CABLESPEECH FOR WHOM?

MARK S. NADEL*

"[I]f free speech is to continue to have the high value it has historically been accorded, cable television should be afforded the full protection [that first amendment] principles demand."[1] Few constitutional scholars would have any qualms with this observation by George Shapiro, Philip Kurland, and James Mercurio, the authors of *CableSpeech*. Nor would scholars be likely to disagree that "[t]here is no greater threat to freedom and democracy, no more certain signal of tyranny, than government control over the communications media. . . . A society is a free society only to the extent that the persons within it are free from government interference with their right to express themselves. . . ."[2]

Nevertheless, there is good reason to question the thesis that the authors derive from these premises: the conclusion that the first amendment leaves the government powerless to insure media access for those unable to purchase their own medium. This may well be the position of Time, Inc., a major participant in the cable industry[3] which provided funding for the book, but it certainly is not generally accepted constitutional doctrine. The authors fail to acknowledge a very important additional factor: that media firms themselves often restrict free expression in markets where the firms enjoy monopoly power.[4]

Since the book is subtitled "The Case for First Amendment

---

* Adjunct Assistant Professor of Law, Benjamin N. Cardozo School of Law, New York Law School; Research Associate, Columbia University Research Program on Telecommunications and Information Policy; B.A., 1978, Amherst College; J.D., 1981, Harvard University. The author would like to thank Eugene Nadel for his particularly helpful comments.

[1] G. SHAPIRO, P. KURLAND, & J. MERCURIO, CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 220 (1983) [hereinafter cited as CABLESPEECH].

[2] *Id.* at vii, xv.

[3] Time, Inc. is the parent of American Television and Communications Corp. (ATC), the second largest multiple system owner (MSO) in the cable industry, and of both Home Box Office, Inc. (HBO) and Cinemax, the dominant pay-TV service and its sister. Concerning the feelings of the press about its own rights, former *New York Times* editor Lester Markel observed: "[T]he press . . . asserting its near-infallibility, countenances no effective supervision of its operations; it has adopted a holier-than-thou attitude, citing the First Amendment and in addition the Ten Commandments and other less holy scriptures." Markel, *Watching the Press*, N.Y. Times, Feb. 2, 1973, at 31, col. 5.

[4] The seminal piece on this issue is Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). *See also* B. BAGDIKIAN, THE MEDIA MONOPOLY (1983). It is also interesting to note that Public Agenda Foundation analyst Daniel Yanklovich has concluded from his surveys that many Americans are more concerned that the media, not government, may restrict freedom of expression. *See* F. ROWAN, BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS 90 (1984).

Protection," it is not surprising to find that it is written like a brief, offering strong arguments for striking down every regulation that might interfere with the desires of cable system owners. It should serve as a valuable self-help kit to cable industry lawyers who seek to use the first amendment to free their clients from government restraints. Still, it is disappointing that the authors do not provide a more sensitive treatment of opposing positions: the perspective of those who believe that cable technology can and should be used to promote expression by all members of society, including those who can not afford to own their own cable system and those who are not befriended by the industry.

Legal scholars referring to this volume will be reluctant to make their own judgments on the issues discussed until they have seen the opposing brief. In an effort to present all of the evidence to such readers, this Essay will try to point out some of the contrasting viewpoints that the authors neglect to mention or develop.

I. Distinguishing Among Functions

A central flaw in the authors' discussion is their failure to distinguish between the distinct functions performed by cable operators. No longer do cable operators merely retransmit the programs of broadcast stations; they now perform significant roles in production, editing, and marketing.[5] Unfortunately, the authors show little appreciation for the differences in the protection which the first amendment may provide for these different functions. The authors imply that because a cable operator may exercise significant origination and editing functions, activities which are protected by the first amendment, the amendment must also protect the operator in its passive transmission function. But this conclusion does not follow.

The authors recognize that, outside the cable context, "[t]he government may have legitimate interests in regulating the noncommunicative aspects of [a communications] medium. . . ."[6] And they accurately apply this reasoning to the telephone medium, observing that "[t]elephone . . . companies are not primarily engaged in the origination, selection, or editing of expression. Their principal business operations therefore *are not protected by the First Amendment*. . . . The First Amendment, of course, does protect them when they engage in communicative

---

[5] CableSpeech, *supra* note 1, at 3.

[6] *Id.* at 107 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981)).

activities. . . ."[7] This implies that to the extent that telephone companies engage in communicative activities the first amendment will protect them *in the practice of those activities*, but not in the practice of their other operations.

Yet the authors fail to apply this same reasoning to government regulation of cable television. They argue that even the content neutral regulations directed solely at the non-communicative aspects of the cable medium are unconstitutional because these regulations "characteriz[e] cable television as simply a 'conduit' or a 'pipeline' . . . not engaged in 'speaking' "[8] But certainly a coaxial cable transmission facility does not speak; the cable itself is a non-communicative conduit. Cable system owners, like their brothers in telephony, perform both communicative and non-communicative roles, and the latter may be regulated, even though the first amendment protects the former.

When focusing on government regulations that interfere with the origination and presentation of programming or with the performance of editorial functions, the authors present cogent arguments for first amendment protection.[9] They also offer some useful insights into the burdens of both direct and indirect forms of taxation,[10] but their bias becomes apparent when they discuss regulations directed at the technical, non-communicative aspect of cable.

The authors refuse to apply the same dual function analysis to the cable television medium that they used to analyze telephony, even though that framework appears to be the proper one for appraising the first amendment rights of all media entities.[11] Such an analysis, however, would undermine many of the authors' arguments, as will be discussed below.

II. PROGRAM ORIGINATION: OBSCENITY AND INDECENCY

Cable operators and program suppliers have successfully

---

[7] CABLESPEECH, *supra* note 1, at 180 n.28 (emphasis added). *But see infra* text accompanying notes 100-01.

[8] CABLESPEECH, *supra* note 1 at 82 (citing Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Consolidated Edison Co. of New York v. Pub. Serv. Comm'n, 447 U.S. 530 (1980)).

[9] *See infra* notes 12-43 and accompanying text.

[10] *See infra* notes 107-21 and accompanying text.

[11] This reader has focused on the distinction between the medium and the message. Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 FORDHAM URB. L.J. 163 (1982). Although that Article makes too little of the protection provided to the editorial services desired by consumers, this omission is rectified in Nadel, Editorial Freedom: Editors, Retailers, and the First Amendment (1985) (Columbia Business School Research Program in Telecommunications and Information Policy Working Paper) [hereinafter cited as Nadel, Editorial Freedom].

challenged a number of regulations prohibiting cable systems from transmitting obscene or indecent programming[12] and the authors review these cases with approval.[13] In fact, they would go one step further and reverse the Supreme Court decision in *Federal Communications Commission v. Pacifica Foundation*,[14] which upheld the power of the Federal Communications Commission (FCC) to regulate radio and TV broadcasts of indecent material. They make a two-pronged attack on *Pacifica* in its own context of radio and TV and also argue that, even as written, the case does not authorize government regulation of indecency on cable TV.

In the first prong of their attack, Shapiro, Kurland, and Mercurio dispute the *Pacifica* holding that radio and TV should enjoy less protection under the first amendment because broadcast programming intrudes into the privacy of an individual's home. The authors correctly point out that, rather than intruding, a broadcast can only enter a home if invited in. In fact, a consumer must take two affirmative actions: first, purchase a broadcast receiver, and second, turn it on before any program can be received.

Additionally, in the cable context, as all of the lower courts that have addressed the issue of indecency on cable have noted, a consumer must ordinarily take two additional actions: subscribe to cable and pay an extra charge to receive adult programming.[15] Moreover, cable subscribers can easily change their minds simply by turning off undesirable programs. In fact, one who has turned on a cable TV channel has much greater protection against offensive messages than one who chooses to venture outside the home.[16]

The authors' evaluation of the cable subscriber's actual position suggests that there is a much less drastic means to protect consumers against the entry of undesirable programming. That remedy is the government measure approved by the Supreme

---

12 *See, e.g.*, Community Television of Utah v. Wilkinson, C-83-0551A and C-83-051A, slip op. (D. Utah Apr. 10, 1985); Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985); HBO, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

13 CABLESPEECH, *supra* note 1, at 43-48.

14 438 U.S. 726 (1978).

15 *See Cruz*, 755 F.2d at 1420; *Community Television*, slip op. at 38-39; *HBO*, 531 F. Supp. at 1001.

16 *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (the Court pointed out that passersby could turn away if they wished to avoid seeing an indecent film being exhibited at a drive-in theater); Cohen v. California, 403 U.S. 15 (1971) (upholding the right of the plaintiff to wear a coat with the words "Fuck the Draft" inscribed on the back).

Court in *Rowan v. Post Office Department*.[17]

In *Rowan*, the Court held that the government can aid those particular individuals who request the Post Office's assistance in excluding offensive material sent to their homes through the mail.[18] The Court reasoned that any further government action, however, would probably be too much since "[t]he First Amendment 'does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech,' "[19] particularly in media like cable or the mail where the "[r]ecipients of objectionable mailings . . . may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' "[20]

Section 624(d)(2)(A) of the 1984 Cable Communications Policy Act[21] adopted this type of scheme for cable. It requires cable operators to provide "lock-out" devices to any subscribers who desire to exclude a particular channel. Arming cable subscribers with this *Rowan*-like protection would seem to leave them in the same position as mail recipients, for whom the "short, though regular, journey from mail box to trash can . . . is an acceptable burden. . . ."[22] Cable subscribers who chose not to lock out a particular channel would face the comparable minor burden of simply twisting a knob or pressing a channel selector to avoid undesirable messages. Thus, the authors are correct that this first leg of the *Pacifica* rationale provides an unstable basis for the decision and that this rationale does not apply to cable TV where intrusiveness is even less of a problem.

In the second prong of their attack, the authors challenge the use the Court made of the evidence that children have easy access to broadcast programming. Quoting from *Bolger v. Youngs Drug Products Corp.*,[23] the authors observe that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."[24] Yet this response misconceives the actual remedy approved by the Court. The authors' objection would be appropriate if the Court had approved a com-

---

17 397 U.S. 728 (1970).

18 *Id.*

19 Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2883 (1983) (citation omitted).

20 *Id.* (citations omitted).

21 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 624(d)(2)(A), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2790 (to be codified at 47 U.S.C. § 624(d)(2)(A)).

22 *Bolger*, 103 S. Ct. at 2883 (citation omitted).

23 *Id.* at 2875.

24 *Id.* at 2884.

plete ban on indecent programming, but actually the Court only upheld the FCC's decision to prohibit indecency during the middle of the afternoon. The authors do not tackle the more subtle question of whether such channeling restrictions might represent valid time, place, and manner regulations.

This issue is now being grappled within the context of dial-a-porn services. The FCC sought to prevent minors from gaining access to pornographic phone messages by limiting the operating hours of the services to between 9 p.m. and 6 a.m., those periods when the Commission believed that children would be under parental supervision.[25] The Second Circuit, however, rejected that scheme, holding that the FCC "[f]ailed adequately to demonstrate that the regulatory scheme [was] well tailored to its ends or that those ends could not be met by less drastic means."[26] If the FCC can fully document its reasons for rejecting the apparently less drastic means, the court will presumably be more receptive.[27] Thus, the authors' attack on the second rationale seems misplaced because it does not appreciate the limited nature of the remedy.

Because locked boxes can be used by parents to protect their children from adult programming, the only time when this rationale might support the use of time channeling on cable would be for public access channels. Since the authors never examine the possibility that the first amendment might permit the government to utilize some cable channels as public fora by establishing public access channels,[28] they never consider this issue.

The problem is that some viewers who might occasionally be inclined to sample public access programming might also be concerned about stumbling upon offensive programming on that

---

25 Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 56 RAD. REG.2d (P & F) 49, *rev'd*, Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984).

26 *Carlin Communications*, 749 F.2d at 121. The court observed that:

> The FCC expressly rejected certain alternatives, but the record provides minimal explanation for why screening or blocking or using access numbers would not be both more effective in limiting the dial-it audience to those over the age of eighteen and less restrictive of adults' freedom to hear what they want when they want to hear it.

Id. at 122.

27 Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Notice of Proposed Rulemaking, Doc. No. 83-989, RAD. REG.2d (P&F) Curr. Serv. 79:217 (Mar. 1, 1985).

28 Public access channels are authorized in section 611 of the Cable Communications Policy Act of 1984, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2782 (to be codified at 47 U.S.C. § 611). For an early view of these electronic soap boxes, see Price & Morris, *Public Access Channels: The New York City Experience*, in SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 229 app. C (1971).

channel. For example, two of the most celebrated programs on public access in Manhattan have been "Midnight Blue" and "The Ugly George Hour of Truth, Sex and Violence," both of which have featured sexually explicit material.[29] Can the government do anything to help these consumers avoid such offensive material without denying them the benefits of the public access channels?

The first amendment would appear to permit a sensitive response to this problem. For example, it would probably be constitutional for the government to require, as part of a truth in labeling law, that programs with indecent material be carefully identified as such, possibly with a white dot or the words "rated X" on a corner of the screen or on the channel selector during a presentation.[30] Under *Pacifica*, it would probably also be constitutional for the government to limit such programming on public access channels to specific time periods.[31]

III. Editorial Selections: The Fairness Doctrine and Political Broadcast Rules

The authors are on their strongest footing when they discuss the protection that the first amendment accords to editorial services performed by cable operators, analogizing such services to those performed by newspaper editors.[32] Both deserve identical first amendment protection against government "access" regulations which might actually abridge expression. The book also makes a strong attack on the fairness doctrine, which requires broadcasters to devote a reasonable amount of time to controversial issues of public importance and to afford adequate opportunity for the presentation of opposing viewpoints on these issues.[33] The authors' primary attack is against the rationale for the doctrine: the perceived scarcity of broadcast stations and cable systems.[34] The authors explain that the actual situation is one of economic rather than physical scarcity. Two footnotes in the recent case of *Federal Communications Commission v. League of*

---

29 *See* Schwartz, *The TV Pornography Boom*, N.Y. Times, Sept. 13, 1981, § 6 (Magazine), at 44, col. 1. Ugly George is now off the air.

30 *See* Writers Guild of America, West, Inc. v. Federal Communications Comm'n, 423 F. Supp. 1064, 1099 n.44 (C.D. Cal. 1976) (the French use a white dot on TV screen to serve as a warning device for programming with strong sexual content).

31 *See* Robinson, *Cable Television and the First Amendment*, 6 Com. & L. 47, 56 (1984) (*Pacifica* should be recognized as a media-neutral time, place, and manner decision).

32 CableSpeech, *supra* note 1, at 4.

33 47 C.F.R. § 73.1910 (1984).

34 CableSpeech, *supra* note 1, at 49.

Women Voters of California[35] suggest that since the publication of *CableSpeech*, the Supreme Court may be more willing to accept the authors' conclusion, thereby joining the FCC[36] and most other commentators,[37] in questioning the propriety of the fairness doctrine.

Still, the authors define editorial freedom too broadly. For example, they state that "[i]n *Miami Herald* . . . [t]he Court held that . . . *any* enforceable right of access required unconstitutional government intrusion into the role of editors,"[38] when what the Court actually said was "*[i]t has yet to be demonstrated* how governmental regulation . . . can be exercised consistent with First Amendment guarantees. . . ."[39] Not every access regulation need interfere with editorial freedom.

One example of such a non-interfering regulation is the one discussed in *PruneYard Shopping Center v. Robins*,[40] a case with which the authors have great difficulty. In *PruneYard*, a shopping center owner made a first amendment challenge to the California state constitution, which was interpreted by the state court as granting public speakers a right of access to its shopping center parking lot. The Supreme Court rejected the owner's claim that the holding in *Miami Herald*—finding that a right-of-reply statute that applied to newspapers violated the first amendment—prohibited any kind of regulations facilitating access to any communications medium.

The authors contend that the *PruneYard* decision is based on the critical fact that the shopping center owner had already opened its medium to all desirous clients,[41] but what they apparently ignore is that an integral part of a cable system's normal operation is to open itself up to negotiate with all program suppliers who would like to gain access to its cable channels.[42] True, cable operators only desire to be open to those with whom they

---

35 104 S. Ct. 3106, 3116-17 nn.11 & 12 (1984).

36 *See* Notice of Inquiry, 49 Fed. Reg. 20,317 (1984).

37 *Id.*; *see also* W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT (1984) and sources cited therein.

38 CABLESPEECH, *supra* note 1, at 123 (emphasis added).

39 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (emphasis added).

40 447 U.S. 74 (1980), *discussed in* CABLESPEECH, *supra* note 1, at 133-35.

41 CABLESPEECH, *supra* note 1, at 135.

42 All advertiser supported cable nets would like to "buy" access to as many cable subscribers (and thus cable systems) as they can because the rates that they can charge to advertisers are based on their audience size. Cable operators only "sell" access to those who offer the highest prices in the form of direct payments, time available for the sale of local advertisements, quality of programming which can justify a higher subscriber charge, and general attractiveness leading households to subscribe to cable.

will ultimately deal, but that is also true of the shopping center owner who only wishes to be open to actual buyers, not non-buyer speakers, like those at issue in *PruneYard*.

On this matter, it is useful to review the words of Professor Laurence Tribe, in a passage which the authors quote twice in their volume:

> [E]ntrusting government with power to assure media access entails at least three dangers: the danger of deterring those items of coverage that will trigger duties of affording access at the media's expense; the danger of inviting manipulation of the media by whichever bureaucrats are entrusted to assure access; and the danger of escalating from access regulation to much more dubious exercises of governmental control.[43]

Rules like the fairness doctrine, which pose some of these dangers, would seem to abridge the first amendment rights exercised by cable editors, but rules like the common carrier access rules of *PruneYard* do not appear to pose any of these dangers. Therefore, they should not automatically be condemned as a violation of the first amendment.

IV. TRANSMISSION: REGULATING THE USE OF CABLES

The heart of the debate over cable regulation and the first amendment concerns the regulations that require cable operators to construct channels for the use of program suppliers who may present programming that is disagreeable to the operators' editorial positions. Within most competitive environments there is no need to ask one firm to permit others to share its medium, but in the cable medium there is a strong case that such a need exists because cable delivery is a natural monopoly.

A. *Monopoly or Competitive Market?*

1. Intermedia Competition

The authors' position is that cable "is one of many means of communication and in competition with most"[44] and "[t]he existence of these alternatives makes it difficult to conclude that operators of cable systems enjoy any significant market power, even in geographical areas served by only one system."[45] Yet reeling off an alphabet soup of new technologies does not prove that cable

---

[43] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-22, at 697 (1978) (footnote omitted), *quoted in* CABLESPEECH, *supra* note 1, at xii, 88-89.

[44] CABLESPEECH, *supra* note 1, at xii.

[45] *Id.* at 8.

faces any significant competition. For example, the authors list subscription television (STV)[46] as a competing video medium,[47] but is it really? In 1982, when the cable industry was eager to prove to Congress that they faced real competition, the industry's trade group, the National Cable Television Association (NCTA), commissioned a study of cable-STV competition.[48] A careful examination of that study, however, reveals some interesting facts.

First, the study examined the market where STV was strongest: Los Angeles. In Los Angeles, Oak Industries' STV station, ON-TV, had purchased exclusive rights to some Los Angeles Dodgers games, and both ON-TV and SelecTV, a second STV station, earned enough money to support strong media advertising campaigns. In such circumstances it was not surprising that even after cable had entered the community, the two STV stations still retained a 17.3 percent market penetration.[49]

These high retention rates, however, were only temporary in Los Angeles and have never been duplicated elsewhere. In fact, the STV industry fell into a decline in 1983 as a number of major firms abandoned operation[50] and this is not surprising. STV was never really expected to be a long term competitor; it was only supposed to fill the window of opportunity during the interim before cable entered the market. Now that cable has arrived, obituaries for STV appear frequently.[51]

The future prospects of another competitor, direct broadcast satellites (DBS),[52] are also in doubt as Comsat, CBS, and Western Union, three of the most prominent original applicants,

---

46 Subscription television is the broadcast of scrambled signals over UHF or even VHF television frequencies. Viewers are required to pay the STV operator for a decoder to unscramble the programming. For a short history of the service, see Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U.L. REV. 529, 532-34 (1983).

47 CABLESPEECH, *supra* note 1, at 5.

48 Browne, Bortz & Coddington, The Impact of Competitive Distribution Technologies on Cable Television (Mar. 1982) (report commissioned by the National Cable Television Association) [hereinafter cited as Browne].

49 *Id.*

50 *See, e.g., Bloom Is Off STV Rose*, BROADCASTING, Sept. 5, 1983, at 35.

51 *See, e.g.*, J. Henry, *The Economics of Pay TV Media* and K. Thorpe, *The Impact of Competing Technologies on Cable Television* in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY (E. Noam ed. 1985) [hereinafter cited as VIDEO MEDIA COMPETITION]; Goldstein, "STV: Downhill Racer," Channels of Communications, Nov.-Dec. 1984; The Essential 1985 Field Guide to the Electronic Media, at 42.

52 Direct broadcast satellite service is the use of a high powered satellite to send a signal that is strong enough to be received by households equipped with small home antenna dishes. While it eliminates the need for a local program distributor, a local presence still seems to be required for marketing, installation, servicing, and billing. For a short historical background of DBS, see Stern, *supra*, note 46, at 541-43.

have all abandoned plans to enter the market.[53] The home video industry may well provide intense competition for the dissemination of some types of programming, but it cannot be used for the delivery of live sports and news.[54]

Presumably other media will serve the approximately fifteen percent of the nation in the less dense rural markets where cable appears to be uneconomical.[55] Yet even the NCTA study noted above, which was commissioned to prove that the cable market was competitive, concluded that "cable television will remain the dominant technology for distributing video programming even if multichannel STV, MDS (multipoint distribution service) and DBS develop as planned."[56] As Ithiel de Sola Pool observed in *Technologies of Freedom*, his much more sensitive book on the first amendment and the mass media: "Whatever alternative means of communications exist, nothing else can offer the equivalent of the multiservice broadband cable running past every house . . . . One can imagine a railroad owner in the nineteenth century denying being a monopolist because anyone refused access to a train could use a horse and buggy."[57]

2. Limitations on Entry

The authors state that "direct competition between cable systems has not been shown impractical, except possibly in cases where the government itself imposes conditions which artificially increase the fixed costs of cable television."[58] But this is a bit disingenuous. Common sense as well as a number of empirical studies indicate that it is less expensive for a single firm to construct and operate a single cable television system in a community than for two competing firms to install duplicative head-end equipment and trunk networks and to employ separate marketing, sales, and service staffs.[59]

---

[53] *See* Pollack, *Plan for TV by Satellite Falls Apart Over Risks*, N.Y. Times, Dec. 1, 1984, at 31, col. 1; *see also* Sanger, *Satellite TV Systems Seen in Doubt*, N.Y. Times, July 12, 1984, at D1, col. 3; Sanger, *Western Union Drops Satellite to-Home TV Plan*, N.Y. Times, July 11, 1984, at D2, col. 1.

[54] For a discussion of VCRs, see Waterman, *Prerecorded Home Video and the Distribution of Theatrical Feature Films*, in VIDEO MEDIA COMPETITION, *supra* note 51. *See also, VCRs: Moving in on Cable's Turf?*, CABLEVISION, Jun. 25, 1984, at 23-28.

[55] Henry, *supra* note 51. Paul Kagan Associates predicts that cable television penetration will level off at about 86% by 1990. *See* THE CABLE TV DATABOOK 11 (Paul Kagan Assocs. 1984).

[56] *See* Browne, *supra* note 48, at xii.

[57] I. POOL, TECHNOLOGIES OF FREEDOM 173 (1983).

[58] CABLESPEECH, *supra* note 1, at 13.

[59] *See, e.g.*, Noam, *Economies of Scale in Cable Television: A Multiproduct Analysis*, in VIDEO MEDIA COMPETITION, *supra* note 51; B. Owen & P. Greenhalgh, Competitive Policy Con-

It is possible that competing firms, under intense competitive pressure could operate so efficiently that they would actually have lower total costs than a single more apathetic monopolist, but it seems unlikely that this would occur within the cable television industry.[60] The largest multiple system owners (MSOs) appear more eager to trade systems with each other than to get into expensive price wars.[61] Early examples of head-to-head competition, known in the industry by the derogatory term "overbuilding," have usually led to mergers, buyouts, bankruptcy, or complaints about service.[62]

Suppose that a government body concludes that coaxial cables are analogous to telephone wires for regulatory purposes and that cable systems, like local telephone systems, should be regarded as natural monopolies and treated as common carriers. If the first amendment does not forbid the government from regulating entry into telephone service[63] or mail delivery,[64] why should cable be different?

---

siderations in Cable Television Franchising (Economists, Inc., Wash, D.C., 1982); K. WEBB, THE ECONOMICS OF CABLE TELEVISION 55-59 (1983).

60 The Justice Dep't has suggested a more likely scenario:

> A consolidation of overbuilt franchises . . . may result in significat economic efficiencies which may increase price, service and quality benefits to consumers.
>
> However, cable operators may not necessarily be forced by competitive pressures to return to consumers the benefit of efficiencies that result from consolidation. . . .

Cable TV Franchising 3 (Apr. 19, 1985) (quoting U.S. Dep't of Justice, Press Release (Apr. 1, 1985)). Because entry into the cable television system industry requires very large capital costs and may involve protracted regulatory hearings, it is not the type of industry where competition, actual or potential, is likely.

61 It appears that the major MSOs realize that it is to their advantage to avoid competition. They fear that if they threaten to compete with another MSO in its market then that MSO will retaliate by competing in one of their markets, leading to expensive price wars. Thus David Stoller reported in 1982 that even "[w]here cities have tried to spur competition during refranchising by inviting competitive bidding, they have been unable to inspire even a nibble of interest from any companies other than the incumbent operator." Stoller, *The War Between Cable and the Cities*, CHANNELS OF COMMUNICATIONS, Apr.-May 1982, at 36. For a review on some recent trades, see Cable TV Franchising 3 (Apr. 19, 1985).

62 *See* Touche, Ross & Co., Financial and Economic Analysis of the Cable Television Permit Policy of the City and County of Denver (Jan. 20, 1984) and other surveys discussed therein. Recent estimates indicate that there are approximately 40 instances of overbuilding today. Based on such theoretical, as well as empirical, evidence, the Justice Dep't has observed that " '[a] single firm may be able to provide cable service at lower cost than two or more competing firms—in other words cable delivery has some natural monopoly characteristics.' " Cable TV Francising, *supra* note 60, at 3 (quoting U.S. Dep't of Justice, Press Release (Apr. 1, 1985)).

63 *See* Capital Tel. Co. v. City of Schenectady, 560 F. Supp. 207 (N.D.N.Y. 1983). It should also be noted that before the government established monopoly franchises there was intense competition among telephone companies. *See* Gabel, *The Early Competitive Era in Telephone Communications, 1893-1920*, 34 LAW & CONTEMP. PROBS. 340 (1969).

64 *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981).

The authors quote the Tenth Circuit conclusion in *Community Communications Co. v. City of Boulder*[65] (Boulder II) that the "government must have some authority in such a context to see to it that optimum use is made of the cable medium. . . ."[66] They also recognize that "[n]umerous other decisions also establish that cable television may be a public utility for some purposes. . . ."[67] So then why can't the government decide that optimal cable television service will be provided by a municipal or privately owned common carrier monopolist?

Although the authors answer that "[w]henever a government sets a limit upon the number of cable operators it will permit to use public rights of way, the government is setting a limit upon the number of persons who can engage in a form of communication that is protected by the First Amendment,"[68] this is just not so. The government has limited entry into ordinary first class mail delivery by granting monopoly status to the United States Postal Service[69] without limiting the number of entities who can send their messages through the mail. Similarly, local telephone companies are granted monopoly status[70] and yet the public enjoys unrestricted use of that medium. As long as there is no limit on the number of cable channels that a cable operator can install and all speakers/publishers who can afford to pay the cost of access are permitted to secure it, a government created media monopoly does not abridge freedom of expression.

But "[n]o one would seriously contend that the government has the constitutional power to appoint the newspaper publisher in its community, even if it were shown that physical or economic factors dictate that only one newspaper can successfully operate[,]"[71] continue the authors and, indeed, they are correct. Nevertheless, a number of scholars have suggested that the first amendment would permit the government to require a monopoly publisher to sell access on a nondiscriminatory common carrier basis.[72]

---

65 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982).

66 CABLESPEECH, *supra* note 1, at 190-91 (*quoting* 660 F.2d at 1379).

67 CABLESPEECH, *supra* note 1, at 125-26 n.187.

68 *Id.* at 173.

69 *See* 18 U.S.C. § 1696 (1982); 39 U.S.C. §§ 601, 604 (1982); *see also* National Ass'n of Letter Carriers v. Independent Postal Sys. of America, Inc., 470 F.2d 265 (10th Cir. 1972).

70 *See* 47 U.S.C. § 203(c) (1982); *see also Capital Tel.*, 560 F. Supp. 207.

71 CABLESPEECH, *supra* note 1, at 189.

72 *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 671 (1970); F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 334 (1981); M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.09[D][2][c], 4-132 to 4-134 (1984); B. SCHMIDT, FREEDOM OF THE

In *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*[73] and *Omega Satellite Products, Co. v. City of Indianapolis*,[74] two cases whose holdings the authors try to minimize, the courts make it clear that the first amendment may permit limitations on entry by cable systems, as long as they do not involve content based distinctions. If the authors object to such entry regulation they should explain exactly how such regulations interfere with the expression that producers and consumers of messages desire to share.

In March 1985, in *Preferred Communications, Inc. v. City of Los Angeles*,[75] a case more in tune with the *CableSpeech* position, the Ninth Circuit held that the monopoly cable television franchise awarded by the city of Los Angeles violated the first amendment. Nevertheless, there are two interesting aspects of the case that should not be ignored.

First, the Los Angeles franchise did not include a leased access provision that granted the plaintiff or any other potential cable program disseminator a right to use the number of channels it desired at a reasonable, competitive market price. Therefore, the franchise license was tantamount to a preferred right to disseminate cable programming, allowing others only some more limited inferior access.

Second, the court stated in a footnote that "[i]n addition to originating their own programming, cable television operators exercise considerable editorial discretion regarding what their programming will include,"[76] and yet the court did not amplify or explain this comment. What kind of editorial discretion is exercised by cable operators and why and how does a monopoly franchise necessarily deny them the opportunity to do so? A careful examination of what actually constitutes the editorial freedom protected by the first amendment suggests that such freedom need not be abridged by a monopoly franchise award under all conditions.[77]

PRESS VS. PUBLIC ACCESS 40 *passim* (1976). Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 629; Nadel, *A Unified Theory*, *supra* note 11, at 200.

73 562 F. Supp. 543 (W.D. Ky. 1982), *appeal dismissed by stipulation of the parties*, No. 82-5187 (6th Cir. Apr. 8, 1983).

74 694 F.2d 119 (7th Cir. 1982).

75 754 F.2d 1396 (9th Cir. 1985). For the authors' views on the *Preferred* case, see Shapiro & Mercurio, *City Authority over Cable Limited in 'Preferred'*, Legal Times, Mar. 25, 1985, at 14 col. 1.

76 *Id.* at 1410 n.10.

77 See Nadel, Editorial Freedom, *supra* note 11.

3. Essential Facilities

Even if cable systems face some degree of competition from other media, the efficiencies achieved as a result of economies of scale and scope[78] may make cable the only economically practical medium for distributing many types of video programming. This is significant because the antitrust laws impose an "obligation to serve" on the owners of a facility that is considered to be essential.[79] As the authors explain, a facility need not literally be essential to be classified as an "essential facility" for the purposes of the doctrine of that name; it is only necessary that all other alternatives to it are " 'economically infeasible' and denial of its use [would] inflict 'a severe handicap on potential market entrants.' "[80]

Applying this rationale in *Home Placement Service, Inc. v. Providence Journal Co.*,[81] the First Circuit permitted a real estate firm to compel a newspaper to print its advertisement because the newspaper was "the essential medium for survival."[82] The authors attempt to diffuse the impact of this case by claiming that the Court of Appeals did not address the first amendment issue;[83] yet it is inconceivable that the court was unaware of the amendment's impact. Presumably, the court simply did not consider it to be a relevant defense because the publisher was being sued in its role as a transmission conduit rather than as an editor.[84]

The authors further argue that the holding would not apply to a cable system because cable is rarely "the *only* means for the speaker to convey his message."[85] But this suggests that the *Providence Journal* was the *only* medium available to Home Placement when, in fact, the alternative media of direct mail, radio, and billboards were also available. What the authors refuse to accept is that the essential facilities doctrine can apply to cable television systems even though these systems may face potential

---

78 Economies of scale arise when it is less expensive (per unit) for a single firm to produce a large quantity of output than for multiple smaller firms to produce that same output. Economies of scope arise when it is less expensive for the single firm to produce multiple products than for multiple firms to produce the products separately. For evidence of such economies, see *supra* note 59.

79 *See*, Associated Press v. United States, 326 U.S. 1 (1945).

80 CABLESPEECH, *supra* note 1, at 129 (quoting Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)).

81 682 F.2d 274 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

82 682 F.2d at 278.

83 CABLESPEECH, *supra* note 1, at 124.

84 *See* POOL, *supra* note 57, at 103-05 (discussing the failure of the courts to mention the first amendment in telephone cases). *See also* Evenson v. Ortega, 605 F. Supp. 1115 (D. Ariz. 1985) (refusing to permit publisher to enjoin placement of advertisement).

85 CABLESPEECH, *supra* note 1, at 124 (emphasis added).

competition. As the authors acknowledged earlier, the doctrine focuses on the economic practicality of alternatives rather than on their mere existence. Therefore, cable may be characterized as an essential facility if its efficiency makes other media economically impractical alternatives.

B. *Marketplace For Whom?*

The authors correctly point out that "[s]ubstituting government decree for the free operation of the market risks serious misallocation of channels."[86] This is a basic premise of capitalism. They also assert that cable television "inherently promotes diversity in response to market forces,"[87] but it is unclear what they mean by this comment. Surely they realize that some rules and regulations are necessary, if only to insure that market forces can be expressed.[88] Presumably, they mean that a cable system, with its multitude of channels, can replicate a competitive marketplace on its own; but this can only occur if a cable operator permits actual competition.

Not surprisingly, however, the authors do not favor actual competition among cable networks. The benefits provided by such competition would flow primarily to the public, partially at the expense of the cable operator. Instead, the authors sympathize with the cable operator who is required to make a massive investment in plant and equipment. Shapiro, Kurland, and Mercurio are reluctant to permit control over the market to fall into the hands of the buyers and sellers of the market: those who produce programs and those who consume them. They protest that access

> requirements prevent the cable operator from providing, in response to market forces and in accordance with the operator's editorial judgment, the mix of programming which best serves his subscribers. Instead, access requirements place program decisions in the hands of those who have no responsibility to ensure the continued viability of the system and no accountability to subscribers.[89]

Do they mean that firms which produce and supply programs have no accountability to subscribers? Surely they cannot mean that a

---

[86] *Id.* at 88.
[87] *Id.* at 105.
[88] *See* Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 614 (1959) (discussing the necessity of a property rights structure).
[89] CABLESPEECH, *supra* note 1, at 103.

competitive marketplace does not make producers accountable to consumers. If program producers do not give consumers what they want the producers will lose their investment, even if their product gains critical acclaim. That is true accountability!

But what if the cable operator is not accountable in some respect? Suppose that an adult programming service, like the Playboy channel, seeks access on a cable system because a significant number of subscribers have expressed a strong desire for it, but a state statute prohibits the cablecasting of such adult programming. Clearly the authors would support Playboy's effort to strike down the statute. But what if the statute was voided and yet the cable operator still refused to grant access to the service?

The operator might dislike the programming, or be greedy and seek an unconscionable share of the potential profits. Or perhaps the programming offends a small but powerful faction in the community whom the cable operator needs or desires to please. Suppose that the subscribers then try to overrule the cable operator through legislation requiring that one channel be leased on a common carrier basis. Under these circumstances, would the authors still repeat the following?

> By compelling him to deliver the expression which he does not wish to communicate, and with which he may violently disagree, the proposals would substitute the government's judgment about what should be expressed for that of the . . . people who collectively influence the content of his programming by their subscriptions.[90]

Do the authors mean to say that it is unconstitutional for the state to deny subscribers access to indecent programming, but that the first amendment protects the cable operator against rules which would deny him or her censorial power?

One way of facilitating actual competition is to prevent a single firm from acquiring control over too large a proportion of the channels of retail distribution in a market. This antitrust doctrine also applies to the media. The Supreme Court so held when it approved rules prohibiting the cross-ownership of newspapers and broadcast stations in the same market.[91] As the authors observe, those rules, which limit the share of media channels which a single firm can control in a single market, "did not force a speaker to say what the speaker did not want to say and did not interfere with editorial deci-

---

[90] *Id.* at x-xi.

[91] Federal Communications Comm'n v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

sions about the content of communications."[92] Additionally, the rules avoid the three dangers that Professor Tribe worried about.[93]

C. *Common Carrier Status*

What, then, is wrong with regulations which limit the share of cable channels which any single firm can control in any single market? And what is wrong with requiring a cable system to operate as a common carrier so that any firm of media editors can secure as many channels as it desires, subject only to the rules of the market which dictate that the firm cover its own costs plus the costs of the transmission medium?[94] Does such an access scheme force a speaker to say what he does not want to say or interfere with the editorial discretion of any individual channel editor?

The cable operator may claim that it needs control over the entire set of channels because the only practical strategy for marketing cable services is for the operator to market all the channels as a package or packages. Thus, the relevant unit for first amendment analysis is an entire cable system, not individual channels or individual programs. Under this reasoning, however, the most efficient marketing of radio and television sets would have required the FCC to grant control over all stations within a market to that firm selling those pieces of hardware.

The authors' strongest argument might be that a cable operator could be irreparably harmed if one access user disseminated unpopular offensive programming and thereby besmirched the reputation of "cable television" in a community. Yet RCA could make a similar argument that its NBC network or the sale of its TVs could be seriously damaged if television received a bad reputation due to the performance of some disreputable broadcaster. A similar argument was unsuccessfully made by AT&T when it sought to retain full control over the marketing of terminal equipment in the telephone industry.[95]

The appropriate remedy for protecting consumers from pro-

---

92 CABLESPEECH, *supra* note 1, at 104.

93 *See supra* note 43 and accompanying text.

94 *See, e.g.*, Nadel, *COMCAR: A Marketplace Cable Television Franchise Structure*, 20 HARV. J. ON LEGIS. 541 (1983).

95 Even after the decisions in Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956), and Use of the Carterfone Device in Message Toll Telephone Serv., 13 F.C.C.2d 420 (1968), AT&T continued to frustrate entry into the terminal equipment market. It was not until the FCC itself assumed responsibility for technical evaluations, in Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), 56 F.C.C.2d 593 (1975), *aff'd sub nom.* North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977), that entry became truly open.

gramming that they may not care to receive appears to be the same one discussed earlier concerning consumers who would prefer to avoid offensive programming. Cable operators can disassociate themselves from undesirable program suppliers by recommending that subscribers lock out such channels. With a little explanation from cable operators, a community should lay no more of the blame for offensive programming on the cable operator than it does on RCA or Zenith for the Playboy channel, or a telephone company for dial-a-porn services. Meanwhile, if the cable operator had any fear that others might compromise the technical integrity of its system, as AT&T claimed to have about outsiders attaching their own terminal equipment to its telephone network, these could be addressed through the FCC's technical regulations.[96]

The authors oppose common carrier treatment observing that "[c]able television . . . has not developed on a common carrier basis, and there is no assurance that it would be economically viable if operated on this basis."[97] But there is no reason why it should necessarily be any less profitable to operate a cable system as a common carrier. If the agreements that cable operator "affiliates" are making with cable network suppliers are not illegal then presumably they could set similar rates as common carriers. For example, cable system owners might demand 40% of the subscriber fees and 40% of the commercial minutes or resulting advertising revenues earned by each network program supplier from serving the cable service community.

The authors further defend their position by claiming that "[o]wnership of printing presses could also be separated from control over the content of what is printed, but for the First Amendment."[98] From this statement it would follow that the first amendment should have prevented the government from divesting the major movie studios of their theaters[99] and prohibiting AT&T from utilizing its own lines for electronic publishing,[100] yet it did neither. In fact, newspaper publishers—the self proclaimed guardians of the amendment—are responsible for hav-

---

96 The FCC's present cable technical operating standards are given at 47 C.F.R. §§ 76.601-.617 (1984).

97 CABLESPEECH, *supra* note 1, at 103-04.

98 *Id.* at 84 n.31.

99 United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

100 *But see* United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 186 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) (later proceeding omitted).

ing exerted the pressure to impose the AT&T exclusion.[101]

The authors maintain that "any analogy between cable systems and common carriers is merely a conclusion reached by some commentators about how they believe cable television should be regulated."[102] That is absolutely true, but once one recognizes that a cable television system does not have any inherent legal status, that it could be treated as a public utility common carrier[103] or as a privately owned print publisher, it is necessary to come to some conclusion based on the first amendment and public policy options. On that score it is interesting to note that in the 1970's every major policy study on how cable should be regulated recommended that cable operators be required to provide at least some degree of non-discriminatory access to unaffiliated program suppliers. This included studies by conservatives, such as the 1971 Nixon Cabinet (Whitehead) Committee and the Committee on Economic Development.[104]

The problem is that the authors write as if the right of media owners is the only important interest protected by the first amendment. It is as if the amendment does not protect the rights of the public, and therefore, no court should "exalt the interest of members of the public in communicating information about the First Amendment interest of cable operators in controlling the programming on their channels. This is precisely what the

---

101 They feared AT&T as a potentially dominant competitor.

102 CABLESPEECH, *supra* note 1, at 85.

103 When the FCC examined cable television systems in 1952, it considered them to be more like common carriers than broadcasters. *See* Krattenmaker & Metzger, *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U.L. REV. 403, 420 n.111 (1982) (citing the March 25, 1952 Memorandum to the Commission from the General Counsel, the Chiefs of the Broadcast and Common Carrier Bureaus, and the Chief Engineer, *reproduced in Television Inquiry, Review of Allocation Problems, Special Problems of TV Service to Small Communities: Hearings on S.376 Before the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 3490, 4142 (1958)).

104 The studies, which recommend that cable operators be required to lease most, if not all, of their channels to unaffiliated program suppliers on a non-discriminatory basis, include: STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE 90 (Comm. Print 1976); Cabinet Committee on Cable Communication, Cable: Report to the President 29-30 (1974) (the Whitehead Report); W. Jones, State of New York Public Service Commission, Regulation of Cable TV by the State of New York, Report to the Commission 199-201 (1970); Owen, *Public Policy and Emerging Technology in the Media*, 18 PUB. POL'Y 539, 546 (1970); Committee on Economic Development, Broadcasting and Cable Television 70 (1975); and Sloan Commission on Cable Communications, On the Cable: the Television of Abundance 142 (1971). These and other studies are carefully discussed in K. KALBA, SEPARATING CONTENT FROM CONDUIT (1977). More recently common carrier type structures have been proposed by Henry Geller, see Petition of Henry Geller and Ira Barron to Issue Notice of Proposed Rulemaking RM-3294 (Oct. 9, 1981) and Nadel, *supra* note 94.

Supreme Court has ruled that government may not do."[105]

Hence, "[i]n cases in which a communications enterprise is alleged to have abused an essential facility . . . [and both] economic freedom [and] First Amendment freedom of expression [are] at stake[,]" the authors argue that "[t]he constitutional rule . . . certainly can be no more restrictive than the antitrust rule on essential facilities and should accord even more deference . . . to the freedom of the communicator to communicate only what he chooses."[106] Again, it is as if freedom of communication belongs only to those who own essential facilities, and not to those who seek to use the facilities to communicate.

D. *Taxing Regulations*

The authors should be commended for discussing the many implications of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*[107] for the cable industry. In that case, involving a special state use tax on newspaper supplies, the Supreme Court held that "[d]ifferential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."[108] As the authors reason:

> The First Amendment should . . . have made it clear to the politicians that they have no constitutional power to sell the right to communicate through this medium any more than they could sell the right to communicate by way of the other print and electronic media. . . . What local governments have a right to charge for is the use of public rights of way to string wires. And that can be sold only at prices that bear a reasonable relationship to the cost. They cannot inhibit free speech by charging for the right to engage in it.[109]

This calls into question the constitutionality of cable franchise fees and thus section 622 of the 1984 Cable Act, which specifically permits a municipality to charge a cable system operator a franchise fee of as much as 5% of gross revenues.[110] Already, in *City of Ala-*

---

105 CABLESPEECH, *supra* note 1, at 103-04.
106 *Id.* at 131.
107 460 U.S. 575 (1983).
108 *Id.* at 585.
109 CABLESPEECH, *supra* note 1, at xv, *discussed at* 201-06.
110 Cable Act, *supra* note 21, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2787 (to be codified at 47 U.S.C. § 622).

meda v. Premier Communications Network,[111] a California court has applied *Minneapolis Star* to void a tax on MDS service.

The authors discuss the reasoning behind this prohibition on taxation and why it should also lead to a prohibition against rate regulation. As they explain, rate regulation can be used as an indirect form of censorship. Cable operators seeking a rate increase will be reluctant to criticize the administration responsible for approving such an increase.[112] Under the 1984 Cable Act rate regulation will disappear in most communities in 1987, but it will still be an issue for systems in markets that are not "subject to effective competition."[113]

The authors may also have a strong case for challenging regulations that serve as cross-subsidy taxes. A requirement that a cable operator provide universal service or more channel capacity than efficiency demands imposes a taxing cost that the cable operator will normally pass on to cable subscribers in the form of higher prices. If *Minneapolis Star* prohibits a town from imposing a tax directed at a communications media, then such an indirect tax would also seem to be prohibited.[114]

Unfortunately, the authors fail to examine the ramifications of this analysis beyond cable television. If they seriously believe that courts should void such legislation, they should have explained whether this would also require those courts to void rate regulation of the telephone company,[115] special taxes imposed on telephone service,[116] and the requirement, imposed by Congress, that television sets be made to carry all UHF as well as VHF channels.[117]

The "must carry" rules,[118] which require a cable system to carry the signals of local TV broadcast stations, serve a similar function of cross-subsidizing broadcast stations and viewers who must rely on profitable broadcast stations to provide them with programming.[119] While this might be good public policy, it is unclear whether the first amendment would permit media funding to be provided by taxing cross subsidies rather than direct government grants. As Pool points out, "[t]he rise of magazines hurt book publishing. The rise

---

111 156 Cal. App. 3d 148, 202 Cal. Rptr. 684 (Ct. App.), *cert. denied*, 105 S. Ct. 567 (1984).

112 CABLESPEECH, *supra* note 1, at 166-71.

113 Cable Act, *supra* note 21, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2788 (to be codified at 47 U.S.C. § 623).

114 CABLESPEECH, *supra* note 1, at 206-09.

115 *See, e.g.*, 47 U.S.C. §§ 200-224 (1982).

116 *See, e.g.*, 26 U.S.C. § 4251 (1982) (history omitted).

117 47 U.S.C. § 303(s) (1982).

118 47 C.F.R. §§ 76.51-.65 (1984).

119 CABLESPEECH, *supra* note 1, at 145.

of television hurt movies. But no one suggested that those situations required Congress to make exception to the First Amendment."[120] The D.C. Circuit agreed with the authors, that the rules " 'are fundamentally at odds with the first amendment' "[121] when they struck down the rules in July.

V. CONCLUSION

In summary, *CableSpeech* is written in the form of a brief, using the first amendment to attack most regulations faced by cable operators. It is valuable for presenting almost all of the possible first amendment arguments that cable system owners may make in the years to come. Nevertheless, a reader eager to understand both sides of the issues and make his or her own judgments must go elsewhere to a more scholarly work like Pool's *Technologies of Freedom*[122] or William Van Alstyne's *Interpretations of the First Amendment*.[123]

---

[120] POOL, *supra* note 57 at 163 (footnote omitted).
[121] Taylor, *Court Overturns Key F.C.C. Rule Covering Cable*, N.Y. TIMES, July 20, 1985 at 1, col. 2 (quoting Quincy Cable T.V., Inc. v. F.C.C. Slip op. 83-1283 at 7 (D.C. Circuit July 19, 1985)).
[122] POOL, *supra* note 57.
[123] *See supra* note 37.