University of Michigan Journal of Law Reform

Volume 20

1987

Cable Television Rights of Way: Technology Expands the Concept of Public Forum

Lawrence E. Spong
University of Michigan Law School

CABLE TELEVISION RIGHTS OF WAY: TECHNOLOGY EXPANDS THE CONCEPT OF PUBLIC FORUM

From 1974 to 1984 the number of cable television subscribers in the United States rose from 8.7 million to 30 million and the number of cable systems grew from 3158 to 6200.[1] This growth has forced courts to evaluate the guidance that the first amendment should provide for cable television policy. The courts have entertained questions ranging from the public's right of access to the cable system to the proper standards for regulating broadcasts over the cable system.[2] Recently, in *City of Los Angeles v. Preferred Communications, Inc.*,[3] the United States Supreme Court considered a cable television company's claim that it had a right of access to public rights of way in setting up a cable television system. The City of Los Angeles maintained a franchising scheme whereby only one company was granted access to public rights of way in any one market.[4] The Court recognized that the cable company's claim implicated the first amendment,[5] but declined to resolve the question of the applicable first amendment standard to be used in evaluating claims of access to public rights of way.[6]

1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985 542, 545 (105th ed. 1984) [hereinafter BUREAU OF THE CENSUS]. By 1990, projections show that there will be 55 million cable television subscribers. *Id.* Cable television permits broadcast of numerous television stations' signals to a receiver at any one time. The cable company builds a "head end" facility (a satellite dish or antenna) that picks up broadcast signals from various television stations. Speaker & Wirtschafter, *Cable Television Franchising*, in 1983 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 131, 149 n.1 (M. Meyer & J. Viera eds.). These signals are then sent to customers through cables utilizing public rights of way involving utility poles or underground conduits.

2. *E.g.*, Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978) (challenging mandatory access requirements); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (reviewing FCC orders regulating broadcasts over cable systems).

3. 476 U.S. 488 (1986).

4. Local governments may regulate television franchising. 47 U.S.C. § 541 (Supp. III 1985). Normally, one cable company receives an exclusive franchise for a particular area. Other cable companies are effectively denied use of the public rights of way.

5. *Preferred Communications*, 476 U.S. at 494.

6. *Id.* at 495.

This Note argues that the public forum analysis is the proper standard for evaluating a cable television company's claim of access to public rights of way. Part I discusses the constitutional basis for this standard. Part II examines the ideological justifications for the public forum doctrine and argues that public rights of way are public forums for cable television purposes. In addition, it explains the application of the public forum doctrine to cable access questions and the doctrine's advantages over other standards.

I. CONSTITUTIONAL FOUNDATIONS

To demonstrate that the public forum analysis is the appropriate first amendment standard by which to evaluate access claims to cable rights of way, it is necessary to explain why cable television is a first amendment speaker. Further, a brief history of the development of public forum analysis will show that cable access claims are an appropriate subject for public forum analysis.

A. Cable Television as a First Amendment Speaker

Until recently, no court had decided whether a cable company's claim of access to public rights of way fell within the protection of the first amendment. To receive this protection, a speaker must disseminate ideas and information.[7] The Supreme Court stated in *City of Los Angeles v. Preferred Communications, Inc.* that a cable television company's claim of access to cable rights of way implicates the first amendment.[8] Cable television activities fall within the definition of speech.[9] Specifically, cable television companies are engaged in the dissemination of speech.[10] They do so not only by transmitting others' broadcasts but also by originating their own programming.[11] Cable televi-

7. *Id.* at 494.

8. *Id.* ("We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests.").

9. *Id.* ("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.").

10. Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982).

11. *Id.*

sion companies disseminate entertainment, news, and ideas.[12] These are the types of activities traditionally protected by the first amendment.[13]

Cable television activities are speech and government regulation of them raises first amendment concerns. The proper standard by which to evaluate cable companies' claims of access for speech purposes remains to be settled.

B. The History of the Public Forum Doctrine

Courts use public forum analysis to evaluate claims of access to public property by first amendment speakers. The public forum doctrine originated in cases evaluating first amendment speakers' assertion of access rights to streets and parks. As speakers' access claims have grown to include other types of government property, the Supreme Court has consistently applied the public forum analysis to such access rights. Presently, cable television companies are making similar access claims to public rights of way, seeking the protections afforded other first amendment speakers who have made public property access demands.

1. Streets and parks— Those seeking access to streets and parks presented the first claims of access to public property for the purposes of speech. Initially, the Supreme Court was hostile to their claims.

In *Davis v. Massachusetts,* the Court denied a speaker access to a public park for the purpose of delivering a speech.[14] Although the speaker claimed first amendment protection, the Court decided the case on property law principles.[15] The Court determined that the local government had the power to restrict access to public property in the same way a private owner may restrict access to his property.[16] First amendment protection ended where property law began.

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12. Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652, 657 (N.D. Ohio 1968).

13. *Id.; see also* City of Los Angeles v. Preferred Communications, 476 U.S. 488, 494-95 (1986).

14. 167 U.S. 43 (1897) (upholding a conviction under an ordinance that required a permit from the mayor before one could give a public address on Boston's public grounds).

15. *Id.* at 47.

16. *Id.*

The Court next considered the issue of distributing literature on public streets in *Lovell v. City of Griffin.*[17] The Court, without raising the property law issue, held that requiring a person to get permission from a city official before distributing literature violated the freedom of the press clause[18] of the first amendment.[19] For the first time, the Court recognized the importance of access to public property in order to give substance to first amendment protections.

A year later, Justice Roberts articulated the public forum doctrine in *Hague v. Committee for Industrial Organization.*[20] In contrast to *Davis,* he stated that the first amendment's free speech clause protected access to public property for the purposes of speech:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[21]

This right of access was not absolute but "must be exercised in subordination to the general comfort and convenience."[22] In subsequent cases, the Court continued to recognize streets and parks as public forums.[23]

2. Other real property access claims— The civil rights movement of the 1960's provided courts the opportunity to extend rights of access to government controlled property beyond streets and parks. In *Brown v. Louisiana,* civil rights protestors

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17. 303 U.S. 444 (1938) (overturning a conviction for violating a city ordinance banning the distribution of literature within the city without the written permission of the city manager).

18. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . .").

19. *Lovell,* 303 U.S. at 451.

20. 307 U.S. 496 (1939) (involving the arrest of union members for violating an ordinance that required persons to obtain permits from the mayor before distributing literature or holding public meetings).

21. *Id.* at 515.

22. *Id.* at 516.

23. *See, e.g.,* Martin v. City of Struthers, 319 U.S. 141 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. New Jersey, 308 U.S. 147 (1939). In these cases, known as the *Jehovah's Witnesses Cases,* the Court recognized parading and distributing literature as appropriate first amendment activities for streets and parks.

claimed access to a public library to protest silently against discriminatory library policies.[24] Although the property involved was not traditionally "held in trust for communication,"[25] the Court recognized the importance of the first amendment right at issue. Although reasonable regulations were appropriate, the Court acknowledged the protestors' right to protest silently in the library.[26]

Despite significant extension of the public forum doctrine, the Court returned to the property analysis of *Davis v. Massachusetts*[27] in *Adderley v. Florida*.[28] In *Adderley*, a group of protestors sought access to jail grounds.[29] The Court held that the government, just as a private owner, could restrict access to its property.[30]

After *Adderley*, it was unclear what property would or would not be a public forum. *Adderley*, however, was the last case in which the Court used property law principles alone to decide access claims to government-controlled property.

3. Quasi-property access claims— More recently the Court has evaluated claims of access to other types of public property or "quasi-property." It has continued to use the public forum analysis.

A claim of access to a school district's mailing system was at issue in *Perry Education Association v. Perry Local Educator's Association*.[31] The Court developed a three-tiered analysis, based on the character of the property involved, for evaluating claims of access to public property.[32] The first category of property, exemplified by streets and parks, has traditionally been open as a forum for speech.[33] The second category includes

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24. 383 U.S. 131 (1966).
25. Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).
26. *Brown*, 383 U.S. at 142-43.
27. 167 U.S. 43 (1897).
28. 385 U.S. 39 (1966).
29. *Id.* at 40.
30.

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate."

Id. at 47-48.

31. 460 U.S. 37 (1983) (evaluating a claim by a rival union that it should have access to the school district mailing system, when access had already been granted to the union then representing the teachers of the school district).
32. *Id.* at 45-46.
33. *Id.* at 45.

property dedicated to expressive activity—for instance, a municipal theatre.[34] The government may regulate these two types of property through the use of content-neutral, narrowly drawn, time, place, and manner restrictions.[35] The third category consists of nonpublic forums that have neither been open to the public nor dedicated to expressive activity.[36] This category could be exemplified by Postal Service letterboxes. The government may regulate nonpublic forums in any manner it sees fit, as long as the regulation is reasonable and is not merely designed to suppress speech based on disagreement with its content.[37] The Court found the teachers' mailboxes in *Perry* to be nonpublic forums and held that the restrictions on the access to the school mailing system were permissible.[38]

Cornelius v. NAACP Legal Defense & Educational Fund presented a recent opportunity for the Court to discuss the public forum analysis.[39] The plaintiffs, various political advocacy groups, sought access to a federal charity drive conducted in the federal workplace.[40] Under the *Perry* three-tiered analysis,[41] the Court held that the charity drive was a nonpublic forum.[42] Although the plaintiffs claimed access to a fund drive rather than to real property, the Court found it appropriate to evaluate the claim by using the public forum analysis.

The history of the public forum doctrine demonstrates that a claim of access to government controlled property for purposes of speech requires use of the public forum analysis. Although the types of property to which speakers have sought access have changed, the Court has consistently applied the public forum doctrine. Cable television companies are similarly first amendment speakers seeking access to government controlled property, i.e., public rights of way. They occupy the same position as those speakers to whom the public forum analysis has historically been applied.

The Supreme Court, while not deciding the issue, implied that the public forum standard should apply to cable companies'

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34. *Id.*

35. *Id.* ("The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.").

36. *Id.* at 46.

37. *Id.*

38. *Id.* at 50-51.

39. 473 U.S. 788 (1985).

40. *Id.* at 790-93.

41. *See supra* notes 32-37 and accompanying text.

42. *Cornelius*, 473 U.S. at 804-05.

claims of access to public rights of way.[43] Although declining to decide the issue of the appropriate standard, the Court referred to *Cornelius*, then the Court's most recent discussion of public forum analysis, suggesting that it was thinking in terms of public forum analysis.[44]

II. PUBLIC FORUM ANALYSIS AND CABLE TELEVISION COMPANIES

The history of the public forum doctrine supports the claim that the public forum analysis is applicable to access claims to public rights of way by cable companies. Nevertheless, such rights of way, especially under the present approach, may not qualify as public forums. The ideological policy justifications for the public forum doctrine suggest that public rights of way should be public forums.[45]

A. Ideological Policy Justifications for the Public Forum Doctrine as They Relate to Cable Television

The need for a marketplace of ideas to test their truth provides one justification for the public forum doctrine.[46] Cable television provides such a marketplace by transmitting a variety of ideas through a single source. This diversity was a goal of Congress when it passed the Cable Communications Policy Act of 1984.[47] Restriction of access to only one company, however,

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43. 476 U.S. 488, 494-95 (1986) (citing public forum cases, including Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985), and Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)).

44. *Id.* at 495. "Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. 'Even protected speech is not equally permissible in all places and at all times.' " *Id.* (quoting *Cornelius*, 473 U.S. at 799 (1985)).

45. One justification for allowing access to public forums is that they serve as the poor man's printing press. The Supreme Court has suggested that a forum is necessary for the "poorly financed causes of little people." Martin v. City of Struthers, 319 U.S. 141, 146 (1943). This justification, however, is not applicable to cable television companies.

46. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

47. Pub. L. No. 98-549, 98 Stat. 2779 (codified at 15 U.S.C. § 21, 18 U.S.C. § 2511, 46 U.S.C. app. §§ 484-487, 50 U.S.C. § 1805 and in scattered sections of 47 U.S.C.); H.R. REP. No. 934, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4656 ("The legislation also contains provisions to assure that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas—an environment of 'many tongues speaking many voices.' ").

reduces the possibility of such a market developing. One company is likely to present only one set of "ideas." Competition among several cable television companies in the same television market assures an abundance and variety of differing views and opinions.

Public forums also provide protection against government censorship and control of speech.[48] Allowing local governments to restrict access to one company raises the possibility of the government's selecting a particular company because of the content of its programming. This restriction may result in limiting access to differing viewpoints and distorting public discussion.[49] For example, in a community with a high concentration of a particular religious group, the local governing body may award the cable franchise to a company which that group controls resulting in censorship by that religious group. A society that places such great emphasis on the freedom of expression and that receives so much of its information through cable television[50] cannot tolerate such a possibility.

The policy justifications for the public forum doctrine demonstrate that the public forum analysis is the best standard to use in evaluating cable access claims. To ensure a market place of ideas and prevent government censorship, cable rights of way should be held to be a public forum.

B. Public Forum Analysis as Applied to Cable Television

The public forum analysis is also the most appropriate legal standard for courts to use in evaluating cable companies' access claims to public rights of way. Application of the public forum analysis suggests that public rights of way are a public forum. The justifications given for regulating public rights of way are weak and fail to take into account important first amendment

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48. Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335, 339 (1986) ("Foremost among these values is protection against government impedance of viewpoints the government itself does not favor, particularly in the form of content- and viewpoint-based restrictions on expression.").

49. Note, *The First Amendment and Cablevision*: Preferred Communications, Inc. v. City of Los Angeles, 22 TULSA L.J. 229, 256 (1986); *see also* Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1409 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986).

50. From 1950 to 1983 the number of homes receiving daily newspapers rose from 53.8 million to 62.6 million. During the same time period, the number of homes receiving cable television service rose from .01 million (1952) to 25 million (1983). BUREAU OF THE CENSUS, *supra* note 1, at 542.

concerns. Additionally, the public forum standard offers advantages over other standards that have been used to evaluate claims of access to public rights of way.

1. Public Forum Doctrine— Requiring municipal franchise licenses of those seeking access to public rights of way is facially content-neutral legislation.[51] Therefore, reasonable time, place, and manner restrictions are permissible.[52] In addition, "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' "[53] These restrictions "must be narrowly tailored to further the State's legitimate interest."[54] The extent to which the government's interest will control, given the current categorical approach, depends on the category of property into which public rights of way fall.

Property is divided into three categories for the purposes of public forum analysis.[55] These include: (1) traditional public forums exemplified by streets and parks, (2) property dedicated to expressive activities—a limited public forum, and (3) nonpublic forums.

For situations that do not fit the traditional public forum analysis, a showing that the forum has been dedicated to a communicative purpose satisfies the requirement for a limited public forum. Because cable television companies are first amendment speakers[56] seeking access to property *dedicated* to use by cable companies, the public rights of way are limited public forums. Courts that have faced this issue have found that a public forum claim was adequately alleged by a showing that the local government had dedicated public rights of way for use by cable companies.[57]

Because the degree of permissible regulation may change as technology advances, and increased expressive activity takes place through cable television, these rights of way may fall

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51. *See* 47 U.S.C. § 544(f) (Supp. III 1985) (prohibiting content regulation). *But see* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1375 (10th Cir. 1981) (discussing plaintiff's claim that the limitation is content-based because it results in the "better" speaker being chosen).

52. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

53. *Id.* at 116 (quoting Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969)).

54. *Id.* at 116-17.

55. *See supra* notes 32-37 and accompanying text.

56. *See supra* notes 8-13 and accompanying text.

57. *See* Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1338 (D.C. Cir. 1985); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1408-09 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986).

within the first category of public forum property.[58] If technological advances make available a large number of cable transmissions in a small space, many companies will be able to use the public rights of way at one time. Much of the important communication of the day may move from the streets to the cable systems. Over time, the public rights of way may become the "traditional" public forums.

Under the Supreme Court's categorical approach to the public forum question, whether a forum is public or nonpublic depends on the intent of the government as to the property's use and the nature of the property at issue.[59] Some commentators have argued that cable access rights of way are nonpublic forums because local governments' limitation of access to only one company evidences an intent that public rights of way are not to be public forums.[60] A more thorough examination of the intent of the government is required, however. States set aside public rights of way intending to aid development of cable communication.[61] By allowing cable companies to use public rights of way, the government evidences an intent to use the property for communicative purposes.[62] In *Cornelius v. NAACP Legal Defense & Educational Fund,* by contrast, the plaintiff sought access to a charity campaign for the purpose of soliciting funds. The Court denied the demand due to the government's legitimate interest in avoiding disruption of the workplace.[63] Furthermore, in *Cornelius,* the restriction to access, placed on a particular class of speakers, was deemed reasonable in light of the purpose served. In the cable area, the only relevant class distinction is between those who have access and those who do not. Access restrictions

58. Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1562 (N.D. Cal. 1984) ("[I]n determining the degree of constitutionally permissible regulation, we must keep in mind that [cable television] technology may change over time; such developments may change the degree of permissible regulation.").

59. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

60. One author found the public forum standard to be the constitutional standard applicable to cable companies' claims of access but stated that public rights of way are nonpublic forums. Note, Preferred Communications, Inc. v. City of Los Angeles: *Impact of the First Amendment on Access Rights of Cable Television Companies,* 35 CATH. U.L. REV. 851, 874-81 (1986). Despite the claim that cable rights of way are nonpublic forums, the author argues that limitation of access to one company is unreasonable in light of the forum's purpose. *Id.*

61. Note, *Aid or Obstruction? Government Regulation of Cable Television Meets the First Amendment*—Preferred Communications, Inc. v. City of Los Angeles, 61 WASH. L. REV. 665, 684 (1986).

62. *Id.* at 684-85.

63. 473 U.S. 788, 805 (1985).

cannot be reasonably based on allowing access only to those with access already and disallowing access to those without.

Use of public rights of way by more than one cable company will not prevent other uses of the property.[64] Interference resulting from unrestricted access would justify some degree of time, place, and manner regulation.[65] It would not, however, justify defining cable as a nonpublic forum. Holding that public rights of way are nonpublic forums does not take into account the vast technological advances underway in the field of cable television that may reduce interference with other uses of the public rights of way.

2. The categorical and functional approaches to public forum analysis— A finding of a limited public forum under the present three-tiered approach would allow certain time, place, and manner restrictions on cable television's access to public rights of way.[66] This is known as the categorical approach. In the past, however, the Supreme Court has often used a more functional approach.[67] The functional inquiry is directed toward the compatibility of the manner of expression with the type of property involved.[68] The nature of the property, the activities that normally take place there, the method of the communication, and the appropriateness of the method of communication for the type of property involved are all considered.[69] The historical development of the public forum cases highlights the difference between the categorical and functional approaches.

The present categorical approach, which emphasizes the nature of the property involved, results from the fear that all government property would become a public forum without a bright line to distinguish public from nonpublic forums.[70] Finding a particular forum to be a public forum results in such a restriction on allowable regulations that the Court may only do so reluctantly. In attempting to avoid this possible domino effect, however, the Supreme Court reaches results without a fair assessment of the competing interests at stake, including the inter-

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64. Note, *supra* note 61, at 684; *see infra* notes 97-99 and accompanying text.

65. Note, *supra* note 61, at 693.

66. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

67. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972).

68. *Id.* at 116 ("Although a silent vigil may not unduly interfere with a public library, . . . making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park.").

69. For an in-depth discussion of the differences between and development of the categorical and functional approaches, see Werhan, *supra* note 48.

70. *Id.* at 418-19; *see, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974); Brown v. Louisiana, 383 U.S. 131, 165 (1966) (Black, J., dissenting).

ests of the speaker, the necessity of access, and the existence of more narrow solutions.[71] Furthermore, the categorical approach ignores important first amendment policies and values by looking only to the character of the property without a full consideration of the effect that a finding of a nonpublic forum would have on speech.[72]

The functional approach, however, allows a balancing of the interests without the domino effect; not all government property will be considered a public forum.[73] At the same time, this approach more carefully considers the first amendment interests of the speaker.[74] The Supreme Court will probably continue to use the categorical approach in deciding future public forum cases. Although the functional approach seems better equipped to handle novel situations, the conflict between the two approaches remains unsettled and unrecognized by the Court.

Should the Court return to a functional approach, it may find other regulation to be appropriate. The functional approach would allow a court to find that cable rights of way are public forums, while at the same time recognizing the necessity of some degree of regulation based on the "uses to which the public property is normally put."[75] Also, the functional approach is more responsive to the technological changes taking place in the cable television field. As changes take place, the functional approach will include the changes in the assessment of the permissible degree of regulation. Should the Court apply the categorical approach and find that cable rights of way are nonpublic forums, the Court will have difficulty changing the degree of permissible regulation in light of changed technologies. The functional approach allows a greater degree of freedom as the technology advances and the need for regulation decreases.[76]

3. Justifications for regulating access to public rights of way— Franchising authorities have argued that restricting access to public rights of way to a single cable television company

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71. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Adderley v. Florida, 385 U.S. 39 (1966).

72. Werhan, *supra* note 48, at 418.

73. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (holding an antinoise ordinance near a school building constitutional).

74. Werhan, *supra* note 48, at 424.

75. *Adderley*, 385 U.S. at 54 (Douglas, J., dissenting).

76. *See infra* notes 88-89 and accompanying text.

is a necessary regulation. They have offered several justifications for restricted access.[77]

Municipal authorities argue that cable television space is entitled to less constitutional protection because it is a scarce resource.[78] Although the broadcast medium is scarce due to the limits of the electromagnetic spectrum,[79] scarcity, in this sense, is not applicable to cable.[80] Cable is scarce in that a limited number of cables may be placed in the public rights of way.[81] Franchising authorities maintain that this physical scarcity enables them to restrict access to the public rights of way to a single cable television company.[82]

Regulation of a public forum must be narrowly drawn to serve a significant government interest.[83] Restricting access to a single cable company is not a narrowly drawn regulation. As the Court of Appeals for the Ninth Circuit has stated:

> We cannot accept the City's contention that, because the available space on such facilities is to an undetermined extent physically limited, the First Amendment standards applicable to the regulation of broadcasting permit it to restrict access and allow only a single cable provider to install and operate a cable television system.[84]

In addition, with technological improvements such as cable companies' ability to transmit their signals through smaller and smaller spaces, such as fiber optics, the physical scarcity justification remains weak.

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77. For a thorough discussion of the justifications for regulation of cable television in general, see Note, *Expanding the Scarcity Rationale: The Constitutionality of Public Access Requirements in Cable Franchise Agreements*, 20 U. MICH. J.L. REF. 305 (1986).

78. Several courts have rejected this argument. *See, e.g.*, Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986); Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984).

79. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (allowing more restrictive regulation of broadcast content because the broadcast frequency was a scarce resource). This claim is presently the source of much criticism. *E.g.*, Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986).

80. *Century Fed.*, 579 F. Supp. at 1563. There is an almost infinite number of stations that can be brought into a home by means of cable.

81. *See, e.g., Preferred Communications*, 754 F.2d at 1404; *Century Fed.*, 579 F. Supp. at 1563.

82. The municipalities involved in both *Preferred Communications*, 754 F.2d at 1403, and *Century Federal*, 579 F. Supp. at 1563, made this argument.

83. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

84. Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986).

Second, franchising authorities argue that the economic scarcity of the resource justifies restricting access to rights of way.[85] Essentially, they claim that the operation of cable television results in a natural monopoly.[86] It is not economically feasible, they argue, for more than one cable company to do business in any one market.[87]

This justification is well accepted because the theory of natural monopolies explains the development of public utilities and justifies restricting the operations of these businesses to only one company.[88] One court has rejected the claim that cable television is a natural monopoly.[89] The court stated that numerous cable companies operating in one market would not involve the degree of public inconvenience that numerous utility companies operating within one market would entail.[90] If this claim is true, then the government has no significant interest in restricting access to the public rights of way, thus making the regulation unnecessary.[91] Nor does empirical evidence support the conclusion that cable television is a natural monopoly.[92] The fact that there is, at present, usually only one cable company in each market does not provide evidence that cable television is a natural monopoly. Local governments limit access to only one company and thereby skew the evidence.[93]

Another argument for restricting access is that the cost of installing a cable system outweighs the cost of serving subscribers

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85. *See, e.g.*, Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1378 (10th Cir. 1981); Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1563-64 (N.D. Cal. 1984).

86. The municipalities in both *Community Communications*, 660 F.2d at 1375, and *Century Federal*, 579 F. Supp. at 1563, made this argument.

87. *Community Communications*, 660 F.2d at 1378 ("[C]able broadcasting is a monopolistic industry because it is not economically viable for more than one cable company to operate in any given geographic area.").

88. Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652, 657 (N.D. Ohio 1968).

89. *Id.*

90.

> Unlike water, gas and electric companies where there is great public inconvenience in having numerous concerns serving the same geographical market, CATV [cable television] is not a natural monopoly. There is only the inconvenience of having another pair of wires, if that, involved in having an additional CATV company in a geographical market.

Id.

91. *Id.*

92. Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867, 880-84 (1983).

93. *Id.* at 880-81; *see also* Note, Preferred Communications, Inc. v. City of Los Angeles: *First Amendment Rights and Cable Television Franchising Procedures*, 17 PAC. L.J. 965, 970 (1986).

and only one company can economically operate in a market. Again, evidence shows that, although these economic factors are present, they are not sufficient ground for the elimination of all competition in the cable industry.[94]

Even assuming that cable television does operate as a natural monopoly, that fact alone is not a sufficient justification for regulation of an activity protected by the first amendment.[95] The Court of Appeals for the District of Columbia Circuit has stated that economic scarcity does not justify regulation of newspapers and therefore does not justify regulation of cable television.[96]

The final justification for restricting access is that cable disrupts the use of public resources and constitutes a nuisance.[97] That cable television does involve some degree of disruption is undisputed: "[Cable television] operating differs significantly from newspaper publishing in that the former entails far more disruptive use of the public domain, *viz.*, attaching cables to utility poles or digging up streets to bury the cables."[98] Such disruption, however, does not justify restricting access to only one company.

The regulation resulting from inconvenience is distinct from restricting access altogether.[99] Restricting access to only one company is not narrowly tailored to the government interest involved. A narrowly tailored solution would not set access according to an arbitrary number. Moreover, technological advances may reduce the force of this argument by allowing cable companies to operate with little or no disruption to the public.

4. Advantages of the public forum analysis— The public forum analysis offers many advantages over the analysis provided by balancing, prior restraint, and the comparative media analy-

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94. *See* Lee, *supra* note 92, at 882-83.

95. *See, e.g.*, Midwest Video Corp. v. FCC, 571 F.2d 1025, 1055 (8th Cir. 1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977).

96. *Home Box Office*, 567 F.2d at 46. *But see* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1378 (10th Cir. 1981). The Ninth Circuit has attacked the conclusion reached in *Community Communications*. Preferred Communications, Inc., v. City of Los Angeles, 754 F.2d 1396, 1405 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986) ("[The analysis] suggests that simply because cable's disruption of the public domain gives rise to a need for licensing, it would also justify the monopoly the City seeks to create by its auction process.").

97. *See, e.g., Preferred Communications*, 754 F.2d at 1405; Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1564 (N.D. Cal. 1984).

98. *Century Fed.*, 579 F. Supp. at 1564.

99. *Preferred Communications*, 754 F.2d at 1406 ("Regulating such use and inconvenience, however, is quite different from restricting access, as the City attempts to do here.").

sis. These other approaches fail to take fully into account the first amendment concerns at issue.

Several courts have used a balancing approach.[100] This approach involves weighing the interests of the cable companies against those of the local government.[101] The balancing approach, however, is not sufficient to protect the first amendment rights of cable companies. The Supreme Court has recognized that where the first amendment is involved, the claim that a regulation is rational is not sufficient.[102] The public forum analysis provides the higher level of scrutiny required.

A prior restraint analysis is also inadequate to evaluate access claims of cable companies. Prior restraint merely prevents local governments from limiting access to one company where more cable space is available. Although one court has used this type of analysis,[103] others have ignored this standard. Prior restraint analysis fails to take into account the interests of the government in preventing disruption of its resources: the focus is exclusively on the first amendment speaker. Striking down franchising ordinances under prior restraint analysis is only a temporary solution to the problem. Although application of prior restraint analysis may prevent enactment of laws that restrict access, this will occur only so long as there exists space for cable. Once rights of way are full, courts will need to adopt a new method.

In determining the appropriate first amendment standard, one must also consider the nature of the medium of speech utilized. "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it . . . ."[104] Differ-

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100. *See* Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 127-28 (7th Cir. 1982); *Community Communications*, 660 F.2d at 1375-80; *see also* Note, *supra* note 61, at 674 n.63.

101. The balancing approach used by courts has been more narrow than the functional approach discussed herein. The courts have put a heavy emphasis on the scarcity and economic arguments without a searching analysis of the first amendment interests at stake. Although considering the interest of the cable companies, the courts have failed to consider the public's interest in a marketplace of ideas. They have also failed to consider technological changes taking place. Essentially, the courts have looked to see if the regulation is rational in light of the government's interest in keeping rights of way free from disruption.

102. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force.").

103. Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891, 901 (W.D. Mo. 1985).

104. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1403 (9th Cir. 1985) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)), *aff'd on other grounds*, 476 U.S. 488 (1986).

ences in media may demand differences in the applicable first amendment standard.[105] These considerations have led some courts to utilize a comparative media approach,[106] comparing and contrasting cable with broadcasting and newspapers.[107] The approach focuses on the degree to which three factors—physical scarcity, economic scarcity, and disruption of the use of public resources—affect each of these media.[108]

The comparative media approach is inadequate for two reasons. Despite the claim that it addresses the unique aspects of cable, it fails to do so by not considering cable's dependence upon access to public rights of way.[109] Although this approach may lead to the conclusion that different standards should apply to cable, it does not answer the question of the permissible degree of regulation.[110]

Public forum analysis ensures that a franchising authority will be able to restrict access to one cable company only in rare instances. The government will not be able to use the access regulation to disguise content regulation:

> [T]he means chosen by the City to serve its interests—allowing only the single company selected through the franchise auction process to erect and operate a cable system in each region—creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or the views expressed in, their proposed programs.[111]

The public forum analysis allows for the vast technological change currently taking place in the cable television field.[112] It is the type of analysis best suited to deal with technological changes.

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105. *Preferred Communications*, 754 F.2d at 1403. "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id.* (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969)).

106. *See, e.g.*, Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 127-28 (7th Cir. 1982). *See generally* Note, *supra* note 60.

107. Note, *supra* note 60, at 857.

108. *Id.*

109. *Id.* at 869.

110. *Id.* at 863-65.

111. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1406 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986).

112. Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052 (8th Cir. 1978). "Moreover, communications technology is dynamic, capable tomorrow of making today obsolete. . . . 'At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding.'" *Id.* (quoting Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 132 (1973)).

CONCLUSION

Local governments have generally restricted access to public rights of way dedicated to the use of cable operations to one cable company. Cable companies have recently begun to challenge this practice. Although the access issue implicates the first amendment, courts have not adopted a single standard for evaluating these claims. This Note has proposed that the appropriate analysis for evaluating cable companies' access claims is the public forum analysis. Applying this analysis to claims of access to public rights of way follows the historical development of the public forum doctrine. Application of this analysis also helps to ensure that government does not influence the content of cable speech. Protection against government censorship is one of the most important justifications for the development of the public forum doctrine. Public forum analysis takes into account the legitimate interests of the government in regulating cable access, while allowing for the rapid technological changes taking place in the field.

—Lawrence E. Spong