CABLE TELEVISION: PROPOSALS FOR REREGULATION AND THE FIRST AMENDMENT*

STUART ROBINOWITZ**

I. INTRODUCTION

The Cable Communications Policy Act of 1984 ("the Cable Act"),[1] although fully effective for only about three years, is already under threat of a premature demise. Cable's competitors, as well as local city councils, have all launched an onslaught against the new statute.[2] As a result, Congress is now considering a maze of proposals for reregulating cable television.[3] The principal proposals to date are the Danforth-Cooper bill[4] and the Gore-Boucher bill.[5] This Article will focus on the two main pending bills as well as a recently released draft bill prepared by the staff of the Senate Commerce Committee.[6]

The proposals for reregulation contemplate, among other things, oversight of programming by local political officials; rate regulation of basic cable services by franchising authorities; granting such authorities *carte blanche* in denying renewals of cable franchises; a reincarnation of the Federal Communication Commission's ("FCC" or "the Commission") "must-carry" rule declared unconstitutional by the courts; and limitations on cable's freedom to create and own programming and information services.

These proposals raise constitutional and policy questions that affect cable systems and cable programmers. The Supreme Court has emphasized that cable television is a first amendment

---

* Copyright ©1990 Stuart Robinowitz.

** Partner, Paul, Weiss, Rifkind, Wharton & Garrison. B.A., 1950, Williams College; LL.B., 1953, Yale Law School. The author has represented cable interests in certain proceedings discussed in this Article.

[1] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 521-559 (Supp. V 1987)).

[2] Cable's competitors include, *inter alia*, broadcasters, Multichannel Multipoint Distribution Service ("MMDS"), Satellite Master Antenna System ("SMATV") operators, satellite-dish entrepreneurs, and telephone companies.

[3] *See* Symposium Appendix II, at 2.

[4] S. 1880, 101st Cong., 1st Sess. (1989); H.R. 3826, 101st Cong., 1st Sess. (1989).

[5] S. 1068, 101st Cong., 1st Sess. (1989); H.R. 2437, 101st Cong., 1st Sess. (1989).

[6] STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 (Comm. Staff Draft 1990). Additional legislation has been introduced since this Article was prepared.

speaker, not a common carrier, and is entitled to exercise broad editorial discretion over its programming.[7] Any statute regulating cable must meet the exacting standards of the first amendment. Accordingly, the debate over the critical policy choice before Congress — whether cable's future development should be determined by bureaucratic regulation or the marketplace — must be guided in large part by first amendment jurisprudence.

This Article analyzes the status of cable television prior to the Cable Act, the policies animating the Cable Act, and the constitutional questions raised by the pending proposals in Congress for reregulation.[8]

II. Cable Prior to the Cable Act

The FCC, along with city and state governments, regulated cable heavily in the 1960s and 1970s. The various levels of government generated a patchwork of often conflicting regulations.

At the behest of broadcasters, the FCC initially devised a regulatory regime designed to inhibit cable's growth.[9] Those restrictions — limiting, for example, the programs eligible for pay cable and the importation of distant television signals — stymied cable's development in its early years. The FCC's restraints, however, gradually collapsed. Courts struck down some regulations on first amendment grounds.[10] The FCC ultimately abandoned other regulations, admitting they were based on flawed economic predictions.[11]

Cable was also heavily regulated at the state and local levels. Local franchising authorities regulated basic cable rates by *ad hoc*

---

[7] *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986); FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

[8] The FCC is currently conducting two cable proceedings that raise some of the same constitutional issues. *See* In Re Notice of Inquiry, Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600 (Dec. 29, 1989); Notice of Proposed Rule Making, Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket No. 90-4 (Jan. 22, 1990).

[9] *See* H. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655 [hereinafter House Report No. 934]. *See also* D. Brenner & M. Price, Cable Television and Other Nonbroadcast Video § 2.03, at 2-8 to 2-17 (1989) (describing effect of early FCC regulations as "freezing the growth of cable") [hereinafter Brenner & Price]; Besen & Crandall, *The Deregulation of Cable Television*, 44 L. & Contemp. Probs. 77, 81-107 (Winter 1981) (describing FCC regulatory history).

[10] *See, e.g.*, HBO, Inc. v. FCC, 567 F.2d 9, 49-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

[11] *See* In re Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 768-69 (1980), *aff'd sub nom.* Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

political decisions, with no substantive criteria or due process safeguards.[12] City councils exercised unbridled discretion in deciding whether to renew franchises — leverage sometimes used to deny franchises unfairly or extract unreasonable concessions.[13] Local officials sometimes demanded high franchise fees not justified by the cost of regulation but designed to raise general funds for city coffers.

III. Growth of Cable Under the Cable Act

Congress, in enacting the Cable Act, found that the labyrinth of federal, state, and local regulations did not serve the public interest or the first amendment goal of providing viewers with a broad diversity of channels, programs, and information services.

Congress designed the Cable Act to provide the cable industry with stability, certainty, and safeguards to stimulate investments in programs, plant, equipment and technology.[14] One of the main goals was to facilitate cable's growth in an atmosphere free from "unnecessary regulation that would impose an undue economic burden on cable systems."[15] Congress also wished to establish national standards to prevent unfair denials of franchise renewals by local authorities.[16] In addition, Congress intended to establish a national cable policy to replace the hodgepodge of local and state regulations.[17]

Thus, among other things, the Cable Act prevents oversight of programming; prohibits rate regulation of cable services, except in limited circumstances;[18] establishes standards and proce-

---

[12] *See Oversight of Cable TV, Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, S. Hrg. 101-464, 101st Cong., 1st Sess., at 1-2 (Nov. 16-17, 1989) (Statement of Sen. Inouye) [hereinafter *Oversight of Cable TV*].

[13] *See* House Report No. 934, *supra* note 9, at 25-26; Brenner & Price, *supra* note 9, § 8.02, at 8-4 (observing that "[t]he overriding interest of the industry was to avoid what it deemed the potential for arbitrary decision making by cities or other franchising authorities that would use the leverage of the renewal process either to favor friends or extract unreasonable obligations from operators").

[14] Congress stated that the Cable Act was intended to "encourage the growth and development of cable systems" and "the widest possible diversity of information sources and services to the public." Cable Act, § 601(2), (4), 47 U.S.C. § 521(2), (4) (Supp. V 1987).

[15] *Id.* at § 601(6), 47 U.S.C. § 521(6).

[16] *Id.* at § 601(5), 47 U.S.C. § 521(5).

[17] *Id.* at § 601(1), (3), 47 U.S.C. § 521(1), (3). *See* Brenner & Price, *The 1984 Cable Act: Prologue and Precedents*, 4 Cardozo Arts & Ent. L.J. 19, 19-20 (1985).

[18] Under the Cable Act, basic cable rates can be regulated by a franchising authority if there is a lack of "effective competition" in a locality. Cable Act, § 623, 47 U.S.C. § 543(b)(1) (Supp. V 1987). The FCC, delegated to define "effective competition," determined that such competition exists in markets with at least three television signals. Implementation of the Provisions of the Cable Communications Policy Act of 1984, "Report and Order," 50 Fed. Reg. 18,637 (1985), *aff'd in relevant part*, ACLU v. FCC,

dures to guide franchising authorities in passing on applications for franchise renewals;[19] prevents the imposition of excessive franchise fees;[20] and subjects requirements for public and leased access channels to uniform national standards.[21]

Under the stability and deregulation created by the Cable Act, cable has expanded rapidly. Since 1984, annual investments in plant and equipment have increased from $200 million to $417 million.[22] The number of national cable satellite network program services has grown from approximately 35 to 65, with an even greater expansion of regional networks. The average number of channels on basic cable service has increased from 24 to 30, with some newer systems offering 70 or more channels.[23] Moreover, investment in basic programming has increased 66% from 1986 to 1988, and grew an additional 18% in 1989. And the number of cable subscribers has grown from 29 million to almost 50 million homes.[24]

This is not to suggest that "all is well" with cable television. There have been isolated examples of abuses by some operators in setting rates.[25] There have also been complaints in certain localities about telephone response time, service calls, and billing practices, complaints similar to those concerning comparable services in other rapidly expanding consumer-oriented businesses. Older systems in some areas are in need of upgrading, a

---

823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Approximately 97% of cable systems are not subject to rate regulation today. *United States General Accounting Office, National Survey of Cable Television Rates & Services: Report to the Chairman, Subcomm. on Telecommunications and Finance, House Comm. on Energy and Commerce* 4 (GAO/RCED Aug. 1989) [hereinafter *GAO Survey*]. The FCC is now reconsidering its three-station definition of "effective competition." Notice of Proposed Rule Making, Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket 90-4, at 19 (Jan. 22, 1990). If there is no "effective competition," the local franchising authority can regulate the rate for the basic tier of cable service under standards to be established by the FCC. Cable Act, § 623(b)(1), 47 U.S.C. § 543(b)(1) (Supp. V 1987).

[19] *Id.* at § 626, 47 U.S.C. § 546.

[20] *Id.* at § 622, 47 U.S.C. § 542.

[21] *Id.* at §§ 611-12, 47 U.S.C. §§ 531-32.

[22] *GAO Cable Rate Survey: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess., 131 (Aug. 3, 1989) (statement of James Mooney, President National Cable Television Association) [hereinafter *GAO Cable Rate Survey Hearing*].

[23] *GAO Survey*, *supra* note 18, at 4.

[24] *GAO Cable Rate Survey Hearing*, *supra* note 22, at 131; *GAO Survey*, *supra* note 18, at 3.

[25] *See Oversight of Cable TV*, *supra* note 12, at 5, 24-25; Nat'l Telecommunications and Information Admin., United States Dep't of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, at 15 (June 1988) [hereinafter NTIA Report].

process now underway, for example, in Manhattan at a capital investment of more than $200 million for a 70 channel system.

But such problems can, it is submitted, be resolved without gutting the Cable Act or invading areas protected by the first amendment. They can be resolved by fair consumer protection standards,[26] reasonable industry compromises, and if necessary, narrowly-tailored regulations. Repeal of the Cable Act — turning back the clock and imposing a heavy-handed regime of reregulation — would be counterproductive. It would discourage capital investment in expanding cable channels, in developing innovative programs, and in pursuing improved technology. The viewing public, it is submitted, would be the loser.

IV. THE FIRST AMENDMENT STATUS OF CABLE

Since the reregulation proposals raise serious constitutional concerns, particularly issues relating to free speech and freedom of the press, one must first examine cable's status under the first amendment. For cable's first 20 years or so, when it functioned primarily as a retransmitter of over-the-air broadcast signals to enhance picture quality, courts did not view cable as a first amendment speaker.[27] But in the mid-1970s, as cable began to originate its own programming, courts began to recognize cable's first amendment rights. *HBO v. FCC*, invalidating the FCC's restrictions on the programs eligible for subscription services, led the way.[28] Since then, courts have uniformly treated cable operators as first amendment speakers and editors because they originate, select, and disseminate news, information, and entertainment.[29]

---

[26] The cable industry recently adopted such standards. *See* Farhi, *Cable Industry Envisions New System for Self-Policing*, Wash. Post, Feb. 16, 1990, at C1, col. 5.

[27] *See, e.g.*, Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968) (regulation by FCC of microwave and off-the-air community antenna television systems not violation of first amendment); Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 225 (D.C. Cir. 1967) (distant signal rules promulgated by FCC not illegal restraint in first amendment rights).

[28] HBO v. FCC, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[29] *See, e.g.*, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494-95 (1986), *aff'g* 754 F.2d 1396 (9th Cir. 1985); Century Communications, Inc. v. FCC, 835 F.2d 292, 294-95 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1444-45 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Telecommunications of Key West v. United States, 757 F.2d 1330, 1336 (D.C. Cir. 1985); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); Omega Satellite Products v. City of Indianapolis, 694 F.2d 119, 127-29 (7th Cir. 1982); Community Communications v. City of Boulder, 660 F.2d 1370, 1378-80 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

In *City of Los Angeles v. Preferred Communications, Inc.*,[30] the Supreme Court declared that cable operators exercise "a significant amount of editorial discretion."[31] The Court added: "[T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [Preferred] seeks to communicate messages on a wide variety of topics . . . ."[32] Although the Supreme Court in *Preferred* did not define the precise contours of cable's first amendment rights, *i.e.*, whether it should be accorded the broad rights of newspapers, the lesser rights of broadcasters, or some intermediate status, lower courts have generally afforded cable broad first amendment rights comparable to those enjoyed by print media.[33]

Broadcasters have been afforded less protection than newspapers under the first amendment because broadcasters use scarce public spectrum space, thereby limiting the voices which may speak.[34] The rationale is based on technological scarcity, not on economic factors that lead, for example, to one-newspaper towns.[35] The inherent physical limitations of the airwaves are not relevant to cable because cable systems have an abundance of channels and possess the technological capacity to carry 100 or more channels.[36] As one authority declared:

> [C]able development has the potential of creating an elec-

---

30 476 U.S. 488 (1986).

31 *Id.* at 494 (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979)).

32 *Id.* at 494.

33 *See, e.g.*, HBO v. FCC, 567 F.2d 9, 44-46; *Quincy*, 768 F.2d at 1449-50; *Preferred Communications*, 754 F.2d 1396, 1404-07 (9th Cir. 1985); *Midwest*, 571 F.2d at 1052-57; Group W Cable v. City of Santa Cruz, 669 F. Supp. 954, 960-61 (N.D. Cal. 1987); Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465, 1470-75 (N.D. Cal. 1987). *But see Omega*, 694 F.2d at 127-29; *Community Communications*, 660 F.2d at 1378-80.

The broadcaster/newspaper dichotomy has led to disparate results. Thus, the D.C. Circuit upheld the "anti-siphoning" pay programming rules as applied to broadcasters, National Ass'n of Theater Owners v. FCC, 420 F.2d 194, 207-08 (1969), *cert. denied*, 397 U.S. 922 (1970), but not as to cable. *HBO*, 567 F.2d at 21, 34, 49-51, 59-60.

Courts have upheld an indecency standard in the case of broadcasters, FCC v. Pacifica Fed'n, 438 U.S. 726 (1978), but not in the case of cable. *See* Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985); Community Television v. Wilkinson, 611 F. Supp. 1099, 1109-16 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd without opinion*, 480 U.S. 926 (1987); Community Television of Utah v. Roy City, 555 F. Supp. 1164, 1169 (D. Utah 1982).

34 *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) ("Unlike other media, broadcasting is subject to an inherent physical limitation. . . . All who possess the financial resources . . . cannot be satisfactorily accommodated."). *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding right of reply under Fairness Doctrine in broadcasting) *with* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating statutory right of reply in newspapers).

35 *See Miami Herald*, 418 U.S. at 249.

36 The scarcity rationale is based on technological scarcity, not on economic factors that lead, for example, to one-newspaper towns. *See id.*

tronic medium of communications more diverse, more pluralistic, and more open, more like the print and film media than our present broadcast system. It could provide minority groups, ethnic groups, the aged, the young, or people living in the same neighborhood an opportunity to express, and to see expressed, their own views.[37]

Whatever the precise breadth of cable's first amendment rights, the standards for analyzing the constitutionality of regulations affecting cable speech are clear. If a regulation *directly* burdens cable speech, the government bears the burden of demonstrating that there is a compelling societal need for regulation and that the challenged regulation is narrowly tailored to serve that need.[38] If a regulation has only an *incidental* impact on cable speech, courts apply the balancing test set forth in *United States v. O'Brien*.[39] Under the *O'Brien* test, the government must demonstrate, among other things, that the regulation serves an important government interest and intrudes on speech no more than necessary.

The principal legislative proposals for cable reregulation will not pass muster under the first amendment, regardless of whether they are scrutinized as direct or incidental restraints on cable speech and regardless of whether cable's first amendment rights are analogized to those of newspapers or broadcasters.

V. The New Legislative Proposals for Cable Reregulation

A. *Program Content*

The Cable Act makes programming immune from government oversight. Local franchising officials cannot require specific program proposals in awarding franchises or in considering petitions for franchise renewals.[40] Congress stated in the report ac-

---

[37] Cabinet Comm. on Cable Communications, Report to the President 15 (1974).

[38] Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530, 540 (1980) ("[a] state action [restricting speech] may be sustained only if the government can show that the regulation is a precisely drawn means of serving a competing state interest"); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978).

[39] 391 U.S. 367, 376-77 (1968) (selective service statute prohibiting the burning of draft cards had only an incidental and permissible impact on speech of Vietnam war protestors). *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-05 (1984) (standard of review of a "viewpoint-neutral regulation" of speech is less than strict scrutiny).

[40] Cable Act, § 626(c)(1)(B), 47 U.S.C. § 546(c)(1)(B) (Supp. V 1987) (franchising authority may consider "the quality of the operator's service, response to consumer complaints, and billing practices"). *See* House Report No. 934, *supra* note 9, at 68 ("The cable operator may not be required, either directly or indirectly, as part of the

companying the Cable Act: "The Committee is also very mindful of the constraints the First Amendment imposes in terms of the permissibility of governmental regulation of program content."[41] The Danforth bill, however, would allow local politicians to review programming decisions in granting or renewing franchises.[42]

This proposal cannot be reconciled with the first amendment. The Supreme Court, as noted, has recognized that cable operators have broad editorial discretion over programming.[43] The Court has also declared: "For better or worse, editing is what editors are for; and editing is selection and choice of material."[44] City councils may not interfere with the right of electronic publishers to select programs.[45]

Granting local politicians unfettered discretion to review programming will have a chilling effect. Cable operators — seeking franchises and renewals — will be reluctant to present controversial programs, material critical of local officials, or programs unpopular with local pressure groups. The Supreme Court recently warned that "[i]t is not difficult to visualize a newspaper . . . feeling significant pressure to endorse the incumbent Mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application."[46]

---

franchise renewal or for a new franchise to provide particular video or other information services, or even a broad category of video or other information service.").

[41] *See* HOUSE REPORT No. 934, *supra* note 9, at 69. *See also* NATIONAL LEAGUE OF CITIES, CABLE FRANCHISING AND REGULATION: A LOCAL GOVERNMENT GUIDE TO THE NEW LAW III-H-14 (1985) (acknowledging that "the involvement of a franchising authority in requiring, as a condition of entry, which specific programming services are provided to cable subscribers should be limited in order to ensure that First Amendment principles of free speech are not improperly infringed.") [hereinafter NATIONAL LEAGUE OF CITIES]; Ryerson & Sinel, *Regulating Cable Television in the 1990s*, 17 STETSON L. REV. 607, 625 (1988) (to ensure that freedom of speech is not unconstitutionally limited, the 1984 Cable Act limits a franchising authority the power to regulate which programming services are provided to cable subscribers) [hereinafter Ryerson & Sinel].

[42] S. 1880, 101st Cong., 1st Sess. § 6(d)(3) (1989).

[43] *See supra* notes 29-31 and accompanying text.

[44] CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973).

[45] Giving local officials unguided discretion over programming is impermissible. "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not . . . ." Cox v. Louisiana, 379 U.S. 536, 557 (1964). *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); Consolidated Edison of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530, 536 (1980) ("Government action that regulates speech on the basis of its subject matter 'slip[s] . . . into a concern about content.' " (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972)).

[46] City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757-58 (1988). *See* NAACP v. Button, 371 U.S. 415, 433 (1963) ("[t]he threat of sanctions may deter [the]

B. *Rate Regulation*

Pending Congressional proposals would allow franchising authorities to regulate the rates for cable services in communities across the nation. The Gore bill would allow local authorities to set prices for a so-called "lifeline" service, including the three network affiliates, local independent stations, and one public station, in any community that has less than two cable systems.[47]

The Danforth bill authorizes franchising officials to regulate rates for basic services in areas without one or more additional "multi-channel" video programming distributors, *i.e.*, another cable operator or wireless operator such as Multichannel Multipoint Distribution Service ("MMDS") or Direct Broadcast Satellite ("DBS"). Under the bill, the alternative multi-channel video distributor must offer "comparable video programming . . . at comparable rates" to at least 67% of the households in the community and have at least 30% penetration in the area.[48] The bill does not deal with the power of cable operators to change the programming mix of the regulated *basic tier* of service or to create new tiers to meet consumer preferences.

The pending bills do not set forth any criteria for rate regulation. There have been suggestions that the FCC establish common-carrier type standards to guide local franchising authorities, such as rate-of-return formulae or so-called adjustable "price caps."[49]

The recent draft proposal prepared by the staff of the Senate Commerce Committee is more sweeping than the Gore or Danforth bills. It would allow rate regulation not only of basic services, but of *all* nonbroadcast advertiser-supported programming services in any cable community that does not have a second cable system or an alternative multichannel video distributor, as defined in the Danforth bill.[50] The FCC is authorized to set rates.[51] In determining whether rates are reasonable, the FCC is directed to ensure that rates "are affordable and do not reflect

exercise [of first amendment rights] almost as potently as the actual application of sanctions").

47 S. 1068, 101st Cong., 1st Sess. § 3 (1989).

48 S. 1880, 101st Cong., 1st Sess. § 4(a) (1989).

49 *See* F.C.C. Notice of Proposed Rulemaking, Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket 90-4 (Jan. 22, 1990).

50 STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 5 (Comm. Staff Draft 1990).

51 *Id.* at § 623(b)(1).

the inclusion of any monopoly profits."[52] Furthermore, the FCC is authorized to ensure that "programmers can create new programs and services and can recover the cost of creating such new product," and that "cable operators can reasonably expand the capacity and the technological capabilities of their cable systems."[53] Local franchising authorities have the right to take over the ratemaking role of the Commision provided they follow the guidelines and procedures established by the FCC. Local political officials would have a strong incentive to assume this power in view of the leverage they would gain over cable operators.

All the proposals for rate regulation, as shown below, are inconsistent with fundamental first amendment values. The price control proposals have been stimulated by complaints about rate hikes since rate deregulation became fully effective in December 1986. Anecdotal examples of price gouging have been highlighted.[54] But the overall factual record, as shown below, is far from compelling for the advocates of price regulation.

Basic cable rates increased an average of about 29% between 1986 and 1988 according to a recent GAO survey.[55] But rates for subscription services, such as HBO and Showtime, declined in that period.[56] If basic and non-basic services are taken together — the only meaningful measure — average monthly revenues paid by subscribers rose only 14% from 1986 to 1988.[57] The CPI in that period rose almost 8%. In 1989, the year after the GAO survey was completed, cable rates rose only 3.8%, while CPI rose 4.6% according to the Bureau of Labor Statistics.[58]

One critical fact emerges from the statistical debate about cable rates. Since rate deregulation became effective at the end of 1986, the price *per basic service channel* has not increased according to GAO.[59] Today, the average rate for a typical package of 30 basic channels amounts to less than 50 cents per channel per month. The total cost of basic service, on average, is thus less than $15 per month.[60]

Cable interests advance several explanations for rate in-

---

[52] *Id.* at § 623(b)(3)(A).
[53] *Id.* at § 623(b)(3)(B) & (C).
[54] *See Oversight of Cable TV*, *supra* note 12, at 4 (statement of Sen. Gore).
[55] *GAO Survey*, *supra* note 18, at 1.
[56] *Id.* at 6.
[57] *Id.* at 50.
[58] *See* Hershey, *Consumer Prices Up 4.6% in '89*, N.Y. Times, Jan. 19, 1990, at D1, col. 6.
[59] *GAO Survey*, *supra* note 18, at 26.
[60] *Id.* at 24.

creases since 1986. First, basic rates were kept at artificially low levels — levels that significantly trailed the CPI for more than a decade — by city councils prior to the Cable Act.[61] Second, since deregulation, cable operators have been upgrading their systems and adding new channels of programs as part of basic services.[62] Third, popular cable networks such as ESPN, CNN, MTV, and USA have sharply increased the fees they charge to cable systems.[63]

The pending ratemaking proposals in Congress treat cable as if it were a common carrier or public utility. But, as noted, the Supreme Court has emphasized that cable is not a common carrier or public utility but rather an electronic publisher with broad editorial discretion.[64] The ratemaking proposals conflict with basic first amendment rights of cable operators and cable programmers for several reasons.[65]

1. The Ratemaking Proposals: A Direct Burden on Speech

First, government control of the price a speaker may charge for his speech, an unprecedented and extraordinary concept even in wartime,[66] is antithetical to the principles underlying the

---

61 From 1972 (when the FCC authorized local rate regulation) to 1986, cable rates reportedly ran 72 percentage points behind the CPI. *GAO Cable Rate Survey Hearing, supra* note 22, at 131 (1989). If price controls hold prices below competitive levels for years, price increases following the lifting of controls can be expected.

62 *GAO Survey, supra* note 18, at 4. Cable operators have added from 24 to more than 30 channels on average. *Id.*

63 In the past six years, the most popular basic networks more than tripled monthly per-subscriber fees charged to cable operators. *See* Waldman, *New Fees Alter the 'Basic' Idea of Cable TV*, Wall St. J., Jan. 23, 1990, at B1, col. 4 (table). The National Telecommunications and Information Administration of the Department of Commerce recently found that "the costs of providing basic services also appear to have escalated significantly." NTIA Report, *supra* note 25, App. A, at 7.

64 City of Los Angeles v. Preferred Communications, 476 U.S. 488, 494 (1986). The Cable Act also provides that cable is not a common carrier service. 47 U.S.C. § 541(c) (Supp. V 1987) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."); House Report No. 934, *supra* note 9, at 41 ("The Committee intends to exempt video programming from common carrier regulation in accordance with the traditional conception that the one-way delivery of television programs, movies, sporting events and the like is not a common carrier activity.").

65 "Programmers" refers to networks, *e.g.*, CNN or ESPN, which provide program services to cable systems.

66 Prices charged by newspapers, magazines, and other media were exempt from government controls during World War II and the Korean conflict. *See* Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 302(c), 56 Stat. 23, 36 (1942) (excluding from definition of "commoditi[es]" subject to price control "materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers"); Defense Production Act of 1950, Pub. L. No. 81-774, § 402(e)(iii), 64 Stat. 798, 806 (1950) (excluding from regulation, *inter alia*, "rates charged by any person in the business of . . . operating a radio-broadcasting or television station . . . . "). *See* H. Rockoff, Drastic Measures: A History of Wage and Price

first amendment. Telling a speaker what he may charge will necessarily affect the content, quality, and quantity of his speech.[67]

Second, price regulation is particularly suspect here because one medium, cable, is singled out for regulation while competing media, such as broadcasters, newspapers, videocassettes, movie theatres, DBS, and MMDS, are exempt. Such discriminatory treatment is impermissible under a long line of Supreme Court cases invalidating selective taxes on the press.[68] Discriminatory regulation of prices that can be charged for speech are at least as invidious as discriminatory taxes on revenues derived from speech.

Third, rate regulation would have a chilling effect on speech. Rate regulation would give local officials broad discretion to make *ad hoc* political decisions as to rates, especially in view of the vague standards contained in the staff draft.[69] This would chill the speech of cable operators who would engage in self-censorship to avoid antagonizing the local price czar.[70]

Fourth, ratemaking would have an adverse impact not only on cable operators but also on cable programmers whose fees and income would be affected, directly or indirectly, by price controls. That would be particularly true if, as the staff draft contemplates, regulation would apply to *all* non-broadcast advertiser-supported program services.[71] The FCC has recognized

CONTROLS IN THE UNITED STATES 98 (1984) (Second World War decision to exempt media based on conclusion that "[p]rice controls as a whole might not be a danger to political liberty, but in this area the probability seemed too high to take the risk.").

67 *See, e.g.*, Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979) (regulating rates for pay programs will decrease diversity).

68 *See, e.g.*, Minneapolis Star Tribune Co. v. Minnesota Comm'r of Rev., 460 U.S. 575, 581-85 (1983) (invalidating as unconstitutional discriminatory tax on newspapers); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227-28 (1987) (invalidating selective tax on magazines of general circulation). *See also* City of Alameda v. Premier Communications, 156 Cal. App. 3d 148, 202 Cal. Rptr. 684 (1983), *cert. denied*, 469 U.S. 1073 (1984) (invalidating special tax on pay television not applicable to other media).

69 Section 5 of the Committee Draft Proposal states that if cable is subject to effective competition, the FCC will create standards to review the reasonableness of rates. The factors include: (1) whether rates are "affordable"; (2) the potential recovery of costs of new programs and services; (3) the possible "reasonable" expansion of capacity and technological capabilities; and (4) the exclusion of costs associated with sale or acquisition of one or more cable systems within a three year period. STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 5 (Comm. Staff Draft 1990).

70 The chilling effect would not be mitigated even if Congress or the FCC adopted rate caps. The Supreme Court has recently struck down statutory rate caps on the free-speech activities of fundraisers for charities. Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988).

71 The Committee Draft Proposal defines "basic cable service" as "any service tier providing advertiser-supported programming service or providing public, educational, or governmental access channels or the retransmission of local television broadcast signals. . . . " STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN

that rate regulation of non-broadcast services would raise serious free-speech concerns and undermine the incentive to create special programming for cable.[72] It would be anomalous to regulate prices for NBC news on CNBC, a cable channel, but not on the NBC television network. Such discriminatory regulation of speech is repugnant to first amendment values.

Finally, ratemaking would have an impermissible impact not only on movies and entertainment[73] but also on core first amendment services such as CNN's 24-hour news service, public affairs programs, C-Span, locally-originated news programs, and religious, cultural, and minority-interest programs.

Because ratemaking would impose a direct, discriminatory and chilling burden on cable operators and cable programmers, such a law could be upheld, if at all, only by demonstrating that (1) there is a compelling or substantial governmental interest for price controls and (2) that the statute is narrowly tailored to serve that interest or is no more intrusive on speech than necessary.[74] These tests cannot be met.

2. No Compelling or Substantial Societal Interest Justifies a Burden on Cable's Speech

Ratemaking proponents argue that the government has a compelling or substantial need to ensure that consumers receive cable at lower prices because cable is a "natural monopoly" and exercises market power in setting its prices.

However, the record shows that cable prices have not been monopolistic. Cable prices, *on a per channel basis*, have remained constant, trailing inflation, since deregulation.[75] In contrast, movie admission prices increased approximately 30% since 1984 and network prime-time advertising rates (passed on to consum-

THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 4(4) (Comm. Staff Draft 1990).

[72] *See, e.g.*, Community Cable TV, Inc., 54 Rad. Reg. 2d (P & F) 1351, 1359-60 (1983), *reconsid. denied*, 56 Rad. Reg. 2d (P & F) 735 (1984) (FCC preemption of state regulation extends to non-basic services). *See also* HOUSE REPORT No. 934, *supra* note 9, at 24; Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979) (price regulation of pay cable programs would discourage diversity).

[73] It has long been recognized that movies and other forms of entertainment are protected by the first amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) ("expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); Winters v. New York, 333 U.S. 507, 510 (1948) ("What is one man's amusement, teaches another's doctrine.").

[74] *See supra* note 38 and accompanying text.

[75] *GAO Survey*, *supra* note 18, App. I, at 26.

ers) rose more than 25%. But cable's critics do not suggest price regulation for those media. The public views cable as a "good buy," as demonstrated by the extraordinary increase in subscribers even in these areas with good over-the-air reception of broadcast stations.

Second, cable does not exercise monopoly power in setting rates. Cable faces actual and potential competition from broadcasters, VCRs, DBS, MMDS, Satellite Master Antennae System ("SMATV"), home satellite dishes, theatres and other media, all of which place price constraints on cable.[76] For example, broadcasting, which reaches virtually all American homes, remains the dominant video medium.[77] About 40% of homes passed by cable do not subscribe to cable but rely solely on over-the-air television.[78] The 40% of the public that chooses not to subscribe obviously do *not* regard cable as an "essential" service like water, gas, telephone, or electric service. The number of available television stations affects consumer demand for cable;[79] thus, consumers view cable and broadcasting as video alternatives.

Moreover, the widespread popularity of VCRs, which have achieved almost 70% penetration in American homes, also acts as a price constraint on cable. Videocassette rentals and sales have depressed prices for pay cable movie services as well as the popularity of non-pay basic services.

Four powerful companies — NBC (a subsidiary of General Electric), Hughes Aircraft (a subsidiary of General Motors), Rupert Murdoch's News Corporation (owner of the Fox studio and network and *TV Guide*) and Cablevision (a national cable operating company) — have recently announced plans to launch a one -

---

[76] Courts have recognized that such media compete with cable. *See, e.g.*, Satellite Television v. Continental Cablevision, 714 F.2d 351, 355 (4th Cir. 1983) (cable services " 'reasonably interchangeable' with the offerings of movie theaters . . . [and a] wide variety of entertainment services."); United States v. Syufy Enters., 712 F. Supp. 1386, 1389 (N.D. Cal. 1989) (relevant market for first-run movies includes cable, as well as subsequent-run movie houses, home video, and pay-per-view systems). *See also* United States v. Loew's, Inc., 882 F.2d 29, 33 (2d Cir. 1989); Cable Holdings of Georgia, Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987).

Similarly, Congress and the FCC have recognized that "advances in the delivery of video services in general have led to a more competitive environment for cable systems." S. Rep. No. 67, 98th Cong., 1st Sess. 5 (1983). *See* House Report No. 934, *supra* note 9, at 22 (enumerating cable's existing or potential competitors); Competition, Rate Deregulation and the Commission's Policies Regarding the Provision of Cable Television, MM 89-600, Notice of Inquiry at 19 (Dec. 12, 1989) ("Even though there may be only one cable system in a given community, cable systems may face competition at the local level because subscribers have alternatives to cable service . . . .").

[77] *1990 Kagan Media Index*, Paul Kagan Associates, Inc.

[78] *Id.*

[79] Office of Telecommunications Policy, Economic Policy Research on Cable Television: Assessing the Costs and Benefits of Cable Deregulation 18-28 (1976).

billion dollar direct-broadcast satellite service, Sky Cable. This high-powered satellite service is scheduled to blanket the nation soon with 108 channels of programming.[80] There are other DBS ventures planned in the United States. DBS has already started operating in England and Western Europe. Cable, in short, faces actual and potential competitive forces that constrain prices. Cable does not exercise market power in setting prices.[81]

Finally, assuming *arguendo* that cable were viewed as a natural monopoly on the theory that it is uneconomic to have more than one cable system in a locality, that would still not constitute a compelling or substantial government interest that would justify a discriminatory and chilling burden on the speech of cable systems and programmers.[82] Other media, as noted, exercise price constraints on the alleged natural monopolist.

Moreover, under the first amendment, the government cannot regulate the prices of newspapers in the many one-newspaper communities across the nation. "One-newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities."[83] The government cannot regulate the advertising rates of broadcasters, which are passed on to consumers, in communities with only one local television station. Nor can it regulate admission prices in towns where one exhibitor controls all movie screens. Cable is entitled to similar first

---

80 Gerard, *$1 Billion Venture Set to Provide Satellite TV*, N.Y. Times, Feb. 22, 1990, at D22, col. 5; Goldman & Landro, *4 Media Giants Enter Venture for Direct-Broadcast TV Service*, Wall St. J., Feb. 22, 1990, at B4, col. 2.

81 *See* NTIA Report, *supra* note 25, App. A at 87 (cable rate increases, following years of regulation, represented a "necessary market adjustment, rather than the exercise of undesirable market power"); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (expressing doubt that cable is "in a position to exact monopolistic charges").

82 *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-56 (1974) (natural monopoly status of newspapers in communities with only one local paper does not allow the government to interfere with the unfettered editorial discretion of the press); HBO v. FCC, 567 F.2d 9, 46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (assuming cable is "natural economic monopoly," that would not justify "even limited government intrusion" into areas protected by first amendment); *Quincy*, 768 F.2d at 1450 (any "monopolistic characteristics of cable" do not permit "otherwise unwarranted intrusions into First Amendment rights"); G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLESPEECH 155 (1983) ("[R]ate regulation of a communications enterprise is inconsistent with constitutional protections of speech and of the press."). *See also* Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 568 (1980) ("[A]ppellant's monopoly position does not alter the First Amendment's protection for its commercial speech."); Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 17 n.14 (1986); Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530, 534 n.1 (1980).

83 *See Miami Herald*, 418 U.S. at 249 n.13 (quoting A. Balk, *Background Paper*, in TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL, A FREE AND RESPONSIVE PRESS 18 (1973)).

amendment protection. The government normally relies on the antitrust laws to cure alleged market imperfections, not price controls on protected speech.[84]

3. The Proposed Legislation Is Overbroad and Not Narrowly Tailored to Serve the Government Interest Sought to Be Protected

In *HBO* and *Quincy*, where the D.C. Circuit invalidated FCC regulations affecting cable speech under the first amendment,[85] the Court reasoned that not only was there no overriding societal interest justifying a burden on speech, but also that the regulations sought to further the purported interest in a manner that was unconstitutionally overbroad. Provisions of the proposed legislation designed to prevent cable operators from charging "monopolistic prices" by exercising their alleged market power pose similar overbreadth problems. The draft proposal by the staff of the Senate Commerce Committee, as well as the Danforth bill, allow rate regulation in any cable community which lacks an additional cable system or at least one wireless multichannel distributor (*e.g.*, MMDS or DBS) that offers comparable service at comparative rates to most of the community. However, the level of competition which "triggers" rate regulation is no trigger at all.[86] It would, in practical effect, allow rate regulation in virtually *every* community in the nation since only a handful of localities have two cable systems and none has an alternative wireless operator with anything close to the proposed coverage and penetration required by the legislation. In short, the trigger contained in the legislative proposals would lead to *automatic* price regulation in virtually all localities across the nation.

A test for effective competition that is so all-encompassing is constitutionally overbroad. Since the purported goal of the proposed legislation is to prevent cable operators from exercising their supposed market power to change supracompetitive prices, the only permissible test, assuming rate regulation were constitu-

[84] The government can enforce the antitrust laws against media defendants even though they are engaged in protected speech activities. *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945).

[85] *HBO*, 567 F.2d at 9, invalidated the "anti-siphoning" rules limiting the types of programs eligible for pay cable. *Quincy*, 768 F.2d at 1434, invalidated the "must-carry" rules requiring the carriage of local stations.

[86] STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 623(c)(1) (Comm. Staff Draft 1990) (30% or more of households in community subscribing triggers presumption of "effective competition").

tional in the first place, would be one that determined whether a cable operator *in fact* had market power to exercise. A cable operator cannot exercise such power, even in the absence of another local cable system or multichannel wireless video distributor, if it faces "effective competition" from *other* types of actual or potential mass media that place a constraint on its prices.

Congress recognized this economic reality in the Cable Act when it allowed price regulation only in communities where there was no "effective competition."[87] The FCC, to which Congress delegated the task of defining "effective competition," found that such competition existed in any market with at least three television stations.[88] According to the Commission, the existence of three television signals was more than adequate "to allow viewers adequate and significant programming choices" and to deprive the cable operator of "market power."[89] The FCC concluded that in a three-station market, a cable system would at most constitute a "fourth competitor" with viewership less than that of a single local station.[90] The D.C. Circuit affirmed the FCC's rationale.[91] Consequently, media alternatives that fall far short of a second cable system or a comparable multichannel wireless distributor, with extensive coverage and penetration, create effective competition that prevents cable operators from charging monopolistic prices.[92]

The proposed legislation is overbroad for another reason. The staff proposal would regulate rates of *all* advertiser-supported nonbroadcast program services, regardless of whether any particular service bestows market power on a cable operator.[93] The illogic of this proposal becomes clear when one examines the range of program services offered by cable. Some of the more popular advertiser-supported nonbroadcast services, in terms of subscribers,[94] face *direct competition* from broadcast sta-

---

[87] Cable Act, § 623(b)(1), 47 U.S.C. § 543(b)(1) (Supp. V 1987).

[88] Cable Communication Act Rules, 58 Rad. Reg. 2d (P & F) 1, 24-36 (1985), *aff'd in relevant part*, ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

[89] *Cable Comm. Act Rules*, 58 Rad. Reg. 2d (P & F) at 26.

[90] *Id.*

[91] ACLU v. FCC, 823 F.2d at 1554.

[92] Courts have recognized the competition cable faces from alternate sources of video and movie programming. *See supra* note 76.

[93] *See supra* note 71.

[94] Popular advertiser-supported nonbroadcast services include, *inter alia*, news services such as CNN, CNN Headline News, Financial News Network, and CNBC; sports services such as ESPN and regional sports networks; superstations such as WTBS and

tions that offer virtually identical or similar forms of programming. These popular nonbroadcast services afford no market power to cable because "free" television offers the same type of programming at no direct cost to the consumer. Additionally, cable's "niche" or special interest nonbroadcast services appeal to far smaller audiences than mass-appeal television stations.[95] These special-interest services surely do not give cable operators monopoly power to extract supracompetitive profits from the public.

In conclusion, there is no principled constitutional rationale for rate regulation of cable operators or cable programmers — whether the regulation affects movies and sports or news and public affairs, documentaries, religious, and ethnic programs, or channels devoted to the arts or children's programs.

C. *Commercial Leased Access Channels*

The Cable Act requires cable systems to set aside a certain percentage of their channels for lease to third-party programmers on a first-come first-served basis.[96] For example, a cable system with between 55 and 100 channels must dedicate 15% of its channels to leased access. Under the Cable Act, a cable operator has the power to set reasonable rates and terms of lease.[97] An aggrieved lessee has recourse to the courts under the Cable Act.[98]

The draft proposal of the staff of the Senate Commerce Committee, but not the Danforth or Gore bills, provides that in the future the FCC should set just, reasonable, and non-discriminatory rates for leased access channels. Local franchising authorities have the right to assume that power from the FCC if they regulate pursuant to the guidelines established by the FCC.[99]

Congress, in providing for commercial leased access channels in 1984, recognized that it was walking in a first amendment minefield, as shown by the extended and defensive discussion of

---

WGN; general entertainment or movie services such as USA, TNT, and Nick at Nite; and music channels such as MTV and The Nashville Network.

[95] Such specialized nonbroadcast services include, *inter alia*, religious networks such as The Eternal Word Television Network and The Inspirational Network; minority-interest networks such as National Jewish Network and Black Entertainment Television; and cultural channels such as American Movies Classics and Arts & Entertainment.

[96] Cable Act, § 612, 47 U.S.C. § 532 (Supp. V 1987).

[97] *Id.* at § 623, 47 U.S.C. § 543.

[98] *Id.* at § 612(d), (e), 47 U.S.C. § 532(d), (e).

[99] STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 5 (Comm. Staff Draft 1990).

the leased-access requirement in the legislative report accompanying the statute.[100] The report devoted more pages to commercial leased-access than to any other topic. Courts, before and after passage of the Cable Act, have found that compelling cable, an electronic publisher, indiscriminately to afford access to any and all speakers is invalid under the first amendment, just as it would be impermissible to require newspapers or broadcasters to afford such indiscriminate access. There is substantial case law on this point.[101] If it is unconstitutional to require leased-access channels, it is invalid to regulate rates charged to lessees.

D. *Renewal of Franchises*

The Cable Act replaced myriad local and state franchise renewal procedures with uniform national standards to protect "cable operators against *unfair denials* of renewal."[102] In view of municipal abuses at renewal time, Congress considered these protections critical to encourage cable owners to make multi-billion dollar investments in wiring the nation, upgrading systems, and creating new program services.[103]

---

[100] *See* HOUSE REPORT No. 934, *supra* note 9, at 31-36.

[101] In Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052-57 (8th Cir.), *aff'd on other grounds*, 440 U.S. 689 (1979), the Eighth Circuit declared that the FCC's mandatory cable access rules violated the first amendment. The Supreme Court, holding that the regulations exceeded the agency's jurisdiction, stated that it need not reach the constitutional issue. However, the Supreme Court noted that the first amendment objection was "not frivolous." *Midwest*, 440 U.S. at 709 n.19. The Court added, "[W]e reject the contention that the Commission's access rules will not significantly compromise the editorial discretion actually exercised by cable operators." *Id.* at 707 n.17. The Court also declared that "compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers." *Id. Compare* Miami Herald v. Tornillo, 418 U.S. 241 (1974) (invalidating access requirement in case of broadcasters) *with* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (invalidating access requirement in case of broadcasters). *See also* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) (invalidating mandatory access for local television stations), *cert. denied*, 476 U.S. 1169 (1986); Century Communications, Inc. v. FCC, 835 F.2d 292 (D.C. Cir.) (invalidating mandatory access for local television stations) *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); Preferred Communications v. City of Los Angeles, No. CV 83-5846 (CBM), slip. op. at 24-30 (C.D. Cal. Jan. 5, 1990) (invalidating leased-access requirements); Century Federal, Inc. v. City of Palo Alto, 710 F. Supp. 1552, 1554-55 (N.D. Cal. 1987) (invalidating leased-access requirements); Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954, 968-69 (N.D. Cal. 1987) (invalidating leased-access requirements).

[102] Cable Act, § 601(5), 47 U.S.C. § 521(5) (Supp. V 1987) (emphasis added).

[103] *See* HOUSE REPORT No. 934, *supra* note 9, at 71-72.

> The purpose of this [renewal] section is to establish a process which protects the cable operator against an unfair denial of renewal by the franchising authority. . . . This protection is intended to encourage investment by the cable operator at the time of the initial franchise and during the franchise term. It will ensure such investment will not be jeopardized at franchise expiration without actions on the part of the operator justifying such a loss of business.

Id.

The Danforth bill undermines the Cable Act's renewal safeguards, even though nobody claims the current renewal process is deficient in any respect. Indeed, a leading advisor to franchising authorities recently acknowledged that the renewal procedures, agreed to by the National League of Cities when the Cable Act was enacted, are working fairly and effectively.[104]

1. Erosion of Substantive Standards

The Cable Act establishes four specific and objective standards for granting or denying renewals designed to measure past and future performance.[105] While repeating those criteria, the Danforth bill would also allow a franchising authority to consider (1) the cable operator's programming, (2) its "rate making history," and (3) "*any other factors* reasonably determined by the franchising authority to be necessary to advance and protect the public interest."[106] Those standards, as shown below, are incompatible with basic first amendment principles.

2. Erosion of Procedural Safeguards

The Danforth bill also removes the procedural safeguards that Congress concluded were critical. Under the Cable Act, if a franchising authority makes a preliminary determination against renewal, the incumbent operator may commence an administrative proceeding to determine whether the franchising authority established non-compliance with one of the Cable Act's specific substantive renewal criteria.[107] The hearing is designed to ensure the cable operator due process protection, including the right to call witnesses, introduce evidence and cross-examine hostile witnesses. In contrast, the Danforth bill allows the franchising authority to make its own decision, without any for-

---

[104] Ryerson and Sinel state that "the imperfect political compromise that led to the Cable Act has produced a workable regulatory framework in which local governments can continue to take steps to ensure that cable systems are responsive to the needs of their citizens." Ryerson & Sinel, *supra* note 41, at 608. They further note that "the Cable Act [including the renewal provisions] preserves important prerogatives of local governments." *Id.* at 613.

[105] The criteria set forth in the Cable Act, Cable Act § 626, 47 U.S.C. § 546 (Supp. V 1987), are summarized as follows: (1) whether the incumbent cable operator has substantially complied with the material terms of its existing franchise; (2) whether the quality of the operator's services (signal quality, response to consumer complaints, etc.) — but *excluding* the content, mix and quality of programming, has been reasonable in light of community needs; (3) whether the operator has the financial, legal and technical ability to provide the services set forth in its renewal proposal; and (4) whether the operator's proposal is reasonable to meet future cable-related community needs, taking into account the cost of meeting such needs.

[106] S. 1880, 101st Cong., 1st Sess. § 6(d) (1989).

[107] Cable Act, § 626(h), 47 U.S.C. § 546(h) (Supp. V 1987).

mal proceedings at all.[108]

Under the Cable Act, an incumbent denied renewal may appeal to the courts. The franchising authority must show that denial of renewal was based on "a preponderance of evidence."[109] The Danforth bill merely requires a franchising authority to show its action was not "arbitrary and capricious."[110]

The Cable Act also limits renewal proceedings to the incumbent operator.[111] The issue is whether the incumbent has complied with its obligations and is competent to meet future community needs. The Danforth bill, in contrast, invites newcomers to compete for the franchise.[112] Renewal proceedings will once again become "beauty contests," determined by the whims and caprice of local politicians, subject to no objective standards or due process procedures. Finally, the Danforth bill bestows upon cities and local officials immunity from damages under the Civil Rights Act[113] *even* when they intentionally violate first amendment rights in denying renewals.[114]

For Congress to create a regime of standardless renewal proceedings without procedural safeguards and then to invite abuses by granting immunity from damage suits brought under section 1983 would be astonishing. It would trample on basic first amendment principles by resurrecting "the hammer of renewal" as "a weapon in terms of the impact on speech-related functions of a cable system."[115]

These proposals, advanced by local franchising officials eager to regain renewal leverage over cable systems, raise grave constitutional concerns. Conditioning the right to speak on discretionary and standardless political decisions, *i.e.*, "any other factors reasonably determined . . . to be necessary to advance and protect the public interest," without any due process safeguards, is impermissible.[116] The Supreme Court has consistently invalidated regimes giving government agencies unguided and un-

---

108 S. 1880, 101st Cong., 1st Sess. § 6(d) (1989).

109 Cable Act, § 626(e)(2)(B), 47 U.S.C. § 546(e)(2)(B) (Supp. V 1987).

110 S. 1880, 101st Cong., 1st Sess. § 6(f)(1)(B) (1989). The draft staff bill does not revise the present Cable Act's renewal provisions except it suggests that the test on review be "substantial evidence" rather than "a preponderance of evidence." STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 11 (Comm. Staff Draft 1990).

111 Cable Act, § 626(c)(2)(D), 47 U.S.C. § 546(c)(2)(D) (Supp. V 1987).

112 S. 1880, 101st Cong., 1st Sess. § 6(b) (1989).

113 42 U.S.C. § 1983 (1982).

114 S. 1880, 101st Cong., 1st Sess. § 7 (1989).

115 BRENNER & PRICE, *supra* note 9, § 8.01 at 8-3.

116 S. 1880, 101st Cong., 1st Sess. § 6(d)(E) (1989).

bounded power to decide which first amendment speakers will be licensed to communicate or which license requests will be denied.[117]

Under the new proposed renewal regime, free speech will be chilled because cable operators will be motivated to avoid controversial programs, material critical of local politicians, or programs that might offend local pressure groups. The Supreme Court recently warned that the danger of chilling speech is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official."[118]

Consideration of "rate making history," now prohibited by the Cable Act but contemplated by the proposed legislation, is also constitutionally impermissible.[119] Consideration of programming, now prohibited but contemplated, would likewise violate basic first amendment principles.[120]

Creating uncertainties about renewals — giving local politi-

---

[117] *See, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 772 (1988) (invalidating ordinance granting broad discretion to grant or deny applications to place newspaper vending machines on public property); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969) (unconstitutional to subject exercise of speech to a license "without narrow, objective and definite standards to guide the licensing authority"); Niemotko v. Maryland, 340 U.S. 268, 272-73 (1951) (invalidating law giving public officials unbridled discretion to allow religious speech in parks); Saia v. New York, 334 U.S. 558, 559-60 (1948) (unfettered discretion to permit sound trucks is unconstitutional); Lovell v. City of Griffin, 303 U.S. 444, 451-53 (1938) (invalidating law giving public official unbridled discretion in issuing permits to distribute literature).

[118] *City of Lakewood*, 486 U.S. at 763.

[119] *See supra* notes 65-95 and accompanying text.

[120] *See supra* notes 40-45 and accompanying text. The Danforth bill is also vulnerable under the Takings Clause of the fifth amendment (as applied to municipalities by the fourteenth amendment). The 1984 Cable Act assured cable operators that they could invest billions of dollars, confident they would be fairly treated at renewal time by objective standards and procedural safeguards. HOUSE REPORT No. 934, *supra* note 9, at 71-72. The 1984 Act's renewal expectancy absent *cause* and its procedural safeguards gave cable operators a form of protected property. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (teacher has protected property interest arising from expectation of continued employment); Perry v. Sindermann, 408 U.S. 593, 599 (1972) (property interest exists in public job where employment could be terminated only for cause); Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972) (property interest in public employment terminable only for cause). *See also* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978) (public utility customers have property interest because utility may terminate service only for cause). The renewal property rights of the 1984 Act are buttressed by "investment-backed expectations." Hodel v. Irving, 481 U.S. 704, 715 (1987). *Cf.* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979). Taking of property by a state or city is permitted only if it is for a public purpose and includes payment of just compensation. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014-16 (1984). Here, there is no public purpose because the 1984 Act's renewal process is working effectively, a fact confirmed by one of the principal legal counsel for local franchising authorities. *See supra* note 77. Congress cannot now defeat cable's investment-backed expectations, especially when the result will be that cable operators are stripped of speech operations.

cians *carte blanche* without substantive standards or procedural safeguards — will discourage cable operators from making capital investments in improved facilities and new programs and services. Some cable operators have already scaled back plans to invest in plant and equipment as a result of the proposals pending in Congress.[121] Investments in new program services have also been discouraged. There is no basis for demands by local officials to scrap the Cable Act's renewal standards.

E. *The "Must-Carry" Rule*

The D.C. Circuit, in two recent decisions, *Quincy Cable* and *Century Communications*, invalidated the FCC's "must-carry" rules under the first amendment.[122] The Danforth bill[123] and staff draft[124] provide that cable operators must carry all qualified local television broadcast stations to be eligible for the compulsory copyright license.[125] The bill and draft imposes onerous conditions, such as requiring carriage of as many as 23 stations on a 70 channel cable. They also give broadcasters the right to require that their position on the cable dial correspond to their number on the television dial.[126] The proposed "must-carry" requirements suffer from the same constitutional infirmities as the FCC rules twice invalidated by the D.C. Circuit.[127] Forcing cable to carry a multiplicity of local stations, often with duplicative programming, even when subscribers prefer other types of programs such as unique cable-originated services, undermines the first amendment.

---

[121] Higgins, *TCI Considers Sharp Capital Budget Cuts*, Multichannel News, Feb. 19, 1990, at 1, col. 5.

[122] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Century Communications Co. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517, *cert. denied*, 486 U.S. 1032 (1988).

[123] S. 1880, 101st Cong., 1st Sess. § 5 (1989).

[124] STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 15 (Comm. Staff Draft 1990).

[125] 17 U.S.C. § 111 (1988).

[126] *See* S. 1880, 101st Cong., 1st Sess. § 5(a) (1989); STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 15 (Comm. Staff Draft 1990).

[127] In an effort to side-step *Quincy* and *Century*, the Danforth bill and staff draft do not mandate "must-carries." Instead, they require a cable system to carry local stations *if* it wishes to take advantage of the Copyright Act's compulsory license. S. 1880, 101st Cong., 1st Sess. § 2(17) (1989); STAFF OF SENATE COMMERCE COMM., 101ST CONG., 1ST SESS., AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR CABLE TELEVISION CONSUMER PROTECTION ACT, S. 1880 § 2(15) (Comm. Staff Draft 1990). But Congress cannot *condition* the benefits of the compulsory license on cable's sacrifice of the constitutional right to control its programming. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 841-42 (1987).

Despite these constitutional problems, the issue of local signal carriage, without over-reaching demands by broadcasters, appears capable of resolution by a reasonable industry compromise. With rapidly growing channel capacity, cable operators have every incentive to carry local non-duplicative signals that are attractive to subscribers.

F. *Forced Access Proposals*

Anti-cable forces attack the ownership of program networks by multiple system owners ("MSOs") — networks in which cable operators initially invested millions of dollars of risk capital. But a recent study by the Commerce Department's National Telecommunication and Information Administration ("NTIA") concludes that vertical integration has been beneficial to consumers and that "limits on vertical integration are undesirable."[128] NTIA also rejects allegations that MSOs discriminate against non-affiliated services and unfairly deny programs to wireless operators such as MMDS.[129]

1. Forced Access to Cable-Originated Programming Services

Nevertheless, the Danforth and Gore bills and the draft proposal of the staff of the Senate Commerce Committee provide that cable-affiliated services must make their programming available to all other cable systems and multi-channel wireless video distributors operators such as DBS, MMDS and SMATV on non-discriminatory prices and terms.

This proposal collides with the first amendment. Congress cannot, for example, order *The Washington Post* to sell the syndicated columns it controls to its rival, *The Washington Times*. Nor can Congress force CBS, NBC, or ABC to license prime-time programs to independent UHF stations that compete with the networks' prosperous VHF stations in the nation's major markets. The same principle should apply to cable. Electronic publishers cannot be forced to make their speech available to rival speakers under the first amendment.[130]

---

128 NTIA Report, *supra* note 25, at ii.

129 *Id.* at 102, 106-07.

130 The forced program-access proposal, denying cable the right to exclusive control of its programming, is also incompatible with the FCC's recent "syndex" decision. United Video, Inc. v. FCC, 890 F.2d 1173, 1180-81 (D.C. Cir. 1989). There, the Commission enforced local-station exclusivity on syndicated programs against distant-signal importation of those programs to stimulate diversity. Cable systems, according to the Commission, will now have to select new programs to replace the banned syndicated programs. The FCC believed that this would increase diversity.

The government is not free to declare that cable operators and cable programmers have developed valuable programming, and that it would be nice if they were forced to sell it to third parties. A service like HBO or CNN is speech; when it is being broadcast, the originator of the service is "speaking." If it must be sold to competitors, the originator of HBO or CNN is being forced to use its intellectual property to allow others to communicate, and that originator ends up speaking, unwillingly, over the communication channels of others.[131]

The proposed regulation also fails on an economic level. The "equal" price that competitors would pay to cable proprietors would not be fair. It would not reward the cable operator for the risk of developing the programming. It would undermine the very premise of program development — to design an attractive service that would induce people to subscribe to cable service and to reap any further rewards, at unregulated prices, that programming might bring.

Compelled program access, denying cable programmers of the exclusivity typical in the communications and entertainment industry, would create a disincentive to risk capital in creating new programming. This would decrease diversity of ideas and artistic output contrary to the goals of the first amendment. NTIA declared: "Program exclusivity can benefit buyers, sellers, and the public because it is an important component of the copyright system which ensures creators have adequate incentives to produce more programming."[132]

2. Forced Access to Cable Channels

The Gore bill provides that a cable system must provide access to "any program service" except if it lacks channel capacity or determines that the service is not suitable under local community standards.[133] This proposal — converting cable from an electronic publisher into a common carrier — is contrary to basic first amendment values. It would force cable operators to broadcast the speech of any and all third parties, no matter how dis-

[131] This is in direct conflict with cases like Wooley v. Maynard, 430 U.S. 705 (1977), and Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[132] NTIA Report, *supra* note 25, at ii. The draft bill of the staff of the Senate Commerce Committee also gives the FCC the power to limit the number of channels that can be occupied by programming controlled by a cable operator. The purpose is to ensure that cable operators "do not favor" their own programs. This proposal also clashes with the first amendment. There is no basis for telling multichannel cable speakers how much of their own speech to use. The NTIA Report found no problem in this area.

[133] S. 1068, 101st Cong., 1st Sess. § 5 (1989).

tasteful or duplicative, in violation of first amendment principles established by the Supreme Court.[134] Forcing cable operators to provide such access would also preempt cable channels and thereby prevent cable operators from presenting programs that they believe are more suitable and attractive in terms of their overall menu of programs.[135]

As the Supreme Court declared in *Miami Herald*, "[a] newspaper is more than a passive receptacle or conduit"; "[t]he choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment."[136] The Court added that "any such compulsion to publish that which 'reason' tells them should not be published is unconstitutional."[137] The Supreme Court, as noted, has emphasized that cable television is an electronic publisher entitled to exercise broad editorial discretion like other media of communications.[138] Cable operators may not be forced to publish material which "reason tells them should not be published."[139]

To the extent there are complaints about vertical integration from cable's competitors, the marketplace, the antitrust laws, and technological development should provide adequate remedies. As cable systems are upgraded and add increased channel capacity (70 or more channels in newer systems), there will be an abundance of outlets to accommodate a broad array of programs from a wide variety of sources. Cable operators have a compelling economic incentive to fill their channels with diverse programs to attract and retain subscribers.

---

[134] *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-56 (1974) (invalidating right of access to newspapers); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110-11 (1973) (invalidating right of access to broadcasters); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1050-52 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (invalidating FCC's mandatory access requirements, noting cable is not a common carrier); Century Communications, Inc. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517, *cert. denied*, 486 U.S. 1032 (1988) (invalidating FCC's must carry rule); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1457-62 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (invalidating FCC's must carry rule). *See also* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 10-11, 15-17 (1986).

[135] *See Miami Herald*, 418 U.S. at 256-57; *Quincy*, 768 F.2d at 1451-54.

[136] 418 U.S. at 258.

[137] *Id.* at 256 (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945)).

[138] Converting cable from an electronic publisher into a common carrier also raises disturbing questions under the Takings Clause of the fifth amendment. The Supreme Court has stressed that cable is a first amendment speaker, not a common carrier obligated to accept messages of third parties. *See supra* note 45. The Cable Act confirms that cable is not a common carrier. Cable Act, § 621(c), 47 U.S.C. 541(c) (Supp. V 1987). Cable operators invested billions of dollars in reliance on Congressional, judicial, and FCC policies treating cable as an electronic publisher. The current forced-access proposal would undermine those investment-backed decisions by converting cable into a common carrier.

[139] *Miami Herald*, 418 U.S. at 254.

CONCLUSION

Cable television, with a growing multiplicity of channels, has provided the public with the greatest diversity of programs and information at the lowest prices in the nation's history. Before the growth of this medium of abundance, the public had been limited to the advertiser-supported fare of the three commercial networks. Such a diet of programming has been described by former FCC Chairman Minow as a "vast wasteland."[140] Cable is meeting needs neglected by broadcasters, with 24-hour news and sports, gavel-to-gavel coverage of Congress, specialized programs services geared to minorities, quality children's programming and documentaries, channels devoted to arts and cultural events, and locally originated programs geared to special community needs.

The Cable Act has been fully operative for only about three years. It would be counter-productive to repeal this new Act and substitute a pervasive scheme of regulations by myriad local political forces. Faced with a lack of stability and certainty, the threat of massive reregulation and a welter of constitutional battles, the cable industry would be discouraged from investing in new channels, new programs, new plants, and new technologies.

In the long run, market forces — not bureaucratic regulations — will best promote the interest of viewers in receiving the widest possible diversity of information and entertainment services. Regulators, no matter how well-intentioned, cannot predict the future of revolutionary communications technologies or regulate diversity. They should be particularly reluctant to embark on such a perilous venture when critical first amendment rights are at stake.

---

[140] N. MINOW, EQUAL TIME 52 (1964).