Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response

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INTRODUCTION

On the question of the right to photograph there is as yet very little judicial opinion. Clearly, every one who sees fit may make pictures of natural scenery. . . . We think that no photograph exposing others to scorn, disgrace, or contempt would be tolerated.1

One-hundred years ago, during photography's infancy, this was one commentator's opinion as to the permissibility of taking "controversial" photographs. Today, such a position would clearly be contrary to the notions of permissible photography as practiced by photo-journalists, encouraged by society, and protected by the first amendment. However, while photography escaped extensive regulation, many other modes or media of expression have not fared as well. Early societal and legal restrictions on media often have become permanently entrenched and accepted. When society becomes disillusioned with or ignorant of the capabilities of the new mode or medium of expression it often reacts by imposing restrictions. More often such restrictions are the product of the politically powerful attempting to maintain or increase their power and control over society. By setting the ground rules for the new outlet of expression, and by appealing to the majority's fundamental intolerance of the minority, the powerful ensure the continued access of those with whom they agree while freezing out any opponents. Fortunately, as was the case with photography, many such knee-jerk restrictions are detected early and remedied so as to fuel the free flow of expression.

One new medium of expression suffering through these early growing pains is cable television's public access channels.2 Public access channels offer citizens the unprecedented opportunity to express themselves over the powerful medium of television—free from the control of the government or media conglomerates. Public access channels are the electronic soap box of the next—soon to be current—communication age. However, due to disappointment with some of the programming appearing on public access, local governments, cable companies, and even individual cable television subscribers are attempting to restrict material presented on these channels. These restrictions could have deleterious effects on the future uninhibited use of

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1. Scientific American, Apr. 1889.
2. For a description of public access channels see infra notes 52-100 and accompanying text.
the medium. The disappointment stems from the cablecasting of controversial programming or programming produced by unpopular groups. To date, public access programming produced by white supremacists has caused the most furor.

The goal of this Comment is to critique the various governmental responses to controversial programming on public access channels. Local communities have attempted to control controversial programming through the application of two techniques: counter-programming and scheduling. Both methods are intended to diminish the impact of the controversial message and are implemented based solely on the content of the program. Therefore, such restrictions implicate the first amendment and must be scrutinized in accordance with the amendment's precepts.

The background section of this Comment will review the history and development of the cable television industry in general and access channels in particular. This Comment will then examine the Federal Communications Commission's ("F.C.C.") regulation of cable television, focusing primarily on the F.C.C.'s regulation of public access channels from the late 1960's until the late 1970's. Next, the background section will analyze the Cable Communications Policy Act of 1984, the current framework under which local communities control cable television and public access channels. Finally, the background section will conclude with a description of some of the controversial programming at issue, the circumstances under which such programming has been submitted, and the various responses of local governments, cable companies, and local citizens.

The analysis section will examine the treatment controversial speech receives under the first amendment. This Comment will then explore the appropriate level of governmental intrusion on public access programming by applying a public forum doctrine analysis and analyzing a state action problem associated with public access channels managed by non-profit corporations. Lastly, this Comment will critique the use of counter-programming and scheduling as responses to controversial programming on public access channels. This comment concludes that counter-programming and scheduling, as presently practiced, are impermissible because such techniques are contrary to the traditional first-come, first-served public access environment, contravene the purpose of public access as set out by Congress, and violate the first amendment under current public forum doctrine analysis.

I. BACKGROUND

A. Development of the Cable Industry

The first cable television systems in the United States were constructed in the late 1940's. These early cable systems were known as community antenna
television ("CATV") systems, reflecting the fact that they only retransmitted broadcast signals. The location of the first CATV system is "shrouded in the same definitional haze which has obscured the origins of most 'firsts' in broadcast innovation." Cities in Oregon and Pennsylvania claim to have been the location of the first CATV system in the United States. A local radio station operator in Astoria, Oregon, is often credited with constructing the first noncommercial CATV system in 1949. By other accounts, a line serviceman for a utility company who, in 1948, constructed a CATV system in Mahonoy City, Pennsylvania, is the rightful "father of cable television." However, the first CATV system specifically designed to earn a profit, and usually credited with launching CATV was located in Lansford, Pennsylvania.

Jerrold Electronic Corporation, an equipment manufacturer, planned the Lansford CATV system in October 1949, finished construction by early 1950 and, thereafter, began service as a profit-making venture. In these early systems, a CATV subscriber would pay approximately $100 for the installation of the cable and approximately $5 per month for service. The industry grew rapidly and by 1955, there were 400 CATV systems serving 150,000 subscribers.

8. S. REP. 67, supra note 7, at 5. Apparently many early CATV entrepreneurs were either appliance store owners or television repairmen attempting to increase business. M. HAMBURG, ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION §1.02 (rev. ed. 1982) (John Walson, Sr., an appliance store owner, constructed the CATV system to increase sales of television sets as well as collect subscriber fees). This phenomenon closely tracks the modus operandi of the early radio industry pioneers, whose desire to construct radio stations and create programming was fueled by the anticipated profit from selling more radios. D. LEDUC, supra note 6, at 67.
10. See M. HAMBURG, supra note 8, § 1.02; D. LEDUC, supra note 6, at 68.
11. See, e.g., M. HAMBURG, supra note 8, §1.02 (Mahonoy City system charged $100 installation, $2 monthly fee); D. LEDUC, supra note 6, at 67 (typical system charged $100 installation, $5 monthly fee); R. ORINGEL & S. BUSKE, supra note 9, at 2 (Lansford system charged $125 installation, $3 monthly fee).
   Today the average basic monthly fee is $12.48. Telephone interview with Tom Kavanaugh, Regional Marketing Analyst, Showtime Networks, Inc. (Mar. 1, 1989) [hereinafter Kavanaugh interview].
Early CATV's sole purpose was to retransmit distant broadcast television signals to rural, remote areas. Most early judicial opinions that ventured to define CATV shared this assessment. CATV existed to "amplify and distribute television signals of good quality to areas where reception [was] non-existent or difficult." Because broadcast signals travel in straight paths, diminish with distance, and lose clarity when encountering obstacles like mountains, remote, rural areas were the first gaps in the broadcasting void for CATV systems to fill. By installing an antenna on a high location—such as a nearby hill or mountain—the CATV operator would pick up the broadcast signal and transmit it by wire or cable. The signal would be transmitted on utility poles or in underground conduits downhill from the antenna, through various amplification equipment, to the back of the subscriber’s television set, thereby providing interference-free service.

As technology advanced, the nature of CATV changed dramatically. While early systems had a capacity for three to five channels, technology improvements led to a 12 channel capacity in the 1960's, 20 channels in the early 1970's, 36 in the late 1970's, and 54 channels in the early 1980's. Today's state-of-the-art systems have the capacity to offer well over 100 channels.

Advancement was not limited to increases in CATV channel capacity. Programming offered by the CATV company expanded beyond the mere retransmission of broadcast signals. Technology advanced so that the CATV operator could "cablecast" programming produced by itself or third parties. In 1975, Home Box Office became the first company to distribute its own

19. S. REP. 67, supra note 7, at 4; G. SHAPIRO, P. KIRLAND & J. MERCURIO, supra note 18, at 1. A sample of 1227 midwest cable systems reflects the following channel capacity breakdown: 1) less than 15 channels—220 systems; 2) greater than 15 and less than 40 channels—782 systems; 3) greater than 40 and less than 60 channels—201 systems; 4) greater than 60 channels—24 systems. Kavanaugh interview, supra note 11.
20. "Cablecasting" is "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." In re CATV (Pt. 74, subpt. K, First Report and Order), 20 F.C.C.2d 201, app. at 223 (1969). Cablecasting was later subdivided into "origination cablecasting" (under the control of the cable operator) and "access cablecasting" (under the control of third parties). Cable Television Report and Order, 36 F.C.C.2d 143, app. at 215 (1972). For further discussion of "cablecasting," see infra notes 123-164 and accompanying text.
programming nationally by satellite to CATV systems. From its simple beginnings, CATV was transformed into a “complex electronic distribution system with multichannel capacity, two-way transmission capability, local distribution hubs, and local, regional and national interconnection of hubs through terrestrial microwave and domestic satellite facilities.”

Because CATV systems now offered more services than the term “community antenna television” connoted, they became known as “cable tele-

22. Id. at 1.
23. A sample of additional services that the cable industry planned to offer and the public hoped to receive included:

[F]acsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airline reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State and municipal level; e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; various educational and training programs; e.g., job and literacy training, preschool programs in the nature of “Project Headstart,” and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression (e.g., community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community.


Communities can use cable to provide diagnostic and other health services to the elderly or to those confined to the home; Communities can use cable to provide job training services, educational services, or to deliver other social services efficiently; Cable systems can be utilized for load management by private or public electric utilities, providing significant saving for the utility and resulting in more efficient use of our nation's energy resources; . . . . Cable systems can be utilized to provide traffic control, security services and alarm services. If, for example, homes in an area are hooked to the fire department, the fire department will be able to respond more quickly to alarms reducing the loss of life and dproperty [sic], and ultimately (we hope) insurance rates.

Id.

See also Ledbetter, An Overview of Cable Television, reprinted in CABLE TELEVISION IN THE CITIES: COMMUNITY CONTROL, PUBLIC ACCESS, AND MINORITY OWNERSHIP 13 (C. TATE ed. 1971) [hereinafter C. TATE] (speed mail flow, increase computer accessibility and interaction, computerize traffic control, provide emergency communication for combating crime, offer demonstrations and remote retail shopping for marketers); Tate, Community Control of Cable Television Systems, reprinted in C. TATE, at 23 (provide in-home education for handicapped and elderly, increase use of computerized grading in schools, disseminate medical and dental
vision” or “cable systems.”24 Under current federal cable legislation,25 a “cable system” is generally defined as “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.”26 Today, cable television has grown to a $12,000,000,000.00 industry, comprised of 8,000 cable systems subscribed to by more than half of the households in the United States.27

Cable currently delivers programming from four sources: retransmission of broadcast stations; satellite-delivered programming from professional vendors; origination of programming produced by the cable operator, known as local origination; and access programming produced by local individuals

information, list substandard and abandoned housing, review leases and installation contracts, discuss consumer issues, establish consumer hotline for legal aid and consumer protection, increase use of videotape depositions in litigation, provide alarms systems for homes, and allow gas, water, and electric meter reading); Head, Voices on the Cable, HARPERS, Mar. 1973, at 28, 30 (reduce overcrowded classrooms, measure environmental deterioration, disperse overcrowded populations in large cities, lessen neighborhood violence, prevent and control crime, and obviate unnecessary business trips).

For a less optimistic view of cable, see Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652, 665, 667 (N.D. Ohio 1968) (“The public has about as much real need for the services of CATV systems as it does for hand carved ivory back-scratchers. . . . [CATV is] perhaps one of the least necessary services imaginable.”).

24. See Amendment of Pt. 74, subpt. K, §§ 74.1107; 74.1031(c); 74.1105(a),(b), 36 F.C.C.2d 143, 144 n.9 (1972). See also Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 979 n.1 (D.R.I. 1983) (“Cable television is a broader term that refers to systems capable not only of re-transmitting television broadcast signals but also of transmitting a variety of programming from non-broadcast sources made possible by satellite delivery systems as well as programming originated in their own studios.”).

Today, many cable systems transmit signals via optical fiber, not cable. See S. REP. 67, supra note 7, at 4. Presumably, “optical fiber system” or “fiber system” will not replace the “cable television system” moniker. Optical fiber cables contain “one or more optical fibers through which laser light, modulated to carry information, is transmitted.” Miller & Beals, supra note 5, at 87 n.10.


26. 1984 Cable Act § 522(6). See also H.R. REP. 934, supra note 7, at 44, reprinted in USCCAN, at 4681 (same). The original Senate bill that became the 1984 Cable Act defined “cable system” as:

a facility or combination of facilities under the ownership or control of any person or persons, which consist of a primary control center used to receive and retransmit, or to originate broadband telecommunications service over one or more coaxial cables, or other closed transmission media, from the primary control center to a point of reception at the premises of a cable subscriber.

S. REP. 67, supra note 7, at 18-19, 35.

and organizations not associated with the cable operator. Satellite-delivered programming consists of pay television, all-news networks, superstations, religious networks, and other specialized programming services.

Local origination programming is produced, directed, engineered, and controlled by cable company employees. The cable operator determines the content of the programs and often sells advertising time during the show. Cable systems in Montana and Maryland developed local origination in the early 1950's. A recent study found that 90 percent of cable operators

28. See S. REP. 67, supra note 7, at 5:

Systems . . . [carry] local and distant signals, multiple tiers of pay programming, locally originated information and entertainment, text services, C-SPAN's transmission of the proceedings of the House of Representatives and Senate committee proceedings, 24-hour news channels, health programming, religious programming for children and other special audiences, alert and alarm services, and networks specializing in sports events.

Id. See also Miller & Beals, supra note 5, at 87 (broadcast entertainment, channels for public and governmental use, local origination programming, educational channels, closed circuit channels which connect public institutions, specialty information channels, all news channels and FM radio channels).

A recent study suggests that the channels most valued by cable subscribers are distant broadcast signals, pay programming, news channels, and sports channels. Sparkes & Kang, Public Reactions to Cable Television: Time in the Diffusion Process, 30 J. BROADCASTING & ELEC. MEDIA 213, 225 (1986).

29. These services usually require that the subscriber pay an additional fee for each service above the monthly cable fee. Pay television programming services include (with their average monthly charge in parentheses); Home Box Office ($10.13); The Movie Channel ($9.85); Showtime ($9.67); The Playboy Channel ($9.65); The Disney Channel ($9.21); and regional sports networks. Kavanaugh interview, supra note 11.

30. News networks include: Cable News Network; Cable News Network Headline News; C-SPAN (covers the House of Representatives); and C-SPAN II (covers the Senate).

31. WTBS in Atlanta, WOR in New York, and WGN in Chicago are examples.

32. Religious services include: the Christian Broadcasting Network; Eternal World Television Network; and Praise The Lord/People That Love (PTL).

33. Specialized networks include: Black Entertainment Television (BET) (programming produced by or concerning African-Americans); the Discovery Channel (travel and science); Entertainment-Sports Programming Network (ESPN) (sports); Home Shopping Network (consumerism); Music Television (MTV) (music videos); the Nashville Network (TNN) (country music videos); Nickelodeon (children's programming); and the USA Network (sports and general entertainment).

34. R. Ornel & S. Buske, supra note 9, at 3-4 (descriptions of each of aforementioned programming categories).

35. Id. at 10.

36. Id.

37. Apparently the CATV operator in Livingston, Montana, also the owner of a local AM radio station, produced origination programming in the radio station studio using a camera. In re CATV and TV Repeater Services, 26 F.C.C. 403, 408 n.2 (1959). The operator also presented advertising slides during his origination productions. Id.

38. R. Ornel & S. Buske, supra note 9, at 12. By the late 1960's at least 30 operators produced local origination programming. Id.
produced local origination programming. In order of frequency, the study found that programming cablecast on local origination channels included community bulletin boards (automated alphanumeric programming), public service announcements, local sports, public meetings, interview shows, panel discussions on public issues, local news, and call-in shows. Cable subscribers often confuse access programming—produced by third parties—with local origination because both are locally produced and often share the same channel.

B. Access Programming

Cable access, in its broadest sense, is the right of parties other than the cable operator to use cable system facilities to produce and cablecast programming free from the editorial control of the cable operator. From a metaphysical standpoint, access proponents subscribe to the theory that the decentralization of telecommunications program control can serve to enhance the quality of life in a community. Most studies that examined the issue of access to cable in the early 1970's recommended the concept. In 1972, the Sloan Commission on Cable Communications concluded:

There is a need, in every community for the expression of common notions, for the expression of artistic and cultural endeavors; a need to serve the elderly, the deaf, the very young. . . . There is a need to express oneself in forms that can be carried across boundaries to similar communities elsewhere, and indeed to dissimilar communities which might profit from the repression of unpopular views. There is a pervasive need, in short, to be heard.

The Cabinet Committee on Cable Television in 1974 also supported access:

Cable offers countless Americans a chance to speak for themselves and among themselves in their own way, and a chance to share with one

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40. Id. at 247. See also R. Orinigel & S. Buske, supra note 9, at 13 (extensive list of examples of local origination channel programming). Cf. Ledbetter, Cablecasting: Local Origination for Cable Television, reprinted in C. Tati, supra note 23, at 52-53 (four local origination case studies from the early 1970's).

41. R. Orinigel & S. Buske, supra note 9, at 10-11.


43. G. Gillespie, supra note 7, at 79 (quoting Henaut, A Few Notes on Regional Projects, Access 11 (Autumn 1972)).


another their experiences, their opinions, their frustrations and their hopes.46

Access proponents envision the channels as an alternative to the “standard prepackaged TV fare” on broadcast channels.47 Access provides an opportunity for the viewer to “strike back” at the sterile and mundane ad-supported network programming, monopolized by a select few media giants.48

This decentralization of programming would bring with it desired program diversity.49 Furthermore, access proponents insist that diverse access programming would “serve to promote a more enlightened and better informed citizenry.”50

Access programming is categorized into public, educational, governmental (or municipal), and commercial (or leased) access.51 Each programming

46. CABINET COMMITTEE ON CABLE TELEVISION, CABLE: REPORT TO THE PRESIDENT 15 (1974) [hereinafter CABINET COMMITTEE ON CABLE TV]. See also Baran, On the Impact of the New Communications Media Upon Social Values, 34 LAW & CONTEMP. PROBS. 244 (1969), in which the author stated:

This flood of news flowing downward and the felt lack of an upward channel of reply can be expected to worsen in the near term. We need an information feedback channel to assure the citizen that his specific message (not the group response) has, in fact, been received by the power structure. Failure to supply such a channel would appear to guarantee alienation from the political process.

Id. at 251.

47. See R. KLETTER, CABLE TELEVISION: MAKING PUBLIC ACCESS EFFECTIVE 1 (1973).

48. Id.; Note, Quincy Cable and Its Effect on the Access Provisions of the 1984 Cable Act, 61 NORTHE L. REV. 426, 431 n.47 (1986) [hereinafter Note, Quincy Cable] (citing 2 C. FERRIS, F. LLOYD & T. CASEY, CABLE TELEVISION LAW § 15.01 (1985)). Ironically, in the late 1960’s, the Nixon-appointed F.C.C. Commissioners backed mandatory access requirements because the administration felt access programming might diminish the power of the “liberal” commercial television networks, thereby benefiting the Republican party. See Price, Requiem for the Wired Nation: Cable Rulemaking at the F.C.C., 61 VA. L. REV. 541, 542 (1975) (“The possibility of support for cable television served as a weapon for the Nixon administration in Its feud against the networks.”); Meehan, Coming Up Next on Channel C: You!, SATURDAY REVIEW, Sept. 9, 1972, at 14, 18. For a discussion on the F.C.C.’s role in access, see infra notes 112-64 and accompanying text.

49. For a more thorough discussion of “diversity,” see infra notes 199-202 and accompanying text.


51. R. ORINGEL & S. BUSKE, supra note 9, at 11. Other minor specialized access categories include religious and elderly access. Under Rhode Island regulations, “other” access channels may include “religious, cultural, ethnic heritage, and library access.” See Berkshire Cablevision of R.I. v. Burke, 571 F. Supp. 976, 979-80 n.3 (D.R.I. 1983). For a brief account of religion’s early contribution to access, see G. GILLESPIE, supra note 7, at 42-45. Religious access may contain “such events as church activities ... or bible study discussion.” Prangley, Local Community Access Programming: “A Community Pipeline,” 9 CURRENT MUN. PROBS. 355,
category can have an access channel devoted to it exclusively, or often, a
cable operator will combine various access programming umbrellas, and local
origination, on one channel.

1. Public Access

A public access channel is a channel "set aside by the cable operator for
exclusive use by local individuals and community groups." The cable
operator often provides studios, production equipment, and personnel to
assist access users in developing programming. The citizen or community
organization users serve as the broadcasters, actors, directors, producers,
engineers and script writers. Public access has been analogized to an
electronic soap box, a modern town square, free-form television, the
electronic parallel to the printed leaflet, an apartment building's lobby TV


One access proponent described the breadth of all access programming:

Folk acts of the Southeast, hosted by a local museum; the county advocate, focusing
on county agencies; live coverage of city council meetings; individual editorials;
local news, covering a suburban area, produced by the junior league of that area;
two-way programming including discussions with city officials; a series on law-
related matters produced by a local bar association; programming on reading by
local public libraries; and adult education courses.

Under the access rubric there is religious programming, senior citizen program-
ing, health information programming, educational programming for all age levels,
public service announcements, news, (etc).

House Subcomm. Hearings, supra note 42, at 429-30 (statement of William S. Singer, Chicago
Access Corp.).


53. In Dayton, Ohio, for example, the staff of the access management organization will
"produce up to a 15 minute cameo production for any [resident] at no charge" up to "6 times
during a calendar year." ACCESS—Dayton: Operating Rules and Regulations § 2.7 (Dayton,
Ohio, Apr. 1986).

54. Ronka, supra note 52, at 9. See, e.g., Preferred Communications v. Los Angeles, 754
F.2d 1396, 1400 (9th Cir. 1985) (potential cable operator to provide staff and facilities), aff'd
on narrower grounds, 476 U.S. 488 (1986); Erie Telecommunications, Inc. v. City of Erie, 659
F. Supp. 580, 582 (W.D. Pa. 1987) (potential operator to support access programming with
$120,000 upon award of franchise, $240,000 thereafter in monthly installments of $10,000,
followed by monthly payments based upon percentage of gross receipts), aff'd, 853 F.2d 1084
(3d Cir. 1988).

55. R. Oringel & S. Buske, supra note 9, at 10-11; Ronka, supra note 52, at 9.

56. H.R. Rep. 934, supra note 7, at 30, reprinted in USCCAN, at 4667; Price, supra note
48, at 551; TV Shows Made By People Like You, CHANGING TIMES, Apr. 1982, at 80. According
to one study of public access awareness in Milwaukee, Wisconsin, "public access is truly an
'electronic soap box' " to those residents aware of its existence. Porter & Banks, Cable Public

57. Minniberg, supra note 50, at 598.

58. TV Shows Made By People Like You, supra note 56, at 80.

59. H.R. Rep. 934, supra note 7, at 30, reprinted in USCCAN, at 4667. See also NIAPV
Report, supra note 27, at 4 (quoting cable commentator comparing access to "an electronic
Tom Paine; it's an electronic pamphleteer").
Public access is all of these. On public access, anyone can "do their own thing" and "interject a breeze of untrammeled and unrestrained discussion" into television viewing. Approximately 1,500 cable systems provide public access channels and facilities.

The public access idea began as a local phenomenon. The first reported use of public access was in Dale City, Virginia, where the cable operator opened up his local origination channel to the Junior Chamber of Commerce for community programming. The Dale City experiment lasted from December 1968 to early 1970, when lack of funding killed the project. New York City provided the next, and more widely recognized, experience in public access. In New York, a group of educational, artistic, and community organizations developed the idea of public access and helped draft it into the city's cable franchise agreements. By July 1, 1971, each of the two cable companies in New York provided two channels for public access.

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60. D. LeDuc, Beyond Broadcasting: Patterns in Policy and Law 157 (1987) ("[T]he cable's public-access channels seem to be approached by the public less as a viewing alternative than as an 'experience,' as one would watch an apartment building's lobby TV monitor in the hope of seeing a neighbor do something foolish in an unguarded moment.").


62. In re Cable Television Channel Capacity (Pt. 76, § 76.251), 53 F.C.C.2d 782, 800 (1975) (Robinson, Comm'r, concurring in part and dissenting in part) (access is a "'merit' good—which like spinach and Latin lessons are 'good' for us and which we should have—whether or not we want them bad enough to pay for them"); Wirth & Cobb-Relley, A First Amendment Critique of the 1984 Cable Act, 31 J. Broadcasting & Electronic Media 391, 393 (1987) (access as "merit good").

63. R. Oringel & S. Buske, supra note 9, at 7-8. The authors noted that before the printing press, "written communication was controlled for the most part by the power brokers—the feudal lords, the wealthy, and the church." Id. at 7. They parallel that concentration of power to the current "domination of broadcast television by large corporations and networks." Id. at 8. They conclude that public access, like the advent of the printing press, will add to the diversity of information available to citizens. Id.

64. TV Shows Made by People Like You, supra note 56, at 80.

65. Ronka, supra note 52, at 12.

66. McCoy, White Supremacists Find Free Forum Via Public Access Cable TV Stations, WALL STREET JOURNAL, July 12, 1988, at 38, col. 5. Cf. Moss & Warren, supra note 39, at 244 (study finding 80% of surveyed cable systems in New York, New Jersey and Connecticut have at least one public access channel).

67. G. Gillespie, supra note 7, at 35-36.

68. Id.

69. See generally D. Othmer, supra note 61 (description of origins of access in New York City in early 1970's).

70. Clifford, Vanity Video, NEW YORK, Aug. 6, 1979, at 34. See also Note, Quincy Cable, supra note 48, at 431 n.47 (citing 2 C. Ferris, F. Lloyd & T. Casey, Cable Television Law § 15.01 (1985)). For a discussion of the cable franchising process, see infra notes 171-72 and accompanying text.

71. G. Gillespie, supra note 7, at 36; D. Othmer, supra note 61, at 1; Meehan, supra note 48, at 19.
January 1972, the next innovation in public access occurred when the cable system in Reading, Pennsylvania, provided free office space, a telephone and $6,000 worth of videotape equipment to spur public access program development. Further public access advancements at the local level were stalled when in February, 1972, the F.C.C. released its Cable Television Report and Order which set out federal access requirements.

The success of public access varies from system to system and is dependent on the maturity of the cable system, the level of public access funding, and the commitment of the public, local government and the cable company to make public access work. Viewer awareness of public access has ranged from “horrible” to 86 percent of surveyed cable subscribers. One report found that the public access channel in East Lansing, Michigan, attracted a five percent rating from the cable system’s 20,000 subscribers. A public access channel in Bloomington, Indiana is reported to be watched by 50 percent of the adult-viewing audience and 100 percent of the children. Perhaps the most (in)famous access user is New York City’s Ugly George,

72. G. Gillespie, supra note 7, at 38.
73. 36 F.C.C.2d 143 (1972). For further discussion of the F.C.C. access requirements, see infra notes 112-64 and accompanying text.
75. See generally 1982 Sen. Subcomm. Hearings, supra note 23, at 434 (statement of Sue Buske, executive director, National Federation of Local Cable Programmers); R. Orngel & S. Buske, supra note 9, at 10 (list of eight factors for successful access).
76. Varley, Cities as Operators, Tech. Rev., Jan. 1983, at 59 (quoting representative from National Cable Television Association (“NCTA”), lobbying arm for large cable operators). Cf. Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1062 n.87 (8th Cir. 1978) (in survey conducted in mid-1970’s of 10,000 cable subscribers, 97% of those surveyed were disinterested in viewing access programming if they had to pay $1.75 to $2.00 per month for channel), aff’d, 440 U.S. 689 (1979).
77. R. Orngel & S. Buske, supra note 9, at 151-52 (citing survey of Kalamazoo, Michigan, cable subscribers). This study also found that, of all cable subscribers, 76% had watched public access at one time and 74% said the presence of public access was not at all important in their decision to subscribe to cable. Id. A similar survey of Milwaukee, Wisconsin, cable subscribers found public awareness at 50%, increasing to 66% in mature cable systems. Porter & Banks, supra note 56, at 44.

Ironically, one study suggests that nonsubscribers would be the audience most interested in the governmental access, educational access, and local access programming provided on cable systems. Sparkes & Kang, supra note 28, at 225.
79. Smith, Library Clout in Local Cable, American Library, Sept. 1981, at 500. The survey found that 35% of subscribers watched the city council meetings on a regular basis and 38% of those surveyed cited local programming as a reason for subscribing to cable. Id. See also Taylor, supra note 78, at 84 (more on child-produced programming in Bloomington, Ind.).
whose access show, "The Ugly George Hour of Truth, Sex and Violence," contains scenes of women disrobing on the streets and in the alleys of New York City. His program is estimated to have attracted as many as 150,000 viewers out of a possible audience of 300,000 cable subscribers.

As with viewer awareness, the level of participation in producing public access programming varies from community to community. One source estimated that no more than six percent of cable subscribers actively participate in public access programming. Some suggest that the number of people involved in producing cable access programming is greater than the number who watch it. In many communities, public access programming is supported (technically and monetarily) by libraries, schools, governmental agencies, community arts foundations, and nonprofit groups. Since Milwaukee, Wisconsin, inaugurated its public access channel in 1984, over 250 nonprofit/community organizations and over 1,550 individuals have been trained and certified to use public access equipment. In Columbus, Ohio, 760 people were trained to use public access in 1987, and an average of 403 citizens were trained per year from 1984 to 1986.

The amount of programming produced differs from community to community as well. In Columbus, Ohio, for example, public access users produced 2,188 programs in 1987, and averaged 1,525 per year from 1984 to 1986. One access advocate noted that the San Jose, California, cable system carried four or five hours of community programming per day, adding up to thousands of hours per year. However, in a study conducted in the early 1980's of a cable system with nine public access channels, programming


81. Babyak, On the Prowl with Ugly George, NEW YORK, Sept. 1, 1980, at 35-36. Ugly George's half-hour program is cablecast three nights per week at 11:30 p.m. M. HAMBURO, supra note 8, § 6.05[4].

82. TV Shows Made by People Like You, supra note 56, at 83.


84. TV Shows Made by People Like You, supra note 56, at 80.


86. 1987 Annual Report Cable 21—ACTV: The Community Channel (Columbus, Ohio, June 1988).

87. Id.

88. 1982 Sen. Subcomm. Hearings, supra note 23, at 435 (statement of Bruce Jacobs, director, Cooperative Communications Project). Jacobs defended the four to five hour level of daily programming: "I would say that is probably a good more than the average over-the-air broadcast station." Id.
accounted for only 3.7 percent of the channels' total broadcast time. Additionally, various studies and data have suggested that public access channels offer a variety of topics and formats. In Milwaukee, Wisconsin, for example, the types of groups who have used public access include social service (28%), community (25%), education (12%), cultural (8%), religious (8%), arts (8%), health (7%), and government (3%). Furthermore, because the access producer has complete control over the content of his show, the quality of public access programming varies with the personality, skill, and taste of the access producer. Access programs have been used to promote nonprofit community organizations, involve senior citizens, present political issues, teach the mentally retarded to communicate, discuss current

89. Id. at 255 (statement of Thomas E. Wheeler, president, National Cable Television Association). See also House Subcomm. Hearings, supra note 42, at 61 (statements of Thomas E. Wheeler, president, National Cable Television Association (cites 3.7% figure without mentioning number of access channels involved) and Trygve Myhren, chairman and chief executive officer, American Television and Communications Corp. (same)). Cf. Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1062 n.87 (8th Cir. 1978) (citing survey of 149 cable systems showing that access channels went unused an average of 92% of the time).
92. See R. Kletter, supra note 47, at 1 (access could "restore to the television screen some qualities that have nearly been refined out of it; originality; controversy; realism; even attractive amateurishness").
93. In Columbus, Ohio, community groups are encouraged to use public access to:
1. Raise the profile of the group's organization.
2. Educate the community about the organization's concerns.
3. Acquaint potential clients with the organization's services.
4. Recruit volunteers and offer public acknowledgement for their contributions.
5. Gain access to prime time viewing audience.
6. Exercise artistic and editorial control of program content.
7. Save expenses with cost effective method for promotion, publicity, and performance.
8. Obtain program ownership for other avenues of distribution and use.
9. Learn how to work with the other television outlets.
Think Video: Non-Profits & Public Access: ACTV—Channel 21 (Columbus, Ohio, Jan. 1988).
94. See, e.g., Brief of Amici Curiae Los Angeles Community Access Television, Alliance for Communications Democracy and National Association for Better Broadcasting in Opposition to Plaintiff's Motions for Summary Judgment at 3, Preferred Communications, Inc. v. City of Los Angeles, (Oct. 17, 1988) (No. 83 5846 CBM (BX)) [hereinafter Preferred Brief] (senior citizens program in Portland, Oregon); Taylor, supra note 78, at 84 ("Generation Gap" program in Reading, Pennsylvania); TV Shows Made by People Like You, supra note 56, at 83 (interview show with senior citizens in Kansas City, Missouri).
95. See, e.g., H. Dordick & J. Lyle, Access by Local Political Candidates to Cable Television: A Report of an Experiment (1971) (early experiment where local politicians used public access as a forum in Hawaiian election); Taylor, supra note 78, at 84 (public access program on demonstration against Ronald Reagan speech in Albuquerque, New Mexico).
96. See, e.g., Preferred Brief, supra note 94, at 3-4 (Chicago's Project Vital trains mentally retarded individuals to use cameras and create programming); TV Shows Made by People Like You, supra note 56, at 83 ("day-in-the-life" show produced by handicapped individuals in Minnesota, including account of how they put together the access program).
events, and present artists and entertainers. At the other end of the spectrum are programs produced by religious cults, advocates of drug legalization, and purveyors of sexually-explicit fare.

2. Governmental Access

Government access channels are exclusively controlled by the local municipal government. Through government access, local officials can more easily and effectively reach their constituents and will, it is hoped, become more accessible to the voters. The government can use these channels either as a forum for distributing information about local government activities or as a propaganda tool. Shows produced for government access include programs dealing with an explanation of the city budget, budget hearing coverage, an explanation of codes/ordinances, consumer information, candidate debates/forums, fire safety, home security, consumer issues, planning issues, health issues, hearing impaired, elderly, youth, physically disabled, and minority groups.

97. See, e.g., R. ORINGEL & S. BUSKE, supra note 9, at 168-69 (public access show in Austin, Texas, which has included interviews with figures such as former United States Attorney General, Nobel-prize winning biologist, and well-known civil rights lawyer).


100. The majority of sexually-explicit public access programming emanates from New York. See, e.g., Babyak, supra note 81, at 35 (Ugly George program containing scenes of various women disrobing); Mano, Public Access TV, Nat'l Rev., Nov. 21, 1975, at 1298 (tongue-in-cheek account of experience in public access training class in New York); Post, Notes on the Underground, New York, Mar. 9, 1981, at 42; Waters, The Lewd Tube, NEWSWEEK, Dec. 29, 1975, at 61 (strippers, topless salesladies in tropical-fish store, and contortionist); see generally D. OTTMEYER, supra note 61 (review of first two years of access in New York City with programming descriptions).

As one commentator opined, "[w]e may have small groups around the country using electrical communications of the future to share a common interest in some particularly novel form of pornography. Don't dismiss the idea completely. Nature abhors an empty communications channel." Baran, supra note 46, at 254.

101. Miller & Beals, supra note 5, at 112. Some commentators propose that "governmental" access be referred to as "municipal" access because that label "better describes the level of government that employs access." R. ORINGEL & S. BUSKE, supra note 9, at 100. Some have suggested that governmental access should not be limited to municipal officials, but should be opened up to State and Federal officials as well. See 1982 Sen. Subcomm. Hearings, supra note 23, at 220 (statement of Thomas E. Wheeler, president, National Cable Television Association).

102. R. ORINGEL & S. BUSKE, supra note 9, at 11.

103. Id. at 100. See also Miller & Beals, supra note 5, at 112.

104. R. ORINGEL & S. BUSKE, supra note 9, at 100. The authors did not discern any negative connotation by the term "propaganda." Most government access channels are operated as a forum for the distribution of information to the public. Id.

105. Id. at 114. For other uses of government access, see id. at 11, 100 (bulletin boards listing holidays, trash pickups, agendas of municipal meetings, live city council meetings).
3. **Educational Access**

Community groups program educational access channels in an effort to educate subscribers and citizens of all ages. Typically, local school system officials control educational access with the assistance of teachers, students, and school administrators.\(^{106}\) School officials can use educational access to 1) bring school information to the community; 2) update teacher training; and 3) instruct students on using the television medium.\(^{107}\) These channels carry school lunch menus, bulletin boards of school events, school plays, high school sporting events, continuing education courses for adults, school board meetings, and special education for handicapped.\(^{108}\)

4. **Commercial or Leased Access**

Commercial access is set aside for commercial programming produced by third parties. The programming may be commercial itself (e.g., promoting a local business), or it may be noncommercial yet include advertising. Cable operators charge leased access users an hourly fee for time on the channel.\(^{109}\) In Athens, Georgia, the local newspaper leased a channel from the cable operator to produce a local news program entitled, “Observer Television.”\(^{110}\) Since Athens lacks a local broadcast station, it is quite possible that “Observer Television” fills a need for local Athens news.\(^{111}\)

**C. Government Regulation of the Cable Industry**

1. **F.C.C. Regulation of Cable and Access**

From the late 1950’s through the early 1960’s, cable television went unregulated on the federal level.\(^{112}\) During that period, the systems were

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\(^{106}\) R. ORINGEL & S. BUSKE, supra note 9, at 8.

\(^{107}\) Id. at 93.


\(^{109}\) See, e.g., George P. Urban, a/k/a “Ugly George” v. Manhattan Cable Television, Inc., No. 86 Civ. 1821 (S.D.N.Y. Oct. 13, 1987) (Lexis 9174, Genfed library, Dist. file) (Manhattan Cable Television in New York City charges $100 per hour for first year leased access user and $175 per hour for all others).

\(^{110}\) R. ORINGEL & S. BUSKE, supra note 9, at 169-71.

\(^{111}\) Id.

regulated by local, and sometimes, state government.\textsuperscript{113} The F.C.C. saw early CATV systems as providing an interim service by retransmitting broadcast service to those rural, remote areas that did not yet have a local broadcast station.\textsuperscript{114} The F.C.C. believed that once this broadcast "coverage vacuum" was filled with new local stations, cable would disappear.\textsuperscript{115} In the late 1950's, the broadcast television industry encouraged the F.C.C. to assert jurisdiction over cable television pursuant to the Communications Act of 1934.\textsuperscript{116} The broadcasters felt that cable television would have an adverse effect on broadcast television, cutting into advertising revenues and possibly putting many local UHF channels out of business.\textsuperscript{117}

The broadcasters finally persuaded the F.C.C. in \textit{Carter Mountain Transmission Corp. v. F.C.C.}. The broadcasters reasoned that cable television hindered the agency's ability to regulate the broadcast industry according to "public interest" standard; the task assigned the F.C.C. under the Communications Act.\textsuperscript{118} Beginning in 1962, the F.C.C. began regulating more and more aspects of cable television.\textsuperscript{119} This encroachment culminated in 1966 when the F.C.C. asserted jurisdiction over \textit{all} cable television systems.\textsuperscript{120} Subsequently, in the 1968 case of \textit{United States v. Southwestern Cable Co.}, the Supreme Court approved the F.C.C.'s assertion of jurisdiction over cable


\textsuperscript{114} See \textit{In re CATV and TV Repeater Services}, 26 F.C.C. at 407 ("[t]o a substantial extent ... [CATV will] provide service in what would otherwise be 'white areas' where regular direct reception is not available. It is generally agreed that [CATV has] performed a desired service in bringing television to populations who would otherwise not have it."); D. LeDuc, \textit{supra} note 6, at 66 (same).

\textsuperscript{115} See D. LeDuc, \textit{supra} note 6, at 69-70.

\textsuperscript{116} See \textit{Frontier Broadcasting Co. v. J.E. Collier}, 24 F.C.C. 231 (1958) (complaint from 13 broadcast stations against 288 CATV systems urged F.C.C. to assert jurisdiction over CATV systems as communication common carriers). The Communications Act of 1934 was promulgated well before the advent of cable television. The F.C.C. sought clarification of its jurisdiction from Congress in 1959 and again in 1966, however, both proposed bills failed to pass. See \textit{generally} United States v. Southwest Cable Co., 392 U.S. 157, 165 (1968) (discussion of both bills); M. Hamburg, \textit{supra} note 8, § 1.08 (discussion of 1966 bill); D. LeDuc, \textit{supra} note 6, at 95-111 (discussion of 1959 bill).

\textsuperscript{117} See \textit{Frontier Broadcasting Co.}, 24 F.C.C. at 253; S. Rep. 67, \textit{supra} note 7, at 7-8.

\textsuperscript{118} 32 F.C.C. 459 (1962), aff'd, Carter Mountain Transmission Corp. v. F.C.C., 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963). One F.C.C. Commissioner later opined that "[t]he only specific meaning that can be attributed to the phrase 'public interest' as it is used in the Commission opinion is that it means protecting the private interest of broadcasters by limiting or suppressing any actual or potential competition by CATV." \textit{In re Business Radio Service (Pt. 91, subpt. L), Relay Television Broadcast Signals (Pt. 21, subpt. I), Distribution of Television Broadcast Signals (Pts. 21, 74 and 91), Distribution of Television Signals (§ 74.1103), and Carriage of Distant Signals (§ 74.1107(a))}, 6 F.C.C.2d 309, 337 (1967) (Loevinger, Comm'r, dissenting).

\textsuperscript{119} See, e.g., S. Rep. 67, \textit{supra} note 7, at 8 (carriage of distant broadcast signals generally, carriage of distant signals that duplicated local signals, systems that used microwave technology).

\textsuperscript{120} \textit{In re CATV} (Pt. 21, subpt. L; Pt. 21, subpt. I, Pt. 21; Pts. 21, 74 and 91; Second Report and Order), 2 F.C.C.2d 725 (1966).
television pursuant to section 152(a) of the Communications Act. The F.C.C.'s authority was restricted however, to that which was "reasonably ancillary" to regulate television broadcasting effectively.

The F.C.C. began to regulate local origination programming in the late 1960's. While it initially dismissed local origination programming as an isolated phenomenon, the F.C.C. soon realized the importance of the new method of programming and, despite protests from the broadcast industry, condoned local origination since it saw local origination as serving the public interest by providing an additional outlet for local programming, augmenting the fare on community-oriented UHF channels. By 1969, the F.C.C. had promulgated a rule that required all cable systems with more than 3,500 subscribers to originate programming by January 1, 1971. The F.C.C. required cable systems to originate programming, where practicable, as a condition for the carriage of broadcast signals. The cable operator could only originate on one channel and had to program the origination channel to a "significant extent." The cable operator was also required to provide facilities such as studios, cameras and playback equipment for the local production and presentation of programs. Programming on origination channels had to comply with the broadcast requirements of equal time, sponsorship identification, and fairness. Upholding the origination rule on

122. Id. at 178. The Court limited the F.C.C.'s authority to that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Id.
123. See, e.g., In re CATV and TV Repeater Services, 26 F.C.C. 403, 407-08 (1959); Frontier Broadcasting Co. v. J.E. Collier, 24 F.C.C. 251, 252 (1958) ("It is technically feasible for such systems to originate their own program material, but we have no information as to the extent to which this is being done.").
124. See, e.g., In the Matter of Midwest Television, Inc., 13 F.C.C.2d 478, 505 (1968) ("CATV program origination offers promise as a means for increasing the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service, without use of spectrum."). While considering this matter, the F.C.C. restricted the use of commercials on local origination to protect the opportunity for UHF channels to develop an advertising base. Id. at 506.
125. 47 C.F.R. § 76.201(a) (1974). See also In re CATV (Pt. 74, subpt. K, First Report and Order), 20 F.C.C.2d 201 (1969). The F.C.C. referred to local origination program transmission as "cablecasting" as opposed to broadcasting. Id. at 223.
126. 47 C.F.R. § 76.201 (1974); CATV, 20 F.C.C.2d at 208.
127. CATV, 20 F.C.C.2d at 206 ("[l]ong-standing principle in the television broadcast field that one entity should not be authorized, or have interest in, more than one television channel serving the same area").
128. Id. at 214 (F.C.C. defined significant extent as "something more than the origination of automated services (such as time and weather, news ticker, stock ticker, etc.) and aural services (such as music and announcements")"); 47 C.F.R. § 76.201(a) (1974).
129. CATV, 20 F.C.C.2d at 207.
130. 47 C.F.R. § 76.209 (1974). The F.C.C. issued these requirements because, to the cable viewer, local origination programming would be indistinguishable from broadcast programming.
reconsideration, the F.C.C. opined that origination programming would provide an outlet for those wishing to discuss controversial issues. In its 1972 case, United States v. Midwest Video Corp. [Midwest Video Corp. I], the Supreme Court upheld the F.C.C.'s origination rules as being "reasonably ancillary" to the F.C.C.'s duties under the Communications Act.

In 1969, the same year the F.C.C. was enacting origination requirements, it was also contemplating access requirements. The F.C.C. stated that cable operators should be encouraged, and possibly required, to provide a common carrier-type channel for third parties to present their own programming. The F.C.C. explicitly stated that neither the CATV operator, private parties, nor any governmental entity could exercise editorial control over access channel/content. In 1970, it requested comments on an access provision that would require the cable operator to set aside separate channels for governmental, public, leased, and "instructional" (i.e., educational) access programming.

The F.C.C.'s access regulations were the culmination of an extensive bargaining process between these private industry groups. After negotiations between the cable industry, the broadcast industry, and the copyright owners—the F.C.C. issued its 1972 Cable Television Report and Order which, among other things, required all cable systems in the top 100 television markets to set aside one channel each for public, governmental, educational, educational, educational, educational, educational, educational.

See CATV, 20 F.C.C.2d at 219.

For a discussion of these requirements in the broadcast field, see Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). Apparently, these requirements have rarely been enforced against a cable operator. See G. Shaprio, P. Kurland & J. Mercurio, supra note 18, at 50.

131. In re CATV Systems (Pt. 74, subpt. K, Memorandum Opinion and Order), 23 F.C.C.2d 825 (1970) (origination rule would "provide access to those willing to discuss controversial issues") Id. at 827.

132. 406 U.S. 649 (1972) [Midwest Video Corp. I]. Concurring in the 5-4 decision, Chief Justice Burger stated, "[t]heorizing requires acknowledgement . . . that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decision of the Commission and the courts." Id. at 676 (Burger, C.J., concurring).

133. CATV, 20 F.C.C.2d 201. For a general review of the F.C.C.'s actions in the access area, see Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1059-62 (8th Cir. 1978).

134. In re CATV (Pt. 74, subpt. K, First Report and Order), 20 F.C.C.2d at 202. Cable carriers should "operate as common carriers on some channels in order to afford an outlet for others to present programs of their own choosing." Id. at 205.

135. Id. at 207. Access channels would be "free from restriction by local, State, or Federal authority (or by private parties)." Id. However, the F.C.C. noted that illegal lotteries and obscenity would be prohibited on access channels. Id.


137. See Price, supra note 48, at 560-61. These negotiations were coordinated by the Office of Telecommunications Policy ("OTP"). The OTP, which is located in the Executive Office of the President, assists the President in developing communications policy. Barrow, OTP and F.C.C.: Role of the Presidency and the Independent Agency in Communications, 43 U. Chi. L. Rev. 291, 292 (1974).

and leased access.\textsuperscript{139} Because most cable systems had no more than a 12 channel capacity at the time, the F.C.C. also required some operators to rebuild their systems up to 20 channels to assure space for the required access channels.\textsuperscript{140} The F.C.C. felt it had to mandate access provisions rather than rely on the market forces of supply and demand.\textsuperscript{141} The F.C.C. stated that the access requirements furthered national communication goals by providing new outlets for community expression, promoting television program diversity, advancing educational television, and granting local governments a powerful tool.\textsuperscript{142}

\begin{itemize}
\item 139. 36 F.C.C.2d at 192; 47 C.F.R. § 76.251 (1974). These access rules were applicable to all new cable systems operational as of March 31, 1972, in the top 100 television markets. 36 F.C.C.2d at 197. Systems already in existence had five years to comply. 36 F.C.C.2d at 197; 47 C.F.R. § 76.251(c) (1974). The F.C.C. also set up a formula for cable operators to determine when they had to add more access channels. 36 F.C.C.2d at 192. Expansion would occur when the available access channels were “in use during 80 percent of the weekdays . . . , for 80 percent of the time during any consecutive three-hour period for six weeks running.” 36 F.C.C.2d at 192; 47 C.F.R. § 76.251(a)(8) (1974).

Beyond access provisions, the report also dealt with distant broadcast signal carriage, pay television regulation, channel capacity requirements and various technical standards. \textit{Id. See also} S. Rep. 67, \textit{supra} note 7, at 8-9 (describing new regulations). Apparently the distant broadcast signal and pay television regulations were part of the negotiated deal between the cable, broadcast, and copyright industry, while the access, channel capacity and technical provisions were not. Price, \textit{supra} note 48, at 561.

\item 140. 36 F.C.C.2d at 189-90.

\item 141. At a later date, the Eighth Circuit summarized the F.C.C.’s rationale for this decision: (1) cable television is new and evolving; (2) availability of cable channels for dissemination of information is even newer; (3) demand for access services is a function of community awareness of their existence; (4) awareness and full utilization of cable’s potential requires time; (5) some older systems have provided minimal access on a voluntary basis or no access; (6) in those communities awareness has not had opportunity or time to develop; (7) if its requirements resulted in blank channels, it believed that would shorten the time to realize the full potential for access services, because blank channels are visible and continuing inducements to be filled; (8) it considered that true for the channel user and the system operator; (9) if it required the system operator to provide access channels, he could be expected to encourage their use; (10) if it now altered its rules to reflect existing demand for access services, it would raise a barrier to growth of that demand and a distinction to new services “we expect of cable.” Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1033 (8th Cir. 1978) (citing \textit{In re Cable TV Channel Capacity} (Pt. 76, § 76.251), 53 F.C.C.2d 784, 787-88 (1975)).

Despite the F.C.C.’s access mandate, it allowed communities to “experiment” with various types of access provisions—such as program funding, number of channels and access studio management. \textit{Compare In re Application of Arlington Telecommunications Corp.,} 53 F.C.C.2d 757 (1975) (allowed designation of more than one channel for certain access umbrellas) and \textit{In re Application of Complete Channel TV, Inc.,} 34 Rad. Reg. 2d (P&F) 1372 (1975) (allowed access facilities to be funded partially by local government) \textit{with In re Open Channels,} 58 F.C.C.2d 1216 (1975) (disallowed direct funding of third-party nonprofit access foundation with franchise fee funds paid by cable operator to local government).

\item 142. 1972 Cable Television Report and Order, 36 F.C.C.2d at 190. According to the F.C.C., access requirements furthered the “fundamental goals of [the] national communications struc-
The public access channel would be available for noncommercial programming and provided without charge on a first-come, first-served nondiscriminatory basis. The F.C.C. also required that the cable operator promulgate rules which declared the nondiscriminatory nature of access, and proscribed programming containing advertising material, lottery information, and obscene or indecent matter. While recognizing that certain risks were inherent in open access, the F.C.C. nevertheless expressly stated that the cable operator "must not in any way censor or exercise program content control of any kind over" public access programming. The F.C.C. opined that the cable operator would not likely be liable for access programming because the system did not exercise any editorial control over the content of the channel. It was unnecessary for the F.C.C. to impose the fairness and
equal time doctrines on access channels because, unlike broadcast channels, the availability of these channels was to be unrestricted and guaranteed.147

In 1974, the F.C.C. deleted its rule requiring certain cable operators to originate their own programming.148 Because of the general economic downturn of the early 1970's and the over-optimistic assessment of origination's viewer appeal, the F.C.C. concluded that the mandatory origination scheme would not be the most effective method for providing an outlet for local viewpoints. Instead, it stated that it could best accomplish its goal of fostering local expression through the use of access channels. Although the cable operator no longer had to originate programming, the system would still have to maintain cablecasting equipment for access users.152

In 1976, however, the F.C.C. restructured and liberalized its access requirements and timetables.153 It extended, until 1986, the deadline for existing

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147. 36 F.C.C.2d at 196. This rationale was reiterated in In re Program Origination by Cable TV Systems (Pt. 76, subpt. G), 49 F.C.C.2d 1090, 1103 (1974). Some commentators feel that the availability of access channels could lead to the elimination of the "fairness" doctrine for broadcast channels as well. See Emerson, Legal Foundation of the Right to Know, 1976 WASH. U.L.Q. 1, 11; Price, supra note 48, at 551; Simmons, The Fairness Doctrine and Cable TV, 11 HARV. J. ON LEGIS. 629, 647 (1974). Cf. CABINET COMMITTEE ON CABLE TV, supra note 46, at 38; H. DORDICK & J. LYLE, supra note 95, at 24-25 (1971 experiment allowing political candidates to use public access channels as a forum; authors conclude equal time and fairness doctrines unnecessary because all candidates had free access). But see Barrow, Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience, 61 VA. L. REV. 515, 534 (1975) ("[T]he public access channel is available on a first-come, first-served basis to any person for expression on any subject. Hence, there is no procedure for ensuring that all sides of controversial issues will be ventilated, or that opposing political candidates will be heard before elections.").

One commentator has noted the inconsistency in requiring adherence to the "fairness" doctrine on local origination channels, see supra note 130, due to the indistinguishable nature of local origination and broadcast programming, and not requiring the "fairness" doctrine for access channels, which are just as indistinguishable. Simmons, supra at 651.


149. See id. at 1094.

150. Id. at 1104. Many origination advocates countered that the failure of origination was not due to lack of viewer interest, but rather due to the "minimal efforts by the operator to take advantage of, solicit, or even accommodate the program production creativity and talent available in the community." Id. at 1095.

151. Id. at 1099. Cable operators that voluntarily continued to operate a local origination channel still had to comply with the equal time and fairness doctrines. Id. at 1109; 47 C.F.R. § 76.205-209 (1976). This requirement continues today. 47 C.F.R. § 76.205-209 (1987).

152. 49 F.C.C.2d at 1106.

systems to comply with the access and channel capacity requirements. Some cable operators could also combine access channels until access users began to utilize the available time fully or the operator increased the system's channel capacity. Although the F.C.C. still believed that access channels were an important outlet for expression, it recognized that the prior estimates of access impact may have been exaggerated.

In 1979, the Supreme Court struck down the mandatory access rules because the requirements were beyond the jurisdiction of the F.C.C. In F.C.C. v. Midwest Video Corp. [Midwest Video Corp. II], the Court concluded that the access rules imposed common carrier obligations on cable operators which were beyond the F.C.C.'s power under the Communications Act. The Court distinguished the earlier Midwest Video Corp. I opinion because the access requirements, unlike the origination rules at issue in Midwest Video Corp. I, abrogated the cable operator's control over the composition of their programming content. The F.C.C. later deleted the access requirements altogether. The F.C.C. also reiterated its position that it would not apply equal time and fairness

154. Id. at 318-24; 47 C.F.R. § 76.252(b) (1976).
155. Id. at 311-18; 47 C.F.R. § 76.254(b) & (c) (1976). The F.C.C. also modified the composition of cable systems coming under the access requirements. Now, all systems with more than 3,500 subscribers were covered, not cable systems in the top 100 television markets as originally set out. 59 F.C.C.2d at 299-303; 47 C.F.R. § 76.254 (1976).
156. 59 F.C.C.2d at 296. The F.C.C. continued to believe the access could result in: the opening of new outlets for local expression, aid in the promotion of diversity in television programming, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities.

Id.

157. Id. at 296. ("overall impact ... of these channels ... may have been exaggerated in the past."). But see In re Major Market Cable TV Systems (Pt. 76, § 76.251(a)(1)-(a)(8)), 54 F.C.C.2d 207, 222 (1975) (Hooks, Comm'r, concurring) ("the potential uses for access channels are just beginning to materialize and alternative programming to fill those channels is beginning to veritably gush from colleges and other private video groups").
158. F.C.C. v. Midwest Video Corp., 440 U.S. 689 (1979). See also Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1031, 1042 (8th Cir. 1978) ("much of the Commission's cable-regulating has involved the planting of new and dramatic seeds of regulation, based on soaring, euphoric predictions (some from cable owners) of great things to come from cable television, seeds which had to be plowed under, when germination failed in the bright sunlight of commercial, economic, and technological reality .... [B]ut we deal here with the Federal Communications Commission, not the Federal First Amendment Commission."). aff'd, 440 U.S. 689 (1979); id. at 1045 ("jurisdiction is not acquired through the visions of Valhalla"); cf. Home Box Office v. F.C.C., 567 F.2d 9 (D.C. Cir. 1977) (particular pay cable television regulations beyond F.C.C.'s jurisdiction); S. REP. 67, supra note 7, at 9 (listing other early F.C.C. cable television rules either eliminated or struck down).
159. 440 U.S. at 701-02. Cf. National Ass'n of Regulatory Utility Comm'rs v. F.C.C., 533 F.2d 601 (D.C. Cir. 1976) (striking down, on similar grounds, the F.C.C.'s preemption of state common carrier regulations over the use of cable system leased access channels for nonvideo communications).
160. 440 U.S. at 700.
doctrine requirements to any access channels the cable operator voluntarily provided.\textsuperscript{162} Finally, the F.C.C. seemed to indicate that the content control restrictions as to lotteries and obscenity would no longer apply to access programming.\textsuperscript{163} Despite the Midwest Video Corp. \textit{II} holding, cable operators continued to provide access and local origination service, and in some cases, increased efforts.\textsuperscript{164}

2. \textit{Cable Communications Policy Act of 1984}

Congressional action on cable television regulation finally arrived in 1984 with the passage of the Cable Communications Policy Act of 1984 (1984 Cable Act).\textsuperscript{165} The 1984 Cable Act grew out of cable television legislation that Senator Barry Goldwater had introduced every year from 1979 until 1983.\textsuperscript{166} The Cable Act amended the Communications Act of 1934, the F.C.C.'s framework for regulating the electronic communications industry.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{162} \textit{Id.} at 148.
\item \textsuperscript{163} \textit{Id.} ("The specific content control rules pertaining to lotteries, obscenity, and sponsorship identification we will continue to apply only to programming which is subject to system operator editorial control.") (emphasis added).
\item Cable companies often use access as a "public relations" tool to attract new subscribers. See 1982 \textit{Sen. Subcomm. Hearings, supra} note 23, at 220 (statement of Thomas E. Wheeler, president, National Cable Television Association); G. Gillespie, \textit{supra} note 7, at 80. Lucrative access promises will also garner a cable company more franchise agreements with cities. Miller & Beals, \textit{supra} note 5, at 113 n.124 (cite to National Cable Television Association report that notes valuable marketing role access provides). \textit{TV Shows Made by People Like You, supra} note 81, at 81. For more on cable franchising, see \textit{infra} notes 171-72 and accompanying text.
\item \textsuperscript{167} H.R. Rep. 934, \textit{supra} note 7, at 19, 39, \textit{reprinted in USCCAN}, at 4656, 4676, 4738.
Congress promulgated the 1984 Cable Act during a time of public disillusionment with cable television's potential. Consumers and legislators felt the "blue sky" promises of cable had been exaggerated, due to the municipalities and cable companies created by the unrealistic expectations of cable's services. As one commentator put it, cable television "was supposed to enrich bankrupt cities, bring ballet to the balletomane, challenge the power and influence of AT&T, make our streets secure, disalienate youth, and deliver the paper in the morning." This overpromising was a product of the franchising system, whereby a city would authorize a cable company, usually exclusively, to utilize public property for the construction of the physical plant necessary to operate the cable system. These bidding contests usually resulted in local governments demanding concessions from the winning cable company that had no relation

168. An early description of the "blue sky" nature of cable was given by an F.C.C. Commissioner in 1976, who, in describing some of the F.C.C.'s cable rules, stated, "[The requirements were the product of expectations generated in cable's go-go years when the benefits of cable were sold as peddlers once sold Lydia Pinkham's Vegetable Compound, a veritable elixir for the ills of our time." In re Cable TV Capacity and Access Requirements (Pt. 76, § 76.251), 59 F.C.C.2d 294, 330 (1976) (Robinson, Comm'r, concurring).


170. Price, supra note 48, at 552. See also CABINET COMMITTEE ON CABLE TV, supra note 46, at 15-16 (cable television cannot be treated like "an electronic genie" or a "modern day Rosetta stone capable of unraveling the complex problems facing this society"). For a sample of some of the "blue sky" expectations of cable television, see supra note 23.

171. The franchising process usually begins with the local government issuing a request for proposals ("RFP"). H. Rep. 934, supra note 7, at 23, reprinted in USCCAN, at 4660. In the RFP, the city will set out the requirements a cable operator must meet in order to gain an exclusive franchise. Id. An RFP typically contains requirements for "channel capacity; the services to be provided over a system, and the rates for such services; the level of the franchise fee to be paid the city; the availability of channels for community access and access by for-profit program suppliers not affiliated with the cable operator; minority and local participation and ownership of the cable system; methods of enforcing the franchise; the length of the franchise and procedures for renewing the franchise upon expiration." Id. The winner of the RFP bidding receives the franchise, defined as "an initial authorization . . . issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system." 1984 CABLE ACT, § 522(8). See H. Rep. 934, supra note 7, at 19, reprinted in USCCAN, at 4656 ("municipal franchise granted to cable operator specifies nature of cable system to be constructed, service to be provided, and rate which may be charged"); id. at 44-45, reprinted in USCCAN, at 4681-82 (definition of franchise). See also S. Rep. 67, supra note 7, at 45 (Senate bill 69 definition of franchise, equivalent to 1984 Cable Act provision).

172. S. Rep. 67, supra note 7, at 6. The premise for this exercise of local jurisdiction over cable systems was "its use of local streets and rights of way." Id.

173. See also Ronka, supra note 52, at 11 ("The recent rounds of franchising fury have frequently been described as a modern day gold rush.").
to the provision of cable service. Concessions such as the paying of millions of dollars in up-front money to repair a sewage system, the planting of 20,000 trees, the provision of free service to handicapped residents, the computerization of the local public library's card catalog, and the contribution of money to a local drug abuse program are among the most notorious. Local governments also demanded more and more access channels, studios, and equipment despite the under-utilization and high cost of existing facilities. Cable operators were to blame as well. The franchising process caused cable companies to overpromise in order to receive the exclusive franchise, then once the city granted the franchise to the operator the terms would be renegotiated. Other miscalculations that exacerbated the cable operators' dilemma included inaccurate estimates of the costs of maintaining elaborate urban franchises, exaggerated expectations of subscriber demand, and unrealistic estimates of the potential of new services.

To further aggravate cable's image problem, the early 1980's brought cable television its first taste of competition from new technologies such as

176. Id. (in Baltimore, Maryland).
177. Id.
178. House Subcomm. Hearings, supra note 42, at 49 (statement of Thomas E. Wheeler, president, National Cable Television Association) (Miami, Florida, required cable operator to contribute $200,000 a year to city's drug abuse program).
180. See, e.g., H.R. Rep. 934, supra note 7, at 21-22, reprinted in USCCAN, at 4659 ("In Milwaukee, Wisconsin, for example, the cable operator awarded the franchise sought to renegotiate the term of the franchise less than eight months after it was awarded and before construction had barely commenced.").
182. The Senate expressly recognized the adverse effects of these competing technologies during its deliberations. See S. Rep. 67, supra note 7, at 20. But see id., at 45 (minority views of Mr. Lautenberg) ("As far as I can tell, however, no technology yet matches cable in offering the diversity and potential range of services from a single source. Nor have I seen any great body of evidence that cable is fast becoming a threatened industry.").
subscription television (STV), satellite master antenna television (SMATV), video cassettes and discs, low-power television (LPTV), direct broadcast satellite (DBS) service, multi-point distribution (MDS), and multi-channel MDS (MMDS) systems. While most of these alternative technologies suffer from low channel capacity and a high cost per channel, as a group they had a competitive impact. All of these factors were considered by Congress during the 1984 Cable Act debates.

Like the extensive cable regulations resulting from the F.C.C.'s 1972 Report, the Cable Act was primarily the product of compromise. The chief negotiators in this round of cable regulation were the National League of Cities ("NLC") and the National Cable Television Association ("NCTA"), the lobbying organizations for local governments and the cable industry respectively. In fact, Senator Goldwater stated that it would have been "difficult or impossible to achieve final passage of cable legislation without some sort of agreement between the Nation's cities and the cable industry."

183. STV broadcasts a scrambled signal over the UHF band (channels 14-84), the subscriber purchases a decoder to receive the signal at his television set. Sibary, supra note 16, at 385. See also M. Sprague, New Communications Media and Public Broadcasting: Impacts and Opportunities 9, 10 (1980) ("[T]he drawback to STV is its limited channel capacity. A franchisee is limited to one channel of programming per television station.").

184. SMATV is similar to a cable television operation, but without using public right-of-ways. SMATV systems, or private cable, are generally located in large apartment buildings. Sibary, supra note 16, at 386-87.

185. LPTV stations are broadcast stations with a shorter broadcasting radius. Id. at 385.

186. DBS licensee picks up programming from a satellite transponder and then transmits it to small rooftop earth stations. Id. at 387. DBS subscribers need a "converter as well as an earth station to receive DBS signals...[A] tuner would allow the subscriber to select from among the various DBS programs." M. Sprague, supra note 183, at 17.

187. MDS is basically "broadcasting at microwave frequencies" and entails the use of a microwave antenna. Sibary, supra note 16, at 386. An MDS licensee is a common-carrier who provides the transmission hardware for a customer's programming. M. Sprague, supra note 183, at 13.

188. MMDS is the same as MDS except more than one channel is available.

189. See, e.g., 1983 Sen. Subcomm. Hearings, supra note 23, at 214 (statement of Cable Television Access Coalition) (notes limited channel capacity of most competing technologies); Miller & Beals, supra note 5, at 96 n.44 (other media cannot offer variety and number of channels received through cable; nor significant potential for two-way user interaction); Wines, supra note 169, at 318 ("Many experts—and just about all cable system operators—argue that a metropolitan cable-TV system would eventually win any head-to-head contest with competing technologies.").

190. See supra note 138 and accompanying text.


192. 130 Cong. Rec. S14283 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater). Congress’ reliance on the cable industry and the cities to negotiate a cable bill was criticized because (1) the process lacked public participation, and (2) the cable industry was only interested in protecting its government-created monopoly. Sibary, supra note 16, at 403. Cf. 130 Cong.
Congress did not pass the 1984 Cable Act hastily; it was the result of three years of hearings, discussions, and negotiations. The 1984 Cable Act was an effort to update the outdated Communications Act of 1934 and bring the law in line with the new information age. The 1984 Cable Act was an effort to update the outdated Communications Act of 1934 and bring the law in line with the new information age.

The House Report on the 1984 Cable Act ("House Report") noted that the "FCC policies in the 1960's and early 1970's unfairly inhibited the growth and development of cable." Further inhibition would be avoided because the 1984 Cable Act established a comprehensive national policy that clearly set out which level of government was to regulate the various aspects of cable television.

The 1984 Cable Act was designed to achieve six goals: establish a national cable policy; establish fair franchising procedures and standards; establish...
guidelines for the exercise of Federal, State, and local authority over cable; assure that cable provides the widest diversity of information sources and services; establish a fair franchise renewal process; and minimize unnecessary cable regulations. The Act was an attempt to satisfy all relevant groups, and one commentator described the 1984 Cable Act's multiple purposes as a balancing of the rights of the cable operator, the local government and the public.

197. In full, the six purposes are:

1. establish a national policy concerning cable communications;
2. establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
3. establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
4. assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
5. establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
6. promote competition in cable communications and minimize unnecessary regulation that would impose an undue burden on cable systems.

1984 Cable Act § 521.

Senate Bill 66, the predecessor to House Bill 4103, listed only four purposes:

1. establish a national policy concerning broadband telecommunications and to encourage a competitive environment for the growth and development of broadband telecommunications;
2. establish guidelines for the exercise of Federal, State, and local regulatory authority;
3. allow cable systems to be responsive to the needs and interests of the public on an equal basis without competitive disadvantage with other providers of telecommunications services; and
4. eliminate government regulation in order to prevent the imposition of an unnecessary economic burden on cable systems in their provision of service to the public.

S. REP. 67, supra note 7, at 34. These purposes reflected the Senate committee's belief that "the marketplace forces, rather than Government regulation, should govern and prevail." Id. at 11, 17 ("free and open marketplace competition in the provision of cable can only develop if the cable industry is free of unnecessary and burdensome restrictions which place cable at a competitive disadvantage with other providers of similar services"). The Senate also believed that many of the current cable regulations were unnecessary "due to demonstrated expertise on the part of the industry itself, and to increased understanding about, and familiarity with, the industry on the part of state and local officials, and potential cable subscribers." Id. at 11. The Senate apparently believed that this new-found "expertise" would ameliorate the effects of the "blue sky" overpromising and franchise gouging discussed earlier. See supra notes 168-71 and accompanying text.

After the House passed House Bill 4103, the Senate adopted the purposes in the House Bill, but amended the fourth and fifth purpose and added a sixth to reflect its "marketplace" mentality. See statement by Sen. Robt. Packwood, reprinted in U.S. CODE CONG. AND ADMIN. NEWS at 4738.

198. Meyerson, Coaxial Wires, supra note 166, at 621 (1984 Cable Act's purposes described as a "delicate balance between the rights of the cable operator to pursue their business, the
Access provisions were designed to advance the purpose contained in section 521(4) of the 1984 Cable Act, to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information and sources and services to the public.” In one sense, this diversity would come from an increase in the aggregate number of channels available to viewers. Cable’s large channel capacity has the potential of delivering to subscribers over 100 channels of video programming—much more than the five to ten channels traditionally delivered by local broadcasters. Additionally, diversity would be achieved through increasing the number of potential speakers. Access requirements would provide individuals and groups who were previously denied access to an electronic media the opportunity to add their ideas and voice to the marketplace. In the House
Report, public access channels were described as the "video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet" which would "contribute to an informed citizenry by bringing local schools into the home, and by showing public local government at work."\textsuperscript{202}

Public access' ride through Congress was rocky. In early versions of Senate cable legislation, communities could require only cable systems with over 20 channels to provide access—with a ceiling of ten percent of the channel capacity being set aside for public, governmental, educational, and leased access.\textsuperscript{203} The 1982 Senate Bill provided that a cable operator may offer to designate channels for public, educational, governmental, or other users.\textsuperscript{204} The local government could only require governmental access.\textsuperscript{205} Consistent with its "marketplace" inclination,\textsuperscript{206} the Senate set out these limited access provisions "reluctantly, and with some misgivings," commenting that the cable operator's special access obligation would cease when new outlets for this type of programming became available.\textsuperscript{207}

The 1984 Cable Act, however, provides that a franchising authority may require that channel capacity be set aside for public, educational, or governmental use.\textsuperscript{208} Congress did not define "public access" but apparently

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\textit{Hearings, supra note 42, at 62.} In the House subcommittee hearings, Thomas E. Wheeler, the president of the National Cable Television Association, quoting a study by economists Kenneth Baseman and Bruce Owen, stated:

[b]riefly put, increased concentration of control over the "channels" available for media distribution will tend to increase product variety. The reason is fairly simple. An owner of two competing "channels" will be less likely than two independent owners of those channels to offer the same kind of programming. The joint owner will feel that duplicating program types will add little to his total audience, and therefore will be inclined to offer an altogether different kind of program. An independent owner of the second channel, on the other hand, will be more inclined to run a program type similar to that of the first channel, if a larger audience can be attracted by taking a share of the first program's audience than by offering an entirely different kind of programming.

\textit{Id.} See also \textit{id.} at 253-54 (statement of Trygve Myhren, chairman and chief executive officer, American Television and Communications Corp.) (attacks notion that commercial access will breed diversity).


204. S. Rep. 67, \textit{supra note 7, at 38 (emphasis added). See also id. at 28 (cable operator may offer, but may not be required to provide, channel capacity for access uses).}

205. \textit{See id.} at 21.

206. \textit{See supra} note 196.

207. S. Rep. 67, \textit{supra note 7, at 22.}

208. The 1984 Cable Act defines "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise." 1984 \textit{CABLE ACT \S 522(9).}

209. 1984 \textit{CABLE ACT \S 531(b) (emphasis added).} If the franchise was later modified, the 1984 Cable Act forbade the cable operator from modifying "any requirement for services relating to public, educational, or governmental access." \textit{Id. \S 545(e).}
intended that access continue its first-come, first-served nondiscriminatory tradition. The 1984 Cable Act also set up provisions for leased or commercial access. It did not resolve whether cable systems access channels were to be treated like common carriers. In promulgating access provisions, Congress was aware of the first amendment concerns in allowing third-party access to channels operated by the cable operator. Nevertheless, Congress believed that the access provisions were permissible content-neutral, narrowly-drawn, structural regulations.

The access provision of the 1984 Cable Act also allowed the franchising authority to require rules and procedures for the use of access channels. Giving this power to the franchising authority deviated from the prior practice, under F.C.C. regulations, of allowing the cable operator to promulgate access rules and regulations. These rules would be "traffic cop" regulations.

210. Meyerson, Coaxial Wires, supra note 166, at 585 (Congress planned to continue concept of first-come, first-served nondiscriminatory access). The 1984 Cable Act did define "public, educational, or governmental access facilities" as "(A) channel capacity designated for public, educational, or governmental use; and (B) facilities and equipment for the use of such channel capacity." 1984 CABLE ACT § 522(13).

211. 1984 CABLE ACT § 532.

212. Although the 1984 Cable Act permits access requirements, the Act also provides that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 1984 CABLE ACT § 541(c). The Senate Report on Senate Bill 66, which forbade common carrier-type regulations, See S. REP. 67, supra note 7, at 43, stated the prohibition did "not affect . . . any access channel provisions in existing franchises." Id. at 29.

213. See H.R. REP. 934, supra note 7, at 31-36, reprinted in USCCAN, at 4668-73.

The constitutionality of the 1984 Cable Act's access scheme will not be dealt with in this Comment. See generally City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Court unwilling to decide constitutionality of various cable regulations without a more thoroughly developed record); Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983) (upholding Rhode Island mandatory access rules).


214. H.R. REP. 934, supra note 7, at 33, 35, reprinted in USCCAN, at 4670. Examples of other "structural" regulations of the media include "antitrust enforcement and the promulgation of rules limiting cross-ownership of media properties in the same local market." Id. at 31, reprinted in USCCAN, at 4668.

215. 1984 CABLE ACT § 531(b). Apparently this provision was one of the concessions the NCTA made to the NLC during negotiations. See S. REP. 67, supra note 7, at 14.

216. See supra note 144 and accompanying text.
regulations, not related to the content of the programming. Such rules might set out the technical standards for programming, describe the proper use of studio equipment, outline equipment training programs, or prevent an access user from monopolizing the channel.

The 1984 Cable Act's access provisions explicitly prohibit the cable operator from exercising any type of editorial control over access channels. The House Report stated that this provision was integral to the concept of access channels. Because the cable operator could not exercise any editorial control over access programming, the 1984 Cable Act absolved the operator of any civil or criminal liability arising from the programming carried on those channels.

The 1984 Cable Act does provide a mechanism for cable subscribers to avoid programming they find offensive. Section 544(d)(2)(A) provides that if a cable subscriber wants to restrict the viewing of a channel which may contain obscene or indecent programming, the cable operator "shall provide

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218. *See generally* Meyerson, *Coaxial Wires*, *supra* note 166, at 588 ("that the access channel will be used in half-hour or hour long blocks, that some time slots will be reserved for series programming while other slots must be used by different persons each week, and that no individual will be able to monopolize the channels"); Van Eaton & Earley, *Controversial Programming and Access: An Outline of Basic Issues and Approaches Under the First Amendment 12-13* (paper presented in Dayton, Ohio, May 13-14, 1988) ("Such rules might include rules designed to protect the non-commercial, local character of the access channel, to ensure a variety of users have opportunities to use the access facilities and to protect the equipment and facilities from abuse.").

For example, the extensive regulations for access use in St. Paul, Minnesota, contain sections on portable equipment scheduling, post production equipment and facilities, studio use, portable studio and modulator use, user sanctions, access channel time rules, certification, videotape use, public inspection file, videotext use, shared use facilities and equipment, program playback, rate card, maintenance, technical standards, and house, safety and security rules. *Cable Access—St. Paul, Inc. Rules and Regulations* (Apr. 8, 1986, St. Paul, Minnesota). The access regulations for Cincinnati, Ohio, include sections on access operating procedures, equipment check out/in, editing and studio use, cablecast scheduling for single programs, cablecast scheduling for series programming, additional plays for programs, technical requirements for cablecasting, on site behavior, and denial of access privileges. *Warner Cable of Cincinnati Access Rules and Operating Procedures* (Mar. 31, 1988, Cincinnati, Ohio).

219. 1984 *CABLE ACT* § 531(e) (cable operator prohibited from exercising editorial control over any public, educational, or governmental use of access).


221. 1984 *CABLE ACT* § 558. However, if the operator did exercise editorial control over the content of an access program, he would be deemed a "cable programmer" pursuant to the 1984 Cable Act and open to liability. See H.R. REP. 934, *supra* note 7, at 95, *reprinted in USCCAN*, at 4732 (term "cable programmers" encompasses more than just the program producer). Senate bill 66 contained a similar provision. See S. REP. 67, *supra* note 7, at 28, 42.

This immunity is similar to that granted to broadcasters when, pursuant to the Communications Act, they are required to transmit programming submitted by certain legally qualified political candidates. *See Farmers Educ. and Coop. Union of Am., N.D. Div. v. WDAY*, 360 U.S. 525 (1959).
(by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.\textsuperscript{222} This device is commonly referred to as a “lock box” or a “parental control device” and allows a cable subscriber to block out certain signals and keep the channel off his television set.\textsuperscript{223} Congress felt that a “lock box” provision in the case of obscene or indecent programming would not infringe on the first amendment rights of the cable operator, the cable programmer, or other cable viewers.\textsuperscript{224} This balancing of interests provides that, “except for obscenity, the speaker shall not be silenced, the willing viewer shall receive the programming, and the unwilling viewer shall be protected by technology, not by the censor.”\textsuperscript{223} Some have questioned the efficacy of the “lock box”

\begin{itemize}
  \item \textbf{222.} 1984 \textit{Cable Act} § 544(d)(2)(A).
  \item \textbf{223.} See Meyerson, \textit{Rights}, \textit{supra} note 146, at 29-30, 35 (author also describes an “addressable converter,” which enables cable operator to block a particular channel’s signal). \textit{See, e.g., Cabinet Committee on Cable TV, supra} note 46, at 38 (use of “scrambling codes, locked channels, and other devices” to enable the individual to “enforce his own standards of obscenity or violence without the need for extensive prior restraint”).
  \item \textbf{224.} H.R. \textit{Rep.} 934, \textit{supra} note 7, at 70, \textit{reprinted in USCCAN}, at 4707 (Congress was primarily concerned with child viewers).
  \item \textbf{225.} Meyerson, \textit{Rights}, \textit{supra} note 146. Notwithstanding the equal treatment of obscenity and indecent programming under the “lock box” provision, the 1984 Cable Act treats the two very differently. While the 1984 Cable Act’s only restriction on indecent programming is the lock box provision, the Act virtually forecloses the cablecasting of obscene programming on two fronts. Section 559 of the Act provides that “[w]hoever transmits . . . any matter which is obscene . . . shall be fined not more than $10,000 or imprisoned not more than 2 years, or both.” 1984 \textit{Cable Act} § 559. Furthermore, the Act allows the franchising authority and the cable operator to specify in the franchise that “certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.” \textit{Id.} § 544(d)(1). Congress intended the obscenity standard set out in Miller v. California, 413 U.S. 15 (1973), to govern the 1984 Cable Act. H.R. \textit{Rep.} 934, \textit{supra} note 7, at 69, \textit{reprinted in USCCAN}, at 4706; S. \textit{Rep.} 67, \textit{supra} note 7, at 24. The \textit{Miller} standard for obscenity is:
    \begin{itemize}
      \item (a) whether “the average person, applying contemporary community standard” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
    \end{itemize}
  \item \textbf{413 U.S.} at 24.

After the passage of the 1984 Cable Act, the F.C.C. promulgated a rule that cable operators could only provide lock boxes for channels over which the operator exercised editorial control, thereby excluding lock box availability for access channels. The F.C.C. was later ordered to delete this rule—the court commenting that the rule had “no discernible basis in the statute or the legislative history.” American Civil Liberties Union v. F.C.C., 823 F.2d 1354, 1579 (D.C. Cir. 1987).

Despite the “lock box” provision of the 1984 Cable Act, many local access regulations still prohibit indecent programming. \textit{See, e.g., Sangamon State University/Times Mirror Cable Television of Springfield, Inc.: Access Rules} § 3(g) \textit{(Springfield, Illinois, undated)}; \textit{Comcast: Public Access Policies and Procedures} \textit{(Indianapolis, Indiana, Sept. 1, 1988)}; \textit{Public Access Channel Operating Rules: Continental Cablevision of Lansing} § 103(e) \textit{(Lansing, Michigan, undated)}; \textit{Scheduling Regulations, Cable 21-ATV: the Community Channel} § 2.01(f) \textit{(Columbus, Ohio, Feb. 12, 1986)}.\textsuperscript{224}}
alternative in light of its complexity.226

The 1984 Cable Act dramatically altered the F.C.C.'s jurisdiction to regulate cable television.227 The F.C.C. exercises even less regulatory power over cable systems,228 and plays a minor role in determining the future direction of cable regulation.229 The F.C.C.'s only involvement in access is reviewing grievances relating to a cable operator's failure to provide commercial access.230

D. Controversial Programming

Although some cable television insiders have recognized the threat of controversial programming on public access,231 until recently such programming was limited to New York City and was controversial only because it was marginally obscene. Today, however, controversial programming has spread across the country and contains material or is produced by organizations that inflame the sensibilities of the majority of cable subscribers. The organizations that cause the most consternation for local governments, viewers, and cable companies include groups like the Ku Klux Klan, the Nazis, and other notorious "hate" groups.232 Although the use of public access by these groups was

226. See Jones v. Wilkinson, 800 F.2d 989, 1003, 1006 (10th Cir. 1986) (Baldock, J., concurring) (less than one percent of cable subscribers have purchased lock boxes due to the unwanted complexity of the devices).

227. Meyerson, Coaxial Wires, supra note 166, at 547.

228. S. REP. 67, supra note 7, at 19.


230. 1984 CABLE ACT § 532(e).

231. See, e.g., In re Reconsideration of Cable TV (Pt. 74, subpt. K, §§ 74.1107, 74.1031(c), 74.1105 (a),(b); Report and Order), 36 F.C.C.2d 143, 194 (1972) (open access carries certain risks); In re CATV (Pt. 74, subpt. K, Memorandum Opinion and Order), 23 F.C.C.2d 825, 827 (1970) (access will allow "those willing to discuss controversial issues . . . a means of access to the television viewer"); R. KLETT, supra note 47, at 1 (access could bring controversy back to the television screen). But see G. GILLESPIE, supra note 7, at 70 ("There is little indication from the various sources of information for the study that fear of pornographic, indecent, and libelous programming will present a barrier to the viability of the [access] idea.").

232. This comment assumes that white-supremacist speech and other controversial speech described in this section fall within the protections of the first amendment. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (racial speech of Ku Klux Klan); Terminiello v. City of Chicago, 337 U.S. 1 (1949) (protected speech patterned after that of European fascist leaders); Collin v. Smith, 578 F.2d 1197 (7th Cir.) (Nazi march in largely Jewish community), cert. denied, 439 U.S. 916 (1978); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (protected "expression of racist and anti-semitic views" in public forum). This conclusion was also reached by the National Institute Against Prejudice & Violence, see NIAPV REPORT, supra note 27, at 3-6 ("In summary, the Cable Act and the applicable First Amendment standards make it almost impossible to prevent the showing of racist cable programming over a public access channel"). But see Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding
foreseen years ago, only recently have these organizations made extensive use of public access to espouse their message. White-supremacist programming has led some communities to remove public access, and others to

group libel ordinance); Lasson, Racial Defamation as Free Speech: Abusing the First Amendment, 17 COLUM. HUM. RTS. L. REV. 11 (1985) (asserts that properly worded group libel statute would be constitutional).

The cablecast of racist programming would not even rise to an incitement. Such a cablecast would parallel the facts in Brandenburg where the Klan rally was filmed and later broadcast on the local station. Brandenburg, 395 U.S. at 445. Because the “speaker is physically removed from his audience and the members of the audience are separated from each other,”—the typical incitement setting—“a highly-charged atmosphere generated by a closely-packed crowd listening to the exhortations of a forceful speaker—simply isn’t present.” NIAPV REPORT, supra note 27, at 5. Cablecasting would not meet the Brandenburg standard which forbids the government from proscribing advocacy unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” 395 U.S. at 447 (emphasis added).

233. See, e.g., McGrew, supra note 169, at 335 ("Most New Yorkers chuckle tolerantly when the [access] channel decides to broadcast Ugly George. One wonders, though, whether they would remain tolerant if other channels were to feature the Nazi Hour, the Klan on the March, kiddie porn, a real Black Mass . . . ."); Do-It Yourself TV, NEWSWEEK, Jan. 3, 1972, at 49, 50 (quoting one access advocate, "If the Nazi Party walked in, I'd have to give them time. I wouldn't like it, but that's what public access is all about.").

234. As one white-supremacist was quoted as saying, “This public access allows us to reach more people than leaflets do,” NIAPV REPORT, supra note 27, at 12. Unwittingly, this white-supremacist tapped into the Nazi slogan, Sturmabterlung, originally expressed by Hitler in Mein Kampf. See Terminiello, 337 U.S. at 23-24 (Jackson, J., dissenting) (citation omitted). Sturmabterlung was a figure of speech: “possession of the streets is the key to power in the state.” Id. (citation omitted). Modern-day white-supremacists might be updating Sturmabterlung in order to take possession of television, today’s “key to power.” Cf. Minniberg, supra note 50, at 585 (cites studies that “indicate that while the mass media are not effective in creating people's existing views, they are extremely effective in creating new opinions”); Comment, Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine, 10 HARV. C.R.-C.L. L. REV. 137, 148 n.54 (1975) (hereinafter Comment, Obligation to Present Controversial Issues) (“The medium has enormous power to reinforce existing opinions, to create public opinion on entirely new issues, and to influence people who presently have no opinion. The power to influence the undecided is especially significant, for political elections are very often decided by a relatively small number of undecided voters.”) (citations to various studies omitted).

235. In June 1988, the Kansas City Council (Missouri) voted to amend its franchise and cancel the city’s public access channels to avoid the airing of “Klansman Kable,” an access program produced by the local Klan. National Institute Against Prejudice & Violence, Bigotry and Cable TV: The Controversy Continues, FORUM, Sept. 1988, at 6 [hereinafter NIAPV UPDATE]. The council planned to keep what it considered the best of public access programming by moving it to a local origination, or community channel. That channel, however, is under the strict editorial control of the cable operator. Id. See also The Ku Klux Klan and 'Klansman Kable,' NEWSWEEK, July 4, 1988, at 21 (more background on Klan controversy in Kansas City); Kansas City Pulls Plug on Klan Access, CHICAGO TRIBUNE, June 18, 1988, § 1, at 4, col. 1 (same). The American Civil Liberties Union and the Klan are suing the Kansas City Council, alleging a deprivation of first amendment rights. Missouri Knights of the Ku Klux Klan v. Kansas City, No. 89-0067-CV-W-5 (W.D.Mo. 1989); KKK, ACLU Sue City, Nat’l J., Feb. 6, 1989, at 6, col. 1. They assert that the public access channel is the “modern equivalent of a soapbox on a street corner.” Id.

The Florida Klan is also producing an access program called “Florida Klan News.” McCoy, supra note 66.
consider doing the same—often at the urging of the cable operator.\textsuperscript{236} The most controversial of the white-supremacist access programs is "Race and Reason," produced by Tom Metzger, head of the White Aryan Resistance.\textsuperscript{237} "Race and Reason" is a series of 30-minute talk show programs moderated by Metzger.\textsuperscript{238} The theme of the series is a call "for creation of a separate White nation in the United States," citing the "inferiority of Blacks and other racial minorities, the conspiracy of Jews to dominate the U.S. government, and the superiority of Whites."\textsuperscript{239} Metzger has produced 63 episodes of "Race and Reason" and over 25 cable systems have cablecast it.\textsuperscript{240}

The access channel in Austin, Texas, was the first to cablecast "Race and Reason" in late 1984.\textsuperscript{241} In 1987, "Race and Reason" was submitted to the cable system in the East Bay Area of California.\textsuperscript{242} The cable company sent the program to its New York headquarters to allow its attorneys to preview the show. The California system later cablecast the show at 11:30 p.m., but preceded it with "Molly's Pilgrim," an Academy Award-winning show produced by the Anti-Defamation League of B'nai B'rith.\textsuperscript{243} In the fall of 1986, "Race and Reason" hit the access channel in Pocatello, Idaho.\textsuperscript{244} The access management staff, comprised of public library employees, did not treat "Race and Reason" any differently than other shows.\textsuperscript{245} However, Pocatello's access procedures require that programs be available for viewing at the studio one week prior to their cablecast date.\textsuperscript{246} This provision helped

\textsuperscript{236} See NIAPV UPDATE, supra note 235, at 6 (Cox Cable in Spokane, Washington, and Capitol Cablevision in Jackson, Mississippi, have urged the elimination of public access to avoid controversial racist programming).

\textsuperscript{237} For a recent account of white-supremacist activities in the United States, including a profile of Metzger, see Coplon, \textit{Skinhead Nation}, ROLLING STONE, Dec. 1, 1988, at 54. Metzger, a longtime white-supremacist, is attempting to modernize his cause by attracting young Skinheads to produce a "dynamic, hip, urban . . . champion of [the] white working class." \textit{Id.} at 58. The use of cable television, particularly the production of "Race and Reason," is part of what he calls his modernization plan.

\textsuperscript{238} NIAPV REPORT, supra note 27, at 3.

\textsuperscript{239} \textit{Id.}

\textsuperscript{240} \textit{Id.} at 2-3. In many cable systems, a program not locally produced needs a local "sponsor" for it to run on public access. See \textit{infra} note 329. "Race and Reason" sponsors include individuals who have affiliations with a "variety of extremist groups including the Klan, Aryan Nations, the American National Socialist Party, White American Skin Heads, and others, in addition to Metzger's own White Aryan Resistance and White American Political Association." NIAPV REPORT, supra note 27, at 2.

\textsuperscript{241} NIAPV REPORT, supra note 27, at 1.

\textsuperscript{242} \textit{Id.} at 7-9.

\textsuperscript{243} \textit{Id.} This was an effort to "balance the message of racial hate and religious intolerance espoused in 'Race and Reason.'" \textit{Id.}

\textsuperscript{244} \textit{Id.} at 17-22.

\textsuperscript{245} \textit{Id.} The public library staff considered, but later dismissed, the idea of producing its own response program. Ammon, "\textit{But I'll Defend Their Right to Say It:}" Racism, Response, and the First Amendment in Pocatello, IDAHO LIBRARIAN, Apr. 1988, at 40, 41.

\textsuperscript{246} Ammon, supra note 245, at 40; Pocatello-Vision 12 Programming Policy (Oct. 1, 1987,
establish a routine by which the local Cable Commission and the Human Rights Advisory Council would preview each “Race and Reason” episode and develop responsive counter-programming. Thereafter, “Race and Reason” and its accompanying counter-programming became regular fare on public access.

Controversial access programming is not the sole domain of white-supremacists. Communities and cable operators have also fretted over programming by homosexuals, pro-gun advocates, extremist religious sects, animal rights activists, and other titillating fare. Controversial access programming and the public reaction to the programs poses a major threat to the continuation of access’ extensive availability.

II. ANALYSIS

A. Controversiality: The Desirability on a Macro Level Versus the Antipathy on a Micro Level

Controversial speech has received special first amendment protection from the Supreme Court. As Justice Stevens once stated, “[a] regulation of
speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law abridging the freedom of speech, or of the press." The Court has been even more vigilant in its protection of controversial expression in the area of mass communications. The Court's solicitude for controversial programming in the broadcast arena is evinced by its holding in Red Lion Broadcasting Co. v. F.C.C.

In Red Lion, the Court upheld the fairness doctrine which imposes a two-prong obligation on broadcasters: 1) to provide coverage of vitally important controversial issues of interest in the community served by the licensee; and 2) to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. The first prong of the fairness doctrine imposes an affirmative duty on broadcast licensees to air programs discussing controversial parody depicting nationally known minister's first sexual encounter as occurring in an outhouse with his mother while intoxicated; NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (emotionally charged rhetoric of boycott organizer was protected speech even though it did contain some references to physical violence to those who did not participate, where the language was not followed by acts of violence); Cohen v. California, 403 U.S. 15, 24 (1971) (first amendment protects the wearing of a jacket emblazoned with "Fuck the Draft"). In Terminiello v. City of Chicago, 337 U.S. 1 (1949), the court stated:

"Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

Id. at 4. After reviewing some of the above mentioned cases, the court in Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985) concluded: "We question whether a regulation of speech that has as its touchstone a government official's subjective view that the speech is 'controversial' could ever pass constitutional muster." Id. at 1230.

Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 546 (1980) (Stevens, J., concurring). See id. at 544 (majority opinion) ("The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments.").

See, e.g., F.C.C. v. League of Women Voters of Cal., 468 U.S. 364, 399 (1984) (striking down law that prohibited noncommercial educational broadcasting station from engaging in editorializing because "its effect is plainly to diminish rather than augment 'the volume and quality of coverage' of controversial issues") (citations omitted); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 385 (1969) (upholding broadcasting fairness doctrine because "the 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public").


There have been recent efforts to repeal the fairness doctrine. The challengers assert that, in operation, the fairness doctrine actually inhibits the presentation of controversial issues because rather than risk accusations that they have failed to present both sides of an issue, broadcasters avoid presenting controversial issues all together. Therefore, if the fairness doctrine is repealed, it will be because the doctrine did not result in enough controversial programming.

Another indication of governmental concern for the protection of controversial programming is the availability of public access channels themselves. As envisioned by both the F.C.C. and Congress, and embodied in the 1984 Cable Act, public access would allow the maximum exercise of first amendment rights without regard to content. Furthermore, studies indicate that the public generally supports the right of even unpopular groups to be heard through mass media.

258. The licensee must devote a "reasonable percentage" of broadcasting time to discussion of controversial public issues—without regard to the personal views of the licensee, the possible unpopularity of the views, or the subject matter to be discussed. In re Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249-50, 1257-58 (1949). The F.C.C. has rarely enforced the first-prong of the fairness doctrine. See Comment, Obligation to Present Controversial Issues, supra note 234, at 10.

The vitality of the first prong of the fairness doctrine was affirmed in a case where the advocates of "controversial" issues wanted access to advertising time on broadcast stations. The Court denied a general right of access to broadcast advertising time because the Court determined that the broadcasters would present a sufficient number of programs discussing controversial issues to fulfill their fairness doctrine obligations. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 131 (1973). The Court noted that the broadcaster "is required to 'present representative community views and voices on controversial issues which are of importance to [its] listeners,' and it is prohibited from excluding partisan voices and always itself 'expressing views in a bland, inoffensive manner.'" Id. (citation omitted).

259. See Syracuse Peace Council v. F.C.C., 867 F.2d 654 (D.C. Cir. 1989); In re General Fairness Doctrine Obligations of Broadcast Licensees (§ 73.1910), 102 F.C.C.2d 143, 147 (1985); see also id. at 188 ("[T]he administration of the fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished"); id. at 190 n.170 ("In our view, use of the fairness doctrine to suppress any point of view, however abhorrent, contravenes the purpose of the doctrine and raises serious constitutional implications."); Brandywine-Main Line Radio, Inc. v. F.C.C., 473 F.2d 16, 63 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (extensive discussion of fairness doctrine's stifling effect); Bazelon, The First Amendment and the "New Media"—New Directions in Regulating Telecommunications, 31 Fed. Comm. L.J. 201, 205-06 (1978) (fairness doctrine has contributed to suppressing programming on controversial issues; rather than risk charges that they have covered only one side of an issue).

260. See supra notes 197-230 and accompanying text.

261. Minniberg, supra note 50 (studies cited therein). The author stated: By a two to one margin, Americans surveyed believe that in the United States, Communists have a right to express their beliefs on television, that homosexuals have a public right to contest laws they feel are discriminatory, and that members of the Nazi party have a right to publish their views. Id. at 593 (footnotes omitted).
Despite this desire for controversiability on the macro level, these viewpoints are usually met with hostility on the micro level.\(^{262}\) In the context of public access programming, three groups—local governments, cable companies, and cable subscribers—are averse to controversial programming, each for different reasons.

Although it was the lobbying arm of the local governments that won the battle for access under the 1984 Cable Act,\(^{263}\) often local government is access' enemy. Many local officials fear performing under the scrutiny of critical access programs which the official cannot control.\(^{264}\) In fact, the primary focus of many access programs may be to criticize and critique local elected officials.\(^{265}\) The politicians thus bothered may seek the earliest opportunity to rid themselves of the discomfort caused by the programs by eliminating or restricting the use of access channels.\(^{266}\) In a recent case, a jury found that local government officials were motivated to secure public access channels by a desire to obtain political support and aid their political supporters.\(^{267}\) The local government can exercise such power through its control over the access channels' budget (the source of which is usually franchise fee payments made by the cable company to the local government), its power to select favorable access management board members who typically operate the access channels, and its power to modify the franchise requirements.\(^{268}\)

\(\text{\(^{262}\)}\) This phenomenon might be coined the NIMBY ("Not in my back yard") doctrine. A NIMBY believes that some things which are generally desirable—e.g., more prisons, drug rehabilitation homes, or a convenient 24-hour drive-through Burger King—can only be implemented if they are not in his back yard. For public access purposes, a NIMBY might posit, "I agree that controversial groups should be allowed to say what they want—just as long as I don't have to be exposed to it."

\(\text{\(^{263}\)}\) See supra notes 191-92 and accompanying text.

\(\text{\(^{264}\)}\) R. ORINGEL & S. BUSKE, supra note 9, at 132.

\(\text{\(^{265}\)}\) Ronka, supra note 52, at 9.

\(\text{\(^{266}\)}\) Id.

Should access channels become a source of popular or effective political criticism and debate some local officials who are stung by the reality of uninhibited, robust and wide-open exposure may feel little incentive to protect the extended life of public access channels and may, instead, welcome an early opportunity to abandon them.

\(\text{\(^{267}\)}\) Id. at 12. See also R. ORINGEL & S. BUSKE, supra note 9, at 133 (danger of local governments, offended by political message or criticism, discriminating when allocating access resource).

\(\text{\(^{268}\)}\) For an example of a typical scenario where a local government exerts its budgetary control over controversial programming:

In another example in what we will call city X, local government officials took umbrage at a series of programs produced by a local gay rights group. The first inquiry focused on why such a program was permitted on the access channel in the first place. The response from city X's access management corporation described the democratic, first-come, first-served principles of the access system. Next, the city administration officials wondered aloud whether the nonprofit organization
Another reason local government may oppose controversial programming on public access is fear that it may be seen as endorsing the views espoused on the programs. Government officials believe that their constituents might hold them responsible for the controversial programming because it was the officials who initially required the cable operator to provide public access channels. Therefore, the logic follows, if the local government disagreed with the content of certain access programming, the officials would exercise their power to eliminate it. While the citizenry may hold the officials politically responsible for the programs' content, given the access channels likely status as a public forum, it is unlikely that allowing such programming on access channels constitutes "state action" which would subject the government to constitutional liability.

Another group which traditionally opposes the public access concept is the cable operator. Cable operators have a natural disinclination toward public access—regardless of the content—because access requirements cost them money. If there were no public access, cable operators would not

should change its nondiscriminatory policy so that "unsavory" groups could be excluded. The access management of course explained the First Amendment implications of that type of censorship. . . . Not long after, the government officials of city X began to wonder publicly whether city X's access management organization should continue to receive its present level of funding from the city from the cable franchise fees. Finally, the city X government called for an evaluation of the access organization that was directly related to its funding.

R. OÖNGEL & S. BUSKE, supra note 9, at 134.

For a real-life example of such tactics, see NJAPV REPORT, supra note 27, at 11 (after white-supremacist programming aired in Cincinnati, Ohio, a member of the access management board stated, "If the present board and/or the Cincinnati Cable Office will not take action against [the cable operator] for displaying [the controversial messages], why should the councilmen of Cincinnati continue to fund the Cincinnati Cable Office?") (citation omitted).


270. This is the same risk that politicians face whenever they create a new forum for expression. Cf. Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15, 16 (1967) ("[W]e all take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication").

271. See infra notes 303-31 and accompanying text.

272. See Widmar, 454 U.S. at 274 ("[A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices . . . [and] such a policy 'would no more commit the University . . . to religious goals' than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance,' or any other group eligible to use its facilities.") (citations omitted). See also Knights of the Ku Klux Klan, Realm of La. v. East Baton Rouge Parish School Bd., 578 F.2d 1122, 1127-28 (5th Cir. 1978) (occasional and temporary use of state facilities by discriminatory groups along with all others does not necessarily constitute state involvement in activities); Ringers, 473 F.2d at 1016-18 (state not considered to espouse views expressed in public forum).

273. See R. ÖÖNGEL & S. BUSKE, supra note 9, at 132 (cable industry wants control of access channels for commercial reasons); LaPierre, supra note 144, at 103-04 (full public access is contrary to cable operator's economic interest and administrative convenience).
have to provide equipment and personnel to fulfill their current access requirements. Additionally, the number of access channels diminishes the number of channels the cable operator would otherwise provide to paying professional programming vendors. Public access programming may also cost the cable operator advertising revenues from its local origination channels. Due to their similar local orientation, public access programming may steal many origination viewers, thereby diminishing the operators’ advertising subscriber base.

Although some cable operators may be able to rationalize these costs as consideration for the “good will” the channels generate, this justification disappears when the public access channel cablecasts controversial programming. Cable operators fear that the presentation of controversial programming on access channels will cost them subscribers. In fact, the cable operators in Spokane, Washington, and Jackson, Mississippi, have urged the elimination of public access channels in order to avoid unpopular controversial racist programming, which they believed cut into their subscriber bases.

Another reason cable operators resist the cablecasting of controversial programming is because they are afraid the community will blame them for the fact the views are aired. The cable operator may also fear being seen as endorsing such controversial views. However, like the associational argument made on behalf of local governments, such an argument is

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274. The divergence of this channel displacement argument and the cable operator’s first amendment argument occurred in Quincy Cable TV v. F.C.C., 768 F.2d 1434 (D.C. Cir. 1985). In Quincy Cable TV, the court struck down the F.C.C.’s “must-carry” rules which required cable operators to carry “every local or significantly viewed signal irrespective of the number of must-carry channels already being transmitted, the degree of duplication, or the channel capacity of a cable system. Id. at 1440. The court concluded that the must-carry rule violated the first amendment because it infringed on the editorial discretion of the cable operator. Id. at 1453-54.

275. See supra note 164.

276. NIAPV REPORT, supra note 27, at 27. “Cable companies provide public access primarily because they are required to as part of their franchise: It costs the companies money, and they generally fear that controversial programming will cost them subscribers.” Id.

277. See NIAPV UPDATE, supra note 235, at 6.

278. Price, supra note 48, at 550 n.55. “[B]ecause of the impact of television, we have a hidden desire to place some responsible party in control as assurance that the medium is not put in the service of persons or groups with attitudes and mores too distant from the mainstream of American thought.” Id. For studies suggesting the power of the television medium, see supra notes 234-35.

279. See Nadel, supra note 44, at 68 (cable industry might argue that dissemination of offensive programming on access could cause irreparable harm to cable operator’s reputation). According to the chairman of American TV and Communication Corporation: “[M]any cable systems are vigorously attacked for programming that appears on the access channels. A prime example is our Manhattan cable system. . . . [A] number of sex-oriented programs are distributed over the access channels. We have been criticized by local, state, and federal officials, as well as subscribers for carrying these programs.” Id.

280. See supra notes 269-72 and accompanying text.
inconsistent with the public forum nature of public access channels.\(^{281}\)

Finally, the cable operator will disfavor any access programming that the local government opposes because the operator is beholden to the city for its lifeblood—the exclusive franchise. When the operator's franchise comes up for renewal, local officials may not look favorably upon a cable operator if an inordinate amount of critical programming appeared on its access channels, or if the cablecasting of controversial programming resulted in angry voters, despite the fact that the operator is not supposed to exercise control over the content of access.\(^{282}\)

Finally, cable subscribers and the citizenry of the community often oppose the cablecasting of controversial programming. They oppose controversial access programming because their monthly cable subscription fees and/or tax dollars are being used to furnish access studio equipment and facilities

\(^{281}\) See Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (given large number of groups meeting on campus, it would be unlikely for students to infer University support from the mere fact of a campus meeting place); National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1018 (4th Cir. 1973) (“We are confident that if the high school auditorium is made available to all groups, the very diversity and complexity of the views expressed, taken in bulk, will cure any incidental official identification attendant upon the use of the building for the articulation of extreme or abusive speech.”).

This associational argument also fails if one believes that public access channels are common carriers. Nadel, supra note 44, at 68. Professor Nadel argues:

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.

\(^{282}\) Ronka, supra note 52, at 9 (cable system may reflect government's or incumbent's point of view where owner perceives it is subject to government influence over programming). Cf. F.C.C. v. League of Women Voters of Cal., 468 U.S. 364 (1984). There, the Court stated:

The court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. The child who wants a new toy does not preface his request with a comment on how fat his mother is. Newspaper publishers have been known to listen to their advertising managers. Elected officials may remember how their elections were financed.

\(^{282}\) Id. at 408-09 (Stevens, J., dissenting).
for the cable casting of views they do not support. However, this monetary support is indistinguishable from the tax dollars that go to maintain streets, sidewalks, parks, and other places where controversial views may be aired. While the cable subscribers and local citizens may not agree with the views, courts have generally not been amenable to such objections when the mode of communication supported by the money is a public forum. The amount of control that any one of these groups may exert over access programming turns on whether cable access is considered a public forum.

B. Public Access as Public Forum

Government limitations on access to a public place or to a means of communication are subject to scrutiny under first amendment "public forum" analysis. The permissible scope of such restrictions differs depending on the character of the property. The Supreme Court has recognized three types of public forums: the traditional public forum; the public forum created by government designation (limited public forum); and the nonpublic forum. However, to date, no court has determined how public access channels should be treated under first amendment "public forum" analysis. How
much control a government entity or state actor may exert with regard to access is a function of how such channels are characterized under this analysis.

A traditional public forum is a place which, through tradition or government fiat has been devoted to expression and the "free exchange of ideas." Public streets, sidewalks and parks epitomize the traditional public forum. Content-based exclusions from the traditional public forum must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." Content-neutral time, place, and manner restrictions


289. Cornelius, 473 U.S. at 800.

290. Perry Educ. Ass'n, 460 U.S. at 45. See, e.g., Frisby, 108 S. Ct. at 2500 ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora."); Boos v. Barry, 108 S. Ct. 1157, 1162 (1988) (same); United States v. Grace, 461 U.S. 171 (1983) (statute restricting expression on sidewalks surrounding Supreme Court building held unconstitutional); Hague v. CIO, 307 U.S. 496, 515 (1939) (streets and parks immemorially held in trust for the use of the public); Grutzmacher v. Public Bldg. Comm'n of Chicago, 700 F. Supp. 1497 (N.D. Ill. 1988) (Chicago's Daley Center Plaza—"a wide and deep park like area artfully appointed with a large Picasso expression in steel, an eternal flame, a large rectangular shallow pool crisscrossed with pipes of fountain sprays and several foliage areas with concrete benches about them ... [a] wide open space call [sic] the Daley Center is flat and decoratively paved with squares of special sidewalk cement"—a traditional public forum).

There are reasons to believe that expression on sidewalks and in parks may receive more protection than that on streets since expression on the street competes with motorized vehicular traffic. See ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986). In ACORN the court noted that there existed:

[s]ubstantial differences in nature between a street, kept open to motorized vehicle traffic, and a sidewalk or public park. A pedestrian ordinarily has an entitlement to be present upon the sidewalk or on the grounds of a park and thus is generally free at all times to engage in expression and public discourse at such locations. This is obviously not true of streets continually filled with pulsing vehicle traffic.

Id. at 1267.

291. Perry Educ. Ass'n, 460 U.S. at 45. See Cornelius, 473 U.S. at 800. See, e.g., Boos, 108 S. Ct. at 1161-68 (striking down as content-based a law which prohibited the "display of any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government ... or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government ... within 500 feet" of any building—including public streets and sidewalks—occupied by a foreign government).

The Supreme Court extensively discussed its aversion to content-based regulations in the
are permissible if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."  

A limited public forum consists of property which the state has opened for public use as a place for expressive activity, even though the state was not required to create such a forum. The government can limit the use of a public forum to a certain class of speakers, to the discussion of certain topics, or to a limited amount of time. As long as the government retains

context of traditional public fora in Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972). In striking down an ordinance that forbade peaceful nonlabor picketing, the Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its idea, its subject matter, or its content." Id. at 95. The Court concluded that:

"Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id. at 96.

292. Perry Educ. Ass'n, 460 U.S. at 45; see also Frisby, 108 S. Ct. at 2495 (upholding content-neutral ordinance prohibiting all picketing "focused" solely on one home located on a residential street to advance significant governmental interest of protecting residential privacy);

Boos, 108 S. Ct. at 1168-69 (upholding law which made it unlawful to congregate within 500 feet of an embassy and refuse to disperse after having been ordered to do so after the police reasonably believed the congregation presented a threat to security or peace);

Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640 (1981) (upholding rule that prohibited sale of any merchandise outside of fixed locations at state fair);

Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding anti-noise ordinance designed to prevent disruption of nearby school although noise concededly emanated from protest on nearby sidewalk);

ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986) (upholding statute that prohibited solicitation of contributions from passengers in vehicles at intersections of public streets).

In declaring Chicago's Daley Center Plaza a traditional public forum, the court described conceivably permissible time, place and manner restrictions:

This requires management, and management naturally involves simple matters of time, place and manner, deadlines for application, communication regarding permits, preconditions for uses and the sharing of uses, matters about the size, the erection and removal of structures, the assumption of costs for utilities, and the protection of the plaza against the costs that could grow out of injuries to third parties caused by the uses of themselves.

Grutzmacher, 700 F. Supp. at 1503.


294. As one court pointed out, the term limited public forum may be misleading: "Although the government, when it turns property from a nonpublic forum into a public one, may do so only for a limited purpose,... it also may open the forum to the same extent as a traditional forum." M.N.C. of Hinesville, Inc. v. United States Dep't of Defense, 791 F.2d 1466, 1472 n.2 (1986).


296. See, e.g., City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (limited speech at open school board meeting of school matters,
the "open" character of the limited public forum, the government must regulate
the forum according to the same standards which apply to a traditional public
forum.297 Furthermore, depending on the nature of the limitation placed on
the property, the government is required to extend access "to other entities of
similar character."298 The most problematic aspect of the limited public forum
is determining the appropriate "limits" of the forum so as to assure that any
restrictions imposed are not a disguise for censorship.299

A nonpublic forum consists of property which is not by tradition or
government designation a forum for public communication.300 Permissable

including teacher's union collective-bargaining negotiations); Bonner-Lyons v. School Comm.
of City of Boston, 480 F.2d 442 (1st Cir. 1973) (allowing individuals to use inter-school mail
to transmit information opposing school integration through bussing); Toward A Gayer Bicen-
access to Old State House to those groups or individuals whose projects or themes were related
to Rhode Island bicentennial).

297. See generally Cornelius, 473 U.S. at 802 (state not required to retain open character of
facility indefinitely); Perry Educ. Ass'n, 460 U.S. at 46 (same).


299. Id. at 48. See Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986) ("When the
government ... creates a limited public forum for the use of certain speakers or for the
discussion of certain subjects, the first amendment protections provided to traditional public
forums only apply to entities of a character similar to those the government admits to the
forum.")

300. Toward A Gayer Bicentennial Comm., 417 F. Supp. at 640 n.9 (limits must be drawn
"so that they could be applied even-handedly, and not used as a shield to cover censorship").
See also Cinevision Corp. v. City of Burbank, 745 F.2d 560, 575 (9th Cir. 1984) (court required
to review with particular scrutiny any claim that governmental body is attempting to suppress
controversial or political expression).

One commentator has suggested that the limited public forum category is dead. Post, Between
Governance and Management: The History and Theory of the Public Forum, 34 UCLA L.
Rev. 1713, 1745-57 (1987). Professor Post asserts that Perry Educ. Ass'n:

[j]imposes no first amendment constraints whatever on the government's ability to
build discriminatory criteria into the very definition or purpose of the limited public
forum, and thus as a practical matter the government remains as free to limit public
access to a limited public forum as to a nonpublic forum.

Id. at 1753. Post concludes that Cornelius "shrinks the limited public forum to such insignif-
icance that is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to
gain access to such a forum." Id. at 1756-57.

301. Perry Educ. Ass'n, 460 U.S. at 46. For further examples of nonpublic forums, see
Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (high school newspaper); Cornelius,
473 U.S. at 788 (Combined Federal Campaign, a charity drive aimed at federal employees);
Council of Greenburgh Civic Assoc., 453 U.S. 113 (1981) (mail boxes); Estiverne v. Louisiana
State Bar Assoc., 863 F.2d 371 (5th Cir. 1989) ("Louisiana Bar Journal," a monthly publication
of the local bar association); M.N.C. of Hinesville, Inc. v. United States Dep't of Defense,
791 F.2d 1466 (11th Cir. 1986) (preferential access points for distribution of publications on a
military base); Calash, 788 F.2d 80 (municipal stadium); Muir v. Alabama Educ. Television
Comm'n, 688 F.2d 1033 (5th Cir. 1982) (state operated public television stations). Cf. Advocates
for Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976) (state official allowed discretion in allocating
National Endowment for the Arts grants-in-aid for literary magazines); The Network Project
government restriction on this type of forum are much more extensive than those permitted with respect to public or limited public forums. The government may reserve the nonpublic forum for "its intended purposes, communicative or otherwise," and can regulate the property with regard to subject matter and speaker identity so long as the distinctions drawn are "reasonable in light of the purpose served by the forum and are viewpoint neutral."302

1. Public Forum Analysis Applied to Public Access Channels

To receive treatment as a traditional public forum a place or method of communication must possess the same attributes as forums historically associated with the free and open expression of ideas.303 Unfortunately, most of the cases applying this test only consider those fora already declared traditional public fora, i.e., streets, sidewalks, and parks. For a variety of reasons, public access channels do not possess all the attributes of other traditional public fora. A far from comprehensive list of distinguishing factors between public access channels and other traditional public fora includes: 1) cable systems are not required to have public access channels (and many do not) whereas most every community has streets, sidewalks or parks; 2) to get a program on public access, the citizen must be able to use video equipment (and usually go through a training program) whereas the speaker using a street, sidewalk, or park to express himself needs no specialized training; 3) there is usually a delay in time between when the public access program is produced and when the program is cablecast (unless the program is a "live" production) whereas expression in a street, sidewalk or park is immediately communicated; 4) public access channels are not widely utilized whereas "[s]treets and parks are part of the experience of all citizens";304 and 5) the public access channels are a creature of statutes—from the F.C.C. to the 1984 Cable Act—whereas access to streets, parks and sidewalks can not be statutorily abolished.305

To determine whether a "place" is a limited public forum or nonpublic forum, courts look primarily to the government's intent in allowing access to the property.306 A "place" is a limited public forum only if the government
has made a policy or practice of opening it to use by the general public or some segment thereof.\(^{307}\) Courts will also scrutinize the nature of the property and its compatibility with expressive activity in order to discern the government's intent.\(^{308}\) Therefore, an examination of the government's policies and practices relating to public access channels and the channels' compatibility with indiscriminate expression is necessary.\(^{309}\)

### a. The government's public access "practice"

When analyzing the government's practice, courts examine the previous use of the forum or how the forum is customarily operated to determine whether the government intended indiscriminate access to the forum.\(^{310}\) During the period in which public access channels were under the aegis of the F.C.C., it required the cable operator to promulgate access rules mandating that access be provided on a first-come, first-served nondiscriminatory basis.\(^{311}\) Under the 1984 Cable Act, franchising authorities are responsible for promulgating access rules and regulations—virtually all of which include a first-come, first-served provision.\(^{312}\) This practice of first-come, first-served use of public access channels is consistent with the notion of indiscriminate use by the general public and this practice would therefore constitute evidence of a limited public forum.

### b. The government's public access "policy"

The courts will also examine the policy the government articulates for a forum to gauge the government's intent. The governing policy statement for public access channels is the 1984 Cable Act. In describing public access channels as the "video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet," 313 the legislators arguably intended access to

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\(^{308}\) **Cornelius**, 473 U.S. at 802. See also Grayned v. Rockford, 408 U.S. 104, 116 (1972) (issue is whether manner of expression is incompatible with normal activity of particular forum at particular time).

\(^{309}\) Another formulation of the limited public forum test asks: "does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance." **Estiverne v. Louisiana State Bar Ass'n**, 863 F.2d 371, 378-79 (5th Cir. 1989) (quoting Southeastern Promotions Ltd. v. City of West Palm Beach, 457 F.2d 1016, 1019 (5th Cir. 1972)). The foregoing analysis subsumes the elements of this test as well.

\(^{310}\) **Cornelius**, 473 U.S. at 802-03. See also Cinevision Corp. v. City of Burbank, 745 F.2d 560, 576 (9th Cir. 1984) (nature of previous use of forum may also be relevant).

\(^{311}\) See supra note 143 and accompanying text.

\(^{312}\) See, e.g., **Pocatello—Vision 12 Programming Policy** at 1 (Pocatello, Idaho, Oct. 1, 1987); **Sangamon State University/Times Mirror Cable Television of Springfield, Inc.: Access Rules § 3(a)** (Springfield, Illinois, undated); **Comcast Cablevision of Indianapolis, Inc. Public Access Policies and Procedures** at 1 (Indianapolis, Indiana, Sept. 1, 1988); **ACCESS—Dayton Operating Rules and Regulations** § 1.3 (Dayton, Ohio, Apr. 1986).

\(^{313}\) See supra note 202 and accompanying text.
these channels to be indiscriminately available to the general public.

The 1984 Cable Act’s implicit prohibition against the exercise of editorial control over public access programming by the franchising authority or any other governmental agency also suggests Congress intended access to be unlimited. The 1984 Cable Act’s sponsor in the House stated that public access would provide a diversity of viewpoints only if the channels were available without rules or regulations concerning cable program content. The House Report stated, “[t]he access channel requirements . . . will ensure a diversity of information sources without government intrusion into the content of programming carried on the cable system.” Additionally, section 544(f)(1) of the 1984 Cable Act preempts all levels of government from exercising content control over public access programming except as expressly set out in the Act. Therefore, the local franchising authority cannot exercise editorial control over public access programming because such control is not expressly provided for in the 1984 Cable Act. The government can only exercise control over programming on the governmental access channels and perhaps also on the educational access channels, but not on the channels designated for public access.

Furthermore, this implicit prohibition against governmental editorial control over public access programming is evinced by the 1984 Cable Act’s provisions relating to cable systems owned by governmental entities. Congress was so concerned with governmental censorship that, if a governmental entity owned and operated a cable system, the 1984 Cable Act prohibited the franchising authority from exercising any editorial control over the content of any cable service. In such a system, the franchising authority

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314. Meyerson, Coaxial Wires, supra note 166, at 587. See also Preferred Brief, supra note 94, at 18 (“government is prohibited from favoring one speaker, viewpoint or subject over another” on public access channels); R. ORNHA & S. BUSKE, supra note 9, at 131.
317. 1984 CABLE ACT § 544(f)(1) provides in relevant part: “[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision of content of cable services, except as expressly provided in this subchapter.” See generally Jones v. Wilkinson, 800 F.2d 989, 995 (10th Cir. 1986) (Baldock, J., concurring) (local franchising authorities are preempted from exercising control over programming on access channels); Meyerson, Coaxial Wires, supra note 166, at 587.
318. See H.R. REP. 934, supra note 7, at 47, reprinted in USCCAN, at 4684 (no limitation on franchising authority’s or other governmental entity’s editorial control over application of channel capacity to governmental purposes).
319. See 1984 CABLE ACT § 522(2) (in cable system owned by governmental entity, government prohibited from exercising editorial control over cable content, except for governmental and educational access channels).
320. See Meyerson, Coaxial Wires, supra note 166, at 602; Meyerson, Rights, supra note 146, at 51.
321. 1984 CABLE ACT § 533(e)(2). See also S. REP. 67, supra note 7, at 21 (if governmental entity acquires ownership interest in cable system, it is prohibited from controlling content of any programming unless program is generated on governmental access channels).
would have to delegate the responsibility of content control (i.e., selecting programming services) to a separate entity. Therefore, based on the "policy" enunciated by the 1984 Cable Act, Congress intended that public access channels be available for indiscriminate use.

c. Public access' compatibility with indiscriminate expression

Under the "compatibility" element, the Court will scrutinize the nature of the property and its compatibility with expressive activity in order to discern the government's intent. The compatibility of media and expression is obvious. Media, like broadcasting, are specifically dedicated to communication; transmitting expression is the media's exclusive purpose. The compatibility analysis is equally applicable to public access channels. When considering "compatibility," courts examine whether the government takes an active or passive role in its relation to the forum. Because public access

322. 1984 Cable Act § 533(e)(2).

[Unlike the streets, parks, public libraries, and other "forums" that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated specifically to communication . . . .] The expression of ideas—whether political, commercial, musical, or otherwise—is the exclusive purpose of the broadcast spectrum.

Id. at 194-95 (Brennan, J., dissenting).

324. Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 317, 380 (5th Cir. 1989). "Where a forum serves as an essentially passive vehicle for expressive activity by the public, or by a particular class of speakers, unrestricted access is not incompatible with the facility's primary activity." Id. (quoting Muir v. Alabama Educ. Television Comm'n. 688 F.2d 1033, 1042 (5th Cir. 1982)). "[T]here is a constitutionally significant difference between the government's role in speaking through a state-sponsored medium and its role in managing a public resource that serves as an essentially passive vehicle for the expressive activities of others." Id. at 379. This theory is consistent with Professor Post's position that, in lieu of a public forum analysis which focuses on the characteristics of the "place," courts should focus on whether the government takes a position of "governance" or "management" of the "place." Post, supra note 300, at 1775. According to Professor Post:

In situations of governance the state is bound by the ordinary principles of first amendment jurisprudence, but when exercising managerial authority ordinary first amendment rights are subordinate to the instrumental logic characteristic of organizations, and the state can in large measure control speech on the basis of an organization's need to achieve its institutional ends. This instrumental logic even extends so far as to justify courts deferring to the judgment of institutional officials respecting the need to control speech, if such deference is itself thought necessary for the attainment of institutional ends.

Id.

For example, the government "governs" the streets, sidewalks and parks, but "manages" a prison or military base. Under Post's analysis, expression on public access channels would receive complete first amendment protection because the local government "governs" the channels. The local government cannot "manage" the programming on public access because it is prohibited from exercising editorial control. See supra notes 314-21 and accompanying text.
is controlled by the access programmers and not the franchising authority, the government's passive role suggests the channels' compatibility with indiscriminate use. Finally, the Court seems less likely to find expression compatible with a place if such a holding would impinge on the government's role as an employer. However, uninhibited expression on public access channels would not interfere with the government's employerly duties over its personnel.

The analysis of all three factors as they relate to public access channels demonstrates that the channels are open for indiscriminate use by the general public. The government's public access policy has always been first-come, first-served. The governing policy of public access channels, the 1984 Cable Act, demands uninhibited utilization of public access to fulfill its intended first amendment goals. Furthermore, the 1984 Cable Act, by prohibiting all levels of government from exercising editorial control over the public access programming, indicates the indiscriminate availability use of public access channels. Finally, public access channels are compatible with indiscriminate expression by the general public. Such use neither interferes with the government's active control over a forum nor infringes on the government's power over its personnel as an employer.

325. Public access channels are distinguishable from cases finding as non-public fora a state-run bar association magazine, Estiverne, 863 F.2d 371; state-owned public television stations, Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983); government funding for literary magazines, Advocates for Arts v. Thomson, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894 (1976); and government funded public television stations, The Network Project v. Corporation for Pub. Broadcasting, 4 Media L. Rep. (BNA) 2399 (D.D.C. 1979). In each of these cases involving an arguably similar mode of communication to public access channels, the court realized that the government was working with a limited resource and necessarily had to make inherently subjective decisions. See Estiverne, 863 F.2d at 381 ("In order to fulfill the Bar Journal's purposes as a trade journal, its editors must have some degree of discretion analogous to that exercised by editors of private trade journals—with respect to both articles and advertisements."); Muir, 688 F.2d at 1044 (government must make subjective determination as to whether programming is responsive to needs, problems and interests of residents of area it serves); Advocates for Arts, 532 F.2d at 796 (allocation of space without consideration of expressive content of competing applicants' productions is inconceivable; purpose of such a program is to promote art and requires exercise of judgment); The Network Project, 4 Media L. Rep. (BNA) at 2409 (government must apportion finite resource—money; decisions will necessarily involve consideration of content). In all four cases, the courts permitted the government to exercise an active role in managing the alleged forum. This is not the case with public access channels. Congress, through the 1984 Cable Act, did not allow the franchising authority to exercise editorial control over access programming. See supra note 314-21 and accompanying text.

326. Cornelius, 473 U.S. at 805-06 (citations omitted) (federal workplace, like any place of employment, must have wide discretion over management of internal affairs in order to accomplish business objectives). This level of "discretion and control" is analogous to the editorial discretion allowed in certain governmentally controlled forums. See supra note 325. For example, in Cornelius, 473 U.S. 788, the alleged forum was an internal mailer for contributions by federal employees, and in Perry Educ. Ass'n, 460 U.S. 37, it was a school district's internal mail system.
Public access channels are “limited” as to certain speakers and as to certain topics. The only limitation consistently placed on the identity of the access user by franchising authorities requires that the program be the “product” of a community citizen. Some access regulations require that only citizens living within the cable franchise be allowed to cablecast public access programs,\textsuperscript{327} others merely give a local citizen’s program scheduling priority,\textsuperscript{328} and some permit programming produced outside the community if a local citizen sponsors the program.\textsuperscript{329}

\textsuperscript{327} See ACCESS—Dayton: Operating Rules and Regulations § 1.1 (Dayton, Ohio, Apr. 1986) (public access users defined as “any individual or group or organization” in the franchise service area). The Sacramento Cable Foundation adopted the following residency definition:

\textit{3.2 Residency.}

Any resident of Sacramento County or an employee or agent of a non-profit community group or organization with offices located within Sacramento County will satisfy the residency requirement.

\textit{3.21 Residency shall be defined as having a verifiable Sacramento County residential mailing address.}

\textit{3.22 Staff members or representatives of a non-profit community group or organization with offices located within Sacramento County shall be considered as satisfying the residency requirement.}

\textit{3.23 Full-time student status at an educational institution located in Sacramento County will satisfy the residency requirement.}

\textit{Sacramento Community Cable Foundation} § 3.2-3.23 (Sacramento, California, undated) But cf. \textit{In re RVS Cablevision Corp.}, 36 Rad. Reg. 2d (P&F) 1133 (F.C.C. 1976) (striking down franchise requirement that gives a preference to city residents, businesses, industries and educational and cultural institutions in the use of leased access as inconsistent with first-come, first-served mandate of F.C.C. regulations).

\textsuperscript{328} See \textit{Sacramento Community Cable Foundation} § 13.11(a) (Sacramento, California, undated) (locally produced programming receives highest scheduling priority); \textit{Pocatello—Vision 12 Programming Policy} (Pocatello, Idaho, Oct. 1, 1987) (“When time limitations require that choices be made between offered programming, first priority shall be given to locally produced public . . . access programming. . . . Non-locally produced programming shall be used to supplement this schedule, as channel time and staff time permit.”); \textit{Sangamon State University/Times Mirror Cable Television of Springfield, Inc. Access Rules} § 3(b) (Springfield, Illinois, undated) (“When scheduling conflicts arise, SSU shall give preference to . . . access channel users living or located within the . . . franchise area.”).

\textsuperscript{329} See \textit{Pocatello—Vision 12 Programming Policy} (Pocatello, Idaho, Oct. 1, 1987) (“[N]on-locally produced programming will be cablecast only if it is part of an exchange with other access centers, or if it is sponsored by an individual or organization within the community.”); \textit{Allen County Television Center: Operating Rules and Regulations} § 5(E) (Fort Wayne, Indiana, Jan. 1, 1988) (“Requests to cablecast programming produced outside Allen County must be submitted by a county resident.”); \textit{Cable Access—St. Paul, Inc. Rules and Regulations} Art. IX(G)(2) (St. Paul, Minnesota, June 9, 1986) (“Programming not produced through Cable Access—St. Paul, Inc., facilities must be submitted by a resident of St. Paul, an official St. Paul Community representative, or a member of Cable Access—St. Paul, Inc.”); \textit{Warner Cable of Cincinnati: Access Rules and Operating Procedures} 1 (Cincinnati, Ohio, Mar. 31, 1988) (“Non-residents of Cincinnati may produce programs if they are \textit{sponsored} by a Cincinnati resident or group and may take Warner Cable access workshops and use access equipment.”) (emphasis added).
Public access is also "limited" as to permissible topics. Since its genesis, public access programming has always been noncommercial. When the F.C.C. required public access channels, it directed the cable operator to promulgate rules describing the noncommercial nature of the channels. The F.C.C. also established commercial access requirements to provide an outlet for commercial speech and promulgated regulations which provide for leased access. Similarly, the 1984 Cable Act has provisions for leased access. The availability of leased access channels implicitly suggests that public access channels are to retain their noncommercial nature. Furthermore, most franchising authority access regulations prohibit commercial programming on their public access channels.

The availability of public access channels is thus limited to certain speakers and topics. Therefore, the channels constitute a limited public forum for the cablecasting of locally-supplied, noncommercial programming.

2. State Action

Intercmingled with the public forum question is a concomitant "state action" problem. In any system with public access, some organization must perform duties such as ensuring playback of programs on the channel, managing public access studios and facilities, and training interested citizens to use access facilities. This "access manager" is usually responsible for enforcing the access rules and procedures promulgated by the franchising authority under the 1984 Cable Act. Determining the legality of any editorial control the access manager exercises over offensive or controversial access programming depends on the characteristics of the entity. Access managers fall into three main categories: 1) the cable operator; 2) an arm of the

330. See supra note 143 and accompanying text.

331. See, e.g., Pocatello—Vision 12 Programming Policy (Pocatello, Idaho, Oct. 1, 1987) (requiring that programming be non-commercial); Sacramento Community Cable Foundation § 6.1-6.2 (Sacramento, California, undated) (prohibits (a) "[m]aterial designed to promote the sale of commercial products or services" and (b) "[c]ommercial programming which in whole or in part depicts, demonstrates, or discusses products, services, or businesses with the intent or substantial effect of benefitting or enhancing a profit-making enterprise."); Sangamon State University/Times Mirror Cable Television of Springfield, Inc.—Access Rules § 2(a) (Springfield, Illinois, undated) (public access is use of a cable television channel for non-commercial programming); Allen County Television Center: Operating Rules and Regulations § 2(C) (Fort Wayne, Indiana, Jan. 1, 1988) (advertising for sale of commercial products or services, including spots produced by or on behalf of a candidate for public office, is prohibited); Comcast Cablevision of Indianapolis, Inc.—Public Access Policies and Procedures (Indianapolis, Indiana, Sept. 1, 1988) (advertising material promoting sale of products or services is prohibited); Warner Cable of Cincinnati: Access Rules and Operating Procedures 2 (Cincinnati, Ohio, Mar. 31, 1988) (forbids advertising which promotes the sale of products, services, trade, business or person).

332. Meyerson, Rights, supra note 146, at 52-53.

333. Id. at 53.

334. "The primary disadvantage of having an access center operated by a cable operator is that its operations are more susceptible to the budgetary whims of the company. Cable companies also tend to allow less community control over program content and facilities than other types of management." R. Oringel & S. Buske, supra note 9, at 15.
local government, 335 such as the public library 336 or a state university; 337 and 3) nonprofit access management corporations. 338 The cable operator, as access manager, is explicitly forbidden to exercise content control under the 1984 Cable Act. 339 The local government and its agencies are prohibited from exercising editorial control over access programming under the first amendment and implicitly under the 1984 Cable Act. 340 Whether nonprofit access managers are “state actors” presents a different, and more difficult dilemma.

To satisfy the state action requirement of the fourteenth amendment, the Supreme Court has required that the conduct depriving the federal right be fairly attributable to the State. 341 The Court’s state action decisions have produced a two-part test to analyze the concept of “fair attribution.” 342

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335. The disadvantages of municipal access management include the “danger that access staff will be hired for their political connections instead of their qualifications, and that the center will be used for political propaganda rather than kept at a needed arm’s-length from the political machinations of members of local government.” R. O RINGEL & S. BUSKE, supra note 9, at 15. See also NIAPV REPORT, supra note 27, at 26 (public access in Pocatello was controlled by the city council and was thus vulnerable to political pressure).


337. In Springfield, Illinois, for example, the public access channel is managed and operated by Sangamon State University. Sangamon State University/Times Mirror Cable Television of Springfield, Inc. Access Rules § 1 (Springfield, Illinois, undated).

338. See R. O RINGEL & S. BUSKE, supra note 9, at 14; Meyerson, Rights, supra note 146, at 53-54, NIAPV REPORT, supra note 27, at 6-7. Nonprofit access management corporations, unlike the cable company and the local government, are most likely to promote the use of public access channels. Nonprofit access managers are insulated from the political pressures felt by municipal access managers and from the budgetary whims felt by cable company access managers. R. O RINGEL & S. BUSKE, supra note 9, at 27. Nonetheless, nonprofit corporations are prone to exercise editorial control over controversial programming, and are vulnerable to the dictates of the local government which fund them. Id. at 134-35. A nonprofit access management corporation is similar to the entity a franchising authority must create when the government owns the cable system.

339. See supra notes 321-22 and accompanying text.

340. See supra notes 314-22 and accompanying text.


342. Id. Justice White’s majority opinion in Lugar was the first attempt to fashion a test from prior state action cases.


Justice White’s test merely compiles the holdings of the Court’s prior state action cases. Lugar, 457 U.S. at 926-42. Although his two-part test may add some lucidity to state action by organizing past cases into two categories, the test is not very precise and may be quite abstract and vague. Phillips, The Inevitable Incoherence of Modern State Action Doctrine, 28 ST. LOUIS U.L.J. 683, 720 n.190, 735 n.264 (1984). Justice White’s test was applied in Albert v. Carovano, 824 F.2d 1333, 1339 (2d Cir. 1987).
first part of the test focuses on the relationship between the state and the actor. The second part focuses on the character of the actor.

Under the first part, to constitute state action the "deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." Therefore, the state policies or regulations that create the relationship between the state and the alleged state actor must connect with the actor's conduct which deprived the putative plaintiff of a federal right.

In the case of the nonprofit access management corporation, the basis of its relationship with the state is two-fold. First, the franchising authority specifically creates the nonprofit access management corporation for the sole purpose of supervising the access facilities the franchising authority required the cable operator to provide under the 1984 Cable Act. Any regulation

344. Lugar, 457 U.S. at 938.
345. Id. at 937.
346. Id. at 938; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (requiring sufficiently close tie between state and challenged action of regulated entity so that action of latter may be fairly attributed to state). See also West, 108 S. Ct. at 2259 (state action for § 1983 claim found where state contracted out for prison medical care—"dispositive issue concerns the relationship among the State, the physician, and the prisoner"); Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (no state action in nursing home's discharge or transfer of patients to lower levels of care without adequate notice where only connection between state and nursing home was the adjustment of benefits); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (no state action in racially discriminatory policies of private club where only connection between state and club was issuance of liquor license).
347. See Meyerson, Rights, supra note 146, at 57. Under the 1984 Cable Act, if the nonprofit access corporation exercises editorial control over access programming, the corporation may become a "cable programmer" subject to any civil or criminal liability arising from the programming. See supra note 221.

It is not clear whether Congress intended a nonprofit access management corporation created pursuant to § 533(e)(2) of the 1984 Cable Act to be a state actor. See supra notes 321-22 and accompanying text. Congress included this provision to alleviate its fears of government censorship in cable systems owned by the government. This delegation of editorial control responsibility would seem to indicate that the nonprofit access management corporation would not be a state actor. To bolster this argument, an analogy can be drawn to the Corporation for Public Broadcasting ("CPB"). The goals of the CPB are "to facilitate the development of educational broadcasting, to assist in the development of systems of interconnection for the distribution of educational television programs and to aid in the establishment of systems of public television stations." Network Project v. Corporation for Pub. Broadcasting, 4 Media L. Rep. (BNA) 2399, 2401 (D.D.C. 1979). Congress' intent in establishing the CPB were similar to that in promulgating § 533(e)(2) of the 1984 Cable Act:

Congress desired to establish a program funding agency which would be free from governmental influence or control in its operation. Yet, the lawmakers feared that such complete autonomy might lead to biases and abuses of its own. The unique position of the Corporation is the synthesis of these competing influences. Reference to the legislative history of the 1967 Act shows a deep concern that governmental regulation or control over the Corporation might turn the CPB into a Governmental spokesman. Congress thus sought to insulate CPB by removing its programming
of access programming content by the nonprofit access management corporation would be compelled by the access rules and regulations promulgated by the governmental franchise authority. Second, the local government or the franchising authority usually nominates, appoints, or confirms the nonprofit access management corporation’s board of directors. Due to the close relationship between the state and the nonprofit access management corporation, any claim of first amendment deprivation based on the access manager’s exercise of editorial control over access programming would surely be imputed to the state. But for the franchising authority’s access requirements and its concomitant access rules and procedures, the nonprofit access management corporation would not exist. Therefore, under the first-part of the Supreme Court’s state action analysis, the nonprofit access manager constitutes a state actor while performing access-related duties.

The second part of the Supreme Court’s two-part state action analysis focuses on the character of the purported state actor. The purported state activity from governmental supervision.

Accuracy in Media, Inc. v. F.C.C., 521 F.2d 288, 293 (D.C. Cir. 1975). In Network Project, public television viewers and program producers alleged that the CPB censored the content of public television, eliminated funding for controversial programs, and required detailed descriptions of program content as a condition of funding. 4 Media L. Rep. (BNA) at 2401. Relying primarily on the degree of insulation between the government and the CPB as provided in the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 stat. 365 (1967), the court held that the CPB was not a state actor. Id. at 2403-08. But cf. Columbia Broadcasting Sys. v. Democratic Nat’l Comm., 418 U.S. 94, 149 (1973) (Douglas, J., concurring). Justice Douglas reasoned that:

since [the CPB] is a creature of Congress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a ‘press’ as that word is used in the First Amendment. If these cases involved [the CPB], we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper. . . . The Government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired.

Id.

The provisions in section 533(e)(2) may be distinguished from the CPB for state action purposes. Section 533(e)(2) access managers are still compelled to enforce the access rules and regulations promulgated by the franchising authority. The House Report suggests that the access manager’s only discretion is selecting programming services, and not exercising control over access. H.R. Rap. 934, supra note 7, at 68-69, reprinted in USCCAN, at 4705-06. It would also be inequitable for an access manager in a community with a privately-owned cable system to get less protection than a neighboring community with a publicly-owned system simply because of the ownership configuration. Lastly, as discussed in supra notes 324-25, the CPB’s active involvement in funding is distinguished from the passive managerial duties relating to public access channels.

348. Id. See, e.g., Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 593 (W.D. Pa. 1987) (access channels controlled by seven member Board of Managers, of whom five are appointed by Erie City Council); By-Laws of Comm. Access Corp., Inc., Lansing, Michigan Art. IV, § 2 (Lansing, Michigan, undated) (nine directors nominated by cable operator and confirmed by the Lansing City Council).

349. Lugar, 457 U.S. at 938.
actor must be a state official, have acted with or obtained significant aid from state officials, or otherwise have his conduct fairly chargeable to the state. Three significant characteristics of a nonprofit access management corporation make its conduct fairly chargeable to the state. First, where the private entity exercises powers that are "traditionally the exclusive prerogative of the State," the entity becomes a state actor under "public function" doctrine. Assuming arguendo that public access channels are a limited public forum, any exercise of editorial control over the content of programming would clearly be a power traditionally exercised by the state. For example, it would clearly be impermissible for a local government to delegate its duties over streets, parks, and sidewalks to a private party in order to avoid constitutional dictates.

The second characteristic that transforms the nonprofit access management corporation into a state actor is the manner in which the corporation is funded and the level of that funding. Nonprofit access managers receive funding almost exclusively from municipal governments, either directly or indirectly. Apparently the level of government funding is significant enough

350. Id. at 937 (person must fairly be said to be state actor "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."). Accord West, 108 S. Ct. at 2255 (§ 1983 case). This prong of the analysis encompasses a variety of other "state action" tests, including the 'public function' test, the 'state compulsion' test, the 'nexus' test, and . . . a 'joint action test.' Lugar, 457 U.S. at 939 (citations omitted). See also Blum, 457 U.S. at 1004 (state held responsible for private decision when state overtly or covertly encouraged or coerced private actor) (citations omitted).


352. See supra notes 285-331 and accompanying text.

353. Meyerson, Coaxial Wires, supra note 166, at 585 (the 1984 Cable Act regards access channels as "the modern counterpart to the city streets or, perhaps more precisely, to the streets in a company town") (emphasis added).

354. Recent Supreme Court decisions indicate that governmental funding, without more, may be insufficient to establish state action. Phillips, supra note 342, at 719. See, e.g., San Francisco Arts and Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (United States Olympic Committee is not governmental actor); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (no state action where public funds accounted for between 90% and 99% of entity's budget); Blum v. Yaretsky, 457 U.S. 991, 1011 (1982) ("[t]hat programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business").

In the case of a nonprofit access management corporation, however, the claim of state action may also rest on the manner of funding. See supra notes 354-56 and accompanying text.

355. Meyerson, Rights, supra note 146, at 57. See, e.g., 1987 Annual Report Cable 21—ACTV: The Community Channel (Columbus, Ohio, June 1988) (ACTV Cable 21 partially funded by City of Columbus through the cable television franchise fees); Milwaukee Access Telecommunications Authority: Fact Sheet (Milwaukee, Wisconsin, undated) (1987 operating budget of $577,000 through franchise fees). These corporations may also receive funding from arts foundations.
that one commentator noted that the most pervasive threat to access programmers' first amendment rights is the governmental influence over access organizations "by political and budgetary pressure."\(^{356}\)

Finally, editorial control exercised by a nonprofit access management corporation constitutes state activity because such action is not essentially a private function.\(^{357}\) The private function doctrine—which also focuses on the entity's characteristics—"effectively deconstitutionalize[s] formally public activity because of its functional resemblance to private behavior."\(^{358}\) Unlike the public defender in Polk County, the school in Rendell-Baker, or the nursing home in Blum, an access manager has no equivalent in the private sector. But for statutory provisions, public access channels would not exist. Therefore, because of the large amount of state aid,\(^{359}\) the state's significant overt and covert influence over the decisions of the nonprofit access management corporation, and the lack of a private function nature, such

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\(^{356}\) R. Orngul & S. Buske, supra note 9, at 133. See supra note 268 for examples of governmental budgetary influence over access managers and channel content.

The F.C.C. in 1975 reached a similar conclusion. See In re Open Channel, 58 F.C.C.2d 1216 (1975). A group which assisted individuals in producing access programs in New York City asked the F.C.C. to approve a rule allowing cable systems to fulfill their access obligations by contributing toward the funding of a "separate community entity designed to effectuate the production of public access programming." Id. at 1216. The F.C.C. declined the request:

[We cannot ignore the potential for either direct or indirect control over the content of public access programming by any arm of government involved in administering or financing public access arrangements. It is of grave concern to us that in devising a public access arrangement, in disbursing funds, or in overseeing the operation of an allegedly separate public access organization, the franchising authority may influence the choice of speakers or the views expressed on cable television public access channels.

Id. at 1218.

The F.C.C. would allow such arrangements "only in the most extraordinary circumstances, and only when a specific showing is made that the proposal contains sufficient safeguards against direct or indirect government censorship." Id. at 1219. See, e.g., In re Application of Complete Channel TV, Inc., 34 Rad. Reg. 2d (P&F) 1372 (1975) (allowed access facilities to be funded partially by local government only with assurance that government would exercise no editorial control over programming). Although such arrangements are commonplace today, the warning sounded by the F.C.C. still applies.

357. The private function doctrine was first enunciated in Polk County v. Dodson, 454 U.S. 312 (1981). There, the Court held that a public defender was not a state actor because the defender performs an "essentially private function." Id. at 319. "[A] public defender does not act under color of state law when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding." Id. at 325. See also Rendell-Baker, 457 U.S. at 840-41 ("The school is also analogous to the public defender found not to be a state actor in Polk County v. Dodson. . . . [i]n the relationship between the school and its teachers and counselors is not changed because the State pays the tuition of the students."); Blum, 457 U.S. at 1011-12 (nursing home held not to be state actor).

358. Phillips, supra note 342, at 710.

359. Lugar, 457 U.S. at 937.

360. Blum, 457 U.S. at 1104.
corporations satisfy the state action requirements under the second part of the Supreme Court analysis.\textsuperscript{361}

The conclusion that nonprofit access management corporations are state actors can also be justified by exploring two underlying themes in the Court’s recent opinions which have effectively narrowed the scope of state action. The first theme, which is closely related to the private function doctrine, is the Court’s recent solicitude for business interests in its state action cases.\textsuperscript{362}

These recent cases evince a concern for the organizational autonomy of the entity, “especially as this manifests itself in solidified control over employees, members, or third parties.”\textsuperscript{363} Declaring nonprofit access managers state actors for purposes of exercising content control over access programming does not impinge the entity’s duties as an employer. The related second theme suggested by recent cases is the notion that the state action standard will vary depending on the constitutional right allegedly violated.\textsuperscript{364} Early state action opinions usually included claims of racial discrimination,\textsuperscript{365} and the doctrine was expansively interpreted in these cases. Today those claims are not as common. Most of the recent pro-business state action decisions involve due process claims and have triggered a narrower interpretation of the doctrine.\textsuperscript{366} For public access purposes, the constitutional claim at issue is a first amendment claim. Although a first amendment claim may not generate the same level of scrutiny as one of racial discrimination, it surely will not be dismissed as quickly as a due process claim and, therefore, a more expansive view of the state action doctrine should apply.\textsuperscript{367} *

\textsuperscript{361}. One commentator has asserted that the nonprofit access management corporation constitutes an actual governmental entity. Meyerson, Rights, supra note 146, at 57.

Federal income tax laws governing nonprofit corporations may also prohibit a nonprofit access manager from exercising content control over access shows. R. ORNOEL & S. BUSKE, supra note 9, at 26-27. Nonprofit organizations must not “propagandize... to influence legislation... , participate in or intervene in any political campaign... , or be organized or operated for the benefit of private interests.” Id.

\textsuperscript{362}. Phillips, supra note 342, at 739 (cases cited therein).

\textsuperscript{363}. Id.

\textsuperscript{364}. Id. at 740.


As Justice Marshall noted in Jackson, a due process case, the singular state action standard applied by the majority “would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve.” 419 U.S. at 374.

\textsuperscript{367}. See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946) (striking down state ban on distributing religious literature). But see San Francisco Arts and Athletics, 483 U.S. at 522 (no state action where commercial speech affected); Adams v. Vandemark, 855 F.2d 312 (6th Cir. 1988) (no state action in first amendment case due to lack of nexus between state control over entity and entity’s decision to discharge plaintiff).
III. Counter-Programming and Scheduling as a Response to Controversial Programming

The community has three options to combat controversial programming on public access channels: 1) challenge the first amendment protection of the controversial speech; 2) eliminate public access entirely; or 3) use public access to promote its own positive ideals. Short of attacking the first amendment protection of controversial expression or pulling the plug on public access channels, what options are available to the franchising authority and access manager to respond to controversial programming? To date, franchising authorities and access managers have employed two methods of attack: counter-programming and scheduling.

Counter-programming is the active solicitation by access managers of programming that responds to the message of a particular controversial show or programmer. Scheduling is the manipulation of the sequencing of public access programs in an effort to surround controversial programs with responsive counter-programming. Both methods are designed to minimize the impact of the controversial message. Access managers that use counter-programming and scheduling do so without clear standards or guidelines.

368. NIAPV Report, supra note 27, at 23. The NIAPV Report stated:
three options open to [the] community are First, we can challenge the protection of [the] speech under the First Amendment. Second, we can seek to silence the [speech] by attempting to eliminate public access altogether. Our third option is to learn how to use this powerful medium, not only to combat [controversial] cable programs, but to promote our own positive goals . . . .

Id.
The first two options will not be reviewed here. However, for a review of the second option of pulling the plug on public access channels, see supra note 235 and accompanying text for a description of one city's experience. "Silencing the bigot is also dangerous because it misleads us into believing we have thereby dealt with the racism, when we have not. The bigot and his racism simply become more difficult to identify and expose for what they are." NIAPV Report, supra note 27, at 23.

In Cohen v. California, 403 U.S. 15 (1971), the court held that the first amendment is designed to remove governmental restraints from the arena of public discussion, allowing the public to decide which views shall be voiced, so that such freedom will produce a more capable citizenry and a more perfect polity and in the belief that no other approach would comport with the political system's premise of individual dignity and choice. Id. at 24. In Terminiello v. City of Chicago Justice Jackson quoted President Woodrow Wilson:
I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out and the world knows that he is a fool. So it is by exposure of folly that it is defeated; not by the seclusion of folly . . . .

Terminiello v. City of Chicago, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting) (citation omitted).

369. Some access managers have attempted to codify these methods in their access rules and regulations promulgated pursuant to the 1984 Cable Act. Other systems which have access rules and regulations utilize counter-programming and scheduling on a case-by-case basis. Finally, some systems have no written access rules and regulations at all. Telephone interview with Capital Cablevision, Charleston, West Virginia (September 19, 1988); telephone interview with official of Rockford Cablevision, Rockford, Illinois (September 19, 1988).
Therefore, access managers exercise extensive discretion in determining whether a program is controversial and whether to utilize counter-programming or scheduling to respond to it.

Both counter-programming and scheduling are content-based activities. Such efforts are content-based because they are triggered solely by the perceived controversial nature of the program or programmer. The Court has not viewed favorably attempts to minimize the impact of one viewpoint by elevating the persuasive appeal of another. Furthermore, there is no evidence that controversial programming exerts any undue influence on viewers or denies viewers exposure to other programming—these are actions designed to protect the majority from a minority viewpoint. Because counter-programming and scheduling are content-based, in order to be considered constitutionally sound under the applicable public forum doctrine,

370. See supra notes 253-62 and accompanying text for review of special protection controversial speech receives from the first amendment. See also Hustler Magazine v. Falwell, 485 U.S. 46, (1988) ("Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."); Stewart v. District of Columbia Armory Bd., 863 F.2d 1013 (D.C. Cir. 1988) (large banner posted in Washington D.C.'s Robert F. Kennedy Memorial Stadium reading "John 3:16—For God so loved the world that He gave His only begotten Son that whosoever believeth in Him shall not perish, but have everlasting Life"—removed due to its controversiality).


372. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785-86 (1978) (legislature's suppression of speech which provides one side of debatable public question advantage offends first amendment); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ."); Columbia Broadcasting Sys., Inc. v. F.C.C., 629 F.2d 1, 31 (D.C. Cir. 1980) (Tamm, J., concurring) (regulation must guard against government action that tends to enhance persuasive appeal of particular speaker or viewpoint), aff'd, 453 U.S. 367 (1981).

373. See also Krattenmaker & Powe, Television Violence: First Amendment Principles and Social Science Theory, 64 Va. L. Rev. 1123, 1274 (1978) (regulation which restricts amount of violent programs "might pass constitutional muster if its proponents could show that the public is being denied exposure to other types of programs and that limiting the amount of existing programs would further the public interest by ensuring a wider variety of viewing options"); cf. Bellotti, 435 U.S. at 789-90 (no showing that voice of corporations has been overwhelming or significant in influencing Massachusetts referenda; no finding that confidence of citizenry in government is threatened).

374. "Everything else on television is counter-programming to Gay Cable Network access programming." Telephone interview with Louis Maletta, president, Gay Cable Network (August 29, 1988).

Such restrictions also limit the access of minority or unpopular groups to mass media, an institution to which they are already excluded. Cf. Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 661 (1974) (court rejected university decision to bar gay rights group from access to university facilities, stating "[i]t would seem that these communicative opportunities are even more important for [the gays] than political teas, coffees, and dinners are for political candidates and parties, who have much wider access to the media, being more highly organized and socially acceptable").
these activities must be necessary to serve a compelling state interest and narrowly drawn to achieve that end.

A. Counter-Programming

Counter-programming may take one of two forms. First, the franchising authority itself may produce the counter-programming.\(^{375}\) Second, and more common, the franchising authority may solicit a third party to produce counter-programming.\(^{376}\) One community that has attempted to codify a counter-programming policy is Columbus, Ohio.\(^{377}\) Under its regulations, the nonprofit access management corporation pre-screens any programs which a city board member or member of the public brings to the attention of the board which is purported to contain material which a substantial number of access viewers may find offensive.\(^{378}\) After reviewing the program, the board may:

a. direct the staff to schedule and show the program according to the regular rules of [the operator] \ldots;

b. direct that the showing of the program be preceded by a warning notice;

c. direct that the program be shown at night only with or without a warning; and

d. design a plan to solicit appropriate responsive programming from the community, and direct the staff to make assistance of the responsive programming a priority.\(^{379}\)

The governmental interest in counter-programming may be a desire to be fair or to present a balanced view of a topic. These interests would be similar to the interests advanced by the fairness doctrine in the broadcasting field, which requires a broadcast licensee to air both sides of a controversial topic of public importance.\(^{380}\) The fairness doctrine was premised on the limited availability of broadcast frequencies and the concomitant need for governmental licensing.\(^{381}\) However, when the F.C.C. controlled access, it did not

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375. This was an option that Pocatello, Idaho, rejected when confronted with "Race and Reason." See supra notes 245-46 and accompanying text.

376. This was the option utilized by the communities discussed in supra notes 243-50 and accompanying text.

377. Scheduling Regulations, Cable 21—ACTV: The Community Channel (Columbus, Ohio, Feb. 12, 1986).

378. Id. § 7.04(b). Potentially offensive programming includes "those which might be considered obscene, or slanderous or which portray or advocate violence or hatred toward any societal group." Id.

379. Id. § 7.04(c)(2).

380. For a brief description of the fairness doctrine requirements see infra notes 257-59 and accompanying text.

381. See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 388-89 (1969) ("If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves."); In re Fairness Doctrine (§ 73.1910), 102 F.C.C.2d 143, 146-47 (1985) (discusses bases for fairness doctrine); Simmons, supra note 147, at 629 (discusses bases for fairness doctrine).
apply the fairness doctrine to access channels because, unlike broadcasting, access was available to everyone free of charge.\footnote{382} Governmental regulation of fairness and balance is inapplicable to a public forum which is indiscriminately open to the general public.\footnote{383} Another flaw in the counter-programming concept is its discriminatory effect on minority or unpopular speakers. As subsection (d) of the Columbus, Ohio, counter-programming regulation suggests, the access manager may be directed to offer facilities, funds and the assistance of access personnel to one group without offering these same services to the minority or unpopular group.\footnote{384} For example, the access manager would make special efforts to assist the NAACP in developing a counter-program to the white-supremacists, but it is unlikely that the access manager would offer the Klan assistance to counter-program the NAACP. Promoting counter-programming is permissible and should be encouraged in the overall scheme of public access. However, counter-programming actively solicited by the access manager and the discriminatory provision of access services to favored groups is impermissible.\footnote{385} This programming is the result of the artificial forces of the access manager and franchising authority. Conversely, counter-programming whose impetus comes from the community and which is the natural product of generally applied access education and training is permissible and desirable.

The use of counter-programming presents still another problem. Assuming that this action effectively constitutes editorial control by the access manager,

\footnote{382. See supra note 147 and accompanying text. The Columbus, Ohio, regulations recognize the inapplicability of the fairness doctrine to access programming, but nevertheless allow the access manager to "make an effort to provide for fair and balanced programming throughout its entire program schedule." Scheduling Regulations, Cable 21—ACTV: The Community Channel § 3.05(d) (Columbus, Ohio, Feb. 12, 1986).}

\footnote{383. See Krattenmaker & Power, supra note 373, at 1273-74 (1978). The authors reject an effort to require broadcasters to reduce the number of violent programs and present a more "balanced" programming menu, noting that (1) the fairness requirement in broadcasting rests wholly upon the medium's scarcity, and (2) the government "lacks power to compel speakers using traditional media—whether in the parks, on the streets, or in newspapers—to balance the views they express" \textit{id.}; cf. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 145-46 (1973) (Stewart, J., concurring). In rejecting a general right of access to broadcast advertising time, Justice Stewart noted that the Framers of the constitution "believed that 'fairness' was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice." \textit{Id. But cf.} Bonner-Lyons v. School Comm. of City of Boston, 480 F.2d 442, 444 (1st Cir. 1973) (declared internal distribution system of school a limited public forum, and enjoined the further distribution of anti-bussing material "unless fair and reasonable [sic] timely opportunity is afforded to others having differing views to use the same channels").}

\footnote{384. See R. Oringer & S. Buske, supra note 9, at 132 (notes problem when "[facilities are . . . made available to one community group, without requiring [the access manager] to work with other members of the community").}

\footnote{385. Van Eaton & Earley, supra note 218, at 13.}
and that manager is a state actor, these activities constitute indirect control of expression by the government or "governmental speech."386 Governmental speech is perceived as dangerous because "participation by the government in the dissemination of political ideas poses a threat to open public debate that is distinct from government impairment of individual liberty."387 As one commentator put it, "[s]tudents of the Constitution debate endlessly over whether Nazis may march in a Jewish neighborhood, but virtually ignore the march of government, an immensely more powerful communicator than a small group of malcontents."388 The government could nullify the effectiveness of criticism by using the vast wealth of resources at its disposal.389 By skewing public debate, governmental speech also has the potential to "destroy the underpinnings of government by consent."390 By drowning out the voice of dissent, this brand of speech may result in intellectual and social uniformity.391 Indeed, the government may employ a friendly press, committed to views favorable to its own, to curtail the activities of those with critical opinions.392 In the realm of public access, the danger of governmental speech is manifested by the access manager who utilizes counter-programming illegitimately to further the propaganda of the prevailing government and simultaneously drown out the voice of dissent.393


387. Kamenshine, supra note 386, at 1104. Some commentators do not agree that governmental speech is a constitutional problem. See, e.g., L. Tribe, AMERICAN CONSTITUTIONAL LAW 588-91 (1978) (no constitutional provision means that "government cannot add its own voice to the many that it must tolerate, provided it does not drown out private communication."); Emerson, Legal Foundation of the Right to Know, 1976 WASH. U.L.Q. 1, 7 ("The government of course is entitled to participate in the system of freedom of expression and, while its contribution may at times tend to drown out others, no constitutional objection can normally be entered.").

388. Yudof, supra note 386, at 864.

389. Kamenshine, supra note 386, at 1104.

390. Id. at 1105 (government must be restrained from manipulating free marketplace of political ideas if self-government is to be preserved).

391. See Emerson & Haber, supra note 386, at 522; see also Van Alstyne, supra note 386, at 532-33 (government may seek to suppress "expression of ideas inimical to their interests"); Yudof, supra note 386, at 873 (government may "silence the strong or critical voices").

392. Van Alstyne, supra note 386, at 532-33.

393. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-41 (1942) ("Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.").
Another tool franchising authorities and access managers use to respond to controversial programming is scheduling. The first-come, first-served formula of public access does not offer any guidance as to whether an access manager can schedule programming. A literal interpretation of first-come, first-served suggests that programs should be scheduled and cablecast in the order access producers submit them. Therefore, based on the first-come, first-served concept and the limited public forum nature of access, scheduling of public access programming constitutes impermissible editorial control under the 1984 Cable Act.

Some access managers schedule counter-programming, whether solicited by the access manager or not, before and/or after the controversial program in an effort to minimize the program's impact. Surrounding the controversial program with counter-programming diminishes the persuasive appeal of the message. Governmental attempts to alter the viewer's reaction to

394. See Midwest Video Corp., 571 F.2d at 1057 (question arises "how any 'scheduling' could be done, of programs unknown to and under no control" of the access manager); D. Ortmier, supra note 61, at 32 (public access cannot be system-analyzed or preprogrammed); LaPierre, supra note 144, at 103 (discusses ambiguities in first-come, first-served dictate).

395. See Meyerson, Rights, supra note 146, at 61 ("there is no 'journalistic discretion' involved in running a public access system; each individual access programmer exercises 'journalistic discretion.'"). See generally Krattenmaker & Powe, supra note 373, at 1270 (scheduling inconsistent with basic principle of time, place, and manner cases because it is content-related). Cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("[t]he choice of material to go into a newspaper, and decisions made as to limitations on the size and content of the paper, are treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."); Columbia Broadcasting System, 412 U.S. at 124 ("[f]or better or worse, editing is what editors are for; and editing is selection and choice of material."); Preferred Communications v. Los Angeles, 754 F.2d 1396, 1410 (9th Cir. 1985) ("[a] law allowing free expression in public parks only for a few minutes at 6 a.m. hardly provides an adequate replacement for the right to free, untrammeled debate in that forum."); aff'd on narrower grounds, 476 U.S. 488 (1986); Nadel, Editorial Freedom, supra note 179, at 232 (organizing of material is part of editorial discretion).

396. Communities confronted with "Race and Reason" have used the "scheduling" of counter-programming to respond to its message. This practice was condemned by the F.C.C., In re Obscene or Indecent Matter on Access Channels, 59 F.C.C.2d 984, 985 (1976) ("[A]s a matter of taste and common sense it would be appropriate for [offensive] programming to be cablecast at hours that would tend to minimize its exposure to children. Our rules do not require such scheduling, but we wish to make clear that neither do they prohibit it."), and is advocated by some commentators. E.g., R. Oringel & S. Buske, supra note 9, at 30 ("[i]t is important that your access group does not waste the many hours that some community access groups have wasted by agonizing over rules to control a situation that may never occur, or if it does, can be managed by judicious scheduling.") (emphasis added).

In other media, scheduling is used to enhance the persuasive effect of certain messages. Cf. In re Revocation of the Licenses of Western Conn. Broadcasting Co., 43 F.C.C.2d 730, 733 (1973) (in reviewing broadcaster's decision to refuse to air a candidate's political ad immediately after his opponent's ad, the F.C.C. noted that the "policy of requiring a minimum separation between announcements of opposing candidates was adopted to assure that each announcement would have maximum effect").
controversial expression are impermissible. However, scheduling is often justified as an attempt to build a regular public access viewership. In fact, one set of access rules has a provision that explicitly lists "building a regular viewership" as a "high priority." This type of scheduling, similar to the scheduling performed on broadcast television, is done to make access channel programming more accessible to viewers. Public access, however, was not meant to be a step-child of broadcasting. Judging by the program offerings on broadcast stations, it is questionable whether we want more. Given society's interest in the discussion of controversial issues, styling public access after broadcast would be ill-advised. The fairness doctrine advertisers.

397. See Boos, 108 S. Ct. at 1163 (suggesting that protecting listener's reaction to speech is impermissible).

398. The dilemma between audience-building and the first-come, first-served formula has been described as: "[s]hould access emphasize simply getting people on the air, or should some flexibility be sacrificed to accommodate the audience?" R. Kletter, supra note 47, at 12.

399. Cable Access-St. Paul, Inc. Rules and Regulations Art. IX(K)(3) (St. Paul, Minn., Apr. 8, 1986). The rules provide that scheduling will be done "on a priority basis ... within the parameters of overall program composition and flow, considerations of audience building, constraints of schedule building with regard to series, live feeds and special events, and the representative diversity of programming on the [access] channels." Id. Art. IX(A)(1).

400. One commentator has stated:

Broadcast programs appear ... in regular scheduled spots, or as specials at times scheduled regularly for specials. Audiences build up viewing habits based on these patterns. Vary a show's day and time from week to week and its audience share will plummet. Time-slot programming serves economic rather than aesthetic purposes. Timing on cable need not be as rigid as for broadcasting, but regular scheduling is very much a part of building an audience.

R. Kletter, supra note 47, at 11.

401. See supra notes 47-48 and accompanying text.

402. See supra notes 255-59 and accompanying text.


[In light of the strong interest of broadcasters in maximizing their audiences, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversialness of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply 'bad business' to espouse—or even to allow others to espouse—the heterodox or the controversial.]

Id.

One commentator supports this view:

Network managers, on behalf of mass-circulation advertisers and advertising agencies, provide programming best calculated to sell mass-consumer goods. Programs on controversial issues do not attract the maximum audience and do not create the atmosphere for effective salesmanship. In the absence of regulation, Gresham's Law operates in broadcasting to drive out programs on controversial issues and to bring in mass appeal entertainment programming.

Barrow, Program Regulation, supra note 147, at 524-25. See also M. Hamuro, supra note 8, § 6.43 (examples of sponsors withdrawing support for shows whose controversy endangered sponsor's commercial success).
and the implicit coercion of the government have had an adverse impact on the free flow of expression emanating from broadcast television. Furthermore, the government's deliberate scheduling of expression at a public forum, without the speaker's cooperation, is clearly impermissible. Therefore, utilizing the scheduling of access programming to build viewership, with a secondary motive to minimize the effect of controversial programming, is not a constitutionally sound practice.

The type of scheduling presently performed by access managers to "answer" controversial access programming is more stringent and intrusive than permitted under either the fairness doctrine or the personal attack doctrine, both of which are applicable to broadcast television. The focus under both doctrines is to represent both sides of an issue fairly. Under the fairness doctrine, the broadcast licensee can satisfy his obligation to discuss both sides of a controversial issue in his "overall pattern of broadcast service." Rarely does the licensee present both sides of a controversial issue back-to-back.

Under the stricter personal attack doctrine, if the broadcaster, during the presentation of a controversial issue of public importance, attacks the honesty, character, integrity, or personal qualities of an identified person or group, the attacked person or group is allowed responsive air time. The broadcaster must provide the attacked person or group with notification of the date and time of the broadcast, a script or tape of the attack, and an offer to respond. Therefore, similar to the fairness doctrine, the airing of a response under the personal attack doctrine might not occur until days or weeks after the attack.

Conversely, the scheduling of counter-programming by access managers is used to surround the controversial access program with counter-programming to minimize its impact. Such scheduling does not enhance the fair representation of issues because scheduling is used to restrict minority viewpoints through the programming of majority viewpoints which are more than represented by other access programs and other media. This type of sched-

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404. There are many instances of the broadcast media being "captured" by the government on which they report. See Van Alstyne, supra note 386, at 542 n.38 (notes "[t]he faithfulness of the private press in relaying, amplifying, and reciprocating the government's own propaganda"). See also Minniberg, supra note 50, at 589 (cites report that notes government's power over mass media; "[m]ore than 20,000 persons are employed in government public relations, a system which "arranges tours, sets up exhibits, sponsors aerial events, schedules speakers, offers press interviews and press briefings, [and] transmits radio programs around the world"").

405. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257-58 (1949). See Barrow, Program Regulation, supra note 147, at 523-24 ("[t]he differing points of view need not be presented at the same time, but may be presented in the broadcaster's overall program service."); Simmons, supra note 147, at 631, 653 (response to controversial program could be aired in mid-afternoon of following week, thereby minimizing response's effectiveness).

406. See Personal Attack Rule, 47 C.F.R. § 73.1920 (1984); Galloway v. F.C.C., 778 F.2d 16, 18 (D.C.Cir. 1985) (component of fairness doctrine that requires licensees to provide notice and other protections).
uling is more intrusive than the procedure under the two broadcast doctrines because under the broadcast model, the controversial program is allowed to stand on its own with its message undiluted. This comparison points up the content-impact of this technique and further demonstrates the impermissibility of the current use of scheduling by access managers to answer controversial programming.

IV. RECOMMENDATIONS AND CONCLUSIONS

Public access channels have been and continue to be a forum for unhindered expression, thus providing ordinary citizens with an opportunity to speak through a medium traditionally controlled by the government and large media giants. However, societal fear of controversial racist ideas and ignorance of the public access concept may promote increased regulation which may ultimately allow the government and media giants to deprive us of our only avenue to unrestricted television access. The regulation of this new medium of expression in order to dilute the effect of controversial programming presents many complex first amendment and societal problems. While there may exist popular support for increased regulation, this "solution" does not eliminate racism and only hinders the free flow of expression of others. Beyond the first amendment implications, it would be unfortunate if society placed restrictions on the use of public access to "solve" a problem, only to have those restrictions obstruct the growth of the medium. These restrictions may result in public access programming becoming a step-child of the bland, inoffensive fare offered by ad-supported broadcast channels. Once a restriction is in place it is difficult to dislodge it later.

Controversial programming should be shown on the same basis as other access programming. The use of counter-programming and scheduling to dilute the impact of certain programs and groups is discriminatory because it disadvantages the controversial message. Counter-programming should be encouraged, but not specifically targeted at one message or programmer. Through education, counter-programming will develop naturally, rather than artificially. A nondiscriminatory approach to controversial programming comports with the goal of free flow of information, the 1984 Cable Act, and most importantly, the first amendment.

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407. See NIAPV REPORT, supra note 27 (discusses three examples of problems caused by racist programs on public access TV).

408. "[A] good rule of thumb ... may be to ask yourself whether the rule is directed to solve a real problem, whether you are willing to apply it across the board (including yourself) and whether the rule is a sensible solution to the problem which does not place certain users at an undue advantage." Van Eaton & Early, supra note 218, at 13.