The Signal Cable Sends-Part I: Why Can't Cable Be More Like Broadcasting?

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Articles

THE SIGNAL CABLE SENDS—PART I: WHY CAN’T CABLE BE MORE LIKE BROADCASTING?*

LAURENCE H. WINER**

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* Part II of this article will appear in 55 Fordham L. Rev. (forthcoming March 1987); see infra note 3.
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In recent years, commentators, courts, and the FCC have begun distinguishing cable from broadcast television and analogizing cable instead to the print media in order to afford cable fuller first amendment freedom than broadcasting traditionally has enjoyed. This article challenges that approach, arguing that cable and broadcasting have a functional similarity and are close substitutes for one another. In fact, they form a unified cable/broadcasting medium that should be indistinguishable, for first amendment purposes, from the print media. In this way, cable and broadcasting each supports the other's entitlement to full first amendment freedom.

I. INTRODUCTION

Is cable television more like broadcasting or more like the print media such as newspapers? This question is often posed by those attempting to determine the proper scope of regulation for the cable medium. Much could turn on how this question is resolved. Broadcasting traditionally, though inappropriately,1 has been subject to extensive regulation based largely on the perceived scarcity of the electromagnetic spectrum; if cable is analogized to broadcasting, then it may be subject to similarly broad regulation. If, on the other hand, cable is seen as sharing more attributes of the print media, the first amendment should shield it from government control to the same extent that newspapers are protected.

In fact, however, this is the wrong question. The premise of this article is that discussion of the appropriate regulation of the electronic media must start with recognition of the close functional similarity between cable and broadcast television. At least with respect to audio/video programming, cable and broadcasting should be viewed as essentially one medium. The basic regulatory question then becomes: Is the cable/broadcast medium distinguishable, for first amendment purposes, from the print media? A scarcity rationale cannot provide the basis for distinction, since there is nothing scarce about such a unified medium. Therefore, unless there are other compelling justifications for specific regulatory controls—and this article will argue that there are none—this unified medium should enjoy the same first amendment status as newspapers.

The Supreme Court recently noted the increasing criticism of spectrum scarcity as the prevailing rationale for broadcast regulation. The Court further indicated that it might reconsider its longstanding approach to regulation upon an appropriate signal that

1. See infra Section II (discussing the myth of scarcity).
technological developments require a fresh perspective.\(^2\) Cable sends such a signal. This article analyzes the nature of this signal by first reviewing the errors that led to the emergence and adoption of the scarcity rationale and then examining the current meaning of scarcity. The precipitant demise of the scarcity rationale calls for such a reexamination of scarcity principles from the current technological perspective. In this context, the new and rapidly developing cable technology offers an easy resolution to the scarcity conundrum. Indeed, a proper reading of recent judicial opinions affording cable more first amendment protection by trying to distinguish it from broadcasting in fact confirms the basic similarity between these two media and presages the end of the doctrine of electronic media scarcity.\(^3\)

Finally, this article presents a number of specific examples of difficulties with cable/broadcasting regulation that arise from asserting distinctions between them. These problems can be eliminated by treating cable and broadcasting as a unified medium. There is,

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\(^2\) FCC v. League of Women Voters, 468 U.S. 364, 376-77 n.11 (1984). The Court also suggested that it might reconsider the constitutional basis for the fairness doctrine, id. at 378-79 n.12, probably the single most inhibiting feature of current broadcast regulation derived from the scarcity rationale. The FCC has sent its own signal in this regard, relying in part on cable. See 1985 Fairness Doctrine Report, 102 F.C.C.2d 143 (1985), petition for review dismissed as to constitutional challenge but not otherwise, Radio-Television News Directors Ass'n v. FCC, 809 F.2d 860 (D.C. Cir. 1987) (per curiam); Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987) (discussing FCC's response to Supreme Court's invitation to send it a signal); Order Requesting Comment, 52 Fed. Reg. 2,805 (Jan. 27, 1987) (in light of the 1985 Fairness Report, FCC requests comment on whether enforcement of fairness doctrine is constitutional or is contrary to the public interest); see also infra Section V.B (discussing the fairness doctrine).

\(^3\) Separate treatment is required for one line of cable cases in which cable is distinguished from broadcasting: the cases dealing with attempts to control so-called “indecency” on cable. See Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985), aff'd sub nom. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), appeal docketed, 55 U.S.L.W. 3514 (U.S. Jan. 5, 1987) (No. 86-1125); Cruz v. Ferre, 571 F. Supp. 1164 (D. Utah 1982); Home Box Office v. Wilkinson, 531 F. Supp. 986 (D. Utah 1982). Since regulation of broadcast indecency—upheld by the Supreme Court in FCC v. Pacifica Found., 438 U.S. 727 (1978)—is thought, somewhat incorrectly, to rest on considerations that do not invoke a scarcity rationale, these cable cases, which differentiate cable from broadcasting to avoid the reach of Pacifica, raise concerns rather different from those that are the focus of this article. In a companion article I explore the indecency issue and show that the asserted distinctions between cable and broadcasting in that context are basically wrong, outmoded, and largely unnecessary. Since they also conflict with the beneficial approach developed here of treating cable and broadcasting as a unified medium, the reasoning of the cable indecency cases should be discarded. Their correct result of no censorship, however, should be retained. See Winer, The Signal Cable Sends—Part II: Interference From the Indecency Cases?, 55 Fordham L. Rev. ___ (forthcoming Mar. 1987).
therefore, a profound symbiosis between cable and broadcasting in which each supports full first amendment freedom for the other.⁴

II. THE MYTH OF SCARCITY

Scarcity of the electromagnetic spectrum as a justification for plenary federal regulation of the broadcast medium developed through a series of legislative and judicial failings. At least initially, the first amendment implications of such regulation were not well recognized. Moreover, a misunderstanding of the physical nature of the broadcast medium fostered the erroneous notion of scarcity when, in fact, there is not and never has been a true lack of broadcast frequencies.⁵ The potential irrelevance of the scarcity rationale, however, requires a review of the meaning of broadcast scarcity, which is explored in this section. The next section will then analyze whether cable now robs that concept of any vestigial meaning.

A. The Early Years of Broadcast Regulation—Interference and Scarcity

The Radio Act of 1912⁶ was Congress’ first general attempt⁷ to regulate the early radio industry. It mandated the licensing of radio stations, allocated certain frequencies for government use, adopted some anti-interference measures, and established disaster signal procedures. This Act, however, failed to set aside any particular frequencies for the use of private broadcasters. After the development in the early 1920s of the first standard broadcast stations, the demand for broadcast licenses grew dramatically.⁸ When Herbert

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⁴ Disputes between cable and broadcast interests arising from their economic competition, such as the current controversy over the cable “must-carry” rules (i.e., cable’s obligation to carry certain broadcast signals), unfortunately sometimes distort their otherwise common first amendment interests. See, e.g., Countdown on Must-Carry, Broadcasting, Feb. 3, 1986, at 30, 31; Roper, Rethinking the Strategies of Must-Carry Regulation, Broadcasting, Oct. 21, 1985, at 20. For a discussion of the must-carry rules, see infra Section III.B.

⁵ “The ‘scarcity’ that exists and that for 60 years has resulted in a tightly regulated, politicized, oligopolistic, and indeed trashy system of broadcasting is the result of regulatory policies adopted by political decision makers, not a result of technological constraints to which the decision makers thought they were responding.” Pool, Comment, in UNNATURAL MONOPOLIES 173 (R.W. Poole, Jr., ed. 1985). See infra notes 95-109 and accompanying text.


⁷ The 1912 Act had been preceded by the Wireless Ship Act of 1910, ch. 379, 36 Stat. 629 (1910), a maritime safety measure mandating shipboard radio equipment.

⁸ There were two stations on the air and about 400,000 receivers in 1921, 300 stations and over 2,000,000 receivers a year later, and more than 500 stations by 1925. E. FOSTER, UNDERSTANDING BROADCASTING 67-68 (2d ed. 1982).
Hoover, as Secretary of Commerce, attempted to assign frequencies and regulate the burgeoning industry, he was stymied by court rulings. For example, Hoover could not refuse to grant a license to a qualified applicant even though the new station would interfere with existing ones. Furthermore, his power to restrict the frequency and hours of a licensee's operation was doubtful. Hoover therefore abandoned his attempt to impose restrictions on broadcasters, and pleaded, in vain, for self-regulation.

By 1926 hundreds of broadcasters were on the air across the country. They operated at will, choosing their hours, frequency, and power levels with little regard for interference with each other. "The result was confusion and chaos. With everybody on the air, nobody could be heard." Faced with this chaos and pressured by President Coolidge, Congress enacted the Radio Act of 1927. Given the consequences of Congress' prior failure to enact

9. Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923). The court held that "Congress intended to fully regulate the business of radio telegraphy" but that it did so "without leaving it to the discretion of an executive officer." Id. at 1006. Since the court held that the duty to issue a license was mandatory and not discretionary, the most Hoover could do in granting the license was to select a wavelength resulting in the least possible interference. Id. at 1007. Indeed, the court ruled that in adopting the 1912 Act Congress had accepted interference in operation and had therefore merely prescribed regulations by which the interference could be minimized rather than prevented entirely. Id. at 1005.

10. United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). The court indicated that while the defendant station had not violated the criminal provision of the 1912 Act, the station's actions had violated specific statutory regulations for which a fine up to $100 could be imposed and for repeated violations of which the license could be revoked. Id. at 618. Thus Hoover was not totally powerless.

A few months after the Zenith decision, however, Hoover requested an opinion from the Attorney General defining the Secretary's powers and duties under the 1912 Act. 35 Op. Att'y Gen. 126 (1926). This opinion concluded that, while the 1912 Act required a station to obtain a license before broadcasting and imposed a criminal penalty for failure to do so, the Secretary of Commerce could not limit the duration of licenses and had no general authority, apart from the regulations in the 1912 Act itself, to assign wavelengths or fix the times or power at which stations could operate. Thus, a station could "with impunity operate at hours and with powers other than those fixed in its license" subject only to regulations of the Act and penalties for malicious interference. Id. at 131-32.

11. See S. Head & C. Sterling, Broadcasting in America 139-40 (4th ed. 1982). For example, Los Angeles and Chicago had, respectively, 23 and 40 stations operating over limited spectrum space which, with the equipment then available, could accommodate only seven stations without resort to time sharing. C. Sterling & J. Kittross, Stay Tuned: A Concise History of American Broadcasting 66 (1978).


meaningful legislation, it is not surprising that Congress now reacted with plenary legislation. Indeed, although the main problems needing attention were technical in nature—including a registration system to establish frequencies, power, and hours of operation in order to eliminate interference—the 1927 Radio Act initiated comprehensive regulation of the fledgling radio industry.15

The overriding feature of the 1927 Act was its clear implication that ownership of the electromagnetic spectrum rests with the public.16 As a corollary, the 1927 Act established the vague notion of the “public-interest, convenience or necessity,” or some permutation thereof, as the standard by which regulation was to be measured.17 On this conceptual basis the 1927 Act created the Federal

15. This legislative overkill was presaged by President Coolidge who, in his 1926 appeal to Congress, sought legislation not only to "protect radio listeners from interference," but also to promote radio in the public interest by entrusting to a government agency the "important functions of deciding who shall exercise the privilege of radio transmission and under what conditions." H.R. Doc. No. 483, supra note 13, at 10 (emphasis added). Broadcasters themselves apparently favored federal regulation of the industry as a public utility. See G. Archer, History of Radio to 1926 at 248-50 (1938).

16. The 1927 Act precluded private ownership of radio frequencies, instituting instead a system of government licenses limited in duration with no automatic renewal and no vested right to continued use of the license or the frequency it represented. Radio Act of 1927, ch. 169, §§ 1, 5(H), 9, 11(A), 39, 44 Stat. 1162 (1927). Public ownership of the airways, however, was by no means an a priori matter. In fact, prior to the 1927 Act, at least one court, in an early interference case of first impression, recognized common-law private property rights in the use of a particular radio frequency. The Tribune Co. v. Oak Leaves Broadcasting Station (Cir. Ct., Cook County, Ill. 1926), reprinted in 68 Cong. Rec. 216 (1926).

Moreover, in many respects the scheme of public ownership of the airwaves, with private use thereof simply a privilege to be granted by the government conditioned upon compliance with government regulation, may have been the fundamental mistake that adversely affected the entire subsequent development of broadcast regulation. One can argue that it is as fundamental a mistake as would be a similar scheme of government licensing and regulation of newspapers. See Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 148-49 (1973) (Douglas, J., concurring in judgment) [hereinafter CBS v. DNC]. For a critique of the very concept of public "ownership" of the airwaves, see Winer, supra note 3.

17. Radio Act of 1927, ch. 169, §§ 4, 4(F), 9, 11, 21, 44 Stat. 1162 (1927). The origins of this phrase have been attributed to a young lawyer for the Interstate Commerce Commission who was working for the Senate when the 1927 Act was being drafted and who borrowed the phrase from the Interstate Commerce Act to overcome an impasse among the drafters in defining a regulatory standard. N. Minow, Equal Time: The Private Broadcaster and the Public Interest 8-9 (1964). The fact that a standard for regulating commercial matters such as railroads and grain elevators, see B. Schmidt, Freedom of the Press v. Public Access 137 (1976), could have been considered appropriate for an industry now recognized as entitled to substantial first amendment protection indicates both the generally narrow scope of the first amendment in the early twentieth century, see generally Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205 (1983); Rabban, The First Amendment In Its Forgotten Years, 90 Yale L.J. 514 (1981), and, more particularly, the lack of thought given to the amend-
Radio Commission (FRC or Radio Commission), the precursor of today's Federal Communications Commission (FCC or Commission), to effect licensing and regulatory functions.

Despite the relative success of the 1927 Act in rectifying the previous chaos, President Roosevelt asked Congress a few years later to reorganize and consolidate federal regulation of the communications field. Congress responded by passing the Communications Act of 1934, creating the FCC to replace the FRC and incorporating wholesale the Radio Act of 1927 as Title III. Despite tremendous advances in communications technologies and a vastly expanded first amendment jurisprudence, this basic structure of public ownership of the airwaves, with a licensing system for private use and federal regulation based upon the public interest standard, has governed radio and later television broadcasting since 1927.

B. Initial Development and Approval of the Scarcity Rationale

Almost immediately after Congress established the basic licensing scheme governed by the public interest standard, the FRC, and
later the FCC, began to develop and rely upon a scarcity rationale to support a wide variety of regulatory controls. Lacking meaningful guidance from Congress, the FRC set forth its interpretation of the public interest standard in 1928.\textsuperscript{22} While some of the principles outlined by the Radio Commission involved technical matters such as optimum broadcast reception, freedom from interference, location of a station's transmitter, and the like, it is clear that from the beginning the FRC interpreted its mandate as governing program content as well. For example, the FRC required "a fair distribution of different types of service" and avoidance of "too much duplication of programs and types of program" and of "direct advertising, including the quoting of merchandise prices."\textsuperscript{23} The Radio Commission explicitly invoked an incipient scarcity rationale, referring to "the paucity of channels," "the limited facilities for broadcasting," and the fact that "the number of persons desiring to broadcast is far greater than can be accommodated,"\textsuperscript{24} to justify its paternalistic determination of the best type of service for the listening public, rather than letting the public itself determine this through its discriminating support for various stations.

The FRC quickly applied its newly assumed power in several cases, choosing among competing license applicants based on programming considerations.\textsuperscript{25} It also denied license renewals to one station that was used to diagnose and treat over the air listeners' medical ailments,\textsuperscript{26} and to another owned by a church whose minis-

\textsuperscript{22} Statement by the Commission Relative to Public Interest, Convenience or Necessity, 2 FRC Ann. Rep. 166 (1928) [hereinafter Statement by Commission Relative to Public Interest]. The FRC stated its conviction that the interest of the broadcast listener was more important than that of the broadcaster and referred to the "trust imposed by the license" on the broadcaster. \textit{Id.} at 167, 169. While the FRC acknowledged claims that the 1927 Act was unconstitutional due to the uncertainty and indefiniteness of the public interest phrase, \textit{id.} at 167, it likened the phrase to those of other federal statutes, such as "unfair methods of competition," and left to future Supreme Court decisions the task of giving specific meaning to the standard, \textit{id.; see, e.g., FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); cf. Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 436 (S.D.N.Y. 1978) ("[D]efendant's attack on § 2 of the Sherman Act as void for vagueness on its face would rewrite nearly a century of history, solid precedent, and scholarship"), aff'd in part, rev'd in part, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).}

\textsuperscript{23} Statement by Commission Relative to Public Interest, \textit{supra} note 22, at 168. To illustrate, the Radio Commission indicated that a station that played mainly phonograph records in a community in which the records themselves were readily available to the public might not be best serving the public interest. \textit{Id.}

\textsuperscript{24} \textit{Id.} at 168, 170.


\textsuperscript{26} KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931).
ter broadcast objectionable and allegedly defamatory attacks on other religions and purportedly attempted to influence pending court cases. In each case the FRC’s authority to regulate, even as to program content, was based implicitly or explicitly on the supposed scarcity of broadcast resources. None of these cases reached the Supreme Court. Any one of them, however—especially the last, involving offensive programming—would have presented squarely for resolution the meaning and application of a scarcity rationale in the context of the first amendment implications of content control regulation. At this early stage, the Court might have produced an opinion critical of the scarcity rationale at least as a basis for content regulation. The Court, however, did not consider the issue until 1943. It did so then only in a cursory manner and in the wrong case.

*National Broadcasting Co. v. United States (NBC)* involved a challenge by NBC to “chain broadcasting” regulations promulgated by the FCC in 1941. The Commission, concerned about the dominance of the major networks over their affiliated local stations, proscribed certain specified business relationships between licensees and the networks. While some of these regulations might have

27. Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933).
28. In *Great Lakes*, 3 FRC ANN. REP. at 34, the Radio Commission referred to the problem of more broadcast speakers than can be accommodated; in *KFKB*, 47 F.2d at 672, the court cited the limited number of available broadcast frequencies as the reason the Radio Commission should consider program content in a license renewal case; and in *Trinity Methodist*, 62 F.2d at 852, the court referred to the limited facilities of broadcasting as justifying regulation.
29. The D.C. Circuit Court in *Trinity Methodist*, however, considered and rejected a first amendment challenge to the FRC’s actions.
30. However, for an early case citing frequency scarcity as the basis for a government licensing and allocation function, see FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279, 282 (1933).
31. 319 U.S. 190 (1943).
32. “Chain broadcasting,” formally defined as the “simultaneous broadcasting of an identical program by two or more connected stations,” 47 U.S.C. § 153(p) (1982), meant simply the network system of program distribution whereby programs were transmitted by wire—e.g., by leased telephone lines—from their point of origin to each affiliated station in the network for simultaneous broadcast. *NBC*, 319 U.S. at 194 n.1.
33. The following regulations were the subject of the litigation: (i) Exclusive affiliation of station—a station affiliated with one network no longer could agree not to broadcast the programs of another network; (ii) Territorial exclusivity—a network could not bind itself to its affiliate not to sell programs to any other station in the same area; (iii) Term of affiliation—the agreement between the network and affiliated station could not provide for a period of affiliation longer than two years; (iv) Option time—network optional time during which, upon notice, the network could require its affiliates to carry a commercial program during certain designated hours was limited; (v) Right to reject
had an indirect effect on nonbusiness aspects of a station’s operation—such as program content—there was no direct effect. This, therefore, was not a case involving the FCC’s ability to regulate program content consistently with the first amendment. Rather, in substance it was an antitrust case from which Justice Frankfurter’s far too broad majority opinion became a justification for general FCC regulation of the broadcast media.

Justice Frankfurter began his analysis with an overview of the development of radio regulation. From this he derived “certain basic facts about radio as a means of communication”:

[I]ts facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.

Here Justice Frankfurter mixed two concepts which, though related, should have remained separate—namely, the perceived limited number of available frequencies and the phenomenon of interference. The threat of electromagnetic interference requires regula-

programs—an affiliation agreement could not prevent or hinder an affiliate from rejecting any network programming as unsatisfactory, unsuitable or contrary to the public interest; (vi) Network ownership of stations—network ownership of overlapping local stations, or such ownership that would substantially restrain competition, was prohibited; (vii) Control by networks of station rates—a network could not require an affiliate to restrict in any way its rates for the sale of broadcast time for other than the network’s programs. 319 U.S. at 198-209.

34. The regulation requiring that a station retain a meaningful right to reject network programs, see supra note 33 at (v), for example, preserved a station’s ability to preclude offensive programming. But nothing in the regulation would have affected a station’s right to show any particular kind of programming it desired.


36. Frankfurter’s opinion was joined by only four other Justices. Justices Murphy and Roberts dissented, and Justices Black and Rutledge took no part in the case. NBC, 319 U.S. at 227, 238.

37. Id. at 213. Frankfurter also quoted the Commission’s Report on Chain Broadcasting for the basic policy consideration underlying the regulations: “With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them.” Id. at 218.

tion of the airwaves, just as the threat of auto accidents requires traffic control. But ultimately the question of interference is independent of whether or not spectrum space is scarce. Even if spectrum space were unlimited, interference problems would remain and require regulation, though only of a technical nature. Scarcity, on the other hand, might justify some resource-sharing regulation if logically related to the scarcity problem. By combining the notions of scarcity and interference, instead of considering them as distinct and separate rationales for different kinds of regulation, Justice Frankfurter inappropriately made the leap from necessary but limited technical regulation to a comprehensive scheme for government control of broadcasting. In so doing, he avoided the need to examine the bases for various elements of such control. As his opinion demonstrates, he did this by an unnecessarily expansive construction of the Communications Act followed by a curt dismissal of the first amendment problems inherent in so broad a reading.

Section 303(i) of the 1934 Act specifically grants the FCC authority to make special regulations applicable to radio stations engaged in chain broadcasting. Therefore, all the Court needed to do to decide the statutory question presented was to determine whether that specific grant of power encompassed the business regulations at issue. Here the Court relied on legislative history to support extending the Commission's authority over chain broadcasting beyond technical and engineering matters to include business relationships between the networks and their local affiliates.

But Frankfurter went far beyond this to consider the general

39. Compare Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986), in which the court considered an aspiring cable television operator's first amendment challenge to a city's exclusive franchising arrangement and stressed the need for a thorough analysis of the relationship between proposed regulation of cable and the characteristics of the cable medium. "[A] particular characteristic of a given form of expression can only justify government regulation aimed at addressing that particular characteristic." Id. at 1474-75.

40. That section states in pertinent part:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting.


41. The majority's interpretation was disputed by the dissent. Compare NBC, 319 U.S. at 220-21 (finding that the legislative history of § 303(i) provides the Commission with broad power to regulate the business aspects of chain broadcasting) with id. at 233-36 (Murphy, J., dissenting) (finding that the legislative history of § 303(i) limits the Commission's power in this area to the regulation of only technical and scientific matters).
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scope of the Act. Drawing upon the Act's basic public interest standard Justice Frankfurter wrote:

[W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The facilities of radio are limited and, therefore, precious; they cannot be left to wasteful use without detriment to the public interest. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity."

Again Justice Frankfurter inappropriately mixed notions of interference and scarcity. He made the remarkable assertion that the FCC could determine the "composition" of what is carried on the airwaves without stating what this power encompassed or whether this power derived from interference problems or scarcity. In fact, the content of what is broadcast cannot affect interference, and the

42. Frankfurter also relied upon the Commission's mandate under 47 U.S.C. § 303(g) to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest," and its charge under § 307(b) to "provide a fair, efficient, and equitable distribution of radio service" among the states and communities. NBC, 319 U.S. at 215-18. It is difficult, however, to agree with Frankfurter's construction, id. at 217-18, of the encouragement in § 303(g) to technological development of radio as relating to program content and a role for the Commission in determining if a community is receiving "good" radio service. Cf. id. at 233 (Murphy, J., dissenting) (Commission's role more limited).

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Court offered no analysis of what elements of the airwaves' composition should be affected by scarcity. The Court's sole attempt to justify comprehensive broadcast regulation by a scarcity rationale was the assertion that the airwaves are "limited and therefore precious" and should not be left to "wasteful use."

Even assuming scarcity, the Court should have analogized the frequency allocation function, necessary to prevent interference, to a well-established model for private use of potentially valuable but ownerless resources needing productive development. Land is the ultimate scarce resource; no one is making more of it. Under the Homestead Act of 1862 the government acted as custodian of land in the public domain and defined objective and impartial rules by which individuals could use and acquire it. Among the rules were some requiring productive development of the unused land portions over a period of time. With such a system, once the initial investment is made, freely transferrable property rights attach to the resources and the marketplace insures that they are put to continued optimal benefit.

As with land, frequencies on the electromagnetic spectrum

44. The Court's failure to make this analogy, even at a policy level, is perhaps understandable given the Communication Act's basic scheme of government ownership and licensing of frequencies on a comparative merit basis. But the potentially adverse first amendment implications of the legislative scheme should have been more worrisome to the Court.
47. The concept of private property rights in the spectrum and the analogy to disposition of public land is developed in Coase, supra note 46, at 14, and R. Posner, Economic Analysis of Law, 39-41, 633-35 (3d ed. 1986). See also B. Owen, Economics and Freedom of Expression 90-92, 102-08 (1975); B. Schmidt, supra note 17, at 133-35. Professor Harry Kalven in 1967, after 40 years of the present regulatory structure, characterized the Coase analysis as "an insight more fundamental than we can use." Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15, 30 (1967). On the other hand, for an interdisciplinary study of the feasibility both of a system of private property rights in the electromagnetic spectrum that will permit market exchanges to take place and of a means of transition from the present administrative system to a market one, see DeVany, Eckert, Meyers, O'Hara & Scott, A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study, 21 Stan. L. Rev. 1499 (1969). See also M. Mueller, Property Rights in Radio Communication: The Key to the Reform of Telecommunications Regulation (Cato Institute Policy Analy-
could be assigned initially by lottery, with the user of a frequency held to an appropriate, objective test of its productive use—for example, the broadcast of a technically adequate signal, regardless of content, at a specified power for a required minimum number of hours per day or week. Thus, there were alternatives to Justice Frankfurter's assumed need for the FCC to make programming-based distinctions between competing licensees. These alternatives would have allowed the public interest in broadcasting to be measured by the entity best suited to do so—namely, the public itself acting through the marketplace, rather than by standards imposed by a federal administrative agency. Even without subscribing wholly to the merits of a marketplace approach or rewriting the Communications Act, the Court should have recognized that government determination of what constitutes "wasteful use" of a broadcast frequency necessarily implies a value judgment on the content of what is broadcast. Under the first amendment such a judgment is as inappropriate for broadcasting as it is for newspapers, at least without demonstrating a compelling necessity based on meaningful distinctions between the media.

Instead, the Court compounded its expansive statutory analysis by the short shrift it gave to the first amendment implications, raised


49. Cf. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (affirming, as consistent with the Communications Act of 1934, an FCC Policy Statement relying on market forces to promote diversity in broadcasters' entertainment formats and thereby to serve the public interest).

50. The dissent in NBC essentially recognized this point by stating that the FCC was seeking to:

greatly enlarge its control over an institution that has now become a rival of the press and pulpit as a purveyor of news and entertainment and a medium of public discussion. To assume a function and responsibility of such wide reach and importance in the life of the nation, as a mere incident of its duty to pass on individual applications for permission to operate a radio station and use a specific wave length, is an assumption of authority to which I am not willing to lend my assent.

NBC, 319 U.S. at 232 (Murphy, J., dissenting).
by the networks, of broad government regulation of the broadcast medium. In a single paragraph Justice Frankfurter simply reiterated the limited nature of radio facilities—radio's "unique characteristic"—as a justification for government regulation without any analysis of the nature or scope of such regulation. Rather, he implied that FCC action does not violate the first amendment if such action is valid under the public interest standard of the 1934 Act.

Thus, the Court defined and affirmed the scarcity rationale for comprehensive government regulation of broadcasting in an inap-

51. "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." Id. at 226.

52. Cf. Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968) ("First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for some regulation of broadcasting and the conclusory propositions that 'the public owns the airwaves' and that a broadcast license is a 'revocable privilege.' ") (emphasis in original), cert. denied sub nom. American Broadcasting Cos. v. FCC, 396 U.S. 842 (1969).

53. Frankfurter's exaltation of statutory authority over constitutional interests and the paucity of his first amendment analysis led Professor Kalven to comment that, "The passage catches a great judge at an unimpressive moment." Kalven, supra note 47, at 43. Frankfurter's approach, however, likely was determined by his faith in federal regulatory agencies on the one hand and his restrictive view of first amendment rights on the other. Frankfurter, after all, held an endowed chair in administrative law at Harvard Law School and relished teaching courses in public utilities and administrative law, areas in which he developed expertise. See H. Hirsch, THE ENIGMA OF FELIX FRANKFURTER 132-33 (1981); J. Lash, FROM THE DIARIES OF FELIX FRANKFURTER 15, 36 (1975); M. Parrish, FELIX FRANKFURTER AND HIS TIMES 160 (1982). He also was a well-known, ardent supporter of New Deal legislation, a centerpiece of which was reliance upon regulatory authorities to supervise economic enterprises and curb many of the excesses of the Depression era. See generally H. Hirsch, supra, at 99-126; M. Parrish, supra, at 220-51.

Just three years prior to NBC, Frankfurter wrote for a unanimous Court which was called upon to ascertain and enforce the spheres of authority which Congress has given to the Commission [FCC] and the courts, respectively" in the 1934 Communications Act. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 136 (1940). This opinion has been described as an essay in praise of the flexibility and expertise of administrative law and a warning against assuming that the technicalities of the common law will continue to apply to this important new development. It was a warning also that courts were to play a modest role in reviewing agency procedures and decisions. Kalven, supra note 47, at 38.

With regard to the first amendment, a few years after NBC Frankfurter criticized the notion of a preferred constitutional position for freedom of speech. See Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring). This long-held view continued to color his first amendment opinions. See, e.g., Dennis v. United States, 341 U.S. 494, 521-23 (1951) (Frankfurter, J., concurring). More than his colleagues, Frankfurter remained tenaciously reluctant to invoke the first amendment to invalidate government authority. Compare Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (upholding state law requiring flag salute by school children; opinion for Court by Frankfurter) with West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (overruling Gob-
propriate case, addressing unnecessary matters with a confused rationale and inadequate first amendment analysis. Nonetheless, the Court built on the early position of the FRC and FCC and sketched two related notions of scarcity as justifications for broadcast regulation. First, since the facilities of radio are limited and not available to all who wish to use them, the Commission has a role in determining who should broadcast and in enforcing shared use of the spectrum. Second, again because broadcast facilities are limited, they are precious and the public interest demands that they not be "wasted." This means the Commission must ensure that they are put to "good" use, and this criterion presumably applies to both the determination of who receives a license and to the review of programming services. The first concern focuses on the rights of the public as potential speakers, and the second on the rights of the public as listeners—two themes which, as we shall see, are interwoven into the Court's scarcity analysis.

After this seminal case the Court did not return to a general exposition of the rationale for government regulation of broadcasting until Red Lion Broadcasting Co. v. FCC twenty-six years later. By this time the pattern of extensive regulation was well entrenched. Until very recently Red Lion and subsequent cases unquestioningly affirmed the scarcity rationale and the regulation it supports.

C. Current Notions of Scarcity

Red Lion involved two cases challenging the FCC's contingent access requirements under its personal attack and political editorial rules, which are aspects of the more general fairness doctrine. Although the Supreme Court upheld the rules and affirmed the constitutionality of the doctrine, the Seventh Circuit's consideration

is; dissent by Frankfurter). See generally P. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 75-107 (1971).

While the foregoing may explain Frankfurter's approach in NBC, it of course does not ameliorate the deficiencies of his opinion.


55. Radio-Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968); Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967).

56. For a description of the fairness doctrine and the Commission's rules, see infra Sections V.B-C.

57. There is substantial evidence that, ironically, the Supreme Court's affirmation of the fairness doctrine as an enhancement rather than an abridgment of first amendment freedoms, Red Lion, 395 U.S. at 375, in fact involved an incident in which the doctrine was misused in an effort to stifle diversity of expression. See F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 35-54 (1975). But see F. COOK, MAVERICK: FIFTY YEARS OF INVESTIGATIVE REPORTING 292-311 (1984).
of one of two lower cases demonstrated that the errors of NBC need not have been repeated. The Seventh Circuit read NBC as limited to the issue of the validity of the chain broadcasting regulations, and stated that the early case "does not support the Commission's position that the broadcast press is not entitled to the same order of first amendment protection as the printed press." Rather, the key issue for the court was whether the need for technical, financial and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

In unanimously setting aside the FCC's rules, the Seventh Circuit dealt head-on with the scarcity issue. The court found general circulation daily newspapers to be far scarcer than commercial radio and television stations and rejected the argument that economic and technological barriers to entry are significantly different between the two media. The court also characterized the argument that public ownership of the airwaves transforms the licensees into trustees for the public as "[l]ogically . . . meaningless."

The Supreme Court's broad opinion, however, dashed whatever hopes there were that, following the Seventh Circuit, a modern Supreme Court would reexamine the scarcity doctrine as a basis for general regulation of broadcasting. The Court found authority for the FCC's rules inherent in the public interest mandate which the Court, citing NBC, reiterated to be a power "not niggardly but expansive."

58. Radio-Television News Directors Ass'n, 400 F.2d at 1018 n.43.
59. Id. at 1018.
60. The court, however, was careful to distinguish the rules from the more general fairness doctrine, id. at 1013, and was not prepared to hold the doctrine itself unconstitutional, id. at 1017-18.
61. Id. at 1019. See infra notes 71 (statistics show that new entrants into the television and radio industries have had no difficulty surviving in the industry) & 97 (a recent study shows that economic barriers to entering the broadcasting industry are considerably lower than those for the daily newspaper industry).
62. 400 F.2d at 1019. Here the court quoted from the article by former FCC Commissioner Robinson, supra note 35, at 152.
63. Justice White's opinion was for seven members of the Court. One seat was vacant and Justice Douglas did not participate. Later, however, Douglas noted his disagreement with the Court's opinion, CBS v. DNC, 412 U.S. 94, 154 (1973) (Douglas, J., concurring in judgment), and Justice Stewart expressed his "considerable doubt" about the opinion he had joined, id. at 138 (Stewart, J., concurring).
Turning to the first amendment issues the Court began with the broad assertion that differences in new media justify differences in the first amendment standards applied to them. The Court first discussed the problem of interference, which is irrelevant to fairness doctrine issues. Having started down the same misguided path as Justice Frankfurter in NBC, Justice White then lapsed into a scarcity rationale: "When there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." From this premise of scarcity the result upholding the rules in question quickly but unpersuasively followed.

Untangling the Court's well-known but convoluted language reveals the following logical progression in its argument:

(i) Since "[n]o one has a First Amendment right to a license... as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused";

(ii) Therefore, the key first amendment interest at stake is that of "the people as a whole [who] retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount";

(iii) Then, since these ends and purposes are "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,"

(iv) "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here";

(v) And, therefore, to achieve such ends, "[T]here is nothing in the first amendment which prevents the Government from requiring

65. Id. at 386. This proposition is often repeated without noting that in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), which the Red Lion Court relied on, the statement that each new medium of communication "tends to present its own peculiar problems" is immediately followed by the admonition: "But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." 343 U.S. at 503. See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981); cf. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985) (traditional first amendment doctrine remains applicable), cert. denied, 106 S. Ct. 2889 (1986); Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465, 1470 (N.D. Cal. 1986) (application to one medium of a lesser standard of first amendment protection is "an exception to the rule that must be justified by a particular difference").

66. 396 U.S. at 387-88.

67. Id. at 388.
a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airways.68

Thus the Court reasoned that the FCC was simply effecting an "enforced sharing of a scarce resource" through contingent access requirements in much the same way as if it were simply allocating frequencies among more people by assigning them for only a portion of the broadcast day or week.

The scarcity rationale clearly was the crucial underpinning of the Court's opinion. The Court approvingly cited congressional recognition of the "factual predicate of scarcity" as the basis for regulation70 and took pains to argue that "[s]carcity is not entirely a

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68. Id. at 389-90. The problems with this reasoning are manifold. First, the Court assumes that the marketplace for competing views and voices is restricted to the airwaves without considering the effect of all other mass communication media. Second, the Court does not begin to explain why its argument, based on the need for diversity, does not also support a system of government licensing and regulation of newspapers, which are even more scarce in the meaningful sense in which the Court discusses scarcity. See infra notes 88-92 and accompanying text. Third, the Court posits that there are representative views and voices that by necessity are otherwise barred from the airwaves. Given the number and diversity of broadcast outlets compared, for example, with daily newspapers, see infra notes 71 & 97, this proposition is highly dubious, particularly in the absence of any supporting empirical data. Moreover, the Court dismisses the possibility that any blandness and lack of diversity that may pervade the airwaves might be fostered in large part by ubiquitous government regulation such as the fairness doctrine. 395 U.S. at 393; cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257 (1974) (discussing dangers inherent in applying compulsory access to newspapers). See also Abrams, In Defense of Tornillo, 86 YALE L.J. 361, 364 n.30 (1976) (finding Red Lion and Tornillo "utterly irreconcilable"). Finally, the Court fails to consider the arguably more severe impingement on individual autonomy and editorial discretion resulting from a fairness doctrine scheme, as opposed to one that divides the spectrum into smaller pieces but then protects more fully a licensee's control over its own piece. In short, the Court seems to have fallen into the trap of which Justice Stewart warned in the next major case dealing with broadcast regulation when he described "the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.' " CBS v. DNC, 412 U.S. 94, 145 (Stewart, J., concurring).

69. 395 U.S. at 391.

70. Id. at 399 n.26. In the same footnote the Court quoted with favor from a Senate report:

"If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time [i.e., 47 U.S.C. § 315] and urge the right of each broadcaster to follow his own conscience. . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust."

thing of the past." But now the Court emphasized that the importance of scarcity, as a predicate for regulation, is its assumed threat to a suitable diversity of expression on the airwaves—such diversity being a fundamental first amendment right of the public. Diversity, then, became a chief "good" use of broadcasting which the Commission could promote by suitable regulation.

71. 395 U.S. at 396. The Court also indicated in a single paragraph that, regardless of gaps in spectrum utilization, and even assuming the possibility of new entry by competing stations, the government could act in the public interest to assure diversity of programming. Id. at 400. This is because, in the Court's view, existing broadcasters are entrenched in dominant positions in the industry as a result of "[l]ong experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement" and, therefore, enjoy substantial advantages over any new entrants. Id. Since these advantages are the "fruit of a preferred position conferred by the Government" in the initial license, id., the government may ensure that a broadcaster's programming serves the public interest.

Again, however, the Court's reasoning is opaque at best. Presumably the point is that even if new entrants are technologically possible, economically they would not be able to compete against improperly entrenched elements of the industry and, therefore, cannot be relied upon to foster diversity in programming. But this is a non sequitur. If because of government policies and actions certain segments of the broadcast industry enjoy an unwarranted competitive advantage, the solution is to redress the competitive balance through antitrust types of remedies. Any problem of competition, however, in no way relates to content control over broadcasters' programming—with respect to diversity of programming or otherwise. Nor are the first amendment implications of such control lessened by the antitrust aspect.

Moreover, it would be rather ironic for the government to argue that its selective granting of licenses, which is largely responsible for whatever spectrum scarcity exists, see infra note 102, now somehow justifies even further programming regulation. Indeed, a lottery system of allocating frequencies would avoid the Court's argument and illustrates its fallacy even under the present system. Any preferred position enjoyed by some broadcasters is not the fruit of something conferred on them by the government. The initial license was necessary, of course, but the preferred position is the result of what the broadcaster earned in the marketplace presumably by satisfying the real public interest. Successful broadcasters in this regard are no different from successful businesses in other industries.

Finally, the Court was simply wrong in its economics. Statistics as to growth and earnings in the television and radio industries since 1946 indicate that new entrants, by and large, have had no difficulty surviving, competing, and even thriving despite the supposed advantages of the established industry. See Television Digest, Inc., Television & Cable Factbook, Cable & Services Vol. at A6-A7, A-17 (1986). In particular, since the Red Lion decision there has been a 48% increase in the number of all radio stations and a 113% increase in the FM service. 1985 Fairness Doctrine Report, supra note 2, at 202. For television, the corresponding figures are an overall 44.3% increase, 13.3% increase in VHF stations, and 113% increase in UHF stations. Id. at 204. And independent (i.e., non-network affiliated) television stations have recently doubled in number and captured an increasingly significant portion of the market in most large cities. Hayes, Hot Independent TV Stations, N.Y. Times, June 25, 1985, at D1, col. 2. In marked contrast, since 1950 only four new daily newspapers appear to have successfully entered competition with an existing daily, Wirth, infra note 97, at 2-3, perhaps partly because readership and advertiser loyalty for daily newspapers is much stronger than is audience and advertiser loyalty for broadcast stations, id. at 35-38.
The Court, however, drew the line at mandatory affirmative access rights to the broadcast media in *Columbia Broadcasting System v. Democratic National Committee (CBS v. DNC).*[^72] In that case, two groups sought to purchase broadcast time to present their views on important public issues. When the broadcasters, who regularly accepted paid commercial advertisements, repeatedly denied them access, the groups alleged violations of the fairness doctrine and asserted a first amendment right of access.[^73] While the Commission rejected these claims and upheld a broadcast licensee’s right generally to refuse all editorial advertising,[^74] the D.C. Circuit Court of Appeals reversed on first amendment grounds.[^75]

The Supreme Court[^76] now invoked the scarcity rationale to support editorial control and discretion by licensees. Since under *Red Lion* scarcity means “it is idle to posit an unabridgeable first amendment right to broadcast,”[^77] those seeking access had an up-

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[^73]: Id. at 98-99. The first group sought to air several recorded one-minute radio announcements urging immediate withdrawal of American forces from Vietnam. *Business Executives’ Move for Vietnam Peace v. FCC,* 450 F.2d 642, 646 (D.C. Cir. 1971). *WTOP,* an all-news radio station, repeatedly refused to sell air time to the business executives, relying on its general policy barring all editorial advertisements, buttressed by the station’s claim that such controversial subjects required a more in-depth analysis than could be provided in the short “spot” announcements the group was proposing. *Id.* at 647.

The other group, the Democratic National Committee (DNC), claimed more generally that in planning an extensive media campaign it confronted several obstacles to direct self-expression on the broadcast media, including the refusal of some broadcasters to sell it time to comment on controversial public issues and for the solicitation of funds. *Id.* The DNC, therefore, sought a declaratory ruling from the Commission that a broadcaster could not adopt a general policy of refusing to sell time to “responsible” entities such as itself. *Id.*

[^75]: 450 F.2d at 665. The court, however, applied circular reasoning. The court believed that the public’s pre-eminent first amendment interests in radio and television depended not so much on the scarcity rationale as on the state action feature of broadcasting in this context. *Id.* at 649-51. Such state action, in turn, is premised mainly on the pervasive regulatory relationship between broadcasters and the federal government, *id.* at 651, which is then justified largely by the scarcity rationale. The court’s difficulty here was exposed when it alluded to the natural question of why the first amendment values it purported to be advancing by giving the public some affirmative access rights to the broadcast media do not mandate similar access rights to newspapers. The court’s answer was that broadcasting and newspapers are distinguishable in terms of state action because of the lesser extent of government involvement in newspapers—which was just another way of saying that the scarcity considerations that have been applied to broadcasting have never been thought applicable to the print media. *Id.* at 651 n.17.

[^76]: Five members of the Court formed a majority for the opinion except for that portion (Part III) dealing with the state action issue.
[^77]: *CBS v. DNC,* 412 U.S. at 101 (quoting *Red Lion,* 395 U.S. at 388).
hill battle to overcome the right of broadcasters to exercise editorial judgment.\textsuperscript{78} This they were unable to do, since the Court found the Commission justified in relying on broadcaster editors, who are periodically accountable to the Commission, to fulfill their public interest obligation to provide full and fair coverage of public issues.\textsuperscript{79}

In thus upholding the editorial freedom of broadcasters the Court added an important qualification to its scarcity rationale analysis. Since this was an access case, the Court focused on the ability of members of the public to air their viewpoints rather than on the public's right to receive a suitable diversity of expression. In this context the Court described scarcity as the unavailability of broadcast facilities to all those with the requisite financial resources.\textsuperscript{80} The Court thereby acknowledged that scarcity of the broadcast medium must mean something beyond existing economic barriers to entry, which are common to all media of communication; not everyone who wants to publish a newspaper can do so. Scarcity thus means a perceived, inherent \textit{physical} limitation on the available broadcasting facilities, and a limitation not shared by other media.\textsuperscript{81}

Indeed, the Court implicitly confirmed the uniqueness of broadcast scarcity in deciding \textit{Miami Herald Publishing Co. v. Tornillo (Tornillo)},\textsuperscript{82} the print analogue to \textit{Red Lion}. In the Fall of 1972 Pat Tornillo was a very public and controversial figure in Dade County, Florida, and a candidate for the state legislature. A few days prior to a runoff election the Miami Herald published two scathing editorials attacking Tornillo and opposing his candidacy. Tornillo invoked a 1913 Florida statute making it a misdemeanor for any newspaper which assails the "personal character" or "official record" of any political candidate to refuse to publish without charge any comparable reply the candidate wished to make.\textsuperscript{83} When the Miami Herald refused to print his reply, Tornillo sought damages and, just prior to the election, a mandatory injunction requiring publication. The state attorney general, however, declined to defend the statute and the court dismissed the action with prejudice, finding the statute un-

\textsuperscript{78} \textit{Id.} at 101, 111.

\textsuperscript{79} "For better or worse, editing is what editors are for; and editing is selection and choice of material." \textit{Id.} at 124.

\textsuperscript{80} "All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated." \textit{Id.} at 101.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} 418 U.S. 241 (1974).

\textsuperscript{83} The statute had been ignored until a few months prior to the \textit{Tornillo} editorials when, in a prosecution under the statute, a county judge had ruled that it was unconstitutional. State v. News-Journal Corp., 36 Fla. Supp. 164 (1972).
constitutional on its face under the first amendment.\textsuperscript{84}

Tornillo then lost the election. The case, however, continued as a test of the public's first amendment right of access to the media, with Professor Jerome Barron, a leading advocate of that theory,\textsuperscript{85} as counsel for Tornillo. The Florida Supreme Court, taking a direct appeal of the case,\textsuperscript{86} held the statute constitutional notwithstanding the attorney general's contrary argument; imposed a limiting construction on the criminal statute in an attempt to cure its vagueness and overbreadth; implied a civil cause of action and remedy (though not an injunction) under the statute; and remanded the case to the trial court.\textsuperscript{87}

Upon review,\textsuperscript{88} the Supreme Court detailed the proponents' arguments concerning the public's right of media access only to find such arguments unavailing. These arguments centered on the structure of the newspaper industry. When the first amendment was enacted, a true marketplace of ideas existed. The press was broadly representative of the public, entry into publishing was easy and inexpensive, and there were meaningful alternatives to the conven-

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  \item \textsuperscript{84} Tornillo v. Miami Herald Publishing Co., 38 Fla. Supp. 80, 82, 83 (1972). The court also ruled the statute impermissibly vague. \textit{Id.} at 83.
  \item \textsuperscript{86} Tornillo v. Miami Herald Publishing Co., 287 So. 2d 78 (Fla. 1973) (per curiam). Given the emergency nature of the proceedings below, the case went up on appeal barren of any record except for the complaint and the Dade County Circuit Court's final judgment. So, for example, there was no record as to the chilling or other effect on a newspaper from the right of reply statute.
    The importance of the issue at stake, however, was clear. The Florida ACLU and over a dozen media interests filed separate amicus briefs.
  \item \textsuperscript{87} \textit{Id.} At the time, the Florida Supreme Court was an elected court. Many of the judges were embroiled in public controversies as to their integrity and competence, controversies which the \textit{Miami Herald} no doubt reported on in full. See Fisher, \textit{And Who Will Take Care of the Damrons of the World?}, in \textit{The Trial of the First Amendment} 15-16 (Freedom of Information Center ed. 1975). The court stated its belief that the right of reply statute "enhances rather than abridges freedom of speech and press" since it adds to the flow of information and ideas and furthers the public's right to know all sides of a controversy. Tornillo v. Miami Herald Publishing Co., 287 So. 2d at 80, 82.
  \item \textsuperscript{88} Since the Florida Supreme Court had remanded the matter to the trial court, Tornillo originally argued there was no appealable final judgment. Then, perhaps to test the right of access theory, Tornillo reconsidered and urged the Supreme Court to review the matter. See \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241, 246 (1974). The Court was not much bothered by the notion that the case was not yet ripe for review since it would have been "intolerable to leave unanswered" such an important first amendment issue affecting the freedom and operation of the press. \textit{Id.} at 247 n.6.
\end{itemize}
tional, organized press for the expression of unpopular opinions. Today, the proponents argued, this structure has changed. The communications revolution has produced a press dominated by big businesses increasingly coming under common ownership. A powerful, influential, noncompetitive, concentrated and homogeneous press has arisen. Moreover, new entry into the industry is no longer an alternative since the same economic factors that produced the current condition have created almost insurmountable barriers to entry. This situation, they argued, and the public's first amendment interest in a functioning marketplace of ideas, impose a fiduciary obligation on the press which can be satisfied, in part, by the type of access to the media required by the Florida statute. In other words, economic scarcity in the print media justifies, on first amendment principles, some level of government regulation just as physical scarcity of the broadcast spectrum supports government regulation of broadcasting.

The Court, however, unanimously rejected these arguments. It held that the government could not compel editors and publishers to publish that which "'reason' tells them should not be published." But the Court never explained why scarcity based on economic factors in the print media does not justify governmental interference with editorial discretion when scarcity based on the physical characteristics of broadcasting does. Indeed, in what remains an enigma and an indefensible omission, the Court never cited, let alone discussed, Red Lion.

In sum, then, the Court based its broadcast scarcity rationale on

89. Id. at 248-50.
90. Id. at 254 (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945)).
91. Cf. Home Box Office v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977) (per curiam) [hereinafter HBO v. FCC] ("[S]carcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press.").
92. The Court did not even cite its Red Lion shibboleth, see supra note 65 and accompanying text, that differences among media justify different first amendment treatment. The incongruity of Red Lion and Tornillo, and the Tornillo Court's failure to deal with Red Lion, have led to considerable comment and some attempts to reconcile the irreconcilable. See, e.g., B. Schmidt, supra note 17; Abrams, In Defense of Tornillo, 86 Yale L.J. 361 (1976); Price, Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation, 31 Fed. Com. L.J. 211 (1979); Van Alstyne, The Mobius Strip of the First Amendment: Perspectives on Red Lion, 29 S.C. L. Rev. 539 (1978); Note, Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation, 28 Stan. L. Rev. 563 (1976).
a perceived absolute—if not well-determined—physical limit on the number of distinct, usable broadcast frequencies, a problem unique to the spectrum. This results in two problems: first, that all those who wish to broadcast, even though financially and otherwise capable, may not be able to do so; and second, that the public may not be exposed to an adequate diversity of expression. To rectify these perceived problems the Court has, on occasion, been willing to balance the first amendment rights of broadcasters with the asserted rights of the public as speakers and listeners.

As we have seen, however, the Court's reasoning leaves much to be desired. Yet perhaps the Court's greatest error has been its failure to recognize that fundamentally all resources are scarce, newsprint as well as broadcast frequencies. People would like to use more than they can. This basic economic fact of life is no justification for pervasive government regulation, especially in an area imbued with significant first amendment concerns. It certainly is no basis for regulating the broadcast media but not newspapers. For in any meaningful sense of scarcity, newspapers are far more scarce than broadcast frequencies, especially when many physically avail-

93. For cases after CBS v. DNC, 412 U.S. 94 (1973), that restate this concept of broadcast scarcity, see FCC v. League of Women Voters, 468 U.S. 364, 376-78 (1984); Columbia Broadcasting Sys. v. FCC, 453 U.S. 367, 394-97 (1981) [hereinafter CBS v. FCC]; FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795, 799-800 (1978). Cf. Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (stating that distinguishing between the print and broadcast media on the basis of the latter's physical scarcity is a "distinction without a difference" that "inevitably leads to strained reasoning and artificial results"). The Telecommunications Research court, in discussing the Supreme Court's "classic formulation of the scarcity doctrine," emphasized that the Supreme Court's articulation of the doctrine "contains no hint" of reliance on the immediacy or power of broadcasting, but is based "entirely on the physical scarcity of broadcasting frequencies." Id. at 507-08.


95. Indeed, freedom of the press was established in the context of considerable newspaper scarcity. Only 29 newspapers were publishing weekly, semiweekly, or tri-weekly in the American colonies of 1770 and only 39 in 1780. Eight dailies and 83 weeklies were publishing by 1790. B. Owen, supra note 47, at 64. The ensuing decades, however, saw considerable growth in the number of dailies and weeklies. Id.

96. The "analytical confusion" inherent in the scarcity rationale for broadcast regulation finally has been explicitly recognized in a remarkable opinion joined by Judge, now Justice, Scalia. Telecommunications Research, 801 F.2d at 508.

97. See CBS v. DNC, 412 U.S. at 144 (Stewart, J., concurring). Defining "print media" as general interest, chiefly general circulation daily newspapers, and "electronic media" as AM and FM radio and UHF and VHF television stations, a recent study for the Senate Committee on Commerce, Science & Transportation demonstrates that, both
able broadcast frequencies remain vacant. Furthermore, the growing merger between print and broadcast media illustrates the futility of continuing to distinguish between the two with respect to scarcity or ultimate first amendment status. Yet, as Tornillo demonstrated numerically and in terms of concentration, scarcity lies not with the electronic media but with the print media. Staff of Senate Comm. on Commerce, Science & Transportation, 98th Cong., 1st Sess., Print and Electronic Media: The Case for First Amendment Parity Sec. IV (Comm. Print 1983) [hereinafter Senate Committee Print]. In particular, while at the time of this study there were over 9,150 radio stations and over 1,050 television stations, there were less than 1,800 daily newspapers. Id. at 63. While newspapers still outnumber television stations in raw figures, only 2.5% of American cities with daily newspapers have more than one. Id. In contrast, as of September 1984, 64% of United States households could receive nine or more television broadcast stations compared to only 8% percent in 1964. A.C. Nielsen Co., Nielsen Report on Television 2 (1985). When cable channels are included, 83% can receive nine or more channels and 29% can receive 20 or more. Id. See also 1985 Fairness Doctrine Report, supra note 2, at 204-05, 209-10. Thus, the trend toward extreme concentration in daily newspapers is in marked contrast to the exponential growth in the percentages of cities with multiple television channels. Moreover, a recent study shows that the economic barriers to entering the broadcasting industry, both television and radio, are considerably lower than those for the daily newspaper industry. See M. Wirth, Economic Barriers to Entry: Daily Newspapers vs. Television Stations vs. Radio Stations: A Preliminary Analysis at ii (App. C., Comments of Nat'l Ass'n of Broadcasters, in response to Notice of Inquiry in Gen. Docket No. 84-282, 49 Fed. Reg. 20,317, 20,327 (1984) (1984 Fairness Doctrine Inquiry)) (available from Nat'l Ass'n of Broadcasters, 1771 N. St., N.W., Wash., D.C. 20036).

98. As of mid-1985 there were 54 vacant VHF channels (34 commercial and 20 non-commercial) and 462 vacant UHF channels (109 commercial and 353 noncommercial). 1985 Fairness Doctrine Report, supra note 2, at 207. These vacancies occur in both large and small markets with, for example, 32 commercial UHF vacancies in the top 50 markets. Id. While many of these vacant channels may not be profitable to operate, this is an economic problem, not one of physical limitations. As for radio, the Commission recently allocated 689 new FM channels and has streamlined its procedures to facilitate processing and developing these new FM allotments as well as the already existing 152 vacant FM allotments. Id. at 203.

For a description of frequency vacancies a few years prior to Red Lion, see United States v. Southwestern Cable Co., 392 U.S. 157, 174 n.40 (1968).

99. A number of newspapers such as USA Today and The Wall Street Journal are broadcast to various printing presses across the country before being delivered to readers on newsprint. Senate Committee Print, supra note 97, at 83; Garneau, Wall Street Journal Now Fully Computerized, Editor & Publisher, Aug. 17, 1985, at 32. Similarly, teletext and videotext (see infra note 190) transmit printed text such as newspapers either by broadcast or wire. Senate Committee Print, supra note 97, at 83. See generally I. de Sola Pool, Technologies of Freedom 39-42 (1983) (discussing convergence of print and electronics).

100. See CBS v. DNC, 412 U.S. at 148 (Douglas, J., concurring in judgment) ("My conclusion is that TV and radio stand in the same protected position under the first amendment as do newspapers and magazines."). See also Transmission of Teletext by TV Stations, 101 F.C.C.2d 827, 830-34 (1985) (Commission declined to apply its traditional broadcast content regulations to the print-related textual data transmission medium of teletext since it believed users of teletext do not listen to or view it in the
onstrates, regulation that is acceptable for broadcasting would be anathema for the print media.

Moreover, even the concept of a unique, physical limitation on the availability of broadcast frequencies is questionable. In recent testimony before the Senate Committee on Commerce, Science and Transportation, Dr. Robert S. Powers, Chief Scientist of the FCC, concluded that from a technological point of view there is no inherent shortage of spectrum capacity—not was there any fifty years ago. Rather, growth in the usable spectrum has averaged over twenty percent per year for the past sixty-five years. While we now may be approaching the end of the high frequency frontier of virgin spectrum for terrestrial broadcasting as we know it, this does not imply any fundamental shortage of spectrum for broadcast or other uses. By using channels more efficiently, decreasing channel size, and implementing better geographical distribution of stations through the use of advanced mathematical techniques,
we have greatly increased the intensity of spectrum use. Such improvements in spectrum use naturally have associated costs, but these are no different from similar costs which we have paid numerous times in the past and should expect to pay in the future. Dr. Powers therefore concluded that "the radio frequency spectrum does not impose any fundamental limit to the potential for providing information and entertainment services to homes and business establishments."

Thus, from its inception, the scarcity rationale for regulation of broadcasting was flawed on factual, legal, and policy grounds as well as in its application. However the debate over the scarcity rationale might have been resolved in a previous era, the advent of cable, as the most prominent of the new electronic media, should put an end to that misguided concept. Indeed, in CBS v. DNC the Court anticipated that the dynamic technological nature of the broadcast industry, and the advent of cable, might in a few years make once-acceptable regulation outmoded. And in its most recent review of the "fundamental principles that guide our evaluation of broadcast regulation," the Court added a remarkable footnote:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent chairman of the F.C.C., charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our long-standing approach without some signal from Congress or the F.C.C. that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

107. These include obsolescence of existing equipment, the need for expensive equipment modifications, increased levels of interference, and some modifications of signal characteristics including perceived signal quality. Id. at 40.

108. Id.

109. Id. at 42. See also 1985 Fairness Doctrine Report, supra note 2, at 207 ("These technological improvements combined with the number of vacant channels suggest that there is sufficiently available spectrum to anticipate continued growth in the number of television broadcast facilities.").


112. Id. at 376 n.11 (citations omitted). Cf. Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 508-09 (D.C. Cir. 1986) (describing distinction between
The Court did not indicate the nature of the signal it would require for that revision, but it clearly implied that an appropriate signal would raise substantial issues as to the scope of current broadcast regulation. Equally clear is that cable television, when properly viewed as a reasonably comparable alternative to broadcast television, sends just such a signal.

III. CABLE TELEVISION AND THE END OF BROADCAST SCARCITY

A. Background of Cable

Cable television is a system of communication which, at the consumer level, relies upon wire rather than over-the-air broadcasting for the transmission of signals. The cable technology greatly reduces interference both from external sources and among the various signals transmitted, thereby allowing the consumer to receive a greater number of channels than broadcasting provides. Over sixty-two percent of existing cable systems, accounting for over eighty-eight percent of cable subscribers, have a channel capacity of twenty or more, with forty-six percent of the systems (over seventy-two percent of subscribers) having a capacity of thirty or more. Modern systems are being built with over one hundred channels, and older systems are being upgraded to increase capacity. This great proliferation of available cable channels is the main feature of cable that solves what remains of the scarcity problem.

The cable operator must have a source for the signals transmitted which may include audio/video signals or other data or electronic information. The operator’s programming includes some broadcast and print media as “a distinction without a difference,” but stating that it was not free to fashion new doctrine).

113. The Commission’s 1985 Fairness Doctrine Report, while focusing on the fairness doctrine, may be intended as that signal: “[C]ourts may well be persuaded that the transformation in the communications marketplace justifies the adoption of a standard that accords the same degree of constitutional protection to broadcast journalists as currently applies to journalists of other media.” 1985 Fairness Doctrine Report, supra note 2, at 155.

114. See generally 1 CABLE TELEVISION LAW, supra note 20, at ¶ 5.02 (1983) (describing the technical aspects of cable television); Ferris, The Development of Video Technology, in D. Rice, M. Botein, E. Samuels, Development and Regulation of New Communications Technologies 9-12 (D. Rice, M. Botein, E. Samuels eds. 1980). Although the signal travels along a cable, the same basic physical phenomenon—namely, electromagnetic radiation—is involved as with aerial transmission of broadcast signals.

115. TELEVISION & CABLE FACTBOOK, supra note 71, at A-45.

116. The focus here is on the comparison between cable and broadcast television in the delivery of audio/video programming. See the definitions of “cable service,” “other programming service,” and “video programming” in the Cable Communications Policy Act of 1984, 47 U.S.C. § 522 (Supp. III 1985).
original material, but consists mainly of local or distant broadcast signals picked up over the air by means of special antennas or ground relay systems and retransmitted to customers. In other cases, signals distributed over-the-air via satellites are received by a parabolic dish antenna and retransmitted. Thus, while the consumer sees only a wire coming into a television set, distribution is actually dependent upon broadcasting over the electromagnetic spectrum to the cable operator’s source point or “headend” and then along the cable via electromagnetic radiation to the subscriber.

Cable operators usually offer their subscribers a wide variety of programming services, often with a number of channels sold together as a package or tier. For a monthly subscription fee, customers receive the basic tier—usually including local broadcast stations117 (often with improved reception) and additional channels.118 Beyond the basic tier a customer can purchase “pay cable”—special channels for programming such as sports, children’s programming, feature movies, “adult” programs, and the like.119 Where the necessary technology is available, some cable programmers offer pay-per-view service, by which a subscriber individually orders and pays a fee to see a specific movie or other special programming.120

Cable operators generally also dedicate some of their channels to certain leased or public access uses. For a number of years, for example, many municipalities have required their franchised cable operators to devote a minimum number of channels to “PEG” (public, educational and governmental) uses and to have other channels available for commercial leasing by the public.121 The 1984 Cable Communications Policy Act specifically permits a franchising authority to require PEG access channels and allows full enforcement

117. See infra Section III.B (discussing the must-carry rules applicable to such signals).
118. See Cable Services Subscriber Count, CABLEVISION, Jan. 6, 1986, at 56 (listing various cable services).
119. Id.
120. See, e.g., Competing Points of View on Pay Per View, BROADCASTING, June 10, 1985, at 73; Pay-per-view: On the Verge of Prominence, CABLEVISION, Nov. 4, 1985, at 24; Stevenson, A Push for Pay-Per-View TV, N.Y. Times, June 11, 1985, at D1, col. 2 (nat’l ed.).
121. Similar federal cable access requirements were struck down as beyond the FCC’s statutory jurisdiction in FCC v. Midwest Video Corp., 571 F.2d 1025 (8th Cir. 1978), aff’d, 440 U.S. 689 (1979) (Midwest Video II). This was no bar to local access requirements, however. See generally 2 CABLE TELEVISION LAW, supra note 20, chs. 15, 15A (discussing access to cable systems). But see infra text accompanying notes 137-42. Manhattan Cable TV in New York City, for example, has been used extensively for public, educational, governmental, and leased access purposes. 2 CABLE TELEVISION LAW, supra note 20, ¶ 15.06 & app. C at 449 (excerpts from MANHATTAN CABLE TV COMMUNITY PROGRAMMING HANDBOOK).
of all such provisions in pre-existing franchise agreements.\textsuperscript{122} The Act also mandates that, "to assure that the widest possible diversity of information sources are made available to the public," a cable operator must designate a proportional number of channels for leased commercial use by unaffiliated persons.\textsuperscript{123}

Over the last decade, cable has quickly and successfully penetrated the marketplace, indicating its wide appeal to consumers.\textsuperscript{124} There are 7,300 operating cable systems nationwide serving 19,000 communities with another 1,000 franchises approved but not yet built.\textsuperscript{125} As of mid-1985 cable had penetrated over forty-six percent (39.9 million) of all television households in this country.\textsuperscript{126} Even more significant is the percent of television households for which cable is available if they choose to subscribe—almost seventy-five percent as of January 1987.\textsuperscript{127} While competition from other new video technologies\textsuperscript{128} may cause the rate of growth to taper off, there can be little doubt that a significant portion (and soon a majority) of homes in this country will be plugged into cable and almost all will have the option.\textsuperscript{129} And, as the FCC recently concluded from the substantially higher cable penetration levels in smaller broadcast markets, "there is a significant degree of substitutability between cable and over-the-air television broadcasting."\textsuperscript{130}


\textsuperscript{123} Id. at § 532.

\textsuperscript{124} For a cable industry growth chart, see \textit{Cablevision}, Jan. 5, 1987, at 62.

\textsuperscript{125} Broadcasti\textit{ng} P\textit{ublications} \textit{Inc.}, \textit{Broadcasting/Cablecasting Yearbook} 1986, at D-3 (1986).

\textsuperscript{126} In Brief, \textit{Broadcasting}, Dec. 16, 1985, at 144 (citing statistics from A.C. Nielsen Co.). This represents a 5.7% gain over the previous year. Id.

\textsuperscript{127} Cablevision, Jan. 5, 1987, at 62.


\textsuperscript{129} For estimates of cable's growth to 1990, see Senate Committee Print, supra note 97, at 80-81; Cablevision, Jan. 5, 1987, at 62.

\textsuperscript{130} 1985 Fairness Doctrine Report, supra note 2, at 211. The Commission also referred to the "homogeneity" and "fungibility" between cable and broadcasting. Id. at 220. See also Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985) ("From the perspective of the viewer, no doubt, cable and broadcast television appear virtually indistinguishable."). cert. denied, 106 S. Ct. 2889 (1986); G. Webb, The Economics of Cable Television 20-21 (1983) (discussing complementary-competitive relationship of cable and broadcast television); Levy & Pitsch, Statistical Evidence of Substitutability Among Video Delivery Systems, in Video Media Competition 56 (E. Noam ed. 1985) (discussing statistical evidence that pay cable and broadcast television are substitutes).

In its recently released Must Carry Rules, 61 Rad. Reg. 2d (P & F) 792, 825, \textit{stay of effective date}, 61 Rad. Reg. 2d (P & F) 1176 (1986), the Commission concluded: "[T]he cable industry is now a full-fledged video service providing consumers with alternative programming choices that are competitive with the services of broadcast stations."
Cable, then, supplies an increasingly significant portion of the American public with audio/video programming similar to broadcast television and offers a vastly expanded number of channels. Thus, cable, as a substitute for broadcasting, apparently solves the perceived physical scarcity problem underlying most broadcast regulation. With even modest cable systems offering a plethora of channels and various opportunities for third-party access, it is difficult to argue that any kind of meaningful scarcity exists, either in terms of a lack of diversity of programming or a lack of opportunity for persons to present their views over the medium. There are, however, some additional factors to consider.

B. Cable Carriage of Broadcast Signals

Until very recently the FCC's "must-carry" rules required that cable systems carry all local and other "significantly viewed" broadcast signals, thereby blurring any distinctions between the media. The D.C. Circuit Court of Appeals, however, struck down the rules as violating the first amendment rights of cable operators. Under pressure from Congress, and after a compromise between major cable and broadcast interests, the FCC has reimposed a much less burdensome form of must-carry. Thus, cable operators may continue to carry broadcast stations either voluntarily, or pursuant to the relaxed must-carry obligations, or under a commercial arrangement with the broadcaster. But the demise of the original must-carry rules means that cable systems, many of which were significantly burdened by such rules, will have increased capacity to present additional, diverse programming rather than specified broadcast stations if they so choose. And this gain comes without the loss of the omitted broadcast signals since they remain available for over-the-air reception. Cable, under a relaxed must-carry ob-

132. Quincy Cable, 768 F.2d at 1434.
133. See Must Carry Rules, supra note 130.
134. Such commercial arrangements might involve changes in the compulsory copyright license now granted cable operators to transmit broadcast programming. See Going to War Over Must Carry, BROADCASTING, July 29, 1985, at 23. For a brief description of the federal copyright scheme for cable transmission of broadcast signals, see Quincy Cable, 768 F.2d at 1454 n.42; Must Carry Rules, supra note 130, at 857-58.
135. One system, for example, had 25 of its 32 channels occupied by must-carry signals including three ABC, two CBS, and two NBC affiliates. Must-Carry Winner, BROADCASTING, July 29, 1985, at 25. See also Quincy Cable, 768 F.2d at 1445 (describing Turner Broadcasting System's allegation of economic detriment from the must-carry rules).
136. A simple and inexpensive (about $5.00) "A/B" switch allows a viewer to switch
ligation, therefore has an even greater potential for diversifying television viewing while remaining a nondisplacing substitute for broadcasting.

C. Cable's Access Provisions

Mandatory access provisions imposed on cable operators remove their editorial control over some of their channels and are therefore subject to attack. Indeed, in its 1979 holding that cable access rules imposed by the FCC exceeded the Commission's statutory authority, the Supreme Court also noted that the first amendment problems raised by such rules are "not frivolous." Challenges to such provisions on first amendment and other grounds undoubtedly will persist. The public availability of mandatory access to cable, therefore, remains uncertain.

Despite the Court's language in Red Lion, it is also uncertain to what extent the scarcity rationale depends on the perceived unavailability of individual access to the microphone side of television. In addition to its holding denying such a right of access in CBS v. DNC, the Court also found in the legislative history of the 1927 Radio Act that Congress had specifically rejected the position that all persons wishing to address public issues should have access to broadcast facilities on a nonselective basis. Indeed, the Communications Act

quickly and conveniently between cable and broadcast reception. See Quincy Cable, 768 F.2d at 1441 & n.16. The broadcast reception, however, requires an adequate antenna and may be of poorer quality than if the signal were transmitted by cable. Id. And the cable industry opposes any requirement for universal installation of such switches. NCTA Report Blasts A/B Switch As Too Costly, BROADCASTING, Dec. 1, 1986, at 44. Nonetheless, the continued availability to consumers of broadcast stations directly over the air is a centerpiece of current FCC regulation. See Must Carry Rules, supra note 130.

137. The 1984 Cable Act expressly prohibits an operator's editorial control over PEG and leased commercial channels. 47 U.S.C. §§ 531(e), 532(c)(2) (Supp. III 1985).

138. FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979) (Midwest Video II). The Eighth Circuit had held that the rules violated the first amendment. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978). The Supreme Court, however, suggested that "less intrusive" access provisions might be authorized and constitutional. Midwest Video, 440 U.S. at 705 n.14.

139. See, e.g., Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985) (as amended June 13 & 26, 1985; amended version available on WESTLAW, Allfeds library), aff'd, 106 S. Ct. 2034 (1986) [three versions of Preferred Communications have been published: (i) decided March 1, 1985—in advance sheets (754 F.2d 1396); (ii) as corrected May 20, 1985—in bound volume (same cite); (iii) as amended June 13 & 26, 1985—available on WESTLAW]; Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985).

prohibits common carrier status for broadcasters, and the Court reiterated the Commission's position that "no private individual or group has the right to command the use of broadcast facilities." Therefore, as long as broadcasters present the public with a sufficient diversity of viewpoints, specific individual access to television may not constitute a significant scarcity issue.

At any rate, cable's vast channel capacity should offer considerable opportunity for public access, whether or not mandated. Cable operators certainly have every economic incentive to fill available channels for which there may be a lack of programming. Furthermore, there is no reason to anticipate or have particular concern that cable operators will discriminate in selling time to or covering certain groups or individuals. After all, any such discrimination by daily metropolitan newspapers—which generally enjoy a greater monopoly in their print medium than cable operators (who must compete with broadcasters) enjoy in the television medium—is properly a journalistic concern, not a governmental one. The same should be true of cable. Cable, then, can substantially enhance public access to television, thereby eliminating any vestige of scarcity based on a lack of such access.

D. Cable As a Natural Monopoly

Cable, as the answer to scarcity, is subject to a possible counter-argument. Although cable is not constrained by the same perceived physical limitations as broadcasting, it still might be considered scarce in the economic sense of being a "natural monopoly." In other words, due to certain immutable economic factors in the cable industry, the long-range competitive equilibrium would result in a single firm serving a given geographic area. This natural monopoly,

142. CBS v. DNC, 412 U.S. at 113. See also CBS v. FCC, 453 U.S. 367, 396 (1981) (upholding § 312(a)(7) of the Communications Act as creating a limited right to reasonable access for legally qualified candidates for federal elective office, while emphasizing there is no general right of access to the media).
143. There also is no reason to think that such access to cable should be free, since even statutorily mandated access for federal candidates under § 312(a)(7) of the Communications Act is not free. See CBS v. FCC, 453 U.S. at 382 n.8 (citing Kennedy for President Comm. v. FCC, 636 F.2d 432, 446-50 (D.C. Cir. 1980)).
144. "'The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers.'" Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 255 (1974) (quoting CBS v. DNC, 412 U.S. at 117 (plurality opinion)).
achieved by either competitive processes or governmentally awarded exclusive franchises, results in a single gatekeeper controlling the cable channels subscribers receive. Editorially independent television channels thus remain scarce and, it is feared, diversity in programming may be restricted. However, this natural monopoly argument has severe limitations, and even with a single cable operator it does not follow that diversity will suffer.\footnote{145}

Traditionally a natural monopoly is thought to exist in an industry in which there are sufficient economies of scale that a single firm can serve the market at lower unit cost than two or more firms.\footnote{146} In such a situation regulation generally is thought necessary to protect consumers from monopoly market power which adversely affects prices and quality of service.\footnote{147} The argument that cable satisfies the conditions of a natural monopoly depends on the cost characteristics of the industry.\footnote{148}

\footnote{145. A preliminary issue here—and perhaps also for the access discussion in the preceding section—is whether diversity in television programming can be measured meaningfully. Such measurement requires classifying programs on a social-political-economic scale and therefore is necessarily vague and subjective. Moreover, the relationship, if any, between an increased number of independent programming sources and greater programming diversity is uncertain. See Noam, Local Distribution Monopolies in Cable Television and Telephone Service: The Scope for Competition, in Telecommunications Regulation Today and Tomorrow 351, 369 (E. Noam ed. 1983).


2 A. Kahn, supra, at 119, states:
The critical and—if properly defined—all-embracing characteristic of natural monopoly is an inherent tendency to decreasing unit costs over the entire extent of the market. This is so only where the economies achievable by a larger output are internal to the individual firm—if, that is to say, it is only as more output is concentrated in a single supplier that unit costs will decline.

147. See R. Posner, supra note 146, at 320; F. Scherer, supra note 146, at 482.

148. See 2 A. Kahn, supra note 146, at 119 (“‘The principal source of this tendency [to decreasing unit costs] is the necessity of making a large investment merely in order to be in a position to serve customers on demand.’”). A good summary of the cable natural monopoly argument by a well-known telecommunications economist is set forth in an affidavit filed in a cable franchising case very similar to Preferred Communications. See Declaration of Stanley M. Besen in Opposition to Plaintiff’s Motion for Preliminary Injunction, in Pacific West Cable Co. v. City of Sacramento, No. S-83-1034 MLS (E.D. Cal., preliminary injunction denied, May 9, 1985), aff’d, 798 F.2d 353 (9th Cir. 1986) [hereinafter Besen Declaration]. This was countered by the Declaration of Thomas W. Hazlett. Professor Hazlett has recently expounded his views in Hazlett, Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise, 134 U. Pa. L. Rev. 1335 (1986).}
In particular, there are high fixed costs for a cable system's headend and for the installation and maintenance of a distribution system of trunk lines to serve all potential subscribers. These costs depend on factors such as the size of the geographic area wired and the channel capacity of the system, but do not depend on the number of actual subscribers. Since a large proportion of a system's costs is independent of the number of subscribers, significant economies of scale result as average cost decreases with each additional subscriber. Moreover, these fixed costs require an intensive initial capital investment. This investment is "sunk" in that it cannot easily be recovered and reinvested elsewhere if the cable enterprise is unprofitable. This creates an additional barrier to entry, further insulating an existing cable system from potential competition. The natural monopoly status of cable is supported by engineering and econometric studies and by the practical experience of most cable systems operating as de facto monopolies.

On the other hand, the argument that cable is inescapably a natural monopoly is subject to substantial challenge. For example, the assumption of high fixed costs leading to declining per-unit costs may be offset by increasing per-unit costs of management organization. Further, a significant portion of the high fixed costs


150. Other costs of servicing subscribers—e.g., connecting subscribers to the distribution trunks, providing converters, billing, etc.—and of providing programming may vary with the number of subscribers. See Besen Declaration, supra note 148, at 5-6.

151. There may be economies both in providing the same services to additional subscribers with a single system (economies of scale) and in combining different services on one system even if this requires increasing that system's capacity (economies of scope). See Besen Declaration, supra note 148, at 6-7. Thus Besen concludes that there is unlikely to be competition between two or more cable companies providing either the same services or different collections of services in the same geographic area. Id. at 17-18. Cf. Hazlett, supra note 148, at 1368-69 (arguing that by focusing exclusively on economies of scale and assuming away all differences between products and among consumer tastes, one loses altogether the rationale for competitive enterprise).

152. Besen Declaration, supra note 148, at 23-25.

153. Id. at 7-16, 19-23. 2 A. Kahn, supra note 146, at 126 states:

The clearest case of natural monopoly is in local distribution, where a single investment in distribution network and plant, a single hook-up with the ultimate user, a single periodic reading of meters and billing can handle an expansion of sales within all foreseeable limits at incremental costs far below average and in important respects at zero cost.

154. See Hazlett, supra note 148, at 1364-75; Hazlett, Competition vs. Franchise Monopoly in Cable Television, 4 CONTEMP. POL'Y ISSUES 80, 95 (1986).

155. See Hazlett, supra note 148, at 1366. Hazlett also describes "the inevitable limitations on technical economies of scale" in the cable industry. Id.
may be due to services demanded by a franchising authority as a condition of the franchise. Moreover, while the need to invest heavily in fixed, non-salvageable capital goods may discourage new entrants into the cable market, it also gives an established cable operator more to lose if an entrant is successful. Thus, potential entrants pose a greater threat to operators whose prices or services deteriorate so as to invite competition. While almost all cable systems enjoy exclusivity in their operating territories, then, this may be due more to municipalities’ granting exclusive franchises on the assumption of a natural monopoly than to the actual existence of determinative economic factors.

At any rate, the uncertain issue of cable’s “natural monopoly” tendencies does not require governmental intervention to assure programming diversity. First, we can be justifiably skeptical of econometric arguments of natural monopoly conditions as the basis for government regulation. This is particularly the case when

156. See G. Shapiro, P. Kurland, & J. Mercurio, “CableSpeech”: The Case for First Amendment Protection 202 (1983). Hazlett cites an accounting study estimating that about 22% of subscriber revenues is used to cover costs resulting solely from franchising requirements. Hazlett, supra note 148, at 1363. He also notes that such governmentally imposed services must be of low economic value to consumers; otherwise, cable companies would be happy to provide and profit from them without government coercion. Id. at 1363 n.99, 1381, 1385. In effect, it is the franchising authority that exercises monopoly market power. See G. Webb, supra note 149, at 175, 179-80.


158. There are very few examples of successful “overbuilds” of cable systems, i.e., of two or more cable systems in direct competition. See Meyerson, supra note 149, at 8-9; see also Hazlett, supra note 148, at 1370-75 (discussing alternative rationales other than natural monopoly for the lack of overbuild systems); Lee, Cable Franchising and the First Amendment, 36 Vand. L. Rev. 867, 880-84 (1983) (arguing there is little empirical evidence that cable is a natural monopoly in all markets); cf. Cablevision, Oct. 13, 1986, at 60 (describing increased speculation about overbuilds).

159. See Quincy Cable TV, Inc., v. FCC, 768 F.2d 1434, 1449-50 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 2889 (1986); Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1335-36 (D.C. Cir. 1985).

160. As one influential econometric analysis of the cost structure of modern cable television systems concludes: “Economies of scale and cost subadditivity, while present, are not so substantial as to rule out entirely the possibility of effective actual or potential competition in this industry.” Owen & Greenhalgh, Competitive Considerations in Cable Television Franchising, 4 Contemp. Pol’y Issues 69, 78 (1986). See also A. Smiley, Direct Competition Among Cable Television Systems 34-35 (U.S. Dept. of Justice Economic Analysis Group Discussion Paper 86-9, 1986) (“Under mandatory rate deregulation, it is reasonable to conclude that overbuild competition has a potentially significant welfare-enhancing role.”); Hazlett, supra note 148, at 1370 (“[T]he existence of monopoly, whether in franchised jurisdictions or in open entry communities, is not by itself evidence contradicting the consumer advantages of free competition.”); Noam, Economies of Scale in Cable Television: A Multiproduct Analysis, in Video Media Competition 93-120 (E. Noam ed. 1985) (finding only small economies of scale in number of homes passed). The long distance telephone industry, for example, once thought to be a natural mo-
such regulation has significant first amendment implications and in an industry subject to dynamic changes. Indeed, those courts that have considered the natural monopoly issue in the context of cable regulation have split over it.

Moreover, even if the natural monopoly argument is applicable to cable, it does not justify municipality control over entry into the cable market. Exclusive franchising by municipalities not only legally forecloses actual or potential competitive forces that otherwise might arise; it may also stifle a periodic beneficial competitive process that would allow the market to determine the "best" cable monopoly, is now workably competitive. See generally Samuel, Telecommunications: After the Bell Break-Up, in UNNATURAL MONOPOLIES, supra note 146, at 177-203. The same is true of the overnight mail delivery market. Hazlett, supra note 148, at 1355-57.

161. Cf. Minneapolis Star and Tribune v. Commissioner of Revenue, 460 U.S. 575, 589-90 (1983) ("The complexities of factual economic proof always present a certain potential for error. . . . [T]he possibility of error inherent in the proposed [tax] rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.").

162. Communications is a contemporary example of an industry undergoing rapid technological changes that are apparently opening up a host of new competitive opportunities. In general, the tempo of change in the economy seems to be increasing. The most pernicious feature of regulation would appear to be precisely its impact on change—its tendency to retard the growth of competition that would erode the power of regulated monopolists. To embrace regulation because an industry is today a natural monopoly and seems likely to remain so is to gamble dangerously with the future. To impose regulation on the basis of a prophecy that the industry will remain monopolistic forever may be to make the prophecy self-fulfilling.

163. Compare, e.g., Midwest Video Corp. v. FCC, 571 F.2d 1025, 1055 (8th Cir. 1978) (quoting Home Box Office v. FCC, 567 F.2d 9, 46 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977), to the effect that economic scarcity is insufficient to justify government intrusion into the first amendment rights of cable television), aff'd on other grounds, 440 U.S. 689 (1979) (Midwest Video II); HBO v. FCC, 567 F.2d at 46; and Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986) (holding that fact that cable television market in a proposed service area is a natural monopoly does not justify greater regulation than would otherwise be allowed under the first amendment) with Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 717 (8th Cir. 1986) (holding that the natural monopoly characteristics of the cable market in question justified the regulation imposed by the city); Omega Satellite Prods. v. City of Indianapolis, 694 F.2d 119, 127-28 (7th Cir. 1982) (Posner, J.) (discussing the "apparent natural monopoly characteristics of cable television"); Community Communications v. City of Boulder, 660 F.2d 1370, 1379-80 (10th Cir. 1981) (recognizing natural monopoly as a constitutionally permissible justification for regulation of cable but noting that the degree of regulation depends, inter alia, upon the "degree of natural monopoly"), cert. dismissed, 456 U.S. 1001 (1982); and Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 986 (D.R.I. 1983) (finding economic scarcity a constitutionally sufficient rationale for the regulation of cable television), vacated as moot, 773 F.2d 382 (1st Cir. 1985).

operator to service a region rather than having that long-term selection made politically and bureaucratically by a franchising authority.\textsuperscript{165} The market process favors the diversity actually desired by cable subscribers; the franchising process enshrines a governmental body's concept of appropriate diversity.\textsuperscript{166}

The natural monopoly argument further fails to support substantive regulation of cable because the Supreme Court in \textit{Tornillo} emphatically rejected the concept of economic scarcity as the basis for media regulation.\textsuperscript{167} Indeed, the argument only proves, if anything, that there are monopolistic tendencies in the distribution system for cable services but not in the market for the end product—namely, audio/video programming received on a television set. There are, for example, substantial economies of scale in the transmission phase of printing and delivering daily newspapers\textsuperscript{168} contributing to the de facto exclusivity that most large, daily metropolitan newspapers enjoy.\textsuperscript{169} No one, however, even aside from \textit{Tornillo}, seriously thinks of affirmatively mandating diversity in the pages of a newspaper. Such a demand would be strange since the newspaper has no monopoly on communication in the print media. Similarly, a cable operator, even one with a legally created distribution monopoly, faces significant programming competition from broadcasters, and at least potential competition from newer, emerging technologies.\textsuperscript{170}

\begin{itemize}
\item[165.] "There is a world of difference between the performance that one would expect of a monopolist that survived a competitive struggle to serve its customers and what one expects of a monopolist that is granted a franchise that frees it through state action of any fear of competition." Owen, \textit{Recent Developments in Cable Television Regulation, Regulatory Reform} (published by the Industry Regulation Committee of the ABA Section of Antitrust Law), Dec. 1985, at 4. See also Hazlett, \textit{Private Contracting Versus Public Regulation as a Solution to the Natural Monopoly Problem}, in \textit{Unnatural Monopolies}, supra note 146, at 71-114. But see Central Telecommunications, 800 F.2d at 716 n.5.
\item[166.] See Hazlett, supra note 148, at 1383; see also Century Federal, 648 F. Supp at 1477 (the public's first amendment rights "are endangered by a governmental attitude that government knows best how to fine tune the flow of information to which they have access").
\item[168.] See Spitzer, \textit{Controlling the Content of Print and Broadcast}, 58 S. CALIF. L. REV. 1349, 1974-75 (1985).
\item[169.] See supra note 97.
\item[170.] For an excellent discussion of intermedia competition for the video entertainment market among cable, broadcasting, and the new video services, see Hazlett, supra note 148, at 1390-1400. For a discussion of the broader competitive alternatives to cable across the range of functions cable can perform, see Jackson, \textit{Cable and Public Utility}
in programming led the FCC some time ago to preempt state and local regulation of pay cable rates,171 and, following the 1984 Cable Act, the FCC has relied on the competition between cable and broadcasting to free basic cable services from rate regulation in most instances.172 Thus, whatever other merit the cable monopoly argument may have, the continued availability of broadcast signals should preclude that argument from supporting programming regulation of cable in the name of diversity or otherwise.

Finally, there is no great danger that a single cable operator, as gatekeeper over a multiplicity of channels, would result in uniformity in programming. Although cable operators exercise considerable editorial discretion,173 especially over channels on which they originate their own programming,174 on most channels they simply select a programmer and retransmit everything that programmer provides.175 In these cases the operator, often like a newspaper or magazine editor or a network-affiliated broadcast station, is acting as a conduit for the ideas, viewpoints, and programs of others. This variety is then supplemented by the operator's own original pro-

171. See Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765, 767 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979); see also Community Cable TV, Inc., 95 F.C.C.2d 1204 (1983) (preempting specialized or auxiliary cable system rate regulation as well as that of pay or subscription services), reconsideration denied, 98 F.C.C.2d 1180 (1984).

172. See infra notes 251-254 and accompanying text.


174. See "L.O.", CABLEVISION, Nov. 25, 1985, at 28 (describing the increasing importance of locally originated cable programming).

175. For example, a cable operator might agree with a movie channel to show its programs without additions, deletions, or modifications. Presumably, though, the operator could seek to change or terminate the agreement if dissatisfied with the programming.
Programming together with whatever provisions exist for PEG and leased commercial access channels.

Moreover, the nature of cablecasting ensures that an operator will offer a wide variety of programming. Cablecasting is really "narrowcasting" since entire channels often are devoted to specific formats—news, sports, movies, children's programming, adult programming, etc.—each designed to appeal to specific groups of viewers. A broadcaster, with only one station to offer the public, has to maximize its audience (and hence its advertising revenue). Therefore, it must appeal to the broadest cross-section of the population, often with programming of the lowest common denominator—bland, uncontroversial, and usually uninteresting. On the other hand, a cable operator with a large number of channels, many of which are aimed at specific audiences, has every incentive to offer as many different kinds of programming as possible in order to attract different segments of the viewing population, thereby maximizing total subscriptions. Other factors being equal, the more channels available to an operator, the greater variety of programming it will provide, consistent with market demand. Thus, given the large channel capacity of modern cable systems, and the variety of programming available to fill these channels, cable offers genuine diversity as a solution to the scarcity problem.  

E. Cable's Economic Availability

There is another sense in which cable might be thought economically scarce: is it available to subscribers in a way that makes it comparable to broadcast television and sufficiently prevalent to eliminate any remnants of broadcast scarcity? An average subscription to cable television might include a one-time installation fee (perhaps reduced or waived with a promotional offer) and a current monthly fee of about $9 for basic tier service, expected to increase to almost $14 per month by 1990. Additional premium channels

176. See Hazlett, supra note 148, at 1386:
To argue that cable firms would not, in a competitive environment, provide the sorts of services that local governments select clearly attests to the inefficiency generated by the franchising process. Since the profit-maximizing strategy in a competitive environment is to provide all increments of capacity and programming that consumers value more than the opportunity cost, political selection of cable services has a negative impact on social welfare by imposing the supply of services worth less than their cost.

such as Home Box Office (HBO) might cost about another $10 per month, with a slight reduction expected over the next few years, and with several such premium channels perhaps offered together as one tier at a special price.

Cable, then, might appear to be expensive, especially compared to "free" broadcast television, and therefore of limited availability to viewers. There is, however, no reason to expect free access to a communications medium. Books, magazines, newspapers, theaters, and the like all cost money. Moreover, broadcast television is not really "free" in the true economic sense, since one generally incurs nontrivial "costs" or disutility with broadcast television in order to be able to watch a desired program at a desired time. Commercials, of course, constitute the majority of these "costs." Cable, with its limited advertising, especially on pay channels, and its narrowcasting feature, saves much of these costs.

In addition, if a family's average monthly cost for the basic and premium cable service it wants is $29, that family need not actually bear an additional $29 out-of-pocket expense in order to afford cable. Rather, since cable provides entertainment such as unedited and uninterrupted feature movies, concerts, major sports events, and the like, a family's investment in cable is in good measure not an additional out-of-pocket expense but a partial shift of its entertainment dollars from activities outside the home to cableviewing. These factors therefore indicate that the marginal cost of subscribing to cable is only a modest burden for many viewers who willingly accept that burden for an alternative to "free" broadcast television. Cable's success in creating a nationwide market supports

178. ARTHUR D. LITTLE, INC., supra note 177, at 13.
179. See 1985 Fairness Doctrine Report, supra note 2, at 201 n.211; Levy & Pitsch, supra note 130, at 69-70. The cost of advertising, which supports free broadcast television, ultimately is passed along to viewers as consumers, though not in any direct relationship to viewing habits. Most viewers, however, consider television broadcast commercials a fair price to pay for the medium and a useful source of product information. THE ROPER ORGANIZATION, INC., PUBLIC ATTITUDES TOWARDS TELEVISION AND OTHER MEDIA IN A TIME OF CHANGE 21-22 (1985).
180. See ARTHUR D. LITTLE, INC., supra note 177, at 7, 9.
181. Some portion of the $29 should be allocated to the improved reception of whatever broadcast stations are carried on cable.
182. Given the costs of going out, including tickets for performances, transportation and parking, babysitting, food, and the like, a family would have to forego only a few nights out per month in favor of watching cable to make up most, if not all, of the monthly cable fee. See G. WEBB, supra note 149, at 70 (citing statistical evidence that low-income families may find basic cable an inexpensive substitute for other entertainment).
this conclusion\textsuperscript{183} and establishes that cable is readily available for a considerable portion of the public.\textsuperscript{184}

\section*{F. The Rest of the Electronic Video Marketplace}

Finally, even if cable by itself is insufficient to eliminate broadcast scarcity, surely when considered together with the alphabet soup of other technologies in the new electronic video marketplace, it is apparent that scarcity is a thing of the past. Low power television (LPTV),\textsuperscript{185} subscription television (STV),\textsuperscript{186} direct broadcast satellites (DBS),\textsuperscript{187} satellite master antenna television

\textsuperscript{183}The conclusion is further supported by the apparent lack of price sensitivity, at least within the current range of prices, in the demand for cable service. \textit{See} Arthur D. Little, Inc., \textit{supra} note 177, at 12, 35; \textit{see also} G. Webb, \textit{supra} note 149, at 70 (citing evidence indicating cable's appeal to both low and high income groups).

\textsuperscript{184}It is also worth noting that the 1984 Cable Act prohibits denying access to cable service through economic redlining. 47 U.S.C. § 541(a)(3) (Supp. III 1985).

\textsuperscript{185}Low power television utilizes small broadcast transmitters called "translators," which formerly only rebroadcast signals from full-service television stations to geographically isolated regions, but which now may originate programming, sell advertising or subscription services, and generally become stations in their own right. They operate at limited wattage to avoid interfering with full-power stations and therefore have limited geographical reach. \textit{See} Future Role of Low Power Television Broadcasting in the National Telecommunications System, 51 Rad. Reg. 2d (P & F) 476 (1982), reconsidered, \textit{aff'd}, Neighborhood TV Co. v. FCC, 742 F.2d 629 (D.C. Cir. 1984). \textit{See generally} Senate Committee Print, \textit{supra} note 97, at 75-76; Stern, Krasnow & Senkowski, \textit{The New Video Marketplace and the Search for a Consistent Regulatory Philosophy}, 32 Cath. U. L. Rev. 529, 538-40 (1983) (discussing low power television) [hereinafter \textit{New Video Marketplace}]. Upon allowing translators to originate programming in 1982, the FCC was swamped with thousands of applications for the relatively inexpensive LPTV stations, including proposals for a wide diversity of programming. \textit{New Video Marketplace, supra}. As of mid-1985 there were 126 licensed low power UHF stations and 215 low power VHF stations, with predictions that this technology will eventually add 4,000 television stations to the marketplace. 1985 Fairness Doctrine Report, \textit{supra} note 2, at 211-12.

\textsuperscript{186}Subscription television is a pay service offered by local broadcast stations that transmit a scrambled signal on an allocated frequency to subscribers who then decode it at their television receivers. While this technology has existed for several decades, the FCC's recent elimination of restrictions on STV has sparked increased interest in and expansion of this service. \textit{See} Subscription TV Serv., 90 F.C.C.2d 341 (1982); \textit{New Video Marketplace, supra} note 185, at 532-34. As of June 1984, there were approximately 700,000 STV subscribers and 19 STV channels operating in 17 markets. 1985 Fairness Doctrine Report, \textit{supra} note 2, at 216.

\textsuperscript{187}Direct broadcast satellite systems use high-power, geostationary satellites to pick up a signal beamed from earth (the uplink) and retransmit it directly to small dish antennas owned by subscribers (the downlink). This differs from current communications satellite operations which are considerably less powerful and therefore require large, fixed, and relatively expensive dish antennas and other equipment for reception. Using several satellites to cover the country, DBS will provide a national, direct-to-home television service not tied to any local community. \textit{See} Direct Broadcast Satellites, 90 F.C.C.2d 676, 680-82 (1982), \textit{aff'd in part, vacated in part sub nom.} National Ass'n of Broadcasters v.
(SMATV), multipoint distribution service (MDS), teletext and videotext, and video cassette recorders (VCRs) and videodisc.

FCC, 740 F.2d 1190 (D.C. Cir. 1984). See generally Senate Committee Print, supra note 97, at 72-73; Anderson, The Economic, Legal and Scientific Implications of Direct Broadcast Satellites, 7 COMM. & L. 3 (1985); New Video Marketplace, supra note 185, at 540-43. DBS will be able to offer additional channels with specialized and technically innovative services reaching even remote areas beyond regular broadcast stations or cable. New Video Marketplace, supra note 185, at 542. Indeed, the potential for DBS systems to "wire" the world raises profound international issues. See Gorove, International Direct Television Broadcasting by Satellite: "Prior Consent" Revisited, 24 COLUM. J. TRANSNAT'L L. 1 (1985); Webster, Direct Broadcast Satellites, Proximity, Sovereignty and National Identity, 62 FOREIGN AFF. 1161 (1984). The great expense, however, of a DBS system has slowed its development and clouded its future. See Direct Broadcasting Satellites, Broadcasting, July 1, 1985, at 22; CBS Drops Out of Running for DBS, Broadcasting, July 2, 1984, at 38. Despite the system's potential, the FCC does not yet consider DBS to be a significant contributor to the electronic video marketplace. 1985 Fairness Doctrine Report, supra note 2, at 214-15.

188. SMATV is really "mini-cable" in that it consists of an operator's satellite-fed master dish antenna which serves an apartment building or a complex of buildings through coaxial cable. Since these systems operate on private property they are largely unregulated. See Earth Satellite Communications, Inc., 95 F.C.C.2d 1223 (1983), aff'd sub nom. New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984); Deregulation of Receive Only Domestic Earth Stations, 74 F.C.C.2d 205 (1979); see also Cable Communications Policy Act of 1984, 47 U.S.C. § 522(6) (Supp. III 1985) (excluding from the definition of a "cable system" SMATV systems that do not use a public right of way). This lack of regulation, and the fact that in high-density areas an SMATV system is usually faster and easier to install than a regular cable system, allow SMATV to compete with cable. See generally New Video Marketplace, supra note 185, at 543-45 (discussing SMATV). Estimates of SMATV subscribership vary considerably. See 1985 Fairness Doctrine Report, supra note 2, at 213.

189. MDS is a common carrier service that uses omnidirectional microwave signals for line-of-sight transmission from a fixed location to subscribers' receivers equipped with directional antennas. See Multipoint Distribution Serv., 45 F.C.C.2d 616 (1974). See generally New Video Marketplace, supra note 185, at 545-49. Thus, without utilizing standard broadcast frequencies and without wires, an MDS system can provide programming similar to that on cable to its subscribers within its limited (about twenty-five miles) geographical range. Although MDS operators originally were allowed only one channel, the Commission recently reallocated channels from the Instructional Television Fixed Service (ITFS) to allow multichannel MDS (MMDS), which will make that service all the more competitive. Instructional Television Fixed Service, 94 F.C.C.2d 1203 (1983); see also 1985 Fairness Doctrine Report, supra note 2, at 212-13; MMDS Coming Alive Despite Barriers, CABLEVISION, Dec. 15, 1986, at 34. The FCC also has made a similar technology, operational-fixed microwave service (OFS), a viable means of delivering home video entertainment. See Operational-Fixed Service, 99 F.C.C.2d 715 (1983); New Video Marketplace, supra note 185, at 549-50.

190. Teletext and videotext may be considered electronic publishing, a blend of print media and electronic transmission of signals.

Teletext refers to the one-way transmission of textual and graphic information to a home receiver. The signal could be carried by cable, MDS, or LPTV; however, teletext often refers to utilization of the vertical blanking interval (VBI) of a television broadcast signal. (The typical television picture consists of 525 lines rapidly scanned by the tube's electron gun to create an image. The VBI consists of twenty-one such lines between scans, appearing as a black bar when a television image rolls, some of which are available...
players (VDPs)\textsuperscript{191} are all alternative methods for receiving and viewing an audio/video signal on a home television receiver. Therefore, they all provide additional opportunities for communication through that medium.

It is difficult to predict just what impact these various new and still emerging technologies will have on the video marketplace. However, it is clear that we are undergoing an explosion of new sources of home video entertainment and information.\textsuperscript{192} This article focuses on cable as the most significant and important of these technologies.\textsuperscript{193} Thus, it is imperative to the demise of the scarcity rationale that cable properly be viewed as entirely comparable with and substitutable for broadcasting. The major cable cases support such a result.

IV. Judicial Support for a Unified Cable/Broadcasting Medium

Several major decisions on the statutorily authorized and constitutionally permissible scope of cable regulation distinguish cable from broadcasting and refuse to apply to cable the pervasive sort of regulation that has become commonplace for broadcasting. In-

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\textsuperscript{191} VCRs are capable of playing prerecorded tapes, thereby making available material neither televised nor cablecast; they also can record and play back material from television or other sources such as an attached camera. This time-shifting feature of VCRs thereby increases the audience for television and cable programming. Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 423 (1984). See generally New Video Marketplace, supra note 185, at 556-57. VDPs, which use phonograph-type records instead of tapes, cannot record material but have other useful features. Id. at 557.

\textsuperscript{192} See Senate Committee Print, supra note 97, at 80-81 for estimates of the market penetration of some of these services by 1990. See also Hazlett, supra note 148, at 1387-1400 (discussing intermedia competition for video market). But see The New Order Passeth, Broadcasting, Dec. 10, 1984, at 43 (suggesting that except for cable the alphabet soup of the new media has grown cold since the new technologies collectively have failed to gain a sufficient foothold to compete adequately with cable and broadcasting).

\textsuperscript{193} See I. de Sola Pool, supra note 99, at 155.
stead, these courts treat cable more like newspapers. When properly viewed, however, these cases nonetheless support the functional similarity between cable and broadcasting and the argument for treating a unified cable/broadcast medium more like the print media for first amendment purposes. Indeed, the similarity and competitive relationship between the two were implicit even in the Supreme Court’s initial ruling allowing the FCC to regulate cable to the extent “reasonably ancillary” to its effective regulation of broadcasting.194

Home Box Office, Inc. v. FCC,195 however, contains the first significant and explicit substantive analysis of the first amendment implications of cable regulation.196 In that case the D.C. Circuit Court of Appeals reviewed virtually identical restrictions on pay programming applicable to both cable and subscription broadcast television. The FCC designed these restrictions to prevent pay services from “siphoning” popular program material away from free broadcast television through competitive bidding. The court upheld the subscription broadcast rules, subject to further proceedings, confirming an earlier holding197 that the scarcity rationale for broadcast regulation espoused in NBC and reaffirmed in Red Lion overcame first amendment objections to the rules.198

Yet the court could not apply the first amendment rationale of NBC and Red Lion directly to the rules regulating cable television because of the “important differences between cable and broadcast television.”199 In particular, physical scarcity, “an essential precon-

194. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). See also Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968) (holding that the FCC’s regulation of cable has same constitutional status as its regulation of broadcasting because of cable’s “unique impact upon, and relationship with, the television broadcast service”); cf. Teleprompter Corp. v. CBS, 415 U.S. 394 (1974) (distinguishing, for copyright purposes, broadcasting and early cable systems); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 398-401 (1968) (finding that, for copyright purposes, early cable systems have little in common with the function of broadcasters). Black Hills Video dealt with early and fundamentally different community antenna television systems (CATV); its approval of pervasive cable regulation is of “doubtful precedent today.” Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1404 (9th Cir. 1985), aff’d, 106 S. Ct. 2034 (1986).
196. For a review of prior cases touching on this issue, see id. at 45 n.80.
198. 567 F.2d at 34, 44 n.79, 59.
199. Id. at 43.
dition of that theory,” is absent with cable.\textsuperscript{200} Moreover, alluding to cable’s possible status as a natural monopoly, the court relied on \textit{Tornillo} for the proposition that economic scarcity is insufficient to justify governmental intrusion on the media’s first amendment rights. Thus, there was “nothing . . . to suggest a constitutional distinction between cable television and newspapers.”\textsuperscript{201}

The court therefore invalidated the pay cable rules even though recognizing that they were not intended to suppress free expression.\textsuperscript{202} Had the court viewed the issue as the regulation of a unified, non-scarce cable/broadcast medium, the same reasoning might have voided the restrictions for both facets of that medium.\textsuperscript{203} However, since the crucial distinction between cable and broadcasting was simply one of scarcity, the court’s opinion in no way undermines cable/broadcasting similarity in all other respects. Rather, it supports the fact that such a unified medium, which is not scarce, should enjoy the same constitutional status as the print media.

This conclusion is reinforced by several subsequent cases dealing solely with cable regulation. In \textit{FCC v. Midwest Video Corp.},\textsuperscript{204} for example, the Court reviewed FCC imposition of mandatory access and minimum channel capacity requirements on cable systems. A majority found that such rules exceeded the Commission’s statutory authority but also noted that they raised first amendment questions that are “not frivolous.”\textsuperscript{205} This therefore implies that, when squarely faced with a first amendment challenge to cable or broadcast regulation which is no longer justified by scarcity, the Court

\begin{itemize}
\item \textsuperscript{200} \textit{Id.} at 45. The court also noted the absence of interference among speakers on a cable.
\item \textsuperscript{201} \textit{Id.} at 46.
\item \textsuperscript{202} \textit{Id.} at 48. The court found that the rules served no important or substantial government interest, \textit{id.} at 50, and were “grossly overbroad,” \textit{id.} at 51.
\item \textsuperscript{203} \textit{Compare id.} at 46-51 (voiding pay cable rules) with \textit{id.} at 59-60 (upholding subscription broadcast television rules). The court, however, had a better factual record to rely on with respect to subscription television. \textit{Id.} at 59. \textit{See also National Ass’n of Theatre Owners, 420 F.2d 194, 207-08 (D.C. Cir. 1969) (upholding regulation of subscription television), cert. denied, 397 U.S. 922 (1970).}
\item \textsuperscript{204} 440 U.S. 689 (1979) (Midwest Video II).
\item \textsuperscript{205} \textit{Id.} at 709 n.19. Also see the Court of Appeals’ more extensive discussion of the first amendment issues, in which it concluded: “[W]e have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers.” Midwest Video Corp. v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978), \textit{aff’d}, 440 U.S. 689 (1979) (Midwest Video II). \textit{Cf. Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 716 (8th Cir. 1986) (after discussing case law concerning first amendment distinction between cable and newspapers, declining to take position on record before it); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981) (inappropriate to summarily apply to cable operators the first amendment principles governing newspapers), cert. dismissed, 456 U.S. 1001 (1982).}
may apply the same principles that govern the print media. Indeed, since the Court specifically acknowledged the functional similarity between cable and broadcasting concerning the basic first amendment media freedom to exercise editorial discretion,\textsuperscript{206} it is difficult to see how the Court could do otherwise.

Two recent cases in particular illustrate the importance of not letting distinctions between cable and broadcasting, adduced in the context of cable regulation, obscure their basic similarity and the value of considering them a unified medium.\textsuperscript{207} In \textit{Preferred Communications, Inc. v. City of Los Angeles}\textsuperscript{208} the Ninth Circuit reversed the dismissal of a potential cable operator's first amendment claim that a city could not condition an operator's right to construct and operate a cable system upon participation in a franchise auction procedure or other plan subject to the city's discretion. The court framed the "fundamental issue" as whether a city could limit to one the number of cable companies serving a given region, assuming that the region could physically accommodate more than one system.\textsuperscript{209} The court answered that question in the negative. It thus partly sustained Preferred's "sweeping attack" on the city's cable franchise process by requiring the grant of franchises "to all cable operators who are willing to satisfy the City's legitimate conditions," at least so long as the city has facilities to do so.\textsuperscript{210}

The city argued that the constitutional standards applicable to government regulation of broadcasting should apply to cable as well. The court disagreed, stating that "[d]espite the superficial similarity between broadcasting and cable television, there are significant differences between the two media that have First Amend-

\textsuperscript{206} Midwest Video II, 440 U.S. at 707; see also Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465, 1472 n.12 (N.D. Cal. 1986) (drawing an analogy between cable and traditional print media for purposes of editorial discretion).


\textsuperscript{208} 754 F.2d 1396 (9th Cir. 1985), aff'd, 106 S. Ct. 2034 (1986).

\textsuperscript{209} Id. at 1401. The court specifically avoided passing on the validity of any particular requirements imposed by the city through the franchising process, \textit{id.} at 1401, 1406 n.9, but noted that the city's mandatory and leased access requirements "pose particularly troubling constitutional questions," \textit{id.} at 1401 n.4. The court also affirmed dismissal of Preferred's antitrust claims. \textit{Id.} at 1415.

\textsuperscript{210} Id. at 1401, 1409.
ment consequences." The sole difference the court described, however, was the apparent physical scarcity of radiowaves. Citing NBC, the court recognized that "government intrusion into the affairs of broadcasters" rests on this attribute. Since on the facts before the court the city's facilities could accommodate more than one cable system, the city could not justify its desired scope of cable regulation on a similar physical scarcity. The court, therefore, invalidated the city's limitation on competing cable systems even though by doing so it implicitly questioned the constitutionality of key provisions of the 1984 Cable Act.

The Supreme Court unanimously affirmed, although on the "narrower ground" that the well-pleaded allegations of the complaint raised sufficient factual issues so that the legal issues should not be resolved on a motion to dismiss without a more thoroughly developed record. The Court, therefore, specifically avoided deciding whether Tornillo or Red Lion applied to cable and, like the Ninth Circuit, avoided first amendment challenges to many of the city's franchise conditions.

The Court, however, did reaffirm the right of editorial discretion exercised by cable operators whose activities "plainly implicate First Amendment interests." Moreover, the Court acknowledged

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211. Id. at 1403.
212. Id. In a footnote the court refused to rely on newspapers' long tradition of freedom from government intrusion as the basis for differential treatment, calling this argument a "distinction [which] merely begs the question." Id. at 1405 n.8.
213. See id. at 1400 n.3, 1401 n.4, 1411 n.11. After denying a petition for rehearing, the Ninth Circuit tried to cushion its criticism of the 1984 Cable Act by modifying its opinion slightly. See id. as amended June 13 & 26, 1985, at n.11 (amended version available on WESTLAW, Allfeds library). Unfortunately the last two sentences added to this footnote by the June 13 & 26 amended version were erroneously printed in the text of the published opinions (bound version and advance sheets) at 754 F.2d 1410, col. 1.
214. Preferred Communications, Inc. v. City of Los Angeles, 106 S. Ct. 2034, 2036-37 (1986). The Supreme Court specifically affirmed only the judgment of the Ninth Circuit. That court's analysis, however, remains the law of the case and is instructive as to the constitutional result once a scarcity distinction between cable and broadcasting is no longer tenable. See Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. at 1465, 1468 n.6 (N.D. Cal. 1986).
215. Preferred Communications, 106 S. Ct. at 2036 n.2. The concurrence emphasized that the Court's opinion left open two important questions: first, the proper standard for determining the first amendment status of cable; second, whether cable is sufficiently analogous to another medium to resolve this issue. Id. at 2038 (Blackmun, Marshall, O'Connor, J.J., concurring).
216. Id. at 2037. See Best View Cablevision v. Abbeville, No. 85-1159 (4th Cir. Aug. 13, 1986) (in light of Preferred Communications, court reinstates dismissed first amendment and equal protection claims of cable operator who had been unsuccessful in auction for exclusive franchise); Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985) (citing, inter alia, the Ninth Circuit opinion in Preferred Communica-
the analogy between cable and "traditional" media such as newspapers and book publishers, and hinted that cable's first amendment status surpasses that of broadcasting as long as scarcity allows some government regulation.²¹⁷ Again the implication is clear: since a unified cable/broadcast medium is not scarce, the freedom of the print media offers the appropriate constitutional standard for the cable/broadcast medium.²¹⁸

In an equally important case, Quincy Cable TV, Inc. v. FCC,²¹⁹ the D.C. Circuit Court of Appeals found the Commission's must-carry cable requirements "fundamentally at odds with the First Amendment."²²⁰ Because the Supreme Court has never really addressed the constitutionality of any cable regulation,²²¹ the D.C. Circuit first had to determine the appropriate standard of first amendment review applicable to cable. In particular, the court had to decide whether to apply the principles governing regulation of broadcasting. It found these principles inapplicable because, although "[f]rom the perspective of the viewer, no doubt, cable and broadcast

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²¹⁷. Preferred Communications, 106 S. Ct. at 2037.
²¹⁸. Indeed, the Court suggested that the only appropriate occasion for balancing media first amendment values "against competing societal interests" is "where speech and conduct are joined in a single course of action," such as in the installation and maintenance of cable lines and equipment using public utility poles and rights of way. Id. at 2038. See Century Federal, 648 F. Supp. at 1475-76 (finding that the only asserted governmental interest in the regulation of cable which is important or substantial under the first amendment analysis of United States v. O'Brien, 391 U.S. 367 (1968), is the alleged disruption of the public domain). Just as newspaper delivery trucks are subject to traffic regulations, so may cable be subject to normal safety and similar controls. See Pacific West Cable Co. v. City of Sacramento, 798 F.2d 353, 355 (9th Cir. 1986) ("At the very least, [the city] may regulate the noncommunicative aspects of cable broadcasting through reasonable time, place and manner restrictions"); nothing in Preferred Communications "requires that a municipality open its doors to all cable-television comers, regardless of shape, quality, qualifications or threat to the ultimate capacity of the system."). In this sense broadcasting, of course, has even less conduct-related aspects. The Court's reasoning, therefore, when applied to a unified medium, should preclude government regulation directly affecting the editorial function.
²¹⁹. 768 F.2d 1434 (D.C. Cir. 1985).
²²⁰. Id. at 1438.
²²¹. Id. at 1443, 1445.
television appear virtually indistinguishable, . . . [f]or purposes of First Amendment analysis . . . they differ in at least one critical respect.” 222 Once again the critical distinction of “fundamental significance” 223 was simply the physical scarcity of the broadcast spectrum which the court quickly concluded “has no place in evaluating government regulation of cable television.” 224

The court then analyzed the must-carry rules and found them wanting, even as incidental burdens on speech. But the court expressed “serious doubts” 225 about not applying even more exacting scrutiny. Indeed, the court came close to analyzing this cable regulation as it would similar regulation of newspapers—in which case the regulation would clearly fail. 226 In this context the court observed that “once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity for purposes of the First Amendment, the analogy to more traditional media [i.e. print] is compelling.” 227

Thus, in both Preferred Communications and Quincy Cable the circuit courts precluded cable regulation by distinguishing cable from broadcasting simply on the basis of scarcity. These opinions, therefore, reinforce the conclusion that scarcity is the only constitutionally significant difference between cable and broadcasting and that, without this rationale, the first amendment prohibits most governmental intrusion into the affairs of either medium. Since a unified cable/broadcast medium is not scarce, the constitutional analogy between this medium and the print media is, in the words of the D.C. Circuit, “compelling.”

Equally significant, both courts rejected a new generation of scarcity analysis, based on cable’s alleged status as a natural monopoly, to justify government regulation. 228 The natural monopoly ar-

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222. Id. at 1448; see also id. at 1450 (“[B]eyond the obvious parallel that both cable and broadcast television impinge on the senses via a video receiver, the two media differ in constitutionally significant ways.”).


224. 768 F.2d at 1449.

225. Id. at 1453.

226. See id. at 1452 n.37, 1453.


228. See 768 F.2d at 1449-50; Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1404-05 (9th Cir. 1985), aff’d, 106 S. Ct. 2034 (1986). Since Preferred had alleged that competition for cable services was economically feasible in its desired region, and since the court was reviewing a motion to dismiss, the Ninth Circuit only assumed without deciding that no natural monopoly existed. Indeed, it changed its
argument is likely to persist for some time. However, broadcasting can rescue cable from this argument just as cable rescues broadcasting from the scarcity rationale. For, as a viable alternative to cable for consumers, broadcasting challenges the significance of any monopolistic characteristics in the distribution of cable. The recent cable cases thus highlight the vital symbiosis, illustrated in the next section, between cable and broadcasting.

V. ADVERSE IMPLICATIONS OF DISTINGUISHING CABLE FROM BROADCASTING

Not only are cable and broadcasting far more similar than dissimilar, but distinguishing between them is potentially inimical to their further deregulation and to the movement toward maximum first amendment freedom for both. Not treating them as a unified medium perpetuates analytical confusion with inappropriate results. These adverse effects permeate the range of regulations for each. Four categories in particular exemplify the problem: regulation based on the competitive relationship between cable and broadcasting; the fairness doctrine; broadcasting access provisions; and concerns for children's television.

A. The Competitive Relationship Between Cable and Broadcasting

The history of cable regulation largely reflects the FCC's concern over cable's competitive impact on broadcasting and the potential harm to the Commission's basic policy of fostering and

original language of "conclude" to "assume." Compare Preferred Communications, 754 F.2d (advance sheets; decided Mar. 1, 1985) at 1404 with id. (hardbound volume; as corrected May 20, 1985). The D.C. Circuit in Quincy Cable went further, saying that an economic scarcity argument for cable "rests on the entirely unproven—and indeed doubtful—assumption that cable operators are in a position to exact monopolistic charges," and suggesting that any tendency toward cable monopoly may be attributable more to the municipal franchising process than to any economic phenomenon. Quincy Cable, 768 F.2d at 1450. Both courts indicated that, at any rate, Tornillo would preclude reliance on economic scarcity to justify any denigration of first amendment rights. Quincy Cable, 768 F.2d at 1450; Preferred Communications, 754 F.2d at 1404-05; accord Century Federal, 648 F. Supp. at 1472. But see Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986).

229. See Pacific West Cable Co. v. City of Sacramento, 748 F.2d 353 (9th Cir. 1986); Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985).

230. See supra Section III.D.

231. As the discussion infra in subsection A shows, distinguishing between the media is also contrary to thirty years of cable regulation based upon cable's increased similarity to and effect upon broadcasting.
protecting local broadcasters who serve local community needs. After initially declining jurisdiction over cable in the late 1950s, the Commission soon perceived in the development of cable a threat to broadcasting, and reacted by asserting jurisdiction and initiating a series of cable regulations. In the continuing absence of direct statutory authority, the Supreme Court upheld FCC jurisdiction over cable, but only to the extent “reasonably ancillary” to the Commission’s effective regulation of broadcasting.

The early effect of FCC regulation was to freeze the growth of cable television. Various proposals to resolve this situation resulted in the FCC’s sweeping 1972 cable rules that, in the words


233. As long as the Commission saw cable simply as a boon to local broadcasters by enhancing the quality or reach of their signals, it had no problem deciding that it could not regulate cable as either a common carrier or a broadcaster under the Communications Act. Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, 253-54 (1959). See also Inquiry into the Impact of Community Antenna Systems, TV Translators, TV “Satellite” Stations and TV “Repeaters” on the Orderly Development of Television Broadcasting, 26 F.C.C. 403 (1959) (Auxiliary Services Inquiry) (rejecting notion that commission could derive authority to regulate cable from cable’s competitive economic impact on broadcasting). The Commission, however, unsuccessfully sought legislation giving it some jurisdiction over cable. See M. HAMBURG, ALL ABOUT CABLE ¶ 1.04 (rev. ed. 1981).

234. See CATV, 20 F.C.C.2d 201 (1969) (imposing program origination requirements on cable systems above a certain size), reconsd. denied, 25 F.C.C.2d 825 (1970); Microwave-Served CATV, 38 F.C.C. 683 (1965) (First Report and Order) (imposing certain must-carry requirements for local broadcast signals, and rules of nonduplication of local signals by imported distant ones, on microwave-fed cable systems); Microwave-Served CATV, 2 F.C.C.2d 725 (1966) (Second Report and Order) (imposing must-carry and nonduplication rules, and restrictions on import of distant broadcast signals into certain markets, on all cable systems), aff’d sub nom. Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968); Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), aff’d, 321 F.2d 359 (D.C. Cir.) (denying authorization for microwave relay facilities to import distant broadcast signals to cable system absent showing of no harm to local broadcast station), cert. denied, 375 U.S. 951 (1963).

235. United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (upholding FCC’s authority to promulgate restrictions on distant signals); see also United States v. Midwest Video Corp., 406 U.S. 649, 676 (1972) (Midwest Video I) (plurality upheld program origination rules as reasonably ancillary; concurrence noted that FCC’s position strained the outer limits of its jurisdiction).

236. See 1 CABLE TELEVISION LAW, supra note 20, at ¶ 5.05; Besen & Crandall, supra note 232, at 93.

237. See 1 CABLE TELEVISION LAW, supra note 20, at ¶ 5.05; Besen & Crandall, supra note 232, at 93-95.

of one commentator, "can only be described as baroque." While the rules relaxed some restrictions on cable, they perpetuated the policy of protecting broadcasting from audience fragmentation by cable, which it was feared could destroy free broadcast television. The FCC clearly relegated cable to secondary status, considering it merely a supplement to broadcasting.

The 1972 rules proved unwieldy and difficult to enforce. This, together with a general trend toward deregulation and increasing judicial doubts about the extent of FCC jurisdiction over cable, led to a substantial reduction of restrictions on cable during the rest of the 1970s. In 1979 the Commission completed an exhaustive reexamination of the economic relationship between cable and broadcasting, concluding that cable did not pose a significant threat to overall broadcasting policies. Quite the contrary, the Commission found that the developing relationship between cable and broadcasting, coupled with further deregulation of cable, would stimulate beneficial competition between the media both in the economic marketplace and in the marketplace of ideas.

In sum, over the course of two decades the FCC moved from

239. Besen & Crandall, supra note 232, at 95. These rules governed such matters as must-carry of certain local and other "significantly viewed" broadcast signals, distant signal importation, nonduplication of certain network programming, program origination, minimum channel capacity, access channels, and certain other technical requirements.

240. The courts soon criticized the Commission's policy of placing cable in a subordinate role relative to broadcasting. See HBO v. FCC, 567 F.2d 9, 25, 36 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977).

241. See id. To sustain its cable regulations the FCC was required, at a minimum, to demonstrate that the objectives of such regulations were those for which it legitimately could regulate broadcast media, and when the first amendment was involved, the Commission was also required to state clearly the harm its regulations sought to remedy and its reasons for supposing harm exists; on this basis the court in HBO v. FCC held that pay cable "antisiphoning" rules were invalid. Id. at 34. See also FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979) (Midwest Video II) (holding cable access and channel capacity requirements beyond FCC's ancillary jurisdiction over cable; describing first amendment questions about such rules as "not frivolous").

242. See 1 CABLE TELEVISION LAW, supra note 20, at ¶ 5.05 [6]-[10]; Besen & Crandall, supra note 232, at 98-100.


244. Economic Report, supra note 243, at 661.

essentially ignoring cable, to suffocating regulation, to substantial deregulation.\textsuperscript{246} In each case the Commission based its position primarily on its conception of cable's relationship with, and particularly its growing competitive similarity to, broadcast television. In implementing economic deregulation the Commission has increasingly relied on cable as a competitor and substitute for broadcasting to assure adequate diversity in the electronic video marketplace.\textsuperscript{247}

With the passage of the 1984 Cable Act the symbiotic relationship between cable and broadcasting again features prominently in deregulation. In lobbying for the legislation, a major concern for the cable industry was to achieve deregulation of the rates charged to subscribers.\textsuperscript{248} This was more than just a pocketbook issue for the industry since, as the history of FCC "raised eyebrow" regulation of broadcasting demonstrates, economic power in the form of licensing or rate regulation often breeds more pervasive and intrusive control.\textsuperscript{249} Through a lobbying compromise\textsuperscript{250} the Cable Act grandfathered for two years existing rate regulations. Thereafter, it deregulates all rates except those for "basic cable service in circumstances in which a cable system is not subject to effective competition."\textsuperscript{251} For purposes of this statute the Commission has determined that a cable system is subject to effective competition\textsuperscript{252}

\begin{itemize}
\item \textsuperscript{246} Besen & Crandall, \textit{supra} note 232, at 122.
\item \textsuperscript{247} See, \textit{e.g.}, Multiple Ownership (Seven Stations Rule) 56 Rad. Reg. 2d (P & F) 859, 864-65 (1984) (revoking "seven stations rule" and relaxing restrictions on multiple ownership of radio and broadcast television stations), \textit{reconsidered and granted in part}, 57 Rad. Reg. 2d (P & F) 966, \textit{appeal docketed sub nom.} National Ass'n of Black Owned Broadcasters v. FCC, No. 85-1139 (D.C. Cir. filed Mar. 4, 1985). The Commission noted that its cable and television cross-ownership prohibitions would make little sense unless the two media were "important substitutes" for each other. 56 Rad. Reg. 2d (P & F) at 865. \textit{See also} Must Carry Rules, \textit{supra} note 130, at 827.
\item \textsuperscript{249} \textit{See} Noam, \textit{supra} note 145, at 367-68. For the genesis of FCC regulation by "raised eyebrow," see \textit{1 Cable Television Law}, \textit{supra} note 20, at \S 3.11 n.5. \textit{See also} Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407-08 (D.C. Cir. 1975) (Bazelon, C.J., stating why he voted to grant rehearing en banc).
\item \textsuperscript{250} The compromise was effected after the Supreme Court's decision in \textit{Capital Cities Cable, Inc. v. Crisp}, 467 U.S. 691 (1984), confirmed a trend toward federal preemption of cable regulation that, absent legislation, threatened to rob cities of much local control over cable operators. \textit{Compare Cable Strikes a Deal With the Cities}, \textit{Broadcasting}, June 4, 1985, at 39 (pre-Crisp) with \textit{NCTA-Cities Set to Try Again, supra} note 248 (post-Crisp).
\item \textsuperscript{251} 47 U.S.C. \S 543(b)(1) (Supp. III 1985).
\item \textsuperscript{252} The Commission used the normal antitrust market-definition approach of considering the cross-elasticity of demand between basic cable and other comparable programming services to define effective competition—that is, it considered the alternatives...
in the provision of basic cable services\textsuperscript{253} whenever the franchise market receives three or more unduplicated broadcast signals.\textsuperscript{254} The FCC estimates that its regulations will free approximately eighty percent of all cable systems, serving more than ninety percent of all cable subscribers, from local rate regulation.\textsuperscript{255}


253. Although the statute speaks in terms of effective competition for a “cable system,” the legislative history indicates that the Commission was to focus on determining whether there is effective competition for basic cable services and not for other video or mass media services. H.R. Rep. No. 934, supra note 248, at 4703. See also Amendment of Commission’s Rules—Cable Act, 58 Rad. Reg. 2d (P & F) at 25-26. The focus on basic cable comports with the growing importance of that portion of cable services. See Back to Basic, CABLEVISION, Oct. 14, 1985, at 28. Although § 602(2) of the 1984 Cable Act [47 U.S.C. § 522(2)] defines basic cable service generally as “any service tier which includes the retransmission of local television broadcast signals,” the Commission had flexibility to fashion an appropriate definition for the purposes of rate deregulation. H.R. Rep. No. 934, supra note 252, at 4703. The Commission originally defined basic cable service in terms of the tier of service that includes all must-carry broadcast television signals and PEG access channels, if any. Amendment of Commission’s Rules—Cable Act, 58 Rad. Reg. 2d (P & F) at 33. After the must-carry requirements were found unconstitutional, the Commission reformulated its definition of basic cable service to specify the same signals by referencing the characteristics that previously qualified them for must-carry status. Id., 60 Rad. Reg. 2d (P & F) at 522-23 (1986) (Memorandum Opinion and Order); Definition of Cable Television System, Rad. Reg. 2d (P & F) (Current Service) ¶ 85:5 (June 18, 1986).


255. FCC settles on “Three or More” Standard of Effective Competition, CABLEVISION, Apr. 15, 1985, at 11. See also Hazlett, supra note 148, at 1388 n.187 (87% of cable systems have been released from regulation under the effective competition standard).

256. This approach for basic cable underlies the treatment of cable services generally. The effective competition concept in the 1984 Cable Act involves only basic cable services because nonbasic services already are free from rate regulation. This in turn is primarily because nonbasic services already are subject to sufficient competition from alternative video delivery systems, including broadcast signals. See Amendment of Commission’s Rules—Cable Act, 58 Rad. Reg. 2d (P & F) at 25-26.
control that often accompanies such economic power.\(^2\)\(^{257}\) Suggestions of significant distinctions between cable and broadcasting needlessly compromise the necessary predicate for this approach. More specifically, they challenge the fundamental notions of comparability and a competitive relationship, thereby undermining the basis for the freedom granted cable in the deregulatory era.\(^2\)\(^{258}\)

B. The Fairness Doctrine

Broadly speaking, the concept of fairness on the air has its genesis in section 18 of the 1927 Radio Act, later incorporated into the 1934 Communications Act as section 315.\(^2\)\(^{259}\) This equal opportunities provision gives political candidates a contingent right to equal "use" of a broadcast station triggered by a licensee's allowing an opposing candidate to use its station. The FRC, however, immediately extended the contingent equal opportunities concept by requiring licensees to air diverse views and ideas on matters of public importance.\(^2\)\(^{260}\) A corollary of this obligation, derived from the public interest standard, was that stations had to present programming addressed to the needs and interests of the general population and not just those of a limited group or class.\(^2\)\(^{261}\)

The Commission's stress on the affirmative fairness obligations of broadcasters\(^2\)\(^{262}\) culminated in its 1949 Report on Editorializing.\(^2\)\(^{263}\) In that report the Commission announced what generally is referred to as the fairness doctrine, namely a two-part obligation of broadcasters to: (i) "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest" to their

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\(^{258}\) The potential for change in the current deregulation is embodied in § 623(h) of the 1984 Cable Act, 47 U.S.C. § 543(h) (Supp. III 1985). Under this section the Commission must report to Congress within six years on rate regulation and the effect of competition in the marketplace and submit any appropriate legislative recommendations. Any resurgence of arguments distinguishing cable from broadcasting might therefore prove detrimental to cable interests. See also Amendment of Commission's Rules—Cable Act, 58 Rad. Reg. 2d (P & F) at 35-36.


\(^{261}\) Chicago Fed'n of Labor, 3 F.R.C. ANN. REP. 36 (1929), aff'd, 41 F.2d 422 (D.C. Cir. 1930); Young People's Ass'n for the Propagation of the Gospel, 6 F.C.C. 178, 181 (1938).


\(^{263}\) In re Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).
local community, and (ii) to do so in such a manner "that the public
has a reasonable opportunity to hear different opposing positions
on the public issues of interest and importance" in that commu-
nity.\textsuperscript{264} In 1974 the Commission generally reaffirmed the fairness
doctrine.\textsuperscript{265} But with continuing doubts about the doctrine's wis-
dom and efficacy,\textsuperscript{266} particularly in view of dramatic changes in the
electronic media, the Commission initiated a new "searching and
comprehensive" inquiry into the general fairness doctrine obliga-
tions of broadcast licensees in 1984.\textsuperscript{267}

With respect to cable, the Commission first applied the fairness
doctrine in 1969 when it required systems above a minimum size to
originate programming.\textsuperscript{268} Although the Supreme Court upheld
mandatory program origination,\textsuperscript{269} the Commission subsequently
repealed this requirement\textsuperscript{270} and therefore never sought to enforce

\textsuperscript{264} Id. at 1257-58. See Fairness Doctrine, 47 C.F.R. § 73.1910 (1985). For a general
discussion of the fairness doctrine, see F. Rowan, Broadcast Fairness (1984) and S.
Simmons, The Fairness Doctrine and the Media (1978). See also Fairness Doctrine, 40
F.C.C. 598 (1964) (Fairness Doctrine Primer) (setting forth the fairness doctrine rights,
obligations, and responsibilities of broadcast licensees).

\textsuperscript{265} Fairness Report, 48 F.C.C.2d 1 (1974), reconsidered, 58 F.C.C.2d 691 (1976),
aff'd in part, vacated in part, remanded in part sub nom, National Citizens Comm. for Broad-
casting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978), on
remand, Fairness Doctrine Inquiry, 74 F.C.C.2d 163 (1979) (Report and Order), reconsidered.
denied, 89 F.C.C.2d 916 (1982). The Commission restated the fairness doctrine,
"stripped to its barest essentials," as involving a two-fold duty: "(1) the broadcaster
must devote a reasonable percentage of this [sic] broadcast time to the coverage of pub-
lic issues; and (2) his coverage of these issues must be fair in the sense that it provides an
opportunity for the presentation of contrasting points of view." 48 F.C.C.2d at 7.

\textsuperscript{266} Broadcast deregulatory legislation to repeal the fairness doctrine, among other
matters, has been introduced in Congress since at least 1975. See 133 CONG. REC. S247
(daily ed. Jan. 8, 1987) (statement of Senator Proxmire made on Jan. 6, 1987, mention-
ing pertinent legislation introduced since 1975); Freedom of Expression Act of 1983, S.
Cong., 1st Sess. (1985); First Amendment Clarification Act of 1987, S. 22, 100th Cong.,
First Test, BROADCASTING, June 18, 1984, at 32, and CONG. Q., June 16, 1984, at 1435.
Even the Supreme Court has suggested it might be time to reexamine the constitutional


\textsuperscript{268} Amendment of Commission's CATV Rules and Regulations, 20 F.C.C.2d 201,
208-09 (1969) (First Report and Order). For an overview of fairness doctrine obliga-
tions for cable systems, see Amendment of the Commission's Rules Concerning the
Fairness Doctrine and Political Cablecasting Requirements, 48 Fed. Reg. 26,472 (June 8,
1983) [hereinafter Amendment of Commission's Rules—Fairness Doctrine].

\textsuperscript{269} United States v. Midwest Video Corp., 406 U.S. 649 (1972) (Midwest Video I).

\textsuperscript{270} Cable Television Service, 49 F.C.C.2d 1090 (1976).
the first prong of the fairness doctrine against cable. The fairness doctrine otherwise remains applicable to cable systems engaging in "origination cablecasting"—that is, programming, other than broadcast signals, subject to the exclusive control of the cable operator.

Over the years the Commission has viewed the fairness doctrine as one of the most important pieces of federal regulation. On the other hand, licensees see it as one of the most onerous and chilling requirements. Indeed, the Commission devotes a good portion of its 1985 Fairness Doctrine Report to chronicling the adverse effects of the doctrine upon broadcasters. These effects include the inhibition of both controversial programming and the expression of unorthodox opinion, the threat of government sanctions to coerce or limit certain programming, and the financial burdens created by the doctrine. Rescinding or significantly relaxing the doctrine would

271. Amendment of Commission's Rules—Fairness Doctrine, supra note 268, at 26,474 n.3.

272. See 47 C.F.R. § 76.205 (origination cablecasts by candidates for public office), § 76.209 (fairness doctrine; personal attacks; political editorials), and § 76.5 (r) (origination cablecasting) (1985). The meaning of "exclusive control" in this context is unclear, except that broadcast signals and most access channel programming, prior to the 1984 Cable Act, were not considered subject to exclusive control for this purpose. Amendment of Commission's Rules—Fairness Doctrine, supra note 268, at 26,475, 26,482. The Commission has suggested that the fairness doctrine provisions were meant to apply only to local program origination by cable operators and not to "cable distributed programming over which the system operator retains no practical day-to-day editorial control." Id. at 26,482.

Under the 1984 Cable Act both PEG and leased access channels should also not entail fairness doctrine obligations for the cable operator since they remain outside the operator's editorial control. See 47 U.S.C. §§ 531(e), 532(c)(2) (Supp. III 1985). The 1984 Cable Act otherwise does not appear to affect fairness doctrine obligations for cable operators, and the Commission's authority for such regulations depends on other statutory provisions. See 47 U.S.C. § 315(c) and the discussion of § 315 infra, subsection C. Even prior to its 1984 reexamination of the fairness doctrine for broadcasting, however, the Commission proposed a significant relaxation of cable operators' fairness obligations. Amendment of Commission's Rules—Fairness Doctrine, supra note 268.


274. 1985 Fairness Doctrine Report, supra note 2, at 159-96.

275. Id. In a recent and ominous development, the Commission, while denying the underlying claim, upheld a staff ruling granting a government agency standing to bring a fairness doctrine complaint, including an allegation of deliberate news distortion, against a television network. CIA v. ABC, 57 Rad. Reg. 2d (P & F) 1543, 1544 n.1 (1985) (Staff Ruling), 58 Rad. Reg. 2d (P & F) 1544, 1548-49 (1985) (Memorandum
greatly extend the first amendment freedom of the electronic media, making it more commensurate with that of the print media. The Commission’s current proposals in this regard exemplify the importance of not erecting largely artificial distinctions between cable and broadcasting.

Since the fairness doctrine is premised on a scarcity rationale, the Commission’s 1985 Fairness Report questions the continuing need for the doctrine in light of the great increase in the amount and type of information sources available in the communications marketplace. The Commission not only stresses the tremendous growth and development of both radio and broadcast television, but also relies on the availability of various alternate electronic technologies, especially cable, as an important supplement to traditional broadcasting. Indeed, framing the issue as “whether or not there are inherent differences among various media outlets so as to prevent substitutability with respect to the presentation of controversial issues of public importance,” the Commission reaffirms its earlier conclusion of the fungibility of cable and broadcasting and the “significant degree of substitutability” between them.

The Commission’s most recent proposals for dealing with the

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Opinion and Order). The CIA declined to seek judicial review of its underlying claim. A “media watch dog” organization tried to pursue the matter but was found to lack standing to obtain a review of the Commission’s decision. American Legal Found. v. FCC, 808 F.2d 84 (D.C. Cir. 1987).

In practice, on the other hand, the fairness rules have been described as a “legal placebo” because of the infrequent number of adverse rulings under the doctrine. Mueller, Repeal the Fairness Doctrine by Enforcing It, Wall St. J., Apr. 2, 1985, at 28, col. 3 (eastern ed.). Between 1973 and 1976, of the approximately 50,000 fairness complaints filed with the Commission, only 244 led to inquiries and of these only 54, or 0.1% of the total number of complaints, resulted in adverse rulings. Id. See also F. Rowan, supra note 264, at 51-70. In only one instance has the FCC sustained a complaint relating to the first part of the fairness doctrine, 1985 Fairness Doctrine Report, supra note 2, at 160 n.59, 179 n.131, and only once has it denied a license renewal on the basis of a fairness doctrine violation, id. at 163 n.75.


277. 1985 Fairness Doctrine Report, supra note 2, at 196-226. In addition, the Commission concludes that the transformation of the broadcast marketplace since Red Lion renders the continuing constitutionality of the doctrine questionable. Id. at 148-57. The Commission further stated that in operation the fairness doctrine inhibits rather than promotes first amendment values, making it inappropriate at any rate. Id. at 158-96.

278. Id. at 202-18.
279. Id. at 199.
280. See supra note 247 and accompanying text.
fairness doctrine obligations of cable operators provide a good test of the applicability of this conclusion. The Commission has recognized that cable's lack of scarcity makes it difficult to sustain the imposition of fairness obligations. Instead, capitalizing on cable's multi-channel capacity and its potential for broad public access, the Commission has proposed developing rules to allow a cable operator to satisfy its fairness doctrine obligations by providing cable-cast opportunities on channels specifically set aside for the presentation of programming not under the operator's control. The PEG or leased access channels provided for in the 1984 Cable Act might satisfy this scheme.

Thus, the FCC has found cable to be a competitor and substitute for broadcasting and, as such, to be an important element in its argument for eliminating fairness obligations for broadcasters. Similarly, it has relied on cable's capacity for increased diversity and access in proposing to allow cable operators to substitute access opportunities for their fairness obligations. However, if the Commission seriously believes in the high degree of interchangeability between cable and broadcasting, it should use its cable approach to modify the fairness doctrine for both media. For example, given the wide availability and increasing importance of basic cable service, the FCC might allow suitable access provisions, located anywhere on the broadcast/basic cable dial, as a proper substitute for the broadcast/cable fairness doctrine.

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285. As the Commission recognized, there are several problems with access opportunities as a replacement for fairness doctrine obligations, not the least of which are the substantial constitutional issues raised by mandatory access. See supra notes 137-139 and accompanying text. The Commission's proposal, however, involves a cable operator's voluntarily allowing access as one means of satisfying its fairness obligations. If truly voluntary (see Amendment of Commission's Rules—Fairness Doctrine, supra note 268, at 26,482), this may be a very attractive alternative, especially as more cable systems develop greater channel capacity making such access somewhat less burdensome.

286. See Amendment of Commission's Rules—Fairness Doctrine, supra note 268, at 26,482. The real issue here is whether a suitable audience will be available so that access provisions can adequately effectuate fairness doctrine goals. In this regard, the Commission has already emphasized that in the "rough and tumble marketplace for the pres-
The simplest and optimal approach is to eliminate the fairness doctrine entirely based, at least in part, on cable’s having put an end to any scarcity. But despite the FCC’s recent criticism of the doctrine on constitutional, policy, and practical grounds, it deferred to Congress for any repeal or modification of the fairness doctrine.\(^\text{287}\) Congress, however, is unlikely to tolerate significant dismantling of the doctrine\(^\text{288}\) and the Supreme Court would have to reverse its well-established position to void the doctrine on constitutional grounds.\(^\text{289}\) A more palatable, midway position might be to rely on less onerous, though still problematic, cable access provisions as a

\[\text{entation of competing viewpoints}^{\text{a}} \text{ it does not have to guarantee absolute equality of exposure. } \text{Id. at 26,481. Rather, it might suffice if “periods of equal audience potential were made available with the responsibility for the size of the actual audience left with the party responsible for the program.” } \text{Id. (emphasis in original).}\]

\(^{287}\) The Commission concluded that while the fairness doctrine was not part of the 1934 Communications Act and does not necessarily inhere in the public interest standard, Congress may have codified the doctrine in its 1959 amendment to the Act. 1985 Fairness Doctrine Report, supra note 2, at 227; see infra note 292. Moreover, as a practical political matter the FCC cannot act on the fairness doctrine without congressional support. Indeed, the Commission recently attempted other sorts of deregulation only to retreat in the face of stiff congressional opposition. See Goodale, Summer Storm, N.Y.L.J., Oct. 14, 1984, at 1, col. 1; Six-Month Ban on TV-Show Ownership Rule Changes is Approved in House Vote, Wall St. J., Nov. 9, 1983, at 20, col. 1. Furthermore, as part of its continuing appropriations for fiscal 1987, Congress has required the FCC to consider alternative means of administering and enforcing the fairness doctrine and to report to Congress before making any change in the doctrine. Conference Report to accompany H.J. Res. 738, 99th Cong., 2d Sess., 70-71, 430-31, reprinted in 132 CONG. REC., 10,619, 10,720 (daily ed. Oct. 15, 1986). See Meredith Corp. v. FCC, 809 F.2d 863, 873 n.11 (D.C. Cir. 1987).

\(^{288}\) See supra note 287; Fight Over Rule is Seen in Courts, Not Congress, N.Y. Times, Aug. 8, 1985, at C22, col. 1 (late ed.).

\(^{289}\) Nonetheless, court challenges are pending. In late 1984 the FCC issued its first finding of a fairness doctrine violation in several years. Syracuse Peace Council v. Television Station WTVH, 57 Rad. Reg. 2d (P & F) 519 (1984), reconsidered denied, 59 Rad. Reg. 2d (P & F) 179 (1985). Upon review, the D.C. Court of Appeals remanded the matter to the FCC with instructions to consider constitutional challenges to the fairness doctrine, unless the Commission concludes it may not or should not enforce the doctrine because it is contrary to the public interest. Meredith, 809 F.2d 863. Ironically, the petitioner in Meredith relied heavily on the Commission’s 1985 Fairness Doctrine Report to argue the doctrine’s unconstitutionality. See Brief of Petitioner Meredith Corporation, Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987) (No. 85-1723). Following Meredith the Commission issued its Order Requesting Comment, supra note 2.

In a companion case, Radio-Television News Directors Ass’n v. FCC, 809 F.2d 860 (D.C. Cir. 1987), the court found it lacked jurisdiction to review petitioners’ challenge to the constitutionality of the fairness doctrine brought in light of the 1985 Fairness Doctrine Report. Such a claim must be brought in district court. Id. at 862-63. The D.C. Court of Appeals will review, however, petitioners’ nonconstitutional claim that the Commission acted arbitrarily and capriciously in failing to institute rulemaking to eliminate or modify the fairness doctrine. Id. at 863.
reasonable substitute for any cable or broadcast290 fairness obligations. In any case, the predicate for relaxing the fairness doctrine is the similarity and close interchangeability of cable and broadcasting.

C. Broadcasting Access Regulations

The importance of maintaining the close similarity between cable and broadcasting with respect to the fairness doctrine applies as well to the corollary access requirements imposed on broadcasters. These can be divided into contingent and affirmative access obligations.

The major contingent access provision is section 315(a) of the Communications Act, requiring equal broadcast opportunities for political candidates upon the use of a broadcast station by an opposing candidate.291 The argument that Congress' 1959 amendment to section 315(a) also may have codified the general fairness doctrine obligations demonstrates the intimate relationship between the statute and the doctrine.292 The Supreme Court has further empha-

290. Several years ago the Commission rejected a proposal to develop access provisions for broadcasting as a substitute for broadcasters' fairness obligations. Fairness Doctrine Inquiry, 74 F.C.C.2d 163 (1979), reconstr. denied, 89 F.C.C.2d 916 (1982). Its rejection, however, was based not on any inherent characteristics of broadcasting, but rather on issues common to broadcasting and cable. 74 F.C.C.2d at 172. The Commission's more recent fairness doctrine proposals for cable thus indicate that its earlier reservations are no longer an impediment. See Amendment of Commission's Rules—Fairness Doctrine, supra note 268, at 26,482.

291. 47 U.S.C. § 315(a) (Supp. III 1985). Section 315(b) places restrictions on the fees that can be charged for such uses. See also 1984 Political Primer, 100 F.C.C.2d 1476 (1984); Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209 (1978); Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C.2d 510 (1972); Licensee Responsibility as to Political Broadcasts, 15 F.C.C.2d 94 (1968); 47 C.F.R. §§ 73.1940 (broadcasting contingent access requirements for public office candidates), 76.205 (same for cablecasting) (1986).

292. The 1959 amendment to § 315 created four categories of news broadcasts which qualified as exceptions to a "use" of a station by a political candidate that otherwise would trigger the equal opportunities provision. Congress also provided that nothing in the amendment creating those exceptions "shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Act approved Sept. 14, 1959, Pub. L. No. 86-274, 73 Stat. 55 (1959) (codified as amended at 47 U.S.C. § 315(a) (Supp. III 1985)). This language is the basis for the argument that Congress codified the two-part fairness doctrine. The Commission recently reviewed various possible constructions of this language and surveyed the arguments both for and against congressional codification. 1985 Fairness Doctrine Report, supra note 2, at 227-46. The Commission avoided a definitive conclusion on this issue by deferring action on the fairness doctrine to Congress. The D.C. Court of Appeals, however, in an opinion joined by Judge (now Justice) Scalia, recently found the doctrine to be an "administrative construction, not a binding statutory directive." Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 517,
sized this relationship by noting that a party could easily circumvent the goals of section 315 if the complementary obligations of the fairness doctrine did not exist.\textsuperscript{293}

The FCC's personal attack and political editorial rules, first promulgated in 1967,\textsuperscript{294} comprise a second kind of contingent access provision. Subject to a few exceptions, the former requires a licensee to give an individual, whose "personal qualities" are attacked over the air "during the presentation of views on a controversial issue of public importance," notice and a description of the attack and a reasonable opportunity to respond.\textsuperscript{295} The latter requires a station that editorially opposes or endorses a candidate for public office to give an opposing or unendorsed candidate notice and an opportunity to respond.\textsuperscript{296} Although the Court in \textit{Red Lion} placed these rules on the same constitutional level as section 315 and the fairness doctrine,\textsuperscript{297} it also recognized that they are more

\textit{reh'g en banc denied}, 806 F.2d 1115 (1986). Moreover, another panel of that court has told the Commission that the FCC is obliged to resolve this issue despite intense political pressure from Congress. \textit{Meredith}, 809 F.2d at 874.

The situation is analogous with respect to cable. For purposes of § 315, subsection (c) includes cable systems within the definition of broadcast stations. (Subsection (c) was added as § 315(f) by the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Tit. I, § 104(c), 86 Stat. 3, 7 (1972) and amended to its current version as § 315(c) by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, Tit. IV, § 402, 88 Stat. 1263, 1291 (1974)). Thus, codification of the fairness doctrine should apply equally to cable and broadcasting. The Commission has suggested, however, that the expansion of § 315 to cover cable was done without extended consideration or discussion and that, while Congress intended to apply the equal opportunities principle to cable, it is uncertain whether it also meant to subject cable to general fairness doctrine obligations. Amendment of Commission's Rules—Fairness Doctrine, \textit{supra} note 268, at 26,475-76. Moreover, the Commission has indicated that even if the fairness doctrine is applicable to cable, it should cover only local program origination and not the bulk of cable programming over which the cable operator retains no practical editorial content. \textit{Id.} at 26,482.


294. The Commission's 1949 Fairness Report, which allowed broadcasters to editorialize, foreshadowed these provisions by suggesting that, in choosing a spokesperson for a particular point of view, a licensee should give special consideration to the person or group specifically attacked over the station. \textit{In re Editorializing by Broadcast Licensees}, 13 F.C.C. 1246, 1252 (1949).


297. "In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315 . . . to which the fairness doctrine and these constituent regulations are important complements." \textit{Red Lion}, 395 U.S. at 391.
invasive of editorial discretion since the licensee lacks the option to choose the responding party’s spokespersons.298

Both section 315 and the personal attack and political editorial rules are only contingent rights of access because, to the extent it can do so and still fulfill general fairness doctrine obligations, a broadcaster can avoid programming that will trigger a right of response. Section 312(a)(7), on the other hand, is an affirmative right of access. It provides that the FCC may revoke a license for “willful or repeated failure” to allow legally qualified candidates for federal elective office “reasonable” access to or use of a broadcast station on behalf of their candidacies.299

Each of these access provisions, impermissible if applied to the print media, is subject to attack as an unwarranted intrusion into the editorial discretion of broadcasters as well. The Supreme Court, however, upheld section 312(a)(7) as a limited right to “reasonable” access which “properly balances the First Amendment rights of federal candidates, the public and broadcasters.”300 Moreover, in Red Lion the Court not only sustained the personal attack and political editorial rules but noted that section 315 was part of the law since

298. Id. at 378. See also CBS v. DNC, 412 U.S. 94, 105, 116 (1973).


At the same time Congress imposed the affirmative access obligation of § 312(a)(7), it adopted a conforming amendment to § 315(a). Section 315(a) had stated that a licensee has no obligation to allow a political candidate initial use of the station. The conforming amendment limited this language to § 315(a), thereby avoiding any conflict with § 312(a)(7). See CBS v. FCC, 453 U.S. at 381-82.

300. CBS v. FCC, 453 U.S. at 396-97. See also Kennedy for President Comm. v. FCC, 636 F.2d 432 (D.C. Cir. 1980) (holding that § 312(a)(7) does not entitle candidate to free broadcast time).
the 1927 Radio Act and its constitutionality has been "unquestioned." Nonetheless, while the FCC cannot repeal the statutory provisions, it has proposed repealing its personal attack and political editorial rules. The Commission has further demonstrated its dim view of the equal opportunities provisions by proposing ways to limit their disruptive effect, at least for cable systems.

As with the fairness doctrine, all of these provisions fundamentally are premised on a scarcity rationale. Indeed, Tornillo makes clear that in the absence of the sort of physical scarcity thought to limit the airwaves, government cannot impose on the media the obligation to afford access as a right of response. Cable, as the death-knell for broadcast scarcity, should thus end the justification for these statutes and rules, freeing both media. Therefore, much of the FCC's discussion in its current Fairness Doctrine Report concerning the transformation of the electronic communications marketplace and cable's contribution to that transformation undercuts the need for and the policy supporting the current access provisions.


302. There have been several recent congressional attempts at repeal. See sources cited supra note 266; First Amendment Clarification Act of 1985, S. 22, 99th Cong., 1st Sess. (1985). See also CBS v. FCC, 453 U.S. at 384 n.9.

303. Repeal or Modification of the Personal Attack and Political Editorial Rule, supra note 296. This applies to cable as well as broadcasting. Id. at 28,301 n.31. The Supreme Court seems to have confirmed the Commission's discretion to abandon the rules, but expressed no opinion on the legality of such action. FCC v. League of Women Voters, 468 U.S. 364, 378 n.12 (1984). For critical examinations of the rules, see B. SCHMIDT, supra note 17, at 186; Simmons, The FCC's Personal Attack and Political Editorial Rules Reconsidered, 125 U. PA. L. REV. 990 (1977).


306. See also CBS V. DNC, 412 U.S. at 117-18.

307. See supra note 277. However, the Commission specifically excluded the personal
Indeed, both the contingent and affirmative access provisions are, if anything, more susceptible to attack based on the advent of cable than is the general fairness doctrine. While cable access may well approximate the fairness doctrine scheme of adequate and fair coverage of important or controversial issues, it even more directly and perfectly satisfies whatever meritorious policies underlie the current access provisions. After all, if cable and broadcasting are fungible, access is access wherever on the dial provided. Public or leased access channels on cable, however, may be less problematic and less intrusive into editorial functions than the current contingent and affirmative access provisions.\textsuperscript{308}

The Commission has appreciated this point, at least to the extent of proposing, in lieu of directly applying section 315 to cable, that it should consider cable operators who provide suitable access to have fulfilled their section 315 obligations.\textsuperscript{309} The same reasoning should generally encompass all the current contingent and affirmative access provisions and be applied to the concept of a unified cable/broadcasting medium. In this way, cable, as the end of scarcity, supports the outright repeal of the present statutes and rules for both cable and broadcasting. Short of such repeal, suitable public or leased cable access requirements can replace the present provisions. Either way, there is no reason to contradict such a beneficial, unified approach by mislabeling cable as fundamentally distinct from broadcasting.

\textbf{D. Children's Television}

A final example of the importance of maintaining the similarity between cable and broadcasting involves a particular concern about children's television. While there have been longstanding concerns over the content\textsuperscript{310} and commercialization\textsuperscript{311} of programming attack and political editorial rules from the scope of its fairness doctrine review, 1984 Fairness Doctrine Inquiry, 49 Fed. Reg. 20,317, 20,319 n.10 (1984), perhaps because it already had recommended their repeal or modification.\textsuperscript{308} For a discussion of this comparison, see Amendment of Commission's Rules—Fairness Doctrine, supra note 268, at 26,480-81.

\textsuperscript{309} Id.

\textsuperscript{310} In the fall of 1974 the Chairman of the FCC began meeting with executives of the three major networks to urge them to self-regulate violent and sexually-oriented programming available to children. See Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975). Such meetings resulted in the adoption of the “family viewing” amendment to the National Association of Broadcasters' Television Code (NAB Code) by which programming inappropriate for a general family audience was channelled to later evening hours. See Inclusion in the NAB Television Code of the “Family Viewing Policy,” 95 F.C.C.2d 700 (1983) (the “family viewing” amendment is
watched by children, a major issue has been the amount of suitable programming available for children.

The FCC recently concluded thirteen years of wrestling with this issue. These efforts began in 1971 with proposals that the Commission mandate for each station a minimum number of hours of


More recently, the Commission has rejected a proposed rulemaking requiring broadcast licensees and cable companies to transmit an electronic signal that would allow viewers to block out commercial advertising designed for and directed to children, Children's Advertising Detector Signal, 57 Rad. Reg. 2d (P & F) 935 (1985); denied complaints about "program-length commercials" and related advertising issues on children's programming, Action for Children's Television v. KTTV, 58 Rad. Reg. 2d (P & F) 61 (1985); and declined to initiate a requested rulemaking proceeding regarding profit-sharing arrangements between broadcasters and toy companies in the airing of children's programming, Profit-Sharing Arrangements in the Broadcasting of Children's Programming, 58 Rad. Reg. 2d (P & F) 90 (1985).
age-specific daily programming for children.\(^ {312} \) Although the Commission believed that children require programming designed specifically for them and that broadcasters have a special obligation to serve these needs, it declined to prescribe any set number of hours of such programming.\(^ {313} \) Instead, in its 1974 Policy Statement the Commission relied on industry self-regulation according to established guidelines to improve children’s programming.\(^ {314} \) In order to monitor the success of such industry efforts, the Commission improved its information-gathering ability.\(^ {315} \) In 1978 it reassessed the matter,\(^ {316} \) reestablishing its Children’s Television Task Force to evaluate compliance with the earlier guidelines.

The Task Force reported little improvement in broadcasters’ compliance with these guidelines.\(^ {317} \) The Task Force also concluded that several factors in the market for children’s programs combine to “create incentives for the commercial television system to neglect the specific needs of the child audience.”\(^ {318} \) Such a conclusion might well have led to onerous regulation.

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\(^ {312} \) Children’s Programs, 28 F.C.C.2d 368 (1971) (Notice of Inquiry and Notice of Proposed Rulemaking). See also En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) (Report and Statement of Policy) (declaring “Programs for Children” one of fourteen “major elements usually necessary to meet the public interest, needs and desires of the community”).

\(^ {313} \) Action for Children’s Television, 50 F.C.C.2d at 5-6. The Commission based its decision, in part, on first amendment concerns raised by detailed governmental supervision of programming and on the expectation that the commercial marketplace would provide proper incentives for children’s programming. Id. at 6.

\(^ {314} \) The Commission reminded broadcasters of their obligation to provide programming for both preschool and school-age children. This obligation extended throughout the week, not just on weekends, and included a reasonable amount of programming designed to educate and inform. Id. at 7-8.

\(^ {315} \) See Action for Children’s Television, 55 F.C.C.2d 161, 163 (1975) (Memorandum Opinion and Order) (stating amendments to broadcast license renewal form; these amendments also defined children’s programming as “programs designed for children twelve years old and under,” meaning programs originally produced and broadcast primarily for such a child audience (emphasis in original)); Children’s Television Programs, 58 F.C.C.2d 1169 (1975) (Memorandum Opinion and Order) (additional amendments), reconsidered, 63 F.C.C.2d 26 (1977).


\(^ {317} \) In particular, the Task Force found little increase in the average amount of broadcast time devoted to children’s programs; no significant increase in educational and instructional programs for children; and few licensees making a meaningful effort to air age-specific programs. It further found that nearly half of all children’s programs were still shown on the weekends when only eight percent of children’s television viewing occurs. Children’s TV Programming and Advertising, 75 F.C.C.2d 138, 142-43 (1979) (Notice of Proposed Rulemaking).

\(^ {318} \) Id. at 145. These factors were the size of the child audience, its limited appeal to advertisers, and the small number of outlets in most markets.
In response to the Task Force’s economic analysis, however, the Commission considered simply rescinding its 1974 Policy Statement and any specific obligation of broadcasters to serve the child audience, and relying instead on other sources of children’s programming such as cable.\textsuperscript{319} Although in 1979 the Commission acknowledged the questionable desirability of relying on technologies not then available to most households to provide programming for children,\textsuperscript{320} by 1984, when it finally terminated its children’s television proceedings, the Commission took just such an approach.\textsuperscript{321}

Indeed, the Commission faulted its Task Force for failing to consider the wider actual availability of children’s programming beyond that on commercial broadcast stations.\textsuperscript{322} Among the sources of such programming, the Commission noted in particular the availability of cable television which “passes some 54 percent of all homes and cannot be avoided in any assessment of the accessibility of programming to the child audience.”\textsuperscript{323} Consideration of the entire video distribution system, including cable services, led the Commission to reject its Task Force’s recommendation of mandatory programming obligations. Instead, the Commission announced that a licensee has a continuing duty under the public interest standard to examine and attend to the program needs of the children’s audience as one significant element of its community.\textsuperscript{324} But in so doing, a licensee may consider what other children’s program services, including cable, are available in its market.\textsuperscript{325}

Upon a petition for review by Action for Children’s Television, the D.C. Circuit Court of Appeals in a per curiam decision upheld

\textsuperscript{319} Id. at 147.
\textsuperscript{320} Id. at 152.
\textsuperscript{322} TV Programming for Children, 96 F.C.C.2d at 644.
\textsuperscript{323} Id. at 646. The Commission specifically referred to cable channels devoted to children’s programming, such as Kidstime, Nickelodeon, and the Disney Channel. The Commission also counted some of the programming directed to the child audience on pay cable services such as Home Box Office. Id.
\textsuperscript{324} Id. at 655-56.
\textsuperscript{325} Id. at 656. One dissenting Commissioner called the FCC’s action the “funeral . . . of the FCC’s involvement in children’s television.” Id. at 658 (Rivera, Comm’r, dissenting). See also Note, Deregulating Commercial Television: Will the Marketplace Watch Out for Children?, 34 AM. U.L. REV. 141 (1984).
the FCC's position. Commenting on the petitioner's challenge to the Commission's reliance on children's programming available on cable, the court said:

While that medium is not available in all areas or to all segments of the viewing community, it has a sufficiently broad and increasing presence that the Commission may appropriately consider its offerings in determining the necessity for such nationwide rules as petitioners favored.

After thirteen years of impending regulations, then, cable played a central role in finally relieving broadcasters from more severe interference with their editorial discretion—interference fraught with troubling constitutional and other implications. Any view of cable and broadcasting that does not stress their similarity and substitutability would be disastrous to the liberating function cable otherwise has performed with respect to children's television.

VI. CONCLUSION

Cable, of course, is not necessarily the complete antidote for all broadcast regulation that intrudes upon the editorial function. It is possible to argue, for example, that an adequately and properly informed electorate is so vital to our self-governing, democratic system that qualified candidates for public office should have some right of access to the media. Similarly, one could argue that the consumption or abuse of products such as cigarettes or liquor, though legal, poses a sufficient public danger that, if we can reduce such danger by curtailing advertising, then such advertising should be barred from the mass media. Such arguments, however, in no way involve a scarcity rationale. They must stand or fall on constitutional and other considerations equally applied to all media, including print. As Chairman Fowler expressed it:

The litmus test for regulation of the electronic press is straightforward: hold the regulation next to print "regulation." Would it be permitted for newspapers, periodicals,

327. The only other issue that the court thought required any discussion was the lack of an explicit and detailed Commission mandate for age-specific programming.
328. Action for Children's Television, 756 F.2d at 901.
329. See TV Programming for Children, 96 F.C.C.2d at 651-54; cf. id. at 569-71 (Rivera, Comm'r, dissenting) (discussing the legality of such regulation).
and books? If not, the regulation should be eliminated.\textsuperscript{331}

At the very least, any argument for differential regulation of the media must sustain the heavy burden of justifying itself based on actual, significant characteristics of the media that are logically and factually related to the regulation at issue.

What cable can and should do is lay to rest an already much-discredited scarcity rationale for the regulation of broadcasting. This depends on the demonstrated similarity and interchangeability between broadcasting and cable. Rather than arguing whether cable should be considered constitutionally more like broadcasting or more like the print media, cable and broadcasting should be treated as the unified medium they are. This will allow cable to solidify its position as an entity with full first amendment freedom. Correspondingly, broadcast regulation which depends either directly upon a scarcity rationale or upon a generalized concept of broadcasting’s susceptibility to regulation which in turn is premised on the mistaken notion of scarcity, should be rejected as offensive to the first amendment.