necessarily are intended to
approach,\textsuperscript{71} and the scarcity rationale.\textsuperscript{72} Of these various theories, the scarcity rationale stands out as the most persuasive because it provides a sound basis for government regulation of cable television.

To date, the Supreme Court has accepted physical scarcity as the only form of scarcity that will justify regulation of a communications medium. For example, the Court upheld broadcast regulation because of the physical scarcity of broadcast frequencies and the need to prevent chaos on the public airwaves.\textsuperscript{73} In contrast, the Court explicitly rejected the economic scarcity rationale as a justification for the regulation of newspapers.\textsuperscript{74} In Berkshire, however, the court asserted that the source of scarcity—physical, economic, or legal—should be irrelevant to the question of whether the government may regulate the cable medium. Instead, the court expanded the scarcity rationale and stated that regulation of a communications medium should be

\textsuperscript{71} Another recent proposal for justifying cable regulation is the functional approach, which argues that the cable medium should be divided and regulated according to its different functions. Comment, Functional Classification, supra note 31, at 540-43; see also CABINET COMM. ON CABLE COMMUNICATIONS, supra note 16, at 20 (recommending adoption of policy separating ownership/control of distribution facilities from ownership/control of programming); Comment, Public Access, supra note 31, at 118 (noting the wide variety of functions performed by cable systems). One approach would divide the cable medium into two functions: a programming function and a distribution function. For the first function, a cable operator's programming would be accorded first amendment protection and government regulation of this programming would be prohibited. For the second function, where the cable operator acts merely as a distributor of cable services—akin to a common carrier—government regulation, including public access requirements, would be appropriate and permitted. Cf. Meyerson, supra note 46, at 26 (contrasting the cable operator's roles as producer and distributor).

The functional approach fails to provide an adequate rationale, however, because it does not explain why regulation of a cable operator's distribution function is constitutional under the first amendment.

\textsuperscript{72} See infra text accompanying notes 75-92.

\textsuperscript{73} In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Court upheld the FCC's imposition of the fairness doctrine on broadcasters. The Court argued that broadcast frequencies constitute "a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony [sic] of competing voices, none of which could be clearly and predictably heard." Id. at 376; see also FCC v. League of Women Voters, 468 U.S. 364, 376-78 (1984); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

\textsuperscript{74} In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court struck down a Florida statute that granted a political candidate a right to reply to criticism in the newspaper. The Court found that the statute "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the functions of editors." Id. at 258.
permitted when the effect of scarcity is "to remove from all but a small group an important means of expressing ideas." 75

A. Three Versions of the Scarcity Rationale

The Berkshire court identified three possible sources of scarcity—physical, economic, and legal—in a communications medium. Each source provides a separate basis for justifying cable regulation under the court’s expanded scarcity rationale.

1. Physical scarcity—Under one version of the scarcity rationale, cable television can be regulated because, like broadcast airwaves, the cable medium constitutes a physically scarce public resource. As examples of scarcity, this rationale cites the potentially limited space available in the streets for cables and on utility poles for cable wires. 76 Courts generally have rejected this rationale. 77 In Preferred Communications v. City of Los Ange-

76. See Meyerson, supra note 46, at 27; Note, supra note 27, at 209; Comment, Functional Classification, supra note 31, at 534; see also Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) (admitting that “there may be some practi-

cal limit to the number of coaxial cables that may be hung from utility poles or buried underground,” but refusing to apply the physical scarcity rationale because the defendant did not prove the existence of physical scarcity in the instant case); cf. Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968) (applying the physical scarcity rationale to CATV (community antenna television) because these systems use radio signals).

A narrow definition of this rationale would look at physical scarcity only in terms of the means by which cable television communicates—through coaxial cables. Under this view, cable television might not constitute a scarce physical resource because “cable is not limited to a finite number of channels the way broadcasting is,” and thus regulation would not be required to prevent interference with the use of these channels. See Community Television v. Wilkinson, 611 F. Supp. 1099, 1113 (D. Utah 1985), aff’d sub nom. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986); see also Jones, 800 F.2d at 1001 (Baldock, J., specially concurring); Saylor, supra note 67, at 681; Comment, The Spectrum Scarcity Doctrine: A Constitutional Anachronism, 39 Sw. L.J. 827, 833 n.64 (1986). This Note, however, adopts a broader definition of scarcity that examines the physical limitations and interferences with the provision of cable services, such as the limitation on utility pole space for cables, to determine whether physical scarcity exists in the cable medium. This broader view accords with the underlying rationale in Red Lion for accepting physical scarcity as a justification for broadcast regulation—permitting regulation of a communications medium to prevent interference with the public’s use of that resource.

77. Quincy Cable TV v. FCC, 768 F.2d 1434, 1449 (D.C. Cir. 1985) (noting that the “essential precondition of . . . physical interference and scarcity . . . is absent”) (citing Home Box Office, Inc. v. FCC, 567 F.2d 9, 45 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977)), cert. denied, 106 S. Ct. 2889 (1986); accord Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1404 (9th Cir. 1985) (calling Black Hills “doubtful precedent”), aff’d and remanded, 106 S. Ct. 2034 (1986); Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); Midwest Video Corp. v. FCC, 571 F.2d
the Ninth Circuit recently held that physical scarcity does not exist when the space on the poles and in the conduits is physically capable of accommodating another cable. On appeal, the Supreme Court narrowly affirmed the circuit court decision, but remanded the case for a fuller development of the factual record including "the present uses of the public utility poles and rights-of-way and how [the cable company] proposes to install and maintain its facilities on them." The Court thus left open the possibility that the physical scarcity rationale could be used to justify cable regulation if the factual record proved the existence of scarcity.

2. Economic scarcity—Courts have adopted a second version of the scarcity rationale, which argues that a cable system constitutes a "natural monopoly" because only one system can operate efficiently and profitably in a given community. One firm can supply the entire cable system at a lower cost than could more than one firm. The initial expenses for starting a cable firm, such as the costs for establishing the distribution system, run extremely high and do not change substantially according to the number of subscribers to a cable system. The cable medium under this model constitutes another scarce public resource, like broadcast frequencies, thus justifying government regulation.

Commentators have criticized the economic scarcity rationale by arguing that scarcity does not exist in the cable medium because cable franchises do not constitute true monopolies. Critics

1025, 1054 n.71 (8th Cir. 1978) (limiting Black Hills to its facts), aff'd on other grounds, 440 U.S. 689 (1979); Century Fed., 579 F. Supp. at 1563 n.19; see also Sibary, supra note 64, at 398; Note, supra note 27, at 209-10.
78. 754 F.2d 1396 (9th Cir. 1985), aff'd and remanded, 106 S. Ct. 2034 (1986).
79. Id. at 1404; see also Carlson v. Village of Union City, 601 F. Supp. 801, 811 n.9 (W.D. Mich. 1985).
80. Preferred Communications, 106 S. Ct. at 2038.
81. Central Telecommunications v. TCI Cablevision, 800 F.2d 711, 717 (8th Cir. 1986) (holding that because the city's cable television market constituted a natural monopoly, such that only one operator could provide service at a time, the city could offer an exclusive franchise); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1378-79 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); Carlson, 601 F. Supp. at 811 (using economic scarcity argument to "buttress" village's primary interest in preventing disruption of public domain); Berkshire, 571 F.2d at 985-86; Hopkinsville Cable TV v. Pennyroyal Cablevision, 562 F.Supp. 543, 547 (W.D. Ky. 1982); see also CABINET COMM. ON CABLE COMMUNICATIONS, supra note 16, at 10; Meyerson, supra note 46, at 6-10; Comment, Functional Classification, supra note 31, at 534; cf. Omega Satellite Prods., 694 F.2d at 127-28 (stating that economic scarcity may provide a rationale for regulation of entry into a market); Century Fed., 579 F. Supp. at 1563-64 (refusing to decide the constitutional issue of whether economic scarcity justifies cable regulation because the court had "no facts or expert opinion upon which to make such a determination").
82. Meyerson, supra note 46, at 7-8.
assert that the relevant market should be defined to include all forms of communications, and that cable television cannot represent a true monopoly because it does not have monopoly power over all communications. This argument underestimates the difference in impact of the various media—broadcasting, print, and cable—and ignores the importance that the particular mode of expression may have for a speaker.

A second criticism asserts that the characterization of cable systems as natural monopolies rests upon an unproven assumption that cable operators are in a position to make monopoly profits. Yet this criticism can be countered with proof showing that a cable system operates as a natural monopoly. In communities that confer an exclusive franchise upon a single cable company, the proof is self-evident. In communities where some competition still exists, evidence may prove the limited nature of this competition. Although a community with several cable systems may accurately be deemed to have an oligopoly, rather than a monopoly, the problem of scarcity in the cable medium would remain.

3. Legal scarcity— The Berkshire court identified a third form of scarcity—"legal scarcity." When a franchising authority confers exclusive rights to provide cable services to one or more cable companies, the cable medium may be labelled a "legal" scarcity because "other potential speakers, even those with sufficient funds to establish their own cable systems, would be shut out of the market, in this case, by law." The usefulness of this argument is limited. Legal scarcity offers only an after-the-fact justification that the creation of a limited number of franchises supports regulation. This form of scarcity "merely begs the

83. Saylor, supra note 67, at 679; Note, supra note 27, at 198; Comment, Economic Scarcity, supra note 31, at 264 n.117.
84. See infra notes 129-30 and accompanying text.
85. Quincy Cable TV v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); see also Note, supra note 63, at 436 n.92.
86. See, e.g., Central Telecommunications v. TCI Cablevision, 800 F.2d 711, 717 & n.6 (8th Cir. 1986).
87. The Quincy court noted, for instance, that the monopolistic position of cable systems may solely be the result of an exclusive franchise conferred by the government. 768 F.2d at 1450; see also G. SHAPIRO, supra note 47, at 9-12. In this situation, the cable medium may be characterized as both economically and legally scarce. See infra notes 90-92 and accompanying text.
88. Cf. Meyerson, supra note 46, at 10 ("[T]here is no evidence that such competition can ever involve more than an extremely limited number of competitors.").
89. See id.
question” of whether the initial government regulation was justified.91

Accordingly, the legal scarcity argument does not offer a persuasive basis for justifying cable regulation. Physical and economic scarcity, however, present strong justifications for cable regulation, although proving scarcity may be more difficult in the context of physical scarcity than in the context of economic scarcity.92

B. Advantages of the Scarcity Rationale

Berkshire’s expanded scarcity rationale represents a novel approach to the issue of cable regulation that has several important advantages. By examining the effect of scarcity, rather than its source, the Berkshire court offered a consistent rationale that addresses the important first amendment problem of concentration in a communications medium and provides a justification for regulation based upon the unique characteristics of cable television.

1. Theoretical coherency—Because of its novelty, cable television presents an opportunity to shed the fallacies of the current form of the scarcity rationale used by courts.93 The focus by

91. Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1405 n.8 (9th Cir. 1985), aff’d and remanded, 106 S. Ct. 2034 (1986).
92. See generally Jones v. Wilkinson, 800 F.2d 989, 1003 (10th Cir. 1986) (Baldock, J., specially concurring) (noting that “[t]he legal determination about the first amendment status of cable television depends somewhat upon an evidentiary basis”); supra notes 78-80 & 85-88 and accompanying text.
93. See supra text accompanying notes 73-74. The Quincy court further “observed that technological advances may have rendered the ‘scarcity rationale’ obsolete even for broadcasters.” Quincy Cable TV v. FCC, 768 F.2d 1434, 1449 n.32 (D.C. Cir. 1985) (citation omitted), cert. denied, 106 S. Ct. 2889 (1986); see also FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984) (noting increasing criticism of the spectrum scarcity rationale for the regulation of broadcasting, but refusing to reconsider its approach “without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required”).

The abandonment of the current form of the scarcity rationale has also been advocated by several commentators. See, e.g., L. Tribe, supra note 70, § 12-22, at 699 (“The clear failure of the ‘technological scarcity’ argument as applied to cable television amounts to an invitation to reconsider the tension between the Supreme Court’s radically divergent approaches to the print and electronic media.”) (footnote omitted); Bollinger, supra note 65, at 42 (“[P]erhaps cable offers the Court an appropriate occasion for discarding the shibboleth of the scarcity rationale.”); Comment, supra note 76, at 832-38 (arguing that developments in modern technology, such as DBS (Direct Broadcast Satellite), digital techniques, low-power television, and compression techniques, undermine the assumptions concerning scarcity in the electromagnetic spectrum); id. at 836
courts on the question of whether the scarcity in a medium can be characterized as physical, thus justifying government regulation, has led to an illogical and inconsistent distinction between the print and broadcast media in communications law.\textsuperscript{94} One court has stated that scarcity "can hardly explain regulation in one context and not another" because it constitutes a universal fact.\textsuperscript{95} To a certain extent, all physical resources can be characterized as scarce.\textsuperscript{96} For example, while the broadcast medium relies upon the limited public airwaves, newspapers also depend upon a limited supply of natural resources, such as trees for paper. The universal characteristic of scarcity thus requires that courts and legislatures choose the degree of scarcity that they will require before allowing the regulation of a communications medium. By continuing to use only the physical form of the scarcity rationale, courts and legislatures have avoided this decision.

In contrast, under its expanded scarcity rationale, the Berkshire court explicitly identified the degree of scarcity that it would require to justify government regulation. The court stated that a communications medium may be regulated when the effect of scarcity is to remove an important means of expression from the reach of most people.\textsuperscript{97} Berkshire's rationale, unlike the current form of the scarcity rationale, offers a consistent theory that addresses the appropriateness of regulating communications media.

2. The first amendment problem of concentration of control—Berkshire's broader definition of scarcity shifts the attention of courts and legislatures away from the source of scarcity in a communications medium and enables them to address an

\textsuperscript{94} See Telecommunications Research & Action Center v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (stating that "[t]he basic difficulty . . . is that the line drawn between the print and broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference").

\textsuperscript{95} Id. (footnote omitted).

\textsuperscript{96} Id.; Note, supra note 27, at 189-90 n.55 ("The inherent fallacy of the scarcity rationale is that it applies to just about everything.").

\textsuperscript{97} Berkshire Cablevision v. Burke, 571 F. Supp. 976, 986-87 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985).
important first amendment problem. Under the Berkshire analysis, the effect of scarcity must be examined to determine whether it justifies regulation. The court’s explanation of the required effect—“when scarcity removes an important means of expression”—actually describes the problem of concentration of control in a communications medium. Such concentration presents a clear danger to first amendment interests because it increases the risk that vast power will be given to the owner of a medium, thus allowing the owner to restrict the speech of others at will.98 With too much control, the owner may interfere excessively with the speech of others, block the expression of minority viewpoints, or simply distort public debate with one-sided presentations of controversies.99 Berkshire’s expanded scarcity rationale would allow the government to regulate this private control in a medium and thus further the goals of the first amendment.

3. A regulatory model for cable television—Finally, Berkshire’s broader scarcity rationale offers an alternative to the traditional regulatory models of broadcasting and print—a theory that justifies cable regulation on the basis of the unique characteristics of the cable medium.100 For many courts, categorizing cable as akin either to print or to broadcasting has become the accepted method for determining whether, and to what extent, cable may be regulated under the first amendment. Under the model comparing cable television to newspapers, any government regulation constitutes a violation of the first amendment’s

98. See Bollinger, supra note 6, at 297-98; Meyerson, supra note 46, at 31 (“If there is only one owner of all those channels, there is only one outlet for cable programming and only one operator deciding what will appear on cable television.”) (footnote omitted); see also Cabinet Comm. On Cable Communications, supra note 16, at 19-20; Barron, supra note 46, at 1644-45; Carter, Mass Media: How Responsible, How Free?, 39 Ark. L. Rev. 297, 308 (1985) (citing the danger that the current trend toward ownership and centralization of control of the mass media presents to the first amendment); Comment, supra note 76, at 838-39. The House Report on the Cable Act itself emphasized that one of the greatest challenges for establishing a cable policy “has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain.” H.R. Rep. No. 934, supra note 7, at 30, reprinted in 1984 U.S. Code Cong. & Ad. News at 4667.

99. In the Miami Herald case, the Court stated that “the result of the vast accumulations of unreviewable power in the modern media empire” was likely to be “abuses of bias and manipulative reportage.” Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 250 (1974).

100. See Comment, Public Access, supra note 31, at 118-19 (“The first amendment rights of community members would best be served by the development of a constitutional standard which recognizes the uniqueness of the cable medium.”) (footnote omitted).
guarantee of freedom of speech and press. In contrast, when courts, as in Berkshire, analogize cable to broadcasting, regulation does not violate the first amendment. Several courts have relied on the common features of cable and broadcast television to conclude that the two should be treated similarly. Broadcasting and cable share a similar method of presentation and a history of government regulation that distinguish these two media from print. First, cable "looks" like broadcasting because both media use the television screen to reach viewers. Second, just as the Cable Act requires cable operators to obtain a franchise before providing cable service to subscribers, the Communications Act requires that a broadcasting license be obtained before a person may own or operate a television station. In contrast, newspapers and television do not share the same appearance, nor has one ever had to obtain government permission to start a newspaper.

The superficial similarity between cable and broadcasting, however, blurs finer distinctions between the two media that have important first amendment consequences. For example, the cable operator oversees a spectrum of channels, unlike the broadcaster, who is limited to the presentation of one channel at a time. The large number of channels available allows the cable


102. See Omega Satellite Prods. Co. v City of Indianapolis, 694 F.2d 119, 127-28 (7th Cir. 1982); Community Communications Co., 660 F.2d at 1377-80; Berkshire, 571 F. Supp. at 986-87; see also City of Los Angeles v. Preferred Communications, 106 S. Ct. 2034, 2037 (1986) ("Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in Red Lion Broadcasting Co. v. FCC . . . .") (citation omitted). But see Quincy Cable TV v. FCC, 768 F.2d 1434, 1448-50 (D.C. Cir. 1985) (rejecting the comparison of cable television to conventional broadcasting), cert. denied, 106 S. Ct. 2889 (1986); Community Television v. Wilkinson, 611 F. Supp. 1099, 1112-13 (D. Utah 1985) (distinguishing the cable and broadcast media), aff'd sub nom. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986).


104. Quincy, 768 F.2d at 1448 ("From the perspective of the viewer, no doubt, cable and broadcast television appear virtually indistinguishable."); Jones, 800 F.2d at 1004 (Baldock, J., specially concurring); see also Meyerson, supra note 46, at 29.


106. Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1403 (9th Cir. 1985), aff'd and remanded, 106 S. Ct. 2034 (1986); Comment, Public Access, supra note 31, at 118.
operator to present a variety of issues simultaneously and thus to provide a more diverse array of programming than is possible on one broadcaster's channel.\^107 This variety accords with the first amendment's goal of promoting diversity of expression.\^108

The differences between the cable, broadcasting, and print media should thus be acknowledged by courts and legislatures to avoid automatically classifying cable television under the traditional print or broadcasting regulatory models.\^109 More importantly, the novelty of cable offers an opportunity for courts and legislatures to assess the policies that should guide this new communications medium.\^110 Such an assessment would accord with the Supreme Court's admonitions that each medium of expression should be judged by first amendment standards specifically suited to that medium,\^111 and that differences between media justify distinct first amendment standards.\^112

107. See Comment, Public Access, supra note 31, at 118; see also Meyerson, supra note 46, at 26-27 ("Newspaper readers can turn the page to a different article; cable subscribers can switch the channel.") (footnote omitted); Comment, Functional Classification, supra note 31, at 533. Cf. CABINET COMM. ON CABLE COMMUNICATIONS, supra note 16, at 34 n.6 (noting that newspapers have an advantage over broadcast television because their articles can be read at any time).

In Capital Cities Cable v. Crisp, 467 U.S. 691, 700-01 (1984), the Supreme Court noted that cable and broadcasting are also based on totally different entrepreneurial principles because cable relies on subscribers for revenues, while broadcasting relies on advertisements.

Finally, in addition to a general variety of programs, cable television offers an opportunity for "narrowcasting"—programming targeted at particular social groups such as religious, ethnic, deaf, or other groups. Meyerson, supra note 46, at 14; Minenberg, supra note 46, at 591; Comment, Public Access, supra note 31, at 119 n.187.

108. See supra notes 40-43 and accompanying text.

109. See Note, supra note 47, at 124; see also Comment, Functional Classification, supra note 31, at 538 n.109 ("Because the categorization of cable is such an important policy issue, the appropriate decision-maker should be the body responsible for ultimate policy choices in a democracy—the legislature.").

110. See Bollinger, supra note 6, at 296; Bazelon, The First Amendment and the "New Media"—New Directions in Regulating Telecommunications, 31 FED. COMM. L.J. 201, 211 (1979). In Preferred Communications, 106 S. Ct. at 2038, Justice Blackmun, in his concurrence, expressed a similar concern:

Different communications media are treated differently for First Amendment purposes . . . . In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis.

111. Southeastern Promotions v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it . . . ."); accord Tele-Communications of Key West v. United States, 757 F.2d 1330, 1338-39 (D.C. Cir. 1985); Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1403 (9th Cir. 1985), aff'd and remanded, 106 S. Ct. 2034 (1986).

The advantages of Berkshire’s expanded scarcity rationale clearly suggest that it should be used to regulate the cable medium. The rationale not only takes into account the unique characteristics of cable television, but it also offers a consistent theory that addresses the first amendment problem of concentration of control over a communications medium.

C. Distinguishing the Nonregulation of Newspapers

Opponents of cable regulation have argued that cable’s natural monopoly characteristics should not be sufficient to justify regulation because the Supreme Court rejected the economic scarcity rationale in Miami Herald Publishing Co. v. Tornillo. This criticism assumes that communications mediums with similar characteristics of economic scarcity must be treated similarly. For instance, if franchise agreements require cable operators to provide public access, newspapers must provide space, even additional pages, for public access.

Several important reasons exist for continuing to permit the freedom of newspapers, while allowing the regulation of both cable and broadcast television. First, newspapers perform a sym-
bolic function within American society as representatives of "the press."\textsuperscript{116} This symbolism provides a historical link between newspapers and traditional first amendment values of prohibiting government interference with the press.\textsuperscript{117} Newspapers are viewed as society's tool for implementing the first amendment principle that "debate on public issues should be uninhibited, robust, and wide-open."\textsuperscript{118} Attachment to the symbolism of newspapers also explains society's hesitancy to end nonregulation and its acceptance of the current regulatory scheme. The regulation of cable and broadcasting—newer technologies that have not shared the symbolic tradition of newspapers—does not seem as outrageous or threatening to first amendment notions of a free press.\textsuperscript{119}

This image of newspapers, like many symbols, is illusory because it overlooks the possible sources of censorship in American society. Although the government does not regulate newspapers, private control of the medium often works as effectively to limit (censor) speech.\textsuperscript{120} With no right of access to newspapers, the public can be denied an opportunity to speak through that print medium. If, under the scarcity rationale, concentration of control over a communications medium justifies government regulation, then continuing the nonregulation of newspapers appears nonsensical.

Yet allowing the government to regulate every communications medium that satisfies the scarcity rationale would lead to an equally absurd situation. In all likelihood, the government would be able to regulate cable television, broadcasting, and newspapers under the scarcity rationale, thus leaving no sector of the press unregulated. This result would eviscerate the principles of the first amendment. The symbolic importance of newspapers presents a clear alternative to this situation by providing a rationale for continuing the nonregulation of newspapers.

The continuation of the current system may also reflect a recognition of the difficulties inherent in devising a new system of regulation and a legitimate fear of letting the government get involved in any regulatory scheme.\textsuperscript{121} For instance, an alterna-

\textsuperscript{116} Cf. Pacific Gas & Elec. Co. v. Public Utilities Comm’n, 106 S. Ct. 903, 921 (1986) (Rehnquist, J., dissenting) (noting that corporations have not played "the historic role of newspapers as conveyors of individual ideas and opinion").

\textsuperscript{117} See Bollinger, supra note 65, at 33.


\textsuperscript{119} See generally Bollinger, supra note 6; Bazelon, supra note 110.


\textsuperscript{121} See supra notes 55-56 and accompanying text.
tive system could divide each medium into regulated and unregulated sections, rather than follow the current division along media lines.\textsuperscript{122} The unregulated sections would warrant the fullest first amendment protection, while the regulated sections would merit less protection. Giving Congress or the courts the power to decide which parts of each medium should be regulated, however, would cede ultimate control over the entire press to the government and depart sharply from the concept of a free press.\textsuperscript{123}

Finally, the current partial regulatory scheme has another important advantage. To the extent that any concentration of control allows,\textsuperscript{124} newspapers may act as a forum of last resort in the communications media. Free of government regulation, newspapers may provide a check on censorship and an open forum for the discussion of governmental abuses.\textsuperscript{125}

Ironically, then, the current dual system of censorship—governmental and private—may offer the most effective method for preserving freedom of the press because it prevents any one entity from achieving full control over the communications media. Thus, the symbolic importance of newspapers as a "free press" and the difficulty of devising a new regulatory system provide forceful reasons for treating media, with similar characteristics of economic scarcity, differently.

\textit{Berkshire}’s expanded scarcity rationale thus should be used to justify cable regulation because it allows courts and legislatures to address the underlying communications policies and goals of the first amendment. \textit{Berkshire}’s rationale avoids the illogical distinction between broadcast regulation and the nonregulation of newspapers under the current form of the scarcity rationale.

\textsuperscript{122} \textit{See} Spitzer, \textit{supra} note 69, at 1390. The functional approach presents another example of such an alternative system. \textit{See supra} note 71. Yet even among commentators advocating a functional approach, no unanimity exists as to the number of functions—two or three—that the cable medium serves. \textit{See, e.g.,} Meyerson, \textit{supra} note 46, at 26 (discussing two functions—producing and distributing—of the cable operator); Comment, \textit{Functional Classification}, \textit{supra} note 31, at 540 (separating the functions of cable into three categories: where cable operators (1) cablecast their own programming, and thus, like newspapers, cannot be regulated; (2) offer programming produced by other services, and thus, like broadcasting, can be regulated; and (3) carry local broadcasters’ signals or provide public access channels, and thus should be regulated as common carriers); \textit{see also} Cabinet Comm. on Cable Communications, \textit{supra} note 16, at 21 (distinguishing three functions of the mass media: (1) creating or compiling information or entertainment, (2) selecting or editing information, and (3) transmitting and distributing information to the public).

\textsuperscript{123} \textit{See Note, supra} note 47, at 136.

\textsuperscript{124} \textit{See supra} notes 98-99 & 120 and accompanying text.

\textsuperscript{125} \textit{See} Bollinger, \textit{supra} note 65, at 32-35.
and justifies regulation on the basis of the unique characteristics of cable television. Furthermore, the expanded scarcity rationale answers the first amendment problem of concentration of control in a communications medium by requiring government regulation. Although government regulation itself threatens first amendment principles, an exception to the scarcity rationale should continue to be made for newspapers because of their symbolic importance and because this system preserves an unregulated sphere of the communications media.

IV. RESOLUTION OF THE PUBLIC ACCESS DEBATE

Under Berkshire’s expanded scarcity rationale, public access requirements are clearly constitutional. This rationale justifies cable regulation when the effect of scarcity in the cable medium, regardless of its source, is to remove an important means of expression from all but a small group. Public access requirements not only represent a subset of constitutional cable regulation under this rationale, but also fulfill the rationale’s underlying policy of preventing concentration of control by furthering the goals of the first amendment: promoting self-expression, enhancing the marketplace of ideas, and fulfilling the democracy rationale.126

Public access requirements also represent a sensible compromise of the conflict between the first amendment interests of cable operators and the public.127 Access requirements further the public’s first amendment interests, and, unlike other cable regulations, do not threaten to compromise severely the cable

---

126. See supra notes 39-46 and accompanying text.
127. The Supreme Court recently suggested the use of a balancing approach in City of Los Angeles v. Preferred Communications, 106 S. Ct. 2034, 2038 (1986); see also Quincy Cable TV v. FCC, 768 F.2d 1434, 1462 (D.C. Cir. 1985) (“Regulation of emerging video technologies requires a delicate balancing of competing interests.”), cert. denied, 106 S. Ct. 2889 (1986); Berkshire Cablevision v. Burke, 571 F. Supp. 976, 987 (D.R.I. 1983) (concluding that cable operators’ editorial control over their channels does not create immunity from regulation, but, rather, warrants careful scrutiny to ensure that the officials are not imposing the regulations because of the speaker’s viewpoint), vacated as moot, 773 F.2d 382 (1st Cir. 1985). See generally Bollinger, supra note 65, at 36-37 (advocating the continuation of a partial regulatory system for the media to promote two constitutional values at the same time—“access in a highly concentrated press and minimal government intervention”—and thus to achieve a compromise, rather than a victory for either side, in the access debate); Ciamporcerio, supra note 26, at 392 (“[T]he cable operators and the cities are tied closely together by the physical realities of cable television. Cooperation seems the best course for both sides.”); Meyerson, supra note 46, at 53; Recent Developments—Constitutional Law—First Amendment—Municipal Franchising, 53 Tenn. L. Rev. 179, 197 (1985).
operator's editorial discretion. In contrast, preserving the editorial discretion of cable operators in its purest form—with no restrictions—would absolutely prevent public expression and viewing through public access channels.\(^{128}\)

A comparison of public access channels with the methods of access to other communications media reveals the effectiveness of public access channels as a means of furthering the goals of the first amendment. For example, no right of access to newspapers exists, although the Berkshire court argued that a person may express herself in the print medium by distributing "a written message in the form of a leaflet, pamphlet, or other relatively inexpensive form of "publication."\(^{129}\) This argument, however, ignores the importance that a particular form of the print medium may have for a speaker and, more importantly, the relative ineffectiveness of those alternative forms. A "lonely pamphleteer" cannot hope to distribute her speech as effectively as a newspaper publisher or cable operator.\(^{130}\)

In broadcasting, the fairness doctrine provides the public with access.\(^{131}\) Although both the fairness doctrine and public access channels constitute forms of access that aim, at least in part, at furthering diversity of expression, public access requirements represent a more effective means of accomplishing this goal.\(^{132}\)

---

128. The first amendment rights of viewers have often been noted by the courts. See, e.g., Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981) ("The First Amendment protects not only the right to disseminate, but also the public's interest in the receipt of diversified communications."); cert. denied, 456 U.S. 1001 (1982); Berkshire, 571 F. Supp. at 981-82, 988.


130. Note, supra note 27, at 204 n.140.


132. See Meyerson, supra note 46, at 50-51; Minenberg, supra note 46, at 587-92; Comment, Public Access, supra note 31, at 117 (urging consideration of public access regulations as "a proper replacement for the fairness doctrine"). See generally Bazelon, supra note 110, at 205-06.

The Berkshire court noted that "[t]he fairness doctrine has come increasingly under attack." 571 F. Supp. at 988 n.11. In FCC v. League of Women Voters, 468 U.S. 364 (1984), the Court indicated that it would be forced to reconsider the constitutionality of the fairness doctrine if the FCC proved that the net effect of the doctrine is to chill, rather than enhance, speech. Id. at 378 n.12; see also American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 459 (D.C. Cir. 1979) (Bazelon, J., concurring) (stating that
Public access programming may cover the many possible aspects of a controversy, while the fairness doctrine may induce portrayals of "controversial issues of public importance" as issues with only two opposing viewpoints.¹³³ Furthermore, public access channels allow the public to begin a debate by airing various opinions, whereas the fairness doctrine allows public access only in response to what has already been said.¹³⁴ Thus, because of the limited access available to both the print and broadcasting media, public access to cable television represents an especially important means of promoting the goals of the first amendment. As the Berkshire court correctly pointed out, "[A] resident . . . who does not have seven million dollars to develop his own cable system is shut out of that medium with no way to express his ideas with the widely acknowledged power of the small screen."¹³⁵

Cable operators insist that in place of government regulation, such as public access requirements, the free market alone should be allowed to regulate cable services.¹³⁶ A free market approach would avoid harming the first amendment interests of cable operators. In addition, such an approach would prevent the paternalism inherent in the government's determination of what cable services the public should receive.

Cable operators also assert that they would continue to provide public access channels and that a decision not to do so would simply reflect a lack of public interest in access programming.¹³⁷ Realistically, it seems clear that given a choice between

¹³³ Minenberg, supra note 46, at 589 (arguing that the fairness doctrine "reinforces the status quo," rather than enhancing diversity in the presentation of news programming).

¹³⁴ Public access regulations are not contingent upon the acts of the cable operator, and thus avoid the fairness doctrine's potential chilling effect on an operator's programming. See B. Schmidt, supra note 45, at 212-13; Comment, Public Access, supra note 31, at 116-17; see also Minenberg, supra note 46, at 591 (noting that the fairness doctrine is limited to political speech). The suggestion that public access channels be monitored by local governments for diversity raises the danger of similar "chilling" effects. For an example of this suggestion, see Note, supra note 63, at 439 n.105.

¹³⁵ Berkshire, 571 F. Supp. at 986.

¹³⁶ See Spitzer, supra note 69, at 1391-1402; Comment, supra note 48, at 1411. See generally G. Shapiro, supra note 47, at 77-135.

¹³⁷ See G. Shapiro, supra note 47, at 88; Comment, supra note 48, at 1413 ("If access channels are not offered, it will more likely be due to the community's lack of
a profitable programming service and public access, cable operators would not choose to provide public access.\textsuperscript{138} This approach, however, undervalues the benefits of public access programming. Failure to appeal to a mass audience should not be viewed as an accurate measure of a public access channel's success. Poor audience ratings may only be the result of inadequate publicity, which can be improved to make a community aware of the availability of cable access for local citizen use.\textsuperscript{139} Furthermore, public access programming may be very popular within its targeted, although limited, audience. Religious or ethnic programming, for example, may appeal only to a particular social group, but may be widely watched within that group.\textsuperscript{140} Most importantly, the emphasis on popularity ignores the significance of public access in promoting the goals of the first amendment.\textsuperscript{141}

Finally, public access requirements represent a unique form of cable regulation that may appropriately be distinguished from other cable regulations that infringe upon the editorial discretion of cable operators. For example, in \textit{Quincy Cable TV v. FCC},\textsuperscript{142} the District of Columbia Circuit struck down the FCC's must-carry rules, which required cable television operators to carry local broadcast signals, because the mandatory signals "substantially or completely occupied" the system's channel capacity and "prevented [cable programmers] from reaching their intended audience." Public access restrictions, in contrast, are substantially less intrusive than the \textit{Quincy} must-carry rules be-

\textsuperscript{138} Minenberg, \textit{supra} note 46, at 591 (Cable operators will "inevitably purchase and transmit only profitable programming. Thus, in a cable system without access channels, diversity simply means the satisfaction of the preexisting tastes of several segments of the audience, rather than those of the audience as a whole."). (footnotes omitted); \textit{see also} Recent Developments, \textit{supra} note 127, at 194 ("[T]here is evidence to show that extensive, direct competition in the industry would reduce the revenue of competing firms to the point that no individual firm would have sufficient funds to support the widely varied services (many non-revenue-producing, such as public access channels) . . . ").

\textsuperscript{139} \textit{See Sloan Comm'n on Cable Communications, \textit{supra} note 9, at 127-29; J. Roman, \textit{supra} note 20, at 88-89. One commentator lists eight key factors for successful access programming: "(1) Clear and concise access definition; (2) Defined operating structure; (3) Specifically-designated access channels; (4) Appropriate and adequate equipment; (5) Appropriate staff; (6) Concise, flexible operating rules and procedure; (7) Well designed training program; [and] (8) Adequate operating budget." Buske, \textit{supra} note 10, at 109.

\textsuperscript{140} For a discussion of cable's "narrowcasting" capacity, see \textit{supra} note 107.

\textsuperscript{141} \textit{See supra} notes 39-46 and accompanying text.

\textsuperscript{142} 768 F.2d 1434 (D.C. Cir. 1985), \textit{cert. denied}, 106 S. Ct. 2889 (1986).

\textsuperscript{143} 768 F.2d at 1453; \textit{see also} Midwest Video Corp. v. FCC, 571 F.2d 1025, 1046 (8th Cir. 1978) (questioning whether public access channels are in the public interest, and
cause public access does not occupy such a large portion of the operator's channel capacity. More importantly, although access regulations intrude upon the editorial discretion of the cable operator, they "serve countervailing First Amendment values by providing a forum for public or governmental authorities." Thus, as the Berkshire court itself concluded, public access requirements represent a "sensible accommodation" of the public's interest in access to the cable medium and the cable operator's editorial freedom. Public access requirements effectively and successfully further the goals of the first amendment, while not infringing on the cable operator's discretion as intrusively as other cable regulations. Public access requirements thus should be viewed as the most advantageous balance of the first amendment interests of the public and cable operators.

adding that the viewer's interest is even more paramount with cable than with broadcasting because subscribers pay for service), aff'd on other grounds, 440 U.S. 689 (1979).

The FCC recently adopted a more narrowly-tailored must-carry program. Amendment of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 51 Fed. Reg. 44,606 (1986) (to be codified at 47 C.F.R. pt. 76). The first part of this program requires cable systems to offer input selector switches to subscribers. Subscribers can use these switches, with their antennas, to choose between cable services and off-the-air signals. Id. at 44,606-07. In addition, this part requires cable operators to conduct a consumer education program concerning "the purpose of, and need for, maintaining off-the-air reception capability." Id. at 44,606. In the program's second part, the FCC established interim must-carry rules that will expire at the end of five years. These rules are "intended to provide an orderly transition to a new environment" without must-carry requirements. Id. at 44,606.

144. The House Report stated that cable operators are not "prevented or chilled in any way from presenting their own views and programming on the vast majority of channels otherwise available to them." H.R. REP. No. 934, supra note 7, at 35, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4672. The degree of intrusion on editorial discretion, of course, will vary according to the channel capacity of the individual cable system, and the PEG requirements in the franchise agreement. See Note, supra note 63, at 437 n.98. In Berkshire Cablevision v. Burke, for example, the state regulations at issue required cable operators "to set aside no more than seven of their 50 or more channels for public access." 571 F. Supp. 976, 988 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985). Under the Cable Act, the "fallow time" provision may also reduce the initial intrusiveness of PEG regulations. The House Report explicitly cited the fallow time provisions in the Cable Act as an example of the statute's accommodation of the cable operators' interests in editorial discretion. H.R. REP. No. 934, supra note 7, at 35, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4672. For additional discussion of the fallow time provisions in the Cable Act, see supra note 61.

145. Quincy, 768 F.2d at 1452 (dictum).

146. Berkshire, 571 F. Supp. at 988; see also supra note 127 and accompanying text.
CONCLUSION

The absence of a uniform and generally accepted first amendment standard for cable television offers an important opportunity for courts and legislatures to assess the proper policies that should guide this medium. These decisionmakers should look for guidance to the purposes of the first amendment itself and, accordingly, should adopt Berkshire's expanded scarcity rationale as the appropriate justification for cable regulation. Berkshire's rationale serves "to promote the First Amendment by making a powerful communications medium available to as many of our citizens as is reasonably possible."\(^{147}\) The expanded scarcity rationale supports regulation to counter the effect of scarcity—the removal of an important means of expression from all but a small group—and thus furthers the first amendment's goals of promoting diversity of expression, self-expression, and the expression of minority viewpoints. Furthermore, Berkshire's expanded scarcity rationale offers courts and legislatures a theory that justifies cable regulation on the basis of the unique characteristics of the cable medium and avoids the illogical distinction between broadcast regulation and the nonregulation of newspapers under the current physical form of the scarcity rationale.

Under the Berkshire rationale, public access requirements represent a constitutional and sensible compromise of the conflicting first amendment interests of cable operators and the public. By promoting the first amendment interests of the public, while not infringing as intrusively upon the editorial discretion of cable operators as do other forms of cable regulation, public access requirements effectively counter the harmful effects of concentration in the cable medium. Finally, although eliminating public access requirements would provide stronger protection for the editorial discretion of cable operators, this action would absolutely frustrate the goals of the first amendment served by public access channels. Only a compromise that respects the interests of both cable operators and the public adequately serves the goals of the first amendment.

—Debora L. Osgood

---

147. Id. at 986 (emphasis in original).