To the Graduate Council:

I am submitting herewith a dissertation written by Rose M. Kundanis entitled "Public Access Cable Television and the Public Interest: A Survey of the National Federation of Local Cable Programmers and an Examination of the Cable Communications Policy Act of 1984." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Communications.

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PUBLIC ACCESS CABLE TELEVISION AND THE PUBLIC INTEREST: A SURVEY OF LOCAL CABLE PROGRAMMERS AND AN EXAMINATION OF THE CABLE COMMUNICATIONS POLICY ACT OF 1984

A Dissertation

Presented for the

Doctor of Philosophy

Degree

The University of Tennessee, Knoxville

Rose M. Kundanis

December 1987

FOR JOHN AND ZOE

WHO MAKE IT ALL WORTHWHILE

ACKNOWLEDGMENTS

The author wishes to express her gratitude to Dr. Dan Nimmo for his guidance and help during the early preparation and development of this research. The author also wishes to express gratitude to Dr. George Kundanis for his invaluable assistance in obtaining legal documents and setting up interviews on Capitol Hill. Thanks to all my dissertation committee members: Dr. Herb Howard, Dr. George Everett, Dr. Lewis Hodge, Dr. Barbara Moore and Dr. Michael Singletary. A special thanks must go to my dissertation chairman, Dr. Howard, who patiently worked with the author through numerous revisions and made it possible to finish the project.

Further debts of gratitude must be acknowledged to Dr. Michael Singletary, who allowed the survey to be administered under the auspices of the University of Tennessee Communications Research Center, and Margaret Cook, who acted on my behalf when I was off campus. Thanks to Doug MoKaren for designing the survey cover. Thanks to Dr. E. R. Anderson and Marietta College for the use of the computer for data analysis. And, finally, the author wishes to thank E. John Bordenet without whose help the data would not have been entered into the computers and without whose encouragement and support the research would not have been completed.

ABSTRACT

Government regulation to achieve the First Amendment freedom of speech rights of the public on public access cable television can deprive cable system operators of their freedom of the press. This study examines this conflict in rights and the question of what best serves the public interest.

Four types of data collection were used in this study of cable television and the public interest. Before passage of the Cable Communications Policy Act of 1984, (1) policy-makers were interviewed and (2) a survey of members of the National Federation of Local Cable Programmers was conducted. After the Cable Act was passed, (3) the Act was analyzed for its characterization of public access and (4) U.S. Supreme Court decisions were examined for judgments that could affect public access.

The results support a functional model for cable television presented by interviewee Dr. Henry Geller, Director of the Washington Center for Public Policy Research. The functional model combines several models of media operation. Since cable can operate like a newspaper, like a broadcasting station and like a common carrier, a functional model provides that the law applying to each medium be applied to cable in the appropriate circumstances. If the functional model is applied, there can be regulation to achieve public

access cable television without denying cablecasters their First Amendment rights. Both survey respondents and the Cable Act acknowledged First Amendment rights for cable operators and for citizens desiring access to cable television. The Supreme Court has not yet said which interest is dominant.

In conclusion, the public interest contribution of public access cable television lies in training citizens to speak on cable television, in providing the opportunity for freedom of speech in the electronic media, and in presenting community and public affairs programming. If public access is to contribute to diversity, local communities, not cable operators, must control access. To support public access cable television, the courts can uphold the validity of requiring public access in cable franchises and the public can use the opportunity for expression.

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CHAPTER I

INTRODUCTION

The Federal Communications Commission's 1972 Cable Television Report and Order, the first comprehensive set of cable rules, required cable television systems to set aside one or more channels for use by the general citizenry. These were known as public access channels. The activation of such channels for use by nonprofessional communicators quickly brought about a number of problems, including a conflict between the public's right to access and the cable system owner's right to freedom of the press (freedom of expression) under the First Amendment to the U.S. Constitution.

This study sought to discern what best serves the public interest in this conflict of rights through the perceptions of those persons responsible for cable access programming. Their perceptions may be especially important to an understanding of the current status of access programming, because they deal with the access process on a daily basis and know the value of it first hand. Their opinions on what they do in access and how those activities contribute to the public interest may be important to policymakers, to others responsible for cable access programming, and to scholars who seek to know the nature of cable access and how it may serve the public interest. In addition, the Cable Communication Policy of Act of 1984 will be examined to determine the status of public access cable television following the passage of this legislation. Supreme Court cases also will be examined to determine the direction of judicial interpretation that may affect the status of public access cable television following the passage of the Cable Act.

1. BACKGROUND TO THE PROBLEM

In 1973, George Washington University Bill of Rights scholar Jerome Barron raised this question: "Freedom of the press for whom: the broadcaster or the public?" With the coming of cable television, that question might be adapted today to read: "Freedom of the press for whom: the cable system owner or the public?" (Barron, 1973).

Cable's multiplicity of channels changes the nature of the television medium. Scarcity may no longer be legitimate grounds for television regulation since there may no longer be a need for regulation to attain diversity. Although channel space is very limited in broadcast television, cable television has expanded the number of channels available for programming to as many as 100 in some cable systems ("A Short Course," Broadcasting /Cablecasting Yearbook, 1986, p. D-3). The number of available cable channels has made it possible for many cable companies to offer very specialized programming, including channels reserved for the public's use. These public access channels provide a forum for citizens to exercise freedom of speech rights in the electronic media. Although the Supreme Court judged in Midwest II (F.C.C. v. Midwest Video Corp., 1979) that the F.C.C.'s requirement of reserved access channels was beyond the Commission's jurisdiction, access channels remain a part of the local franchise requirements of many cable systems.

Definitions of Terms

Several terms require a definition for the purposes of this study: cable television, cablecaster, access, PEG channels, public access channel, local origination channel, public access center, public utility, common carrier, pluralism, diversity, franchise, franchising authority, deregulation and public interest.

For this study, Meyerson's (1981) definition of cable television will be used:

> Cable television is basically a system for carrying television and other broadcast signals into the home by wire rather than through the air. The wire is usually a coaxial cable, capable of carrying many different signals without interference. These signals are carried to the "headend," where they are amplified and sent along the cable distribution system. (Meyerson, 1981, p. 3)

A cablecaster is one who produces and distributes programs on a nonbroadcast cable television system. But, in the case of public access channels, the cable owner does not produce the programming. In that case, the production and distribution functions are separate. Therefore, in this study, the distribution function of the cablecaster will be designated by the term cable system operator. The cable system operator is one who administers and controls the cable television system as opposed to those who program access channels. The term local cable programmer will be used to refer to those producing programming for access channels.

In this study, access is the situation in which the non professional is given the authority to program public, educational and governmental (PEG) channels set aside for public use on cable television systems (Berrigan, p. 16).

More specifically, a public access channel is a cable channel that combines three functions. It is

> --a local origination channel which focuses on local issues and events;
>
> --an access and participation channel which lets people tell their own story in their own way;
>
> --a community channel which helps people to communicate with one another in the hopes of creating that feeling of identity and belonging which we call community. (Forbes and Layng, p. 10)

The FCC has described access as being beyond the control of the cable system operator. "The cable operator must not in any . . . way censor or exercise program content control of any kind over the material presented on the public access channel" (Cable Television Report and Order, 36 F.C.C. 2d 141,194 (1972)).

Although the public access channel is a type of local origination of programming in the community, local origination can also refer to the editorial function of the cable system owner. Cable system owners can produce programs in the communities they serve much as local broadcasters can produce local news. As long as the program is produced in the community, it originates locally and can be considered local origination. In this study, local origination will refer to programming produced by the cable system owners and subject to their exclusive control.

A public access center, in contrast to a public access channel, is a place equipped for cablecasting and staffed for training the public in the use of equipment. A public access channel may have an access center associated with it.

Two terms that will be used in reference to various types of models for cable television are "public utility" and "common carrier." The term "public utility" is a more general term than "common carrier" and applies to "a business organization . . . performing a public service and subject to special governmental regulation" (Webster's New Collegiate Dictionary, 1981). Parsons (1984) defines a public utility. "The principal characteristics of a public utility are generally conceded to be the provision of an important public commodity or service and a position as a natural economic monopoly" (p. 279). In this study, the term "public utility" will be used to describe a general model of communications business that is subject to governmental regulation, including regulation of rates.

A special case of public utility regulation seen in communications is the common carrier (Parsons, 1984, p. 282). For this study common carrier will mean communications common carriers that

> . . . exercise no control over the content of what is communicated over their facilities; neither are they subject to any content regulation.
> The fundamental characteristic of regulation under the common carrier model is that the service provider offers the communications facilities on a first-come, first-served basis. (Geller and Lampert, 1983, p. 621)

Telephone companies are perhaps the largest group of telecommunications common carriers. They have no freedom to restrict access or edit conversations based upon message content (Geller and Lampert, 1983, p. 621).

Diversity has been an important consideration in the development of a public interest concept and has been referred to extensively in the interviews and survey research reported here. Berkin gives four factors for diversity in video programming. First, diversity must refer to something truly different from the norm. "Programs on political and social philosophies outside the mainstream rarely appear, and advocates of such positions have no access to video delivery systems" (Berkin, 1982, p. 59). A second factor in diversity is giving voice to those with nonmajority tastes. In the case of cablecasting, diversity is seen in programming that caters to viewers' many specialized tastes. A third factor in diversity is orienting content toward the needs of social and ethnic minorities. Finally diversity implies a range of choice for each consumer (Berkin, pp. 58-60).

The terms "franchise" and "franchising authority" will be used in the discussion of the Cable Act. The definitions provided in the Cable Act itself will be used. A franchise is an initial agreement or renewal that authorizes the construction or operation of a cable system (Sec. 602, Cable Communications Policy Act of 1984, p. 2781). A franchising authority is ". . . any governmental entity empowered by Federal, State, or local law to grant a franchise" (Sec. 602, Cable Communications Policy Act of 1984, p. 2781).

One more term critical to this study needs to be explored. The concept of the public interest has been used as a basis for regulation of broadcasting and cable television. The F.C.C. received its mandate to regulate broadcasting under the public interest umbrella in spite of

First Amendment rights of freedom of the press (Sec. 103, Communications Act, 1934, p. 1082).

Conceptions of the Public Interest

The concept of the "public interest" has been an important consideration in the development of the U.S. system of regulation of the electronic media. Early use of the phrase "public interest" is seen in the public utilities laws of the states. As early as 1892, New York state required certificates of convenience and necessity for the public-interest enterprise of the railroads (Caldwell, 1930, p. 300)). The application to broadcasting came 30 years later. As early as 1922, the Bureau of Navigation's Radio Service Bulletin informed broadcasters that their licenses to broadcast would be revocable whenever it might be in the public interest to do so. In his search for the construct of public service broadcasting, Holt identified the first use of the complete five-word phrase, "public interest, convenience or necessity" for broadcasting in an early radio bill introduced by Congressman Wallace H. White in 1924 (Holt, 1967, p. 34).

The public interest standard was an important part of the understanding of freedom of the press for the electronic media. With the development of broadcasting, the concept of freedom of the press needed to be reconsidered. The tradition of freedom of the press was well established for the print media when radio was introduced. The development of radio and then television called for the application of the First Amendment to the new electronic media.

Siebert, Peterson and Schramm consider the application of the First Amendment to the electronic media in Four Theories of the Press (1956). They present two theories, the libertarian and social responsibility theories, that can be applied to both the print and electronic media in the United States. Peterson quotes William Peter Hamilton of the Wall Street Journal on the publisher's position under libertarian theory:

> "A newspaper is a private enterprise owing nothing whatever to the public, which grants it no franchise. It is therefore affected with no public interest. It is emphatically the property of the owner, who is selling a manufactured product at his own risk. . . ." (Peterson, 1956, p. 73)

Peterson contrasts this classic view of libertarian press freedom with the social responsibility theory of the press. He refers to William Ernest Hocking's Freedom of the Press, a report of the Commission on Freedom of the Press, as one of the first documents that explains social responsibility theory of the press. The Commission on Freedom of the Press, also referred to as the Hutchins Commission, was created to consider the freedom, functions, and responsibilities of major agencies of mass communication in 1947.

> To be free is to have the use of one's powers of action (i) without restraint or control from outside and (ii) with whatever means or equipment the action requires. Unless the equipment necessary for effective action is at hand, unrestraint may be a mockery of freedom. Tell an unprovisioned man lost in the desert that he is free to eat, drink, bathe, read, pitch a tent. . . . no one is hindering him! For the attainment of most of these ends he might better be in prison. Unrestraint without equipment is not liberty for any end which demands equipment. (Hocking, 1972, pp. 54-55)

The social responsibility theory of the press developed in part from the technological and industrial revolution, which affected the nature of the print media as well as the development of broadcasting. With the need for equipment more extensive than a printing press in order to exercise the right of free speech, the nature of the press and consequently the nature of press freedom changed. The development of social responsibility theory reflects that change. Peterson said "Social responsibility theory holds that the government must not merely allow freedom; it must actively promote it" (Peterson, 1956, p. 95).

The concept of serving the public interest is tied to government regulation of the electronic media. In his comprehensive work on Supreme Court interpretations of "public interest" in broadcast decisions from 1927 to 1979, Crane says the regulation of radio and television has developed in the tradition of the social responsibility of the press. Crane says that social responsibility theory has its roots in the libertarian theory of the press.

> Social responsibility theory recognizes that a free marketplace . . . of ideas is necessary if truth is to be found. However, it places a moral and social responsibility on the media to provide that marketplace. (Crane, 1980, pp. 12-14)

Thus social responsibility theory joined with "an anti-exploitation of public resources mood in the Congress" to achieve the original use of "public interest" in broadcasting legislation, according to Crane (1980, pp. 15-16).

The concept of serving the public interest was incorporated into the Radio Act of 1927, the first comprehensive regulatory act covering the broadcast medium. The Act established the Federal Radio Commission and charged it with fostering and regulating the radio industry in the public interest. The Radio Act of 1927 mandated that "Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall-- . . ." (Sec. 4, p. 1163). The Act then continued with a description of the duties of the Federal Radio Commission.

In 1934, Congress enacted the Communications Act and established the Federal Communications Commission (FCC) to replace the FRC (Communications Act, 1934, p. 1064). As with the FRC, the FCC was given authority to regulate broadcast service "as public convenience, interest or necessity requires, . . ." (Sec. 103, Communications Act, 1934, p. 1082).

The public interest concept is thus an important element in the regulation of the electronic media by the FCC. Regulation is allowed if it is in the public interest. Regulation is not allowed if it cannot be justified under the public interest standard. The concept of the public interest is critical to an understanding of the conflict between regulating the electronic media and granting the freedom of the press to the media. Problems exist in the understanding of the concept of the public interest due to the vagueness of the term.

Legal commentators have dealt with the vagueness of the term "public interest" in at least two ways. One way is to interpret its meaning as Stockard has done:

> The exact boundaries of the public interest are vague, but they generally elude those commercial broadcast activities that are held to be harmful to the flow of information deemed to be useful to the public. (1980, p. 43)

Another way to deal with the vagueness of the term "public interest" is to say that it is meaningless, as Kelley and Donway have done:

> That term (public interest) cannot be defined in any but an arbitrary manner, since society in fact is not an entity which can have interest, values or goals. "The public interest" is an empty rubric that offers no objective guide to public policy; its function is merely to serve as a cover for those with some private vision of the good to enforce that vision on others. (1983, p. 5)

In either example, there is a personal subjective judgment that others may accept or reject.

The literature indicates the phrase "public interest" is difficult to define. Holt calls it a fact of life that the regulatory authorities say what the public interest and serving the public interest mean. Then the public interest and serving the public interest become what the regulatory authorities have said (Holt, 1967, p. 639). Head agrees, "Some critics complain that the phrase has never been defined. In fact, though, the commission (FCC) defines some aspect of public interest every time it makes a decision" (1976, pp. 323-324).

Krugman and Reid have developed a a definition of "public interest" by questioning FCC policy makers in their handling of cable television. FCC commissioner Glen O. Robinson told Krugman and Reid, "It (public interest) means different things at different times to different people" (1980, p. 318).

More specifically, Krugman and Reid have identified five factors in the public interest from interviews with FCC Commissioners and FCC staff members. The first factor is balance. The commission serves as an arbitrator to balance the competing interests. "Respondents felt the public interest was met when they balanced various viewpoints" (1980 p. 319). Heterogeneity is the second factor. "The public interest is not a mass interest but rather a compilation of various separate interests" (1980, p. 317). The third factor is dynamism. This takes into account the change in policies and rules. Localism is the fourth factor. If all else is equal, move toward localism is the rule of thumb. The final factor Krugman and Reid found is diversity.

Krugman and Reid view the public interest as a decision or a judgment call by the FCC. "The results have indicated that public interest means an important but not necessarily correct, decision that is subject to review" (1980, p. 324). General consumers are not direct participants in the FCC policy process. But their interests filter through various interest groups who participate in the Commission's balancing process. Krugman and Reid conclude that the public policy decision-making ". . . process relies on participating groups to initiate actions and vie for position in an advocacy system" (1980, p. 324).

Krasnow and Longley say the courts have traditionally given the FCC wide latitude in determining what constitutes the "public interest," because "(a) generalized public belief, even in an undefined ±public interest,' increases the likelihood that policies will be accepted as authoritative" (1978, p. 17).

In addition to the rulings of the FCC, the judgment of the public interest in communications is determined by the judicial and the legislative branches of the federal government. For these determinations, various models have been applied to electronic communication.

The Regulatory Models

Three main regulatory models may be applied to video services. Broadcast, print, and common carrier or public utility models have been used to justify government regulation or the lack of it in various communications media. The regulations pertain to content of the message and access to the media (Geller, 1985).

The broadcasting model calls for close governmental supervision. Operating under licenses, broadcasters must demonstrate to the government that they have served the public interest to get a renewal of their license (Communications Act of 1934, 47 U.S.C. Sec. 307(d)). Both limited content regulation and regulation to achieve access are permitted in the Communications Act. The Fairness Doctrine[1] and the Equal Time provisions affect both the content of the broadcaster's message as well as who has access to this

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[1] On August 14, 1987, the FCC unanimously declared the Fairness Doctrine "unconstitutional." Although President Reagan vetoed a bill codifying the Fairness Doctrine last June, some members of Congress plan to try again to codify it. As of this time (August 1987), the FCC has said it will no longer enforce the Doctrine, but the FCC also has adopted a report containing variations of the Doctrine (Where things stand, August 10, 1987, p. 14).

medium (Communications Act of 1934, 47 U.S.C. Sec. 315(a) (1976); Red Lion v. F.C.C., 395 U.S. at 377 (upholding the Fairness Doctrine)). Thus broadcasters are considered public trustees under the Communications Act in that they must maintain fair and balanced presentations for the public.

The print model, on the other hand, does not allow content or access regulations. The interference of the government is limited to cases of libel or obscenity in the area of content regulation for print media. Unlike the Fairness Doctrine for broadcasting (Red Lion, 395 U.S. 367), the concept of public access to print has been disallowed by the Supreme Court (Miami Herald Publishing v. Tornillo, 418 U.S. 241 (1974)).

Whereas for the print model the assumption is that the lack of regulation will promote free expression, the common carrier model rests on the opposite assumption. According to the late Massachusetts Institute of Technology professor Ithiel de Sola Pool, the absence of regulations could deny freedom of expression.

> The traditional law of a free press rests on the assumption that paper, ink, and presses are in sufficient abundance that, if government simply keeps hands off, people will be able to express themselves freely. The law of common carriage rests on the opposite assumption that, in the absence of regulation, the carrier will have enough monopoly power to deny citizens the right to communicate. The rules against discrimination

> are designed to ensure access to the means of communication in situations where these means, unlike the printing press, consist of a single monopolistic network. Though First Amendment precedents are largely disregarded in common carrier law, still this one element of civil liberty is central to that law. (Pool, 1985, p. 106)

The common carrier or public utility model claims no editorial control for the owner. In fact, the common carrier, by definition, serves the public "indifferently," treating all on a first-come, first-served basis (NARUC v. F.C.C., 525 F.2d 630 (1976)). Telephone companies exemplify communications common carriers. As a public utility, the telephone company cannot restrict access to the system nor edit conversations based on message content (Geller and Lampert, p. 621). Because the public utility is considered a natural monopoly, certain restrictions usually are imposed.

> The original rationale for imposing a stricter duty of care on common carriers was that they had implicitly accepted sort of public trust by availing themselves of the business of the public at large. The common carrier concept appears to have developed as a sort of *quid pro quo* whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business. (NARUC v. F.C.C., 525 F.2d 630 at 641 (1976))

Although the common carrier/public utility model may have public trustee implications similar to the broadcaster's role, the broadcaster is not a public utility and the Communications Act forbids the treatment of the broadcaster as a common carrier (Communications Act, 47 U.S.C. Sec. 153(h) (1976)).

Cable and the Broadcast Model

In early regulation of cable (See Chapter II), the cablecaster was treated much like the broadcaster. This was in part due to the structure of the regulation under the FCC and in part due to the fact that cable and broadcasting appeared to be the same to the viewer because cable and broadcast services use the same receiver--a television set. However, the cable industry has grown and its differences from broadcasting have become more evident to the public and to those involved in the debate over the nature of cable.

In the broadcast model, licensees have broad guidelines of types of programming expected and of certain types not condoned (obscenity) but great discretionary latitude as to specific content. Broadcasting has much lighter structural regulation than the phone company, which is regulated as a monopoly. Yet, the broadcaster has almost as much freedom from content regulation as the print publisher. No one tells broadcasters what to cover; but if they cover one side, they must offer time to the other side under the Fairness Doctrine.

Cable communication is structured differently. Structurally, cable communication is transmitted over a privately owned wire, usually a coaxial cable. Broadcasting is radiated over the publicly controlled electromagnetic spectrum. Structurally, the cable system is analogous to the telephone system:

> (M)iles and miles of cables run through the city, either on poles or underground, and individual homes are connected to the trunk lines by drop lines if the resident desires the service. (Kreiss, 1981, p. 1003)

The need for a place to run all this cable also necessitates a different approach than broadcasting for local use. To use the public right of way in any community, the cable operator must have the permission of the community in the form of a franchise. With some exceptions (Dawson, 1981, pp. 358-359), this franchise is granted exclusively to one cable operator in exchange for services, such as public access channels, promised by the cable operator. "Even in communities which might want to issue competing franchises, economic forces and economies of scale assure cable systems of natural economic monopolies" (Kreiss, p. 1005).

Another important aspect of cable television's structure which differs from broadcasting is its channel capacity. While broadcasting is licensed by the FCC due to the scarcity of the radio spectrum, cable is known for its abundance. While a broadcaster is licensed only for a single channel, the cablecaster can be franchised for as many as 100 channels. Although most, in fact, are limited, the cable systems have the potential of providing as many as 100 channels to each home. In addition, the coaxial cable has data transmission capacity and may provide two-way communication services, including burglar and fire alarms, banking, shopping, remote access to computers, utility meter reading and voting.

The structural differences between cable and broadcasting imply certain functional differences as well. According to Berkin (1982), the data transmission function of cable is very similar to the data transmission function that the telephone system provides with public utility regulations (p. 46). Although broadcast communication of data is possible, the two-way capability is not there for broadcasting.

While the cable operator carries television signals, cable functions as the provider of many other program services from satellite signals. The cable channels can narrowcast to a more limited audience instead of broadcasting to attract the largest possible audience. Entire channels are now devoted to news, sports and movies on cable.

The Difference Between an Editor and a Conduit

The determination of whose First Amendment cable rights will be considered depends upon how cable operators are using the medium--for their own freedom of expression or as a conduit for the freedom of expression of others. The cablecaster and the broadcaster have different functions due to their differing structures as noted earlier in this chapter. These differences are especially important in First Amendment considerations. According to Kreiss, the First Amendment developed with consideration of the direct communication between speaker and listener. The mass media, however, may act as either speakers or conduits for the speech of others.

> To the extent that the media communicate messages themselves, or act as editors in selecting messages to be communicated, they are entitled to full first amendment rights. To the extent that they act as conduits for communications of others, however, the first amendment does not protect their activities. (Kreiss, p. 1024)

If a communications medium functions as a conduit as in the common carrier/public utility model, the carrier does not have First Amendment rights. Rather the one using the conduit expresses herself. The telephone company, for example, provides a conduit for others to speak but is not a communicator itself. The print model provides the communicator with First Amendment rights and few limitations on those rights. The public utility model and the print model thus provide two extremes for consideration of the First Amendment rights of mass communicators.

Although other models may exist, including the broadcast model, two extreme models have been presented in the literature. One is the print model that claims the protections of the First Amendment freedom of the press and views the public interest as being served in a free use of the marketplace. The second is the public utility model that views cable as subject to regulation requiring it to serve the public interest. In the second model, it is the people's First Amendment rights that are considered of primary importance. This model views the public interest as being served by regulation of cable television.

A public utility model differs from the broadcasting model in determining that, at least in part, the cable system owner provides a conduit for the communication of others through public access channels over which no content control is exerted. Unlike the broadcaster who is a public trustee of the public airwaves to provide balanced communication, the cable system operator is designated as a conduit for the communication of others as in public access channels. Broadcasters maintain editing ability by choosing who will speak to balance the communication. In public access, the conduit is open to all on a first-come, first-served basis.

In this consideration of the nature of cable communications and its relationship to the public interest and the First Amendment, the broadcast model will be considered only in its historical and legal relationship (See Chapter II) to cable because cable systems differ in structure and function from broadcast systems. For the consideration of the nature of cable television and specifically public access cable television and its relationship to the public interest and the First Amendment, the two extreme models of print and public utility will be considered. The mass media act as both communicators and conduits. Therefore, a context that allows consideration of both roles will allow the development of a new and comprehensive view of the medium of cable communications based on its unique structure and functions that differ from its historical association with broadcasting.

The Access Debate

Much of the debate over access channels relates to the consideration of cable television in matters of the First Amendment. If cablecasters are considered in the tradition of the print model, they will receive constitutional protection from attempts by the government to impose controls such as access regulations. If, on the other hand, cablecasters are considered in the regulatory tradition of the public utility and broadcast models, the public is granted access to the media for the exercise of freedom of speech rights, thereby limiting freedom of the press for the carrier.

The electronic publisher tradition focuses on the First Amendment rights of the cable operator who is the equivalent of a newspaper editor in this analogy. Therefore, any regulations, including the requirement of access channels by the FCC or local franchising authorities, are seen as unconstitutional intrusions.

> To attempt to legislate mandatory access represents an unconstitutional intrusion into editorial decision making by cable operators. Only the most compelling state interest may be asserted in support of such access requirements, and the claim that access requirements foster the public's interest in receiving the information, increasing diversity or other related interest generally falling within the public interest rubric is insufficient. (Shapiro, Kurland, & Mercurio, 1983, p. 106)

In this view, the cable system is seen as the cablecasters' property, to do with as they see fit. The marketplace, reflecting the popularity of the cablecasters' choices, will function as the final authority for the public interest. Thus, if cable system operators are serving the public interest, they will be successful in the marketplace, make a profit, and stay in business. Conversely, if cable system operators are not serving the public interest, they will not be successful, operate at a loss, and go out of business.

Harvard law professor Ginsburg (1984) disputed the need for regulation, arguing that regulation is not needed to achieve access to cable television. He said, ". . . cable access entails the risk of government control of the medium, with little offsetting potential for benefit" (p. 71).

However, in the tradition that allows the regulation of broadcasting and common carriers, cable access is seen as a benefit that does offset the risk of government intervention. Those in the regulatory tradition are concerned about the risk of monopolistic control of the means of communications. Although cable system operators choose from several programming sources, the choices are theirs alone. The debate here centers on the monopoly characteristics of most cable systems in which a single cable operator is granted an exclusive franchise for a city.

Bill of Rights scholar Jerome Barron (1973) does not see the freedom for the communicator as equal to the freedom of expression for society. Barron states,

> When we finally recognize that freedom for the communicator is not necessarily freedom of expression for society, then antitrust policy or alternative technology will seem less (like) panaceas and more just a realistic means of access to the media. (p. 263)

The advocates of the regulatory tradition see a danger in the electronic publishing tradition where corporations can gain First Amendment rights. "As surely as people become statistics, corporations are taking over traditional human rights. . . . If cable is the technology that eliminates scarcity, then it must be open to all" (Esmonde-White, 1982, p. 7).

The advocates of regulation for cable television view the marketplace as insufficient for the job of protecting the freedom of speech rights of citizens. Regulation is seen as necessary to secure these rights.

> Cable television offers an unprecedented opportunity for growth of communication and culture via diversity of voices. . . . if cable's promise is left to the mercy of the marketplace, and the marketplace fails, the opportunity may be gone forever. (Berkin, 1982, p. 70)

Instead of the marketplace deciding the public interest, diversity is fostered through government regulation.

> In a medium in which government must initially determine who may communicate, the first amendment requires government to establish a system in which some diversity of information and ideas will be communicated to the audience. (Kreiss, 1981, p. 1040)

Government regulation thus is required in the cause of attaining some sort of diversity of information for the audience.

Advocates of the regulatory tradition take the position that the First Amendment both permits and requires public access. "(A)ccess is necessary to fulfill fundamental goals of the First Amendment freedom of speech" (Mininberg, 1984, p. 553).

As can be seen, both proponents and opponents of access regulation base their arguments on the First Amendment.

> Proponents claim that failure to provide diversity would abridge the first amendment rights of those seeking a cable franchise, those seeking access, and those in the audience. Opponents claim requiring diversity would abridge the cable operator's first amendment rights. (Kreiss, 1981, p. 1019)

That both sides can base their arguments on the First Amendment is possible because of the dual constitutional nature of regulation of cable television to achieve access.

> It can be at once a valuable, indeed essential, means of redressing the serious inequality in speech opportunities that exists today within the mass media and a dangerous deviation from our historical commitment to a free and unfettered press. (Bollinger, 1976, p. 2)

The debate over the First Amendment rights of cable ended in the legislative branch with the passage of the Cable Communications Policy Act of 1984. However, the judicial branch has not reached a final decision on the First Amendment nature of cable television (As of this writing: July 1987).

Although The Supreme Court has not yet made a definitive decision on the First Amendment nature of cable television, several decisions have been made since the Cable Act that could affect the First Amendment rights of those using cable television. For example, in the case of <u>City of Los Angeles v. Preferred Communications</u> (1986), the court sent the case back to the district court to get more information to make a judgment about the nature of cable television. Specifically, the case involves the question of whether the City of Los Angeles should be required to grant more than one cable franchise in a given area. Both the electronic publisher and regulatory traditions were considered, but no firm decision has yet (July 1987) been made on the nature of cable television.

2. SIGNIFICANCE OF THE STUDY

Since there is no definition of "public interest" in the law, gaining an understanding of the "public interest" perceptions of various groups with respect to cable access may prove to be valuable in determining whether regulation of cable television systems can be allowed to permit freedom of speech for citizens on public access cable television. Some cable television programmers claim the public interest is best served by the marketplace. Some involved in access programming on cable television claim the public interest is best served by protecting channels set aside for public use, which implies that some sort of regulation may be desirable.

Using the print and public utility models for cable television, this research will examine the concept of the public interest as seen by various groups that were involved in the development of what became the Cable Act of 1984. These groups include members of the U.S. Congress, staff members of the FCC, public interest lawyers, and representatives of organizations that had a vested interest in the outcome of the Cable Act such as the National Cable Television Association (NCTA), The National League of Cities (NLC) and The National Federation of Local Cable Programmers (NFLCP).

The views of the members of the NFLCP, those most directly involved with cable access programming, are especially of interest in this research because these members view first hand how public access cable television functions. Their perceptions of access channels and their concepts of the public interest may be important to policymakers and to others interested in the future of public service through cable television.

The passage of the Cable Communications Policy of Act of 1984 has given a legislative directive on the status of public access cable television. This perspective will be examined along with the judicial perspective provided by Supreme Court cases decided after passage of the Cable Act that may affect the status of public access cable television and the future of access.

3. STATEMENT OF THE PROBLEM

The problem is to determine if the nature and legal status of cable will allow and support regulation to achieve access, since such regulation runs counter to the cable operator's First Amendment rights but supports the First Amendment rights of the public. Is regulation to achieve public access to cable television in the public interest? Is the public interest served by regulation of cable operators to achieve public access? Will the nature of cable television allow regulation to achieve access?

The perspectives of three groups will be explored: (1) those involved in the development of what became the Cable Act before the passage of the act; (2) those responsible for cable access before the passage of the Act; (3) the Congress which passed the Cable Act itself in 1984.

The nature of the relationship between public access cable television and the public interest involves the question of freedom of the press for whom? the cable system operator or the public? Freedom of the press for the public is a concern of those who contend that without access to wide-reaching means of communication such as cable television, the right of free speech is meaningless (Melnick, 1982,p. 1409). Freedom of the press for the cable system operator is a concern of those who contend that the publishers of the electronic media should have the same First Amendment rights as those in the print medium. New technologies allow for new approaches to old issues, and cable television is a relatively new technology that has become a battleground for fighting over the First Amendment freedom of speech for the individual citizen and the First Amendment freedom of the press for the cable system owner.

This research endeavors to determine if (1) public access cable television is perceived as serving the public interest; (2) regulation to achieve public access is legal and constitutional. Is cable access worth having even though there must be regulation of the cable operator to achieve public access?

4. PURPOSES AND RESEARCH QUESTIONS

The research questions can be grouped under six purposes:

1. to describe public access cable television before the passage of the Cable Act;

2. to describe how some of those responsible for local cable programming perceive their role and how this role serves the public interest;

3. to characterize the view of cable television from the perspective of some of those involved in the development of the Cable Communications Policy Act of 1984;

4. to describe how the views of some local cable programmers might characterize cable in the electronic publisher model or in the public utility model;

5. to describe how the Cable Act did characterize pubic access cable television and the First Amendment; and

6. to describe how Supreme Court cases since passage of the Cable Act have characterized public access cable television and the First Amendment.

To describe the status of public access before the passage of the Cable Act, respondents were asked about the nature of their relationship to cable and public access cable television. Information was sought on the kind of labor force (volunteer or professional); the length of involvement; and the extent of involvement (part-time or full-time). (See Survey Section H in Appendix B.)

The respondents were also asked about the cable access channel with which they were associated. Descriptions of the cable access channel included the type (public, educational or governmental); the legal standing (franchise dependent or otherwise); the organizational management (operation by cable company or nonprofit corporation, etc.); the services provided (such as equipment training); length of operation; and size of market. (See Survey Sections I and J in Appendix B.)

To describe how those responsible for local cable programming perceive their role and how this role serves the public interest, programming types were examined. What types of programming do those responsible for cable access consider as serving the public interest? Do cable access channels with which they are associated provide that kind of programming? How do local cable programmers' public interest ratings of programs compare with how often that programming types appear on the access channel with which the programmer is associated? (See Survey Sections F and G in Appendix B.) The programming types used in this comparison were based on the FCC's list of program definitions and modified by Wurtzel in his study of public access cable TV programming (Wurtzel, 1975). (See Limitations Below)

To describe how the views of local cable programmers might help to classify cable in the print model or in the public utility model, the models were represented in the survey instrument (See Survey Sections A-E in Appendix B) and respondents were asked to comment on each. The survey respondents were asked how cable should be treated regarding the First Amendment. In this way it could be determined, in the opinion of cable access programmers, if there is a relationship between the analogy to various media and the view of which First Amendment standard should be applied to cable television. Are either the print or public utility model present in the views of those responsible for cable access? Which one seems to be predominant?

How the Cable Act did typify cable television was presented. Which model for cable television does the Cable Act present? How does the model presented by the Cable Act compare to the model advocated by those responsible for access cable television? Does the Cable Act use the public interest standard? If so, how? If not, what standard is used to allow regulation of cable television?

Models of cable television regulation found in recent Supreme Court decisions were presented. What models are presented in recent Supreme Court cases? How do these models compare to the model presented in the Cable Act? Is the public interest standard used? How might these models affect the status of public access cable television?

5. LIMITATIONS AND DELIMITATIONS

Several limitations to this research affect its significance. First, this research surveyed members of the National Federation of Local Cable Programmers (NFLCP), not representatives of a sample of access channels, because no complete list of access channels was available. Therefore, the conclusions about cable systems are only comments on the systems with which these NFLCP members associated. They are not necessarily representative of all cable systems.

Second, the survey sample of NFLCP members was chosen because of their unique perspective as local cable programmers. Their perspective may be considered biased in favor of access since that is their involvement in cable television.

Third, this research was initiated before the passage of the Cable Communications Policy Act of 1984. It was hoped that analysis of the results of the survey would be completed before the passage of the Act. However, that proved impracticable and the Cable Act was passed before analysis was completed. In the legislation, Congress determined what model cable should follow. In fact, the model of cable as a common carrier has been prohibited by the Cable Act. Thus cable may not be treated solely as a common carrier. Although judicial review will interpret this aspect of the law, the common carrier model is not considered legal at this time (July 1987). Therefore, an analysis of the model established by the Cable Act has been added to this study.

Fourth, the list of program types used in the survey is a limitation because categories overlap. It was used despite the nonexclusivity problems because it was developed by the FCC and has been used by other researchers.

Fifth, the interviewing of only Democratic members of the House of Representatives Telecommunications Subcommittee can be seen as a limitation. The Democratic Party was the majority party at this time and thus maintained control of the subcommittee. The House version of the Cable Act, a nonpartisan issue, was written by the staff of the subcommittee.

The first delimitation of this research is that it will deal only with cable television, not cable radio. Although cable radio is growing, it is not yet a major factor in the consideration of this topic.

A second delimitation of this research is that the research will deal only with public access cable television, not local origination, educational, governmental or leased access.

A third delimitation in this research is the examination of only two basic models for cable legislation: cable is like a newspaper and cable is like a public utility. At the time the NFLCP survey was begun, the question of cable being treated as a a public utility or common carrier was a live issue. This issue has been somewhat limited by the Cable Act that prohibits the treatment of cable solely as a common carrier. However, it has not been determined if cable can be treated as a common carrier in part. Although more than two models can be posited, these two models were used as the two extremes that could be considered as basic models. These two models accounted for practically all of the literature on the subject. As discussed above, the extreme models will allow a fresh look at the problem of the nature of cable television that differs in structure and function from its historical predecessor, broadcast television. Many other models including broadcasting could be fit between these two extremes, but the other possibilities would simply be variations and combinations of the two basic models.

A fourth delimitation is that the issues of obscenity and censorship will only be dealt with as they directly relate to the analysis of the history of access and regulation of cable television. Content regulation is a related topic not within the scope of this study. This study seeks to determine the public interest value of public access cable television by exploring various perspectives on the nature of cable television.

6. ORGANIZATION OF THE DISSERTATION

This dissertation is organized into eight parts: Introduction, Historical Background, Review of the Literature, Methodology, Interview Results, Survey Results, Examination of Cable Act and Recent Supreme Court Cases, and Conclusions. The Introduction has presented the background for the problem, significance of the study, problem statement, purpose and research questions, limitations and delimitations. The Historical Background presents the history of access and cable television and history of access rules. The Review of the Literature presents information on the potential of access and a review of legal journals dealing with the cable debate. It is divided by research method and serves as a basis for the survey instrument. Methodology describes the development of the questionnaire, construction and implementation of the questionnaire, the sample, the response rate and a description of how data analysis was set up.

Interview Results summarize the in-person investigation of the concept of public access cable television and the concept of the public interest according to those involved in the development of the Cable Act. The Survey Results present a demographic profile, analysis of the models of cable television, and analysis by category. An Examination of the Cable Act and Recent Supreme Court cases present the background on the Cable Act and an analysis of these documents as they may affect access cable television. The Conclusions include reflections on the resolution of the cable question by the Congress, the status of judicial review of the Cable Act and suggestions for further study.

CHAPTER II

HISTORICAL BACKGROUND

The history of access to cable television can be seen in four stages in the development of cable television regulation. The 1950s was a period of nonregulation. In the 1960s the jurisdiction of the Federal Communications Commission for cable television regulation was ancillary to its jurisdiction for broadcasting. The right to access and regulation to achieve that access was debated in the 1970s. In the 1980s the regulation focus moved from the FCC to the local franchising authorities. With the exception of the deregulation of rates under the Cable Act, the franchising authority replaced the FCC as the main source of regulation for cable television.

This history includes consideration of the legal actions of three groups in the development of cable television. The Federal Communications Commission has promulgated rules that established access cable television. The courts have been divided in their interpretation of the nature of cable television and the First Amendment rights of cable operators and the public. The U.S. Congress has amended the Communications Act of 1934 to include its model of cable television. (For a summary of the history of access and cable television see Appendix A: Chronology of Public Access Cable Regulatory History.)

This chapter concludes with a discussion of the right to access for the media of print, broadcasting and cable as seen in the law and various court cases throughout the history.

1. HISTORY OF ACCESS AND CABLE TELEVISION

Cable television was developed first in the late 1940s in communities unable to receive television signals. As with radio and television, economic concern also played an important role in the development of cable television. The Federal Communications Commission paid little attention to cable television in the early 1950s when it merely provided extended reception into isolated rural places. Initially, "community antenna television" (CATV) served subscribers who were beyond the range of broadcast signals or were otherwise unable to receive TV (Berger, 1984, p. 96). This service aided local broadcasting stations by increasing the size of their audiences.

Nonregulation in the 1950s

However, in the mid-fifties, after some cable systems began using microwave relays to import distant TV signals to places served by local stations, local broadcasters pressed the FCC for protection (Schmidt, 1976, p. 202). The economic concerns of broadcasters were affected by the growth of the new technology of cable television. But the FCC declined to regulate cable in 1958. Frontier Broadcasting Company had requested the FCC regulate CATV systems as common carriers (Memorandum Opinion and Order, 24 F.C.C. 251 (1958)). After considering the comments of the National Community Television Association, the FCC ruled that CATV systems were not common carriers under the Communications Act of 1934 and declined to assert its jurisdiction.

While the FCC declined to regulate CATV systems in 1958, the U.S. Congress and the courts also considered regulations. The U.S. Congress convened its first cable television hearings that year. After hearings by the U.S. Senate on cable control bill S. 2653 in 1959, the bill was rejected in 1960 (LeDuc, 1973, p. 220). The judicial branch of government also rejected restrictions on CATV systems on the basis of "unfair competition" (Intermountain Broadcasting v. Idaho Microwave, 1961).

FCC Jurisdiction Over Cable Tied to Broadcasting in 1960s

In the 1960s the conflict between broadcasters and CATV system operators led to some victories for broadcasters and some regulations for CATV system operators. The Carter

Mountain appeal of a decision by the FCC indicated the change in attitude about restricting CATV systems.

Carter Mountain Transmission Corporation applied for a permit to install microwave radio relay pickup television signals to community antenna systems in three towns in Wyoming. However, this permit would compete with the efforts of a local broadcaster to provide programming to the rural area. The FCC refused the permit and cited the public interest and their change of attitude.

> Thus, after weighing the public interest involved in Carter's improved facility against the loss of the local station, it must be concluded, beyond peradventure of a doubt, the need for the local outlet and the service which it would provide to outlying areas outweighs the need for the improved service which Carter would furnish under the terms of the instant application. To the extent that this decision departs from our views . . ., those views are modified. (Carter Mountain Transmission Corp., 1962, p. 465)

The Supreme Court let stand the lower court decision that supported the FCC decision (Carter Mountain Transmission Corp. v. F.C.C., 1963). Thus, microwave transmission of distant signals was deemed subject to FCC regulation on the basis of economic injury to a broadcasting station.

After Carter Mountain, the FCC continued to restrict cable in order to enhance broadcasting. In 1965 the FCC issued revised rules applicable to cable and microwave CATV systems to govern carriage of local broadcast signals and nonduplication of local broadcast programming. The FCC ruled at this time because, the report said,

> . . . action is needed to ameliorate the adverse effects of CATV competition upon the maintenance and healthy growth of television broadcast service, . . . (First Report and Order, 1965, p. 683)

The jurisdiction of the FCC in the area of cable was established soon after. In 1966 the FCC declared ". . . under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems . . ." (Second Report and Order, 1966, p. 797).

In 1968 the Supreme Court upheld the FCC's jurisdiction over cable television. It ruled the FCC had authority under the Communications Act of 1934 to adopt cable rules and regulations as "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (U.S. v. Southwestern Cable Co., 1968, p. 178).

The FCC ordered restricted importation by cable systems of distant broadcast signals and consequently froze cable growth in 1968 (Rivkin, 1978, p. 3). At the same time the FCC began to describe a common carrier function for CATV that later developed into a reference to public access cable television. The Notice of Proposed Rulemaking and Notice of Inquiry (1968) states:

> We believe that the public interest would be served by encouraging CATV to operate as a common carrier on any remaining channels not utilized for carriage of broadcast signals and CATV origination. This would provide an outlet for others to present programs of their own choosing, free from any control of the CATV operator as to content except as required by the Commission's rules or applicable law. (p. 427)

The FCC viewed the access concept as in the public interest in the late 1960s. In addition the Notice of Proposed Rulemaking (1968) made reference to possible legislation on cable television.

> The purpose of this proceeding is to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefit of developing communications technology for the public, with particular immediate reference to CATV technology and potential services, and the nature of any regulations and/or proposed legislation that may be necessary or desirable to further this goal. (p. 417)

However, the growth of the cable industry was slower than expected and the FCC continued to regulate cable television.

The Right of Access Debate of the 1970s

After Southwestern, the FCC changed its emphasis from protecting broadcasting to promoting the public interest through full utilization of the technological potential of cable. The FCC's 1969 rules reflected this promotion of the public interest by requiring local origination for cable systems having 3500 or more subscribers. The requirement was linked to the cablecaster's carriage of the signal of any broadcast television station.

> Effective on and after January 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcasting station unless the system also operates to a significant extent as a local outlet by cable-casting and has available facilities for local production and presentation of programs other than automated services. (First Report and Order, 1969, p. 223)

The FCC seemed to view this requirement of local origination or mandatory origination as the "cost" to the cablecaster for carrying the broadcast signals.

In addition, the 1969 rules extended the fairness doctrine, the equal time rule and sponsorship identification rules to cable operators. The FCC also extended its description of what became public access using the same public interest standard as it had in 1968.

> . . . it is our opinion that the public interest would be served by encouraging CATV systems to operate as common carriers on some channels. . . . CATV operators should be able to furnish studio facilities and technical assistance as part of the service, but should have no control over program content except as may be required by the Commission's rules and applicable law. And here, again, we think that at present innovation and experimentation should be encouraged and that such public use of CATV facilities should be free from restriction by local, State, or Federal authority (or by private parties) as to the types of program material to be presented. . . . However, action will be forthcoming only after further study. (First Report and Order, 1969, p. 207)

Although challenged by Midwest Video Corporation, the FCC's mandatory origination rule was upheld by the Supreme

Court in 1972 (U.S. v. Midwest Video Corp.). The Court supported the FCC on two grounds. First, the Court cited the earlier Southwestern case and viewed this requirement as "reasonably ancillary" to broadcasting. Second, the Court viewed the rule as promoting the public interest within the meaning of the Communications Act of 1934 (U.S. v. Midwest Video Corp., 1972). Subsequently, various foundations such as the Sloan Foundation provided detailed proposals for public access in anticipation of the FCC's Cable Television Report and Order in 1972.

The Public Access Concept

The concepts of local origination and public access seemed to be based on the idea that technology could help to solve problems. Perhaps, some conjectured, if people could participate in cable programming, they would also be more involved in other local concerns. In 1971 the Sloan Commission on Cable Communications issued a report on the development of cable television which included a suggestion for the development of public access channels to achieve this potential of local involvement. The Alfred P. Sloan Foundation, concerned with technology and technological change, established the Commission on Cable Communications in 1970. The Sloan Commission saw cable as a way to deal with the urban communication problems.

> Two or more community channels, open to the members of the community for whatever their purposes, might go a long way toward relieving the pressures that arise where communication is in short supply. They will not solve the problems of the inner city, but they may at least contribute toward making some of those problems more amenable to solution. (Sloan, p. 125)

Because of the apparent abundance of channels in modern cable systems, a requirement for public access channels seemed entirely feasible. At that time ". . . cable systems were seen as a means of enhancing social, political and economic processes in cities" (Moss and Warren, 1984, p. 233). By allowing urban citizens a voice on access cable channels, it was expected that the public would get more involved in solving the social, political and economic problems in their communities. Thus, the public interest could be served by providing public access to cable television.

The Public Access Requirement: 1972

The 1972 Cable Television Report and Order presented the first comprehensive rules for cable television. As with local origination, access services were tied to the use of broadcast signals.

> No cable television system operating in a community located in whole or in part within a major television market . . . shall carry the signal of any television broadcast station unless the system also complies with the following requirements concerning the availability and administration of access channels: . . . Public access channel.

> Each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel. (p. 240)

Besides public access and local origination, the 1972 rules also provided for educational, governmental and leased access channels. The rules thus required cable systems in the top 100 cable markets to dedicate four of their channels for public, governmental, educational and leased access. The rationale for this ruling was also given in the Report and Order (1972):

> We believe there is increasing need for channels for community expression, and the steps we are taking are designed to serve that need. The public access channel will offer a practical opportunity to participate in community dialogue through a mass medium. A system operator will be obliged to provide only use of the channel without charge, but production costs (aside from live studio presentations not exceeding five minutes in length) may be charged to users. (p. 191)

According to Henry Geller, General Counsel to the FCC 1964-1970, and Lampert, "These regulations sought to promote the First Amendment goal of diversity through the 'multiplicity of viewpoints' which should occur if all are given access. . . ." (p. 607). These rules are similar to broadcasting regulations in that the cablecaster is required to have certain types of channels but not specific content.

The FCC granted that their rules were for this early stage of cable development.

> Cable television is an emerging technology that promises a communications revolution. Inevitably, our regulatory pattern must evolve as cable evolves--and no one can say what the precise dimensions will be. This Report and Order represents the amount and the substance of regulation that we believe is essential, at this stage, for the orderly development of the industry. (Cable Television Report and Order, 1972, p. 210)

By the mid-1970s, cable systems were reaching no more than 12 to 15 percent of American homes (Committee, 1984, p. 21).

But in 1975, Home Box Office revolutionized the cable industry by launching satellite delivery of programming services. Soon it was possible and economical to deliver many national programming services to local cable systems by satellite.

With the availability of these new services, the cable industry experienced new growth (Committee, 1984, p. 21). However, the new services and greater potential created a problem. Some operators overpromised and oversold in the so-called "blue sky" potential of cable. The cities sought more in the franchise process, including more access facilities and support.

The Public Access Requirement: 1976

The FCC modified the 1972 rules in 1976 to ensure public access to cable systems of a designated size and to regulate the manner in which access was to be provided (1976 Report and Order, 59 F.C.C. 2d 294). The 1976 modification made the access requirements applicable only to cable systems with more than 3500 subscribers. The requirement was restated: each system was to maintain four separate access channels--one public, one governmental, one educational and one leased access channel. But in the absence of full-time demand, channels could be combined into one shared access channel. In addition, each system was required to make equipment available at a reasonable cost to those using the channels and at no charge on the public access channel for programs not exceeding five minutes in length. System operators could have no editorial control of the content of access programming. These regulations also instructed cable operators to offer access on public and leased channels on a first-come, nondiscriminatory basis (Report and Order, 59 F.C.C. 2d 294, 314 (1976)).

Some cable system operators opposed the public access channels. While the FCC acknowledged the opposition to its ruling in the 1976 Report and Order, it continued to come down strongly in favor of the access channels.

> There is, we believe, a definite societal good in keeping open these channels of communication. While the overall impact that use of these channels can have may have been exaggerated in the past, nevertheless we believe they can, if properly used, 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. (Report and Order, 1976, p. 296)

The FCC acknowledged the expenses the requirement imposed on the cable system operators. The 1976 Report listed four items: first, costs directly passed on to the subscribers; second, costs reflected in the profit and loss statements of cable operators; third, opportunity costs.

> "Monies expended to comply with these requirements could have been expended in the construction of new cable systems where none exist or in the development and provision of different services which might be given a higher value by the public." (Report and Order, 1976, p. 296)

Finally, the FCC cited loss of flexibility and initiative as likely to follow with any attempt to imposed detailed governmental regulations on private business concerns (Report and Order, 1976, p. 296).

The FCC made specific reference to the Midwest Video Corporation and to ". . . the most extensive comments filed . . ." by them.

> These arguments do not persuade us that the adoption of reasonable channel capacity and access channel rules are either unconstitutional or beyond our jurisdiction. The Communications Act allows the Commission significant discretion in dealing with the developments, demands, and public interest benefits inherent in the dynamic field of communications. (Report and Order, 1976, p. 298)

The FCC was in for a bit of a surprise regarding the judgments of the Supreme Court.

Access Rules Challenged

The access rules were challenged in court in 1977 when Midwest Video Corporation and the American Civil Liberties Union sought review of the 1976 order (F.C.C. v. Midwest Video Corp., 1979). At the Appeals level, the Eighth Circuit Court held that the 1976 rules impermissibly imposed common carrier obligations on cable operators.

> A common-carrier service in the communications context is one that "makes a public offering to provide (communications facilities) whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. . . ." Report and Order, Industrial Radiolocation Service, Docket No. 16106, 5F.C.C. 2d 197, 202 (1966). (F.C.C. v. Midwest Video Corp., 1979, p. 701)

Chief Judge Markey wrote the decision for the Court of Appeals for the Eighth Circuit. In this decision the court used the analogy that cable television is like a newspaper. Chief Judge Markey asserted that the First Amendment rights of cable operators were analogous to those of newspaper publishers.

> Though we are not deciding that issue here, we have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access. (Midwest Video Corp. v. F.C.C., 1978, p. 1056)

Although the appeals court placed cable television in the print tradition, the Supreme Court made no such commitment.

The Supreme Court upheld the lower court decision in Midwest II, as the case became known. The Supreme Court struck down the access rules solely on a jurisdictional basis. The Court held that the FCC did not have jurisdiction to require access channels, based on the section of the Communications Act of 1934 that prohibits the FCC from imposing common carrier restrictions on broadcasters (F.C.C. v. Midwest Video Corp., 1979). The Court concluded only Congress could compel cable operators to provide common carriage of public-originated transmissions.

Dissenting opinions suggested that the Commission's rules might violate the First Amendment rights of cable operators. The decision, however, was made on statutory grounds. The decision reads,

> Because our decision rests on statutory grounds, we express no view on that question (First Amendment rights of cable operators), save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. (F.C.C. v. Midwest Video Corp., 1979, p. 707)

Thus the Supreme Court did not rule on the constitutionality of access rules. Nor did the high court compare cable with newspapers in its decision. Therefore, the constitutionality of access requirements on cable systems remains an open question (Melnick, 1982, p. 1398).

Access to Print and Broadcasting

The right of access debate of the 1970s also considered access to broadcasting and print communication in two landmark cases: Red Lion v. F.C.C. (1969) and Miami Herald Publishing v. Tornillo (1974). In Red Lion, access to broadcasting was considered, while in Tornillo, access to newspapers was the subject.

Those who favor the requiring of cable access channels justify the requirement by using the "affirmative duty theory" of the First Amendment. That theory says that the First Amendment requires the government to encourage the presentation of diverse ideas in the media. The Supreme Court supported such a theory in Red Lion v. FCC which upheld the Fairness Doctrine which fostered the presentation of diverse viewpoints (Red Lion Broadcasting Co. v. F.C.C., 1969).

The Red Lion Broadcasting Co. operated a Pennsylvania radio station that carried a broadcast criticizing a book. The book's author was denied a reply. After the FCC attempted to invoke the Fairness Doctrine into the case, Red Lion challenged the Fairness Doctrine on First Amendment grounds, alleging that the personal attack and political editorial rules (manifestations of the FCC's Fairness Doctrine) abridged their freedom of speech and press. The court held the regulations were both authorized by statute and constitutional. The Court based its decision on a scarcity rationale.

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of listeners, not the right of the broadcasters, which is paramount. (<u>Red Lion Broadcasting Co. v. F.C.C.</u>, 1969, p. 390)

The importance of the Red Lion decision is often seen in this last phrase, that the right of the viewers and listeners is paramount.

The rights of the readers of a newspaper, however, were seen differently in <u>Miami Herald Publishing Co. v. Tornillo</u> (1974). A Florida statute created a right to reply to press criticism of a candidate for nomination or election. On the basis of this statute, a politician, Pat Tornillo, tried to get his replies to critical editorials printed in the Miami Herald newspaper. The Supreme Court found the statute to be contrary to the First Amendment.

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials--whether fair or unfair--constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. (<u>Miami Herald Publishing Co. v. Tornillo</u>, 1974, p. 258)

The Supreme Court thus struck down the Florida statute because it violated the First Amendment's guarantee of a free press.

The Supreme Court historically has treated print media differently than broadcast media on First Amendment issues. In the case of F.C.C. v. Pacifica Foundation (1978), the Court made this distinction clear. A Pacifica Foundation radio station made an afternoon broadcast of a satiric monologue titled "Filthy Words," which listed and repeated a series of words one "could not say on the air." A father who heard the broadcast while driving with his young son filed a complaint with the FCC. After consideration of the complaint, the FCC issued an order to be associated with the station's license file (Memorandum Opinion and Order, 56 F.C.C. 2d 94, 99). This order could then be used against Pacifica in the future to impose sanctions such as nonrenewal of license. Pacifica took the FCC to court, claiming its constitutional rights to freedom of expression had been violated by the FCC's order. The Supreme Court ruled in favor of the FCC. In the decision, the Court dealt with the differences between print and broadcasting in Part IV C.

> (A)lthough the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims

> of their criticism. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367. (F.C.C. v. Pacifica Foundation, 1978, p. 748)

Two reasons were given by the Court for the distinction between print and broadcasting. First the Court viewed the broadcast media as having established a "uniquely pervasive presence in the lives of all Americans" (p. 748). Second, the Court viewed broadcasting as "uniquely accessible to children, even those too young to read" (p. 749).

Regulation Focus Moved From FCC To Local Franchising Authorities in 1980s

The period of the 1980s has been a period of deregulation for cable television at the federal level with a consequent greater focus on franchising and regulation at the local level. This trend can be seen as early as 1979 with the decision in Midwest II when the Supreme Court determined that the FCC did not have the jurisdiction to require access channels. The FCC eliminated distant signal carriage and syndicated exclusivity rules in 1980 (Report and Order, 79 F.C.C. 2d 663). It appeared that the end of these rules used to protect broadcasters meant the end of the era of FCC regulation as well (Besen & Crandall, 1981, pp. 123-124).

Challenges to Local Regulation

The importance of local regulation had been acknowledged by the FCC in the Cable Television Report and Order in

1972. The FCC decided against federal licensing, the case with broadcasting, in favor of dual jurisdiction between the FCC and the local governments, because

> cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel urban areas into cable districts. Local authorities are also in better position in follow up on service complaints. (Cable Television Report and Order, 1972, p. 207)

Local government regulation has taken three directions, according to Gullett (1985): rate regulation, franchise fees and access channels (p. 581). The cable operator pays the local franchising authority annual franchise fees (Gullett, 1985, footnote 103, p. 570). After the Supreme Court struck down the FCC's public access rules in Midwest II, several states, such as Connecticut, Minnesota and California, enacted their own access requirements (Gullett, 1985, p. 571).

Challenge to local regulation can be seen in court cases during the 1980s. In Community Communications Company v. City of Boulder (1981), referred to as Boulder II, the question was whether the city of Boulder's geographic districting plan for cable operators violated the First Amendment.

> More broadly, the issue concerns the nature and degree of governmental regulation that the First Amendment permits over cable operators. (p. 1370)

But the Court of Appeals found that it did not have enough information to decide such a case so the Court froze the parties in their circumstance until a trial could be conducted on the merits. Another case delayed due to the need for clarification by trial was Omega Satellites v. the City of Indianapolis (1982). Omega's complaint was that the officials of the City of Indianapolis had granted the existing franchisees de facto exclusive franchises, excluding Omega. The Court decision cited the natural monopoly characteristics of cable in addressing Omega's First Amendment concerns in the case.

> . . . the apparent natural monopoly characteristics of cable television provide . . . an argument for regulation of entry. . . . (Omega, 1982, p. 119)

The Berkshire case also considered the natural monopoly characteristics of cable television and the necessity of a single cable system operator for each market. Two operators are not considered economically viable in a single cable market. "Because of . . . start-up costs and the nature of the cable television market . . ., cable systems have operated largely free from competition" (Berkshire Cablevision, Inc. v. Burke, 1983, p. 986). Although it is conceded in Berkshire that cable operators compete for the franchise, it is noted that cable operators "rarely develop competing cable systems for the same service area" (Berkshire Cablevision, Inc. v. Burke, 1983, p. 986).

The Berkshire case dealt specifically with regulation to achieve public access. The Red Lion case was the basis for the Rhode Island Berkshire Cablevision decision, which viewed cable as being analogous to broadcasting. In the Berkshire case the U.S.District Court for Rhode Island examined the constitutionality of mandatory access requirements of the state.

The Rhode Island Division of Public Utilities and Carriers had prescribed regulations requiring cable operators to construct a network to permit origination and transmission of programming at institutions and public buildings, including schools and religious institutions (Berkshire Cablevision, Inc. v. Burke, 1983, p. 977-978). It also prescribed regulations requiring cable operators to make available several channels for public access. Berkshire Cablevision challenged the regulations as violating the First Amendment. But the district court refused to declare the regulations unconstitutional (Berkshire Cablevision, Inc. v. Burke, 1983, p. 988). Senior District Judge Pettine distinguished between newspapers and cable.

> Any person may distribute a written message in the form of a leaflet, pamphlet, or other relatively inexpensive form of "publication." In contrast, a resident of Newport County who does not have seven million dollars to develop his own cable system is shut out of that medium with no way to express his ideas with the widely acknowledged power of the small screen. (Berkshire Cablevision, Inc. v. Burke, 1983, p. 986)

This distinction between newspapers and cable led the Rhode Island District Court to conclude that the goal of governmental regulation discussed in the Red Lion case is applicable to cable. That goal of governmental regulation is "to promote the First Amendment by making a powerful communications medium available to as many of our citizens as is reasonably possible" (Berkshire Cablevision, Inc. v. Burke, 1983, p. 986).

FCC Preemption of Local Regulation

Until the case of Capital Cities Cable v. Crisp (1984), the Supreme Court had continued to limit the FCC's cable jurisdiction under the reasonably ancillary doctrine of the Communications Act of 1934 (Gullett, 1985, p. 561). In Capital Cities v. Crisp (1984), the Supreme Court had to weigh the rights of the state and the rights of the federal government.

> The question presented in this case is whether Oklahoma may require cable television operators in that State to delete all advertisements for alcoholic beverages contained in the out-of-state signals that they retransmit by cable to their subscribers. (Capital Cities v. Crisp, 1984, p. 694)

In Capital Cities the Supreme Court broadened the FCC's cable jurisdiction to local areas by affirming its right to preempt local cable regulations. Referring to the state of

Oklahoma's interest in discouraging consumption of intoxicating liquor, Supreme Court Justice Brennan said in his decision:

> When this limited interest is measured against the significant interference with the federal objective of ensuring widespread availability of diverse cable services throughout the United States--an objective that will unquestionably be frustrated by strict enforcement of the Oklahoma statute--it is clear that the State's interest is not of the same stature as the goals identified in the FCC's rulings and regulations. (Capital Cities v. Crisp, 1984, pp. 715-716)

This ruling in favor of federal preemption of local cable regulation was used in a series of FCC rulings that favored cable operators.

Two of the FCC decisions based on Capital Cities v. Crisp are Nevada I and Nevada II. In Nevada I the Las Vegas, Nevada, cable operator, Community Cable TV, received FCC relief from rate regulation of tiered services (Memorandum Opinion and Order, 1983). In Nevada II the Commission affirmed its holding in Nevada I and granted relief from local rate regulation for Cablevision of New Jersey (Gullett, 1985, p. 578).

The Cable Communications Policy Act of 1984

The conflict between the FCC and local governments on the regulation of cable television and the questions that developed regarding the local franchising of cable television were decided by the passage of the Cable Communications Policy Act of 1984. In its Report on the Cable Act, the House of Representatives Energy and Commerce Committee described the background for the cable legislation. Since 1980 the terms of many franchises had gone beyond economic viability.

> In many cases, the community could not support state-of-the-art systems. . . . In major cities across the country, cable operators have soon after the grant of a franchise turned to the city with requests to reduce channel capacity from that bid in the franchising process, cut back on the services provided, reduce public access facilities, increase rates and slow down the timetable for construction. (Committee, 1984, p. 21)

Not only was cable legislation sought to deal with this problem of economic viability of existing franchises but also to deal with the expected expiration of agreements adopted in the 1960s. With 15-year franchise limits, many agreements were scheduled to expire soon after 1984 and were expected to have to be renegotiated. The character of cable television had changed so dramatically, it was expected that franchise renewals would focus on rebuilding and upgrading existing systems. If the cable company and the franchising authority were unsuccessful in agreeing on changes in the cable system, a renewal of the franchise could be denied and granted to a competing cable company more willing to comply with the requests of the franchising authority (Committee, 1984, p. 22).

The Committee on Energy and Commerce, the House committee responsible for telecommunications, explained the need for the cable legislation it was proposing. Their views are considered here because the staff of its subcommittee, the House Telecommunications Subcommittee, wrote the House version of what became the Cable Act (H.R. 4103).

> . . . the Committee recognizes that the franchise process in every city has very significant national implications for the full development of cable telecommunications and for the delivery of the widest diversity of information sources. In view of this impact, it is appropriate and necessary for Congress to adopt cable legislation. (Committee, 1984, p. 22)

The Cable Act was needed to deal with the coming of age of a new technology whose problems needed resolution on a national level.

With the deregulating trend being shown by the FCC and the preemption by the FCC of the states' regulatory authority allowed by the Supreme Court in <u>Capital Cities v. Crisp</u>, the cities and other local authorities sought confirmation of their regulatory authority from the Congress. National League of Cities legislative counsel Cynthia Pols described the motivation of the cities in pushing for cable legislation.

> "You can't believe how badly the cities wanted this bill. They dread the FCC. (The legislation) takes the FCC out of our hair. It establishes for us clear regulatory authority. . . . The biggest

> set-back is the rate regulation, but what we got there is better than what the FCC has already attempted to give us recently." ("Free at Last," 1984, p. 38)

The desire for the cable legislation thus pushed the cities to reach compromises with the cable industry that led to cable legislation. Also, the cities were afraid the courts had taken away many of their regulatory powers as in Capital Cities v. Crisp and would take away more. Perhaps it would be better to have a law guaranteeing some rights rather than be at the mercy of the FCC and the courts.

Leaders in the cable industry also saw benefits to the legislation. Even one of the Cable Act's chief critics saw the value of cable legislation. John Malone, president and chief executive officer of Tele-Communications, Inc. (TCI) in a statement released September 27, 1984, said:

> ". . . we strongly believe the passage of H.R. 4103 will finally legitimize the cable industry on its own and will lend long term stability in our dealings with local governments and the financial community; both will accrue to the benefit of our customers, the cable subscribers." ("Back to the Brink for Cable Bill," 1984, p. 39)

National Cable Television Association President James Mooney was more dramatic in his prediction of positive the results of the Cable Act.

> "The bill is going to take the heart out of municipal regulation of cable, ... With the elimination of rate regulation and with sharp restrictions being placed on cities' renewal decisions, you are going to take away much of the reason for being of cable regulatory bureaucracies. . . . You are going to find a lot of cable

> regulators out of work in a couple of years." ("Free at Last: Cable Gets Its Bill," 1984, p. 38)

The NCTA President viewed the new act as the deregulation of cable television. (An analysis of the Cable Act is provided in Chapter VI.)

Models for Cable Television in Court Cases

As of this date, no conclusive First Amendment model for cable television has been adopted by the courts. In the Preferred case (City of Los Angeles v. Preferred Communications, 1986), the Supreme Court considered the franchise question. Utilities would not lease space on their utility poles unless Preferred Communications first obtained a franchise from the city. The city of Los Angeles refused, stating Preferred had failed to participate in the auction to award a single franchise. Preferred claimed the city's system of awarding a limited number of franchises through competition violated both federal antitrust laws and the First Amendment. Counsel for the city contended that the case involved a city's right to control the use of its property in connection with the construction of a cable system, not the First Amendment. The Court sent the case back to the District level for trial and the question still is pending. (For analysis of the Preferred case see Chapter VII.)

The Supreme Court strengthened the cable industry's case for First Amendment rights and struck down the FCC's protection of the broadcasting industry by ruling must-carry rules unconstitutional in 1986. Must-carry refers to the rules that require cable systems operators to carry broadcasting stations within a certain radius of their cable system. In the Quincy Cable case the court declared the FCC's must-carry rules were found to be a violation of the First Amendment (National Association of Broadcasters v. Quincy Cable TV, 1986). (For an analysis of the Quincy case see Chapter VI.)

But the First Amendment did not protect an incumbent franchise holder in Missouri from having to compete with other cable companies when its franchise was about to expire. In 1987, the Supreme Court determined that the natural monopoly characteristics of the cable market can justify an exclusive franchise in order to create competition for the cable television market. In TCI Cablevision v. Central Telecommunications (1987) Central tried to bid on the franchise that TCI had in Jefferson City, Missouri. TCI refused to bid on the franchise because it claimed a First Amendment right to continue providing cable services in the city. The City granted the franchise to TCI, but Central sued for damages. TCI defended itself by contending it had a First Amendment right to remain in the city's cable television market with or without a franchise. Therefore, Central could not have been damaged when it lost the franchise (Central Telecommunications v. TCI Cablevision, 1986, p. 713). The court rejected TCI's First Amendment defense for two reasons:

> First, the evidence reveals that TCI was not sincere in advocating competition in the market but simply sought to retain a monopoly originally gained through the grant of a de facto exclusive franchise. Second, the evidence reveals that the City's cable television market is currently a natural monopoly which, under present technology, offers room for only one operator at a time. Thus, we hold that the City could properly offer a de facto exclusive franchise in order to create competition for its cable television market. (Central Telecommunications v. TCI Cablevision, 1986, p. 717)

The court awarded Central \$10.8 million in actual damages and \$25 million in punitive damages. (For analysis of Central case see Chapter VI.) (For a summary of the History of Access and Cable Television, see Appendix A: Chronology of Public Access Cable Regulatory History.)

2. RIGHT TO ACCESS AND FIRST AMENDMENT MODELS

Although no First Amendment model has been adopted by the courts for cable television, several models have been posited in the case law on right to access and cable television (See Figure 1). Courts and commentators have attempted to resolve the issue of defining First Amendment rights of cable operators first by comparing the cable

MEDIUM:	PRINT	BROADCASTING	CABLE
RIGHT TO ACCESS LAW:	FIRST AMENDMENT Freedom of the Press	COMMUNICATIONS ACT Fairness Doctrine	CABLE COMMUNICATIONS POLICY ACT of 1984 Franchise can allow access
RIGHT TO ACCESS SUPREME COURT DECISIONS:	MIAMI HERALD V. TORNILLO (1974) No Right to Access	RED LION V. FCC (1969) Right to Access	NONE

ANALOGIES FOR CABLE SUPPORTED IN SUPREME COURT UPHELD CASES:

CABLE AS PUBLISHER	CABLE AS BROADCASTER	CABLE AS NATURAL MONOPOLY
NAB v. Quincy (1986)	U.S. v. Southwestern (1968)	Central Communications v. TCI Cablevision (1987)

MEDIA DIFFERENCES SUPPORTED IN SUPREME COURT CASES:

BROADCASTING Is NOT PRINT	CABLE Is NOT BROADCASTING:
FCC v. Pacifica	Fortnightly v. United (1978) Artists (1968) HBO v. FCC

Figure 1. Right to Access and Nature of Media

medium either to newspapers, broadcast television or a public utility and then by applying the appropriate constitutional model.

Using the print model, the publisher cannot be forced to provide access to a communication medium because that access would infringe on the publisher's freedom of the press. Required access by citizens to the print media was denied in Miami Herald v. Tornillo (1974). In Tornillo, access by citizens was seen as a violation of the publisher's First Amendment right to freedom of the press. Cablecasters' First Amendment right to choose what to present on their channels was supported by the Supreme Court when it struck down the must-carry rules of the FCC in 1986 (NAB v. Quincy).

Using the broadcasting model, however, access can be required. Access to broadcasting is required by Sec. 315 of the Communications Act of 1934 which prescribes the Fairness Doctrine to provide diversity for the scarce airwaves of the broadcasting medium. In Red Lion v. F.C.C. (1969) the Fairness Doctrine was upheld. But when the Fairness Doctrine was applied to a new use of broadcasting in teletext, the Fairness Doctrine was not applied. In Telecommunication Research and Action Center v. F.C.C. (1986) the DC Circuit Court supported the FCC's judgment that application of the

Fairness Doctrine to teletext would cause economic constraint that would not be in the public interest.

The cablecaster has been treated as a broadcaster in some cases and as different from a broadcaster in other cases. In U.S. v. Southwestern Cable (1968) the Supreme Court upheld the FCC's jurisdiction over cable television as reasonably ancillary to broadcasting. In 1983, a district court cited Red Lion to support the goal of government regulation to achieve access by citizens for public access cable television (Berkshire Cablevision Inc. v. Burke, 1983). But in some cases the differences are emphasized. In 1968, the Supreme Court declared, "The function of CATV systems has little in common with the function of broadcasters" (Fortnightly v. United Artists TV Inc., 1968, p. 400). Again in 1977, the courts declared cablecasting is not like broadcasting (HBO v. F.C.C., 1977).

Two characteristics of a public utility model can be considered here.

> The principal characteristics of a public utility are generally conceded to be the provision of an important public commodity or service and a position as a natural economic monopoly. (Parsons, 1984, p. 279)

The second characteristic, a natural monopoly, has been considered especially as it relates to the franchise that allows public access cable television. Some case law views the franchise as legitimate in a natural monopoly situation.

The local regulation of cable television is permitted if cable has some of the characteristics of a public utility such as being a natural monopoly.

Even before TCI v. Central, there was case law supporting the view of cable as a natural monopoly. In 1982 the court considered if the monopoly status of cable could justify restrictions on the cable system. But the Circuit court remanded the case for factual findings in Boulder II (Community Communications Company v. City of Boulder, 1982). In Hopkinsville TV, Inc. v. Pennyroyal Cable Television, Inc. (1982) the court cited Boulder II and found community antenna television to be a natural monopoly.

Finally, in TCI v. Central Telecommunications, the Supreme Court (1987) upheld a lower court's finding that cable television was a natural monopoly. Therefore, the court ruled, the franchise must go only to one company and, to encourage competition, the franchiser must allow competition for that exclusive franchise.

But some case law has considered the cable franchise as a potential violation of the cablecaster's First Amendment rights. In 1982 the court decided the First Amendment was not violated by the city's franchising process (Omega). In 1986, the Supreme Court failed to resolve the First Amendment issue for the cable operator in the Preferred case (City of Los Angeles v. Preferred, 1986).

In summary, cable television has developed from an era of nonregulation in the 1950s through a period of federal regulation by the FCC in the 1960s and 1970s to its own birthright legislation of the Cable Communications Policy Act of 1984. Public access cable television has developed with the support of the FCC under the public interest standard through the 1970s and with the support of the Cable Act since 1984. The local franchising authorities are now the main support for regulation to achieve public access cable television.

The courts have interpreted the First Amendment rights of the cable system operator by making analogies between cable and other media such as print and broadcasting. The Supreme Court has interpreted First Amendment rights differently, depending on the analogy. If cable is analogous to print, regulation of the cablecaster is prohibited (<u>NAB v. Quincy</u>, 1986). If cable is analogous to broadcasting, the cablecaster is subject to regulations as a public trustee (<u>U.S. v. Southwestern</u>, 1968). In addition, the Supreme Court has judged cable to be a natural monopoly in at least one case (<u>TCI v. Central</u>, 1987). This natural monopoly designation allows regulation to achieve access under the public utility model.

A review of the literature on public access cable television in the next chapter will provide additional background on how public access is perceived as contributing to the public interest.

CHAPTER III

LITERATURE REVIEW

How are public access cable channels perceived to contribute to the public interest? This literature review will cover studies that attempt to answer this question. First, representative literature is presented on the potential of cable access. In subsequent sections, the literature is reviewed by research method: case studies, legal studies, interviews, content analyses, surveys, a field experiment and historical studies. The review is for literature published in the United States about public access in the United States. Consequently, only one foreign research project is reviewed.

Although not specifically cited, trade journals have been used. Broadcasting magazine has been used to identify trends in the broadcasting and cablecasting professions. This weekly publication was helpful in identifying interview subjects (See Interview Results, Chapter V) as well as relevant legislation, F.C.C. decisions and court decisions. Access magazine, a public interest publication dealing with media reform and citizen access to the media, also has been consulted for views of those fostering access. Access is published monthly by the Telecommunications Research and Action Center in Washington, D.C. Community Television

Review, published quarterly by the National Federation of Local Cable Programmers, also has been consulted for the perspective of those responsible for access cable programming.

1. POTENTIAL OF CABLE ACCESS

After 1968, cable became a symbol of pluralism, powerfully attractive to media critics from both the right and left.

> Thus, the Nixon Administration (whose feud with the networks made support of cable an appealing political weapon), . . . egalitarians, futurists fascinated with new hardware and technology, critics of government intervention in economic development, and video radicals all combined to form an unusual constituency for change in official attitudes toward cable. (Schmidt, 1976, p. 204)

The potential for cable to provide a variety of viewpoints specifically through public access has been discussed in the literature. The Center for Policy Research (January 14, 1973) has explored the potential of cable television for participatory democracy. Using cable television and telephone conference circuits in a large urban high rise apartment complex, the Center for Policy Research has evaluated the overall citizen participation in the communications system it provided. The Center has found project participation to be relatively high and has acquired additional data for further program design.

Applications of cable for specific uses also have been explored for various population groups and in various regions. Niemi (1974) reports on the potential of cable as an information network for adult education, and Marchese (1972) discusses the feasibility of involving cable television systems in central Appalachia with efforts toward rural community development.

There has been a proliferation of manuals for use of videotape for community development and social change. Gillespie (1975) has contributed a volume for persons involved with the production of community media programming in the United States or Canada. He provides an annotated bibliography of references. Other manuals range from Gordon's We Interrupt This Program . . . A Citizen's Guide to Using the Media for Social Change (1978) to a Handbook for Producing Educational and Public-Access Programs for Cable Television (Bretz, 1976) and at least five others (Colorado State University, 1975; Zelmer, 1973; Hopkins, et al., 1973; Fredericksen, 1972; and Forbes & Layng, 1977).

Public access channels do not have a wide audience, but these channels enable socially involved groups to reach a local audience. Bretz (1975, pp. 22-23) says, "Whether public access will really amount to access to the public as the name implies, or only access by the public to the medium, is crucial." Broadcast audiences are figured in percentage terms. However, public access cable audiences are compared to other means of gathering people together. "The audiences gathered in a small percentage of a community's cable television homes might overflow the town's largest auditorium" (Bretz, 1975, p. 23). This is not to say that public access does not need program promotion and an attempt to identify and serve unfilled local needs (Bretz, 1975, pp. 29-30).

But if the public access channel does not reach a wide audience, Doty (1975) asks, "Can it really contribute to a renaissance of community spirit and participation, or is the whole concept fundamentally unflyable, built out of nothing more substantial than new left populist mysticism?" (p. 40). Doty's point is that public access must attract an audience.

2. CASE STUDIES

As Moss and Warren (1984) have noted, considerable material has been written on public access "success stories" (p. 234).

Othmer's (1973) study of the New York City public access structure is a valuable history of access in New York and provides some preliminary data on utilization of the channels. Wurtzel also has looked at the New York public access structure two years later (1975). Wurtzel has dealt with two questions:

> 1. What was the content of public-access cable channel programming on a New York City cable system for the first two years of operation; and
> 2. What initial directions, if any, did access channel programming take during the two year period? (p. 16)

Wurtzel concludes that public access channels seemed viable at that time (p. 21).

Several case studies answer the question of who is involved in community programming. Smith describes the role of the Monroe County Public Library in Bloomington, Indiana, in the development of a community access channel through a local cable television franchise (September 1981). Bender presents (1979) six other case studies of community programs, one of which is described by Smith. The case studies include (a) "Public access Cablecasting," a community/university network in East Lansing, Michigan; (b) "Video Action Center," a community studio in Columbus, Indiana; (c) "Access Channel Seven," the library and cable access in Monroe County, Indiana (Same as above); (d) "Project Video," cable CETA, and schools in Jackson, Michigan; (e) "Cable Arts Project," the state and the arts through Minnesota Cable Communications; and (f) "The Citizen and the Cable," from classroom to newsroom in South Bend, Indiana. A public access center which has been seen as a successful model is St. John's Community Video Center, which Autio calls ". . . (an) important milestone in the development of public access" (1984, p. 15). St. John's began operation in 1975 in Knoxville, Tennessee, and has been the focus of international as well as national attention. An example of this attention is a documentary done by a Dutch television group ("Do-It-Yourself Television in America," produced by IKON TV/Holland, 1983).

Finally, Horwitz (1982) analyzes the deregulation of communications as a case study in a larger examination of the regulation and deregulation of economic activity in contemporary American society. Horwitz, however, does not specifically deal with cable television.

3. LEGAL STUDIES

Legal commentators have explored the conflict between the public's freedom of speech and the media owners' freedom of the press. In 1967, George Washington University Bill of Rights scholar Jerome Barron advocated an interpretation of the constitution which would provide and require access to the media. According to Barron, the free marketplace no longer provides First Amendment rights.

> With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition. The world in which an essential rationalist philosophy of the first amendment was born has vanished and what was rationalism is now romance. (p. 1678)

The electronic media, particularly television, has changed the nature of the media and consequently of the relationship of the public to the media.

Public Access and the First Amendment

When public access cable television developed as a way to provide access to television for the public, the legal commentators considered the implications of these channels for the First Amendment. Some commentators (Ginsburg, 1984; Shapiro, 1983; Melnick, 1982) argue the affirmative duty theory (Red Lion v. F.C.C., 1969) that allows regulation to achieve balance in broadcasting (Communications Act of 1934, 47 U.S.C. Sec. 315(a) (1976)) should not be extended to cable television.

> . . . the affirmative duty theory should not be extended beyond broadcasting to cable, and . . . any attempt by federal, state or local government to impose such a duty on cablecasters is contrary to the first amendment. (Melnick, 1982, p. 1394)

This point of view advocates a print First Amendment model for cable television.

In the view of other commentators (Berger, 1984; Kreiss, 1981; Mininberg, 1984), however, the First Amendment is enhanced by public access cable television. According to Kreiss (1981), ". . . the first amendment requires that federal or state governments ensure minimum access to and diversity on cable systems" (p. 1002). Kreiss adds,

> . . . beyond imposing minimum requirements, the first amendment gives federal and state governments wide latitude in placing requirements on cable operators for the purposes of fostering discussion, exchanging ideas, and informing viewers. (p.1003)

These commentators advocate a regulation model to achieve access as consistent with the First Amendment.

The Question of Regulation to Achieve Access

Commentators can be divided into two groups: those who advocate regulation to achieve access and those who do not. Those who advocate such regulation had to reconsider their perspective after the Supreme Court declared the F.C.C.'s mandatory access unconstitutional on statutory grounds. After Midwest II (F.C.C. v. Midwest, 1979) ". . . the real issue submitted is whether the access rules should be permitted in future legislation" (Clarkson, 1980, p. 488). Schwartz (1982) suggests that the Communications Act (1934) should be amended.

> The Communications Act of 1934 should be amended to provide a right of access to cable. . . . The profound social and political influence of television and cable television calls for a scheme of regulation that balances the first amendment rights of freedom of press and freedom of speech. (p. 1043)

Other commentators propose more local solutions. One commentator ("Toward community," 1974) proposes local cable ownership. "The most effective way to assure that community self-expression becomes a reality is through community ownership of CATV systems" (p. 1729). Harrison (1981) notes that local regulation has fared well in the courts and adds, ". . . it may be that local regulation of cable access may withstand first amendment scrutiny where federal regulation would not" (p. 645).

After the Cable Act (1984) was passed, Meyerson (1985) observed, "One of the major breakthroughs of the 1984 Cable Act was that congress for the first time explicitly approved the concept of third-party access to cable systems" (584). These commentators would permit regulation to achieve access by the public to cable television, even though that access may infringe on the cable operator's First Amendment right of freedom of the press.

However, other commentators (Bernet, 1986; Garrett, 1985-1986; Sibary, 1985) oppose regulation to achieve access. They see access provided by the Cable Act as unconstitutional, violating cable operators' First Amendment rights. Sibary (1985) states, "The cable operator's first amendment interests are clearly abridged by any law requiring the operator to provide free or leased access channels" (p. 406).

Bernet (1986) compares the access rules to the F.C.C.'s must carry rules. The must carry rules required cablecasters to carry all specified local over the air television broadcast signals. The Quincy court (<u>Quincy Cable v.</u>

F.C.C., 1985) declared the must carry rules an unconstitutional violation of the cablecaster's First Amendment right. Bernet concludes:

> In ruling that the must carry rules violated the first amendment, the Quincy court also raised serious doubts as to the constitutionality of the mandatory access requirements of the Cable Communications Policy Act of 1984 (Cable Act). . . . (T)he mandatory access provisions, like the must carry rules, violate cable operators' first amendment rights because they are not narrowly tailored to achieve a substantial governmental interest. (pp. 426-427)

Garrett points out the inconsistency of cable access compared to access to other mass media (1985-1986, p. 251). But other media have other First Amendment models that are followed.

Cable Models and Public Access

The three basic models (See Chapter I) of newspapers, broadcasting and public utility or common carrier are supported in the legal commentaries. Sibary (1985) supports the newspaper model and states ". . . the bases suggested for giving cable television a lesser status than newspapers under the first amendment are invalid" (p. 400). Harrison (1981) advocates a broadcasting model. She states, "Regulation would be more easily upheld if cable were deemed within the broadcasting rather than the print model for government regulation" (p. 668). Nadel (1982) differentiates cable operators' economic decisions from their First Amendment rights and allows a common carrier model to achieve public access.

> The owner's rights to include and exclude messages are solely economic property rights. These permit them to select which messages will gain access to their media. If, however, their economic power becomes great enough to enable them to censor messages and/or the advantages of permitting them to exercise discretion is minimal, then the government may regulate access and even impose common carrier obligations upon them. (p. 224)

The reference to economic power becoming great enough refers to the natural monopoly characteristics some commentators associate with cable television. Berkin (1982) says ". . . cable has the characteristics of a natural monopoly" (p.66).

Some commentators (Geller and Lampert, 1983; Opheim, 1985) combine the three models in a functional model for cable television. In her analysis of the Berkshire case (Berkshire v. Burke, 1983), Opheim (1985) describes the functional model for cable. In the Berkshire case, a U.S. District Court examined the constitutionality of mandatory access requirements for Rhode Island. Opheim states:

> A functional classification system that utilizes print, broadcasting, and common carriage models would have been the most appropriate first amendment analysis because cable television performs functions that are similar to print, broadcasting, and common carriage. Applying this functional approach, the Berkshire court would have found the access channel requirements constitutional not because of an inaccurate conclusion that a cable system is more like a broadcasting medium than the print medium, but because access channel requirements are a common carrier function; therefore, the imposition of these requirements did not violate Berkshire's first amendment rights. (p. 543)

The court chose to apply Red Lion (1969) to the Berkshire case, thus using a broadcasting model. Opheim (1985) disagrees with the judge's interpretation, applying instead a functional model.

Geller and Lampert (1983) describe retransmission, origination and conduit functions for cable television. Thus, the retransmission functions would be subject to regulation under the broadcast model; the origination functions would be free of regulation under the newspaper model and the conduit functions would be subject to the common carrier model (pp. 628-629).

In addition to the analyses for public access cable television and the public interest as seen in the First Amendment rights of cable operators and the public, the legal studies have provided important references. The legal comments have provided bibliographic references for primary as well as secondary sources that have been used throughout this research. Important aspects of court cases and cross references for those court cases also have been identified by the legal literature.

4. INTERVIEWS

One way to deal with the question of perceptions of the public interest is to talk to people involved in the development of public interest decisions. Krugman and Reid (1980) focus on the decision-making process utilized by F.C.C. policymakers, asking how F.C.C. members make decisions which are ultimately labeled as being in the "public interest." In this inquiry, focus was on cable tv regulations; because ". . . virtually all F.C.C. cable decisions, as well as other Commission decisions hinge on the interpretation of the concept of 'public interest'" (p. 311). Krugman's (1977) dissertation constituted the basis for this research. His secondary research ". . . involved a review of F.C.C. documents relative to the specific use of the term 'public interest' as it related to (1) broadcast programming and (2) cable television" (1977, p. 15). The questions used in interviews are structured to probe constructs of the public interest used in construction of public policy decisions (p. 314) (for results see Chapter I, section titled "Conceptions of the 'Public Interest'").

Interviews are also the basis for research in another study of the F.C.C. and cable television. Shafer (1980) assesses the role of federal regulation in the development of cable television and the factors which influenced F.C.C. policy decisions from 1959 to 1979. The assessment is based on interviews with 16 of the 26 commissioners who served during the 20-year period.

5. CONTENT ANALYSIS

Two studies have used content analysis to develop public interest constructs for broadcast television. Stockard (1979) uses content analysis of local public affairs programs and a comparison of program forms at various television stations to develop his social construction of television in the public interest (p. vi). Stockard did not do a scientific sampling but used an ethnographic approach. One of his recommendations is:

> . . . all broadcast media should continue to operate under a public interest standard rather than be deregulated if they are to meet the needs of poor and Third World people who are a near-majority in most urban areas. (1979, p. xvi)

In another content analysis on broadcasting and the public interest, Crane (1980) examines 29 U. S. Supreme Court broadcast decisions handed down between 1927 and 1979 in order to discover how the "public interest" standard was applied to broadcast issues (p. vi). Crane used a computer-assisted inventory method to identify occurrences of the phrase "public interest" in the text of Court decisions along with key words and phrases which gave meaning to the Court's application of the term (p. vi). Also a factor analysis was done. ". . . (U)sing a factor-approximation technique, concomitant issues of broadcasting in the public interest were identified and reported as well as a relative weight of each issue before the court over time" (p. vi).

Crane concludes,

> . . . the Court will continue to place the public welfare of the listening audience before the private interest of the broadcaster even when public interest conflicts with economic realities of the modern broadcast market. (p. vii)

These content analyses view the "public interest" perceptions for broadcast television from the point of view of program content (Stockard, 1980) and Supreme Court decisions (Crane, 1980).

6. SURVEYS

Surveys have been conducted to get information on individual access to cable television systems. In cooperation with the Indiana University Department of Telecommunications, the Video Access Center (VAC) in Columbus, Indiana, undertook a two-phase evaluation of its activities. The first phase, done in 1974, is designed to (a) compare VAC to other public access centers throughout the country; (b) determine the size and demographic composition of the VAC audience; and (c) assess the attitudes of Columbus residents toward public access television (Ksobiech, 1975).

Surveys have also been done to determine the level of participation by people on public access channels. Klaver (1976) reports on a study which was conducted to determine the level of individual participation in local cable television programming in six localities in the Netherlands.

Another survey of 91 past and present users of the community programming (public access) channels in Toronto, Canada, reveals that personal contact is most important in the diffusion of knowledge about access opportunities (Sparkes, 1979).

The National Science Foundation has funded a project designed to test and evaluate the impact of two-way cable television on the delivery of public services to senior citizens in Reading, Pennsylvania. The major effects found as a result of a beforeand-after interview survey are described as knowledge about public services, involvement in political processes, and participation in social and community activities. Moss (1978) reports the two-way cable system increased senior citizens' awareness of local issues and their sense of political efficacy (p. 18).

By relying on senior citizens to coordinate cable programs, public organizations were able to use the cable system without investing substantial amounts of time and resources in planning and development (Moss, 1978, p. 23). Although the study is limited to the elderly who cared to be involved in Reading, Moss lists underlying principles which he believes are applicable in other settings:

1. the role of citizens as initiators of programming;
2. use of local neighborhood facilities as the origination sites for programming;
3. the aggregate of organizations to generate a diversity of public service programming; and

> 4. the emphasis on programming to serve distinct sub-groups of the population. (p. 27)

Moss concludes, "By strengthening citizen access to and control over information, cable television enhances the ability of citizens to communicate with public officials and to participate in community processes" (Moss, 1978, p. 29).

Moss and Warren (1984) conducted a survey of cable systems in the Tri-State New York Metropolitan Region. Moss and Warren attempted to fulfill a need for ". . . systematic examination of actual or potential public-oriented uses in enough communities to allow comparative analysis and evaluation" (p. 234). They conclude that their survey ". . . indicates there is no imperative in cable technology that will automatically produce local video democracy" (p. 248).

Moss and Warren (1984) list three developments, any one of which could reduce incentives or requirements for cable operators to provide community-oriented uses of their systems (p. 236). These developments are: competing technologies, the Cable Act, and Supreme Court decisions.

In addition to the Cable Act and Supreme Court decisions, competing technologies could reduce incentives for cable operators to provide community-oriented uses of their systems. After referring to competition from SMATV (Satellite Master Antenna TV), Wines (1984) says,

> In the next couple of years, the industry's near monopoly on pay television will be assaulted by an

> entire video alphabet from direct broadcast satellites (DBS) to low-power television (LPTV) and multichannel, multipoint distribution services (MMDS). (p. 314)

Wines (1984) also cites Washington telecommunication attorney Phillip Verveer as saying that there is no technological reason why telephone companies should not be able to offer the same sorts of video services as cable. Wines says you may be able to dial a movie on your telephone as you now dial the weather, sports or a prayer (p. 317).

Moss and Warren (1984) conclude, "If the future development of cable systems is deregulated and largely left to the play of the private enterprise market, there is little reason to believe that this record will be improved upon in terms of the community-related uses of cable" (p. 251).

In a national study, Ledingham (1983) has examined shared characteristics of cable access centers in major media markets. His survey compares high and low-hour centers. The centers are ranked according to the number of hours a week of programming. The range is 0 to 111 hours, with a median of 20 hours. The high-hour centers are profiled in this way:

> The center is funded, staffed, it has a director, it has equipment that can be used by nonprofessionals . . . it attracts diverse sources as programmers, has developed its own devoted organization (the access coalition), has its continued existence assured as part of the franchise agreement, and actively promotes itself through traditional community information systems. It is responsible to an identified organization that is expert in the video field. (p.5)

Ledingham notes that the high-hour centers are characterized by ". . . a commitment on the part of a community and the cable system to establish funds, staff, equip and maintain, and promote a center. That commitment may well be the key variable in access centers" (p. 20).

7. FIELD EXPERIMENT

The Amsterdam (Netherlands) cable television station is called the LOB. The LOB was one of six community television organizations in the Netherlands selected to participate in a government-funded "experiment" with cable transmission of locally originated programming. The experiment was conceived to determine what role such local communication could play in diverse communities. This cable television experiment was monitored by three independent social science research teams. The part of the experiment reported by Jankowski (1982) uses a multiple-method approach using participant observation, case studies and surveys. As Jankowski describes his research in Amsterdam, ". . . we attempted to construct a broad community study focusing on the role played by the LOB in the development process of the Bijlmermeer as a community" (p. 39).

Jankowski reports the following results:

> . . . there was evidence of an admittedly small but regular and attentive audience. . . . Citizen involvement in community affairs due to intervention by the LOB could not be detected among the

> residents as a whole. Community groups and organizations did report some increases in participation after LOB attention to their activities. In the case studies conducted, work with video and small group viewings of video programs may have been a greater factor in stimulating citizen involvement than in the widespread cablecasting of the programs. (pp. 47-48)

Although Jankowski expected to find that community television ". . . would tend to demystify the medium, transform passive viewers into program creators, and motivate other residents into action around issues concerning the community . . ." (p. 49), he finds that ". . . only in combination with other communications innovations and within a long-range strategy can results in the area of social change be anticipated" (p. 49).

8. HISTORICAL STUDIES

Although many studies have used the method of historiography as part of their analysis, at least three studies dealing with mass communications and the public interest concept have used historical analysis as their primary method of investigation. Holt (1967) attempts to define public service broadcasting. Although he does not deal with public interest and cable television, Holt does provide background on the history of the public interest construct. He observes that it is a fact of life that serving the public interest becomes that which the regulatory authorities assert it to be (p. 639).

Silvers (1981) endeavors to replace what he calls the "outmoded diversity rationale" with his "right of public communication," which involves the right to know and the right to interact (p. 45). Public access to cable television illustrates the right of public communication concept.

> The right of public communication, particularly when operationalized on the state and local level and activated in public access to cable television, offers an ideal forum for the enforcement of strong individual rights which can lead to self-fulfillment, a major goal of our constitutional democracy. (p. 113)

He sees research as a way to assure the success of public access to cable television.

> Studies which can determine the specific assets and liabilities of public access as public access is operationalized in a particular community can prove to be invaluable in furthering the possibility for public access to be a success. (p. 128)

Silvers views his right to public communication as inherent to the public interest (p. 42).

Parsons (1984) deals with the question of the appropriate model of First Amendment rights for cable television.

> The study has identified the fundamental philosophical barrier to fashioning an appropriate model of cable rights, that of the equitable balancing of individual and collective First Amendment claims against the medium. (p. 342)

After rejecting the models such as broadcasting, print, common carrier, and public utility, Parsons posits his own "Full Protection Model." This model

> . . . seeks through access to provide an open forum for views and opinions from all social segments on the grounds of the social needs for such interchange, but it seeks to do so without overly restricting the rights of the cable operator to program ad conduct business at his or her discretion. (p. 341)

The method of historiography has been used by researchers to develop new models as well as to evaluate the established ones.

9. INDICATION OF A RESEARCH GAP

Various models have been examined regarding public interest concepts and the relationship of freedom of expression for the communicator and for the public. The models have depicted cable as like other media, particularly newspapers and broadcast television. The potential of cable television to bring about better communication in cities and to foster participatory democracy have been examined. Case studies have examined working access structures in New York City, Indiana, Michigan, Minnesota, and Knoxville, Tennessee, among others. Legal studies have analyzed the conflict in rights between the public's freedom of speech and the cablecasters' freedom of the press and have developed models including a functional cable model. Interviews have been used to research the views of the members of the F.C.C. on the concept of the public interest. Content analyses of local public affairs programming and Supreme

Court decisions have provided further data on the concept of the public interest. Surveys have been conducted on cable systems to determine use of access facilities and related participation in other community activities. A field experiment has been conducted in the Netherlands to determine the role of locally originated programming in communities. Finally, an historical approach has been used to define the public interest concept and the relationship of public access cable television to that concept and to the various models for cable television.

Although perceptions of the public interest in cable television have been sought, local cable programmers have not been among the groups questioned. The F.C.C. staff and members have been interviewed on this topic, but Congressmen have not been asked about their public interest perceptions. Surveys have been done in this area, but none have focused on the public interest perceptions of local cable programmers and specifically those involved in public access cable television. Ledingham (1979) specifically calls for research on the perceptions of those responsible for public access.

> Clearly there is need for further research into the perceptions of the role of access centers among center personnel, local government, and access audiences. (p. 21)

This research endeavors to fill this gap in the literature of cable television.

The public interest perceptions of Congressmen and others who were active in the debate over what became the Cable Communications Policy Act of 1984 has served as the basis for the survey of the National Federation of Local Cable Programmers. The survey's purpose is to describe the public interest perception of those responsible for local cable programming. The 1984 Cable Act has been examined to determine the legislative form public access cable television regulation has taken at this time. Finally, three recent Supreme Court cases also have been examined to determine the direction of the court decisions at this time.

CHAPTER IV

METHODOLOGY

The following methods were used to determine perceptions of the role public access cable television is performing in the public interest. First, to identify specific ideas and concepts, a series of in-person interviews was conducted with 13 individuals identified by Broadcasting magazine as key persons in the ongoing debate over what ultimately became the Cable Communications Policy Act of 1984. These interviews were conducted between June 27 and July 1, 1983, in Washington, D.C. Statements derived from the responses of those personal interviews became the basis for a survey instrument that was administered by mail to a random sample of members of the National Federation of Local Cable Programmers (NFLCP).

The survey of NFLCP membership, conducted along the guidelines provided by Dillman's Total Design Method, constituted the second step used in this study. Its purpose was to identify local cable programmers' perceptions of access channels and the public interest.

The NFLCP membership is composed of cable companies that do local programming (not multisystem operators), public access coordinators and those interested in access. The SAS statistical package was used for frequency analysis (Proc Freq) of the survey. The frequency analysis included crosstabulation tables, also part of the Proc Freq SAS program (<u>SAS Introductory Guide</u>, 1983, pp. 46-47).

Finally, the Cable Communications Policy Act of 1984 was analyzed to determine the legislative outcome of the cable debate. Three recent Supreme Court decisions were also examined to determine the direction of judicial review following the passage of the Act.

1. DEVELOPING THE QUESTIONNAIRE

<u>Interviewees</u>

The persons interviewed in the process of developing the questionnaire were either (1) House Subcommittee on Telecommunications members and staff, (2) Federal Communications Commission staff, or (3) interest group representatives on the issue of cable deregulation. These individuals were chosen for their expertise in the pending cable legislation. An attempt was made to reach a balance by including legislators, an FCC official and a representative of the National Cable Television Association, which represents the concerns of cable operators, as well as representatives of various organizations concerned with public interest and cable television. (For a listing of interviewees by name, See Chapter V, Interview Results.)

Interview Questions

The purpose of the interviews was to help develop the survey instrument. The researcher both tape recorded and notated the interviews while they were being conducted. In addition, the researcher transcribed the interviews, noting the answers to questions and key topics for development of the survey. The statements of interviewees then were used to develop a range of types of descriptions of the nature of cable television, public access cable television and the public interest.

The following questions were asked of each of the above listed interviewees.

1. How would you characterize the nature of cable television? Some characterizations have been electronic publisher or electronic post office.
2. How does cable compare to other media such as telephone, radio or television?
3. Do you believe public access cable television serves the public interest? In what way?
4. If cable is to be deregulated, in what ways will the public interest be served?
5. If cable is deregulated, how will public access be affected?
6. What is your conception of the public interest?

Additional questions were asked each interviewee based on comments quoted in Broadcasting as well as questions pertinent to each one's individual perspective.

Questionnaire Structure

The questionnaire was divided into 11 sections labeled A-K. (See Appendix B.) Sections A-E were based on the interviews described above. (See Chapter V, Interview Results.) Sections F and G were concerned with programming types. Sections H-K were demographic questions. Sections A-E dealt with the following topics. (See Appendix B, Survey.)

A. The Nature of Cable Television

B. The First Amendment and Regulation of Cable Television

C. The Public Interest and Cable Television

D. Public Access Cable Television

E. Public Access Availability

Access programming types also were explored. Section F listed programming types and provided a scale to rate the public interest value of each type. Section G repeated the same list of programming types and provided a scale to rate the frequency of appearance of each programming type on the channel with which the respondent associated (See Appendix B, Survey).

The last four sections (H-K) sought information about survey respondents in four areas: (H) the respondent's work in cable television; (I) the cable television market in which the respondent works; (J) information on the public access channel in which the respondent works, if applicable; (K) personal demographics on the respondent (See Appendix B, Survey).

Question Construction Sections A-E

The first section (A), dealing with the nature of cable television, was included to establish a base for how each respondent regarded cable television. The first question (A1) asked the respondent to rank the media with 1 being the medium most like cable television and 6 being the medium least like cable television in terms of the kinds of things it can provide the viewer. The media listed were: newspaper, magazine, radio, commercial television, telephone, and postal service. Following A1, the rest of the questions in section A and all questions in sections B-E had the following instructions for use with a Likert scale.

> Answer the following by circling the number that corresponds to your response to the following statements, indicating whether you strongly agree, agree, slightly agree, are neutral, slightly disagree, disagree or strongly disagree.

The statements (A-E) were extracted from the interviews conducted and used in the survey instrument. (See Chapter V, Interview Results). The statements were presented with a Likert scale on a continuum of reaction to agreement/disagreement (See Appendix B, Survey).

Programming Sections F and G

Access programming types was explored in two sections on (F) programming types and the public interest and (G) programming types and frequency of appearance.

Respondents were asked to rate the relationship of various programming types to serving the public interest using a scale of 1 to 7. A rating of 1 indicated that this type of programming is most likely to serve the public interest and 7 indicated that this type of programming is least likely to serve the public interest. The respondent was asked to indicate his/her answer by circling the appropriate number on a Likert scale. The heading over the number grid was "SERVING PUBLIC INTEREST" and directly below this heading the scale began with "Most" and numbers beginning with 1 to 7 labeled with "Least." The meaning of the intermediate points on the 1-7 scale were not suggested with any labels.

The program types were those used by Wurtzel (1975) in "Public-Access Cable TV: Programming" (pp. 15-21), based on his study of two very early public access channels in New York City. The content categories were based on the FCC's list of program definitions and were modified for his study (p. 16). The FCC list,reported in the Federal Register in 1960, is preceded by the following description:

> The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (Policy Statement, 1960, p. 7295)

The following 11 categories Wurtzel used parallel the FCC's original list in most instances:

1. Entertainment programming
2. News programming (only those programs which presented information about events which occurred within 24 hours of the cablecast)
3. Public affairs programming
4. Informational programming
5. Religious programming
6. Instructional programming
7. Sports programming
8. Political programming
9. Children's programming
10. Miscellaneous
11. Experimental art. (Wurtzel, 1975, p. 16)

Wurtzel (1975) reported the largest single program category for public access channels was informational. Because the informational category accounted for such a large proportion of programming, Wurtzel conducted a further content breakdown. Programming in the informational category was subdivided into the following seven categories:

1. Ethnic
2. Community
3. Health
4. Public relations
5. Consumer
6. Political
7. General. (Wurtzel, 1975, p. 17)

Examples of each programming type based on known usage by public access channels were incorporated for the survey of local cable programmers. The following categories of programs constituted the final list which included the examples of each programming type:

(a) Entertainment (including various types of music and dance).

(b) News programming (only those programs which present information events which occurred within 24 hours of the cablecast).

(c) Public affairs programming (for example, programming about municipal services or local meetings).

(d) Religious programming (sermon, religious services).

(e) Instructional programming (intended to teach the audience how to perform a particular skill).

(f) Local sports programming.

(g) Party politics programming (such as electoral politics).

(h) Children's programming (designed for an audience under 12 years of age).

(i) Experimental art ("kinetic art" videotapes, abstract designs and experimental films).

(j) Informational (Please note this category is divided into six sections and each of these sections is treated as a separate variable).

(1) Ethnic (such as Irish, Italian, Jewish, Afro- American, Puerto Rican).

(2) Community (community events and activities).

(3) Health (such as information about drug abuse, free health clinics).

(4) Public relations (publicizing the activities of a particular group or organization).

(5) Consumer (for example, programming on dangers of flammable clothing).

(6) Issue politics (for example, programs supplied by Viet Nam Veterans Against the War).

(k) Other (Please Specify).

Section F was paralleled by Section G which listed the same program types and asked the respondent to

> Indicate . . . how often your channel provides the types of programming listed. On a scale of 1-7, a rating of 1 indicates the type of programming is provided very often and 7 indicates the type of programming is not at all provided.

Other designations were labeled: 2--quite often; 3--often; 4--sometimes; 5-- seldom; 6--very little.

Survey Respondent Information and Demographics, Sections H-K

The questions in Sections H-K were based in part on the 1983 Community Programming Survey distributed by the

National Federation of Local Cable Programmers (NFLCP). The project was sponsored by a grant from the Benton Foundation. This survey was provided by NFLCP project director Carol Novalis.

2. CONSTRUCTING THE QUESTIONNAIRE

The Total Design Method

In order to achieve a "good" response rate, Dillman's (1978) Total Design Method (TDM) was used. The TDM is a survey design, construction and implementation method that has been tested. The average response rate for 48 surveys, which used the Total Design Method, was 74% (Dillman, 1978, p. 21). This method is based on exchange theory which deals with why people respond.

> The theory of social exchange . . . asserts that the actions of individuals are motivated by the return these actions are expected to bring and, in fact, usually do bring from others. (Dillman, 1978, p. 12)

Social exchange can be seen as the motivation for response as opposed to economic reward.

The suggestions for constructing the questionnaire presented in Dillman's TDM also were followed. These guidelines call for a booklet format and specific printing procedures, including front cover design (pp. 121, 150). The sequencing principles for question order and page formulation also were used (pp. 125; 134). (See Appendix B for complete survey.)

Dillman's TDM suggests pretests using three groups: (1) potential users of data, (2) colleagues and (3) people drawn from the population to be surveyed. The questionnaire was pretested by colleagues, some of whom may be potential users of the data, and two local cable programmers (it is unknown if they are members of the NFLCP). Colleagues included three Ph.D. students in Communications at the University of Tennessee. Their input was helpful for revisions in format design, for identifying double-barreled questions, and for clarification of language. Another colleague was a master's student in political science at the University of Tennessee who is a potential user of the data. She has a research interest in public access cable television. Her input also served to help clarify the language of the survey instrument from the perspective of one who might use the data. Two local cable programmers from Knoxville's St. John's Community Video Center agreed to pretest the instrument. They were not asked if they were members of the NFLCP. However, their names did not appear on the final sample used for this survey. Their input was valuable to identify questions difficult to answer for the pretest respondent.

3. THE SAMPLE

The population chosen for this survey was the membership list of the National Federation of Local Cable Programmers (NFLCP). The NFLCP claims to be the only national organization representing the interests and fulfilling the needs of people interested in community uses of cable television. The NFLCP membership brochure calls the NFLCP a

> nonprofit, membership organization which promotes the development of local programming on cable television and provides information about national cable policy issues.
>
> Its purpose is to protect and increase freedom of expression, diversity of ideas and community communication through the medium of cable television. NFLCP members include community programming managers, community producers, independent producers, cable administrators, cable commissioners, public access centers, government access enters, educational institutions, libraries, cable companies, and other individuals and institutions involved with community responsive television.

The NFLCP membership includes cable companies that do local programming,including companies that are part of multisystem operations. However, multisystem operators themselves are not members. A sample of 508 was drawn randomly by the author and a member of the NFLCP staff at the main office in Washington, DC, using a computer. The sample of 508 represents approximately one-third of the 1500 NFLCP members.

4. IMPLEMENTING THE QUESTIONNAIRE

The Total Design Method

The implementation of the survey also utilized the details of Dillman's Total Design Method, a survey design, construction and implementation method (TDM). The mail survey was sent July 22, 1983. Follow-ups were sent August 1 and August 15, 1983. The cover letter sent with the survey contained an appeal consistent with the exchange theory on which TDM is based.

> The appeal of the TDM is based on convincing people first that a problem exists that is of importance to a group with which they identify, and second, that their help is needed to find a solution. (Dillman, 1978, p. 162)

The cover letter read as follows:

> You are one of a small number of local cable programmers who are being asked to give your opinions on cable television. The U.S. Senate recently has passed a cable television bill. A number of bills on this subject also have been introduced in the House of Representatives. These bills could greatly affect the future of cable television.
>
> However, no one really knows how those involved in local cable programming perceive their role and how this role serves the public interest. This information could be very helpful to those in Congress who are working on cable legislation. (See Appendix C for complete letter.)

The cover letter used the letterhead of the University of Tennessee College of Communications, Graduate Studies and Communications Research Center. Dillman's very specific instructions for cover letter and follow-ups were used including a one-week post card follow-up to all recipients of the first mailing and a second follow-up mailed to nonrespondents three weeks after the original mailing. (See Appendix D for copy of postcard.) The second follow-up consisted of a cover letter (See Appendix E for copy of letter), a replacement questionnaire, and another return envelope. The second follow-up cover letter offered results to be sent to those who circled their ID number as a further incentive to return the questionnaire. Several of the returned questionnaires to this point had requested results. Dillman recommends a third follow-up using certified mail. However, since the return rate was close to two-thirds, additional responses would not have been worth the additional expense. The third follow-up was omitted in this research.

As can be seen by the fact that nonrespondents were identified for follow-up mailings, confidentiality--not anonymity--was promised to the respondent. The TDM survey procedure specifies that an ID number be clearly shown on the cover (the inside cover was used) using a numbering stamp.

Some variations and additions were made to the TDM survey system. The size of the questionnaire was larger than specified by Dillman, and a business reply permit was used as the back cover of the questionnaire in order to facilitate return mailing (as opposed to another envelope). A blue seal was attached to each questionnaire in order to secure the booklet for mailing. The altered design was based on a model developed by Jan Quarles ("A Survey for Public Relations Practitioners," class project, 1983). In addition, a Medal of Honor stamp was used on all mailings. This first class stamp used a large format and was brightly colored in red, white and blue, showing the medal of honor. (See Appendix F for example of envelope.)

5. RESPONSE RATE

A total of 323 questionnaires were completed and returned. Seven of the 508 were returned to sender as undeliverable. Omitting questionnaires that could not be delivered (Babbie, 1973, p. 165), the net total of 501 was used to determine an effective response rate of 65%. Furthermore, ten NFLCP members who said they were not local cable programmers declined to respond since the survey was addressed to local cable programmers. Using a net total of 491 mailings, the response rate was 66%. Using either response rate computation, the return exceeded the 60% figure which Babbie regards as a good return (1973, p. 165).

There is a 95% likelihood that the true proportion falls within plus or minus 5.7 percentage points. The binomial used for this confidence interval calculation was sex (60/40) of the respondents (Babbie, 1983, p. 501).

6. DATA ANALYSIS

There were 115 variables. All data analysis was done on a VAX computer using the SAS statistical package. The Proc Freq program statement was used to calculate frequencies for each of the variables in order to describe the profile of respondents and their perceptions on cable television, public access cable television and the concept of the public interest.

An effort to determine the respondents' work area in cable access (Public, educational, governmental, etc.) was ineffective (H1 on survey). Therefore, a recoding was done to determine the status of the individuals in the cable industry. The categories determined by the recoding do not provide comparisons that are statistically significant. However, the categories are presented to provide a comparison of groups based on frequency of response (See Chapter VI, Survey Results).

To recode the status of the individual, five categories were determined. Category 1, cable interest but no access interest, consists of those respondents whose interests do not lie in access. This category was determined by comments such as not in cable TV at present, not in cable, no longer in cable, in cable radio, in cable but not in access. Category 2 consists of those with an access interest but no work in that activity. Category 3, work in public access, consists of those directly involved in public access. Category 4 includes those who work in other access areas such as educational or governmental access. Finally category 5 is the regulator/advisor category which includes regulators, advisors, legal counsel, councilmen, NFLCP staff, and consultants. The regulator/advisor category includes those not directly involved with access but whose role relates to the activity from an outside perspective of regulation and/or censorship.

It should be noted that the use of the term "work" in the above questions refers to involvement by the respondent that is a regular responsibility. However, the involvement is not necessarily paid, nor is it necessarily full time. So that both part-time workers and full-time workers could be volunteer or paid.

In addition it should be noted that responses to Section J (See Appendix B, Survey) were not sorted by the recoded categories mentioned above. They, in fact, included respondents from several categories. Also, the number of respondents for Section J, dealing specifically with public access, differed from the total number of respondents for the survey. Section J could be skipped by respondents having no association with public access but was not restricted to those who worked in public access. The number of respondents for this section varied by question.

Frequencies for variables in Sections A-E of the survey were broken down by the individual's status in access to aid in describing the status of cable access before the Cable Communications Policy Act of 1984 and the perceptions of those responsible for access to cable television. The descriptions were then compared to the models presented in the literature on cable television: (1) cable television as a telepublisher or (2) cable television as a regulated industry and/or public utility.

In the telepublisher model, the communications company is free of government regulation. The public interest is served by the marketplace. Diversity is projected as the outcome of the free marketplace of ideas. In the public utility model, diversity is fostered through government regulation. In this model, the communications company is dependent on the government in some structural way for its ability to communicate.

Because of its multichannel capacity, cable can be compared to newspapers. Just as newspaper publishers choose what goes on their pages, cable operators should be able to decide what goes on their channels. However, cable requires the use of the public right of way to wire the area it will serve. Also, cable can be considered a natural monopoly because it retains an exclusive franchise in most cases to wire a particular area. In this way, it resembles a public utility and is subject to government regulation.

Statements that describe the two models of cable as telepublisher and cable as public utility were extracted from the survey instrument, which is based on in-person interviews conducted in Washington, DC, with those involved in the development of the Cable Communications Policy Act of 1984. Responses were tabulated. Specifically the models can be seen in the following groups of statements appearing in the survey instrument.

Telepublisher Model

A3. Cable is like a newspaper in that the owner-operator can decide what will be presented on his channels just as the newspaper publisher can decide what goes on his pages.

B1. Cable television operators' right to control what goes over the wire should be protected by the First Amendment right of freedom of the press.

B4. A constitutional amendment that would expand First Amendment rights of freedom of the press to cable television should be passed.

C3. Giving the public what it wants on cable television best serves the public interest.

C7. The marketplace is the best judge of the public interest for cable television.

E3. One owner of a cable franchise in a given community is all that is necessary to provide (public) interest programming.

The first three statements in the telepublisher model (A3, B1, B4) refer specifically to the newspaper analogy and freedom of the press. The second three statements (C3, C7, E3) refer to the marketplace as the best measure of the public interest. The marketplace is an integral aspect of the telepublisher analogy. The second model is the Public Utility Model.

Public Utility Model

A6. Cable television is like a common carrier or utility in that the cable owner-operator has no competition from any other cable owner-operator within his franchise district.

A7. Cable television is like a common carrier or utility in that it is neutral to the content of what goes over the system, simply providing the means for others to communicate.

B2. Cable television monopolies should serve as common carriers of information and services produced by others.

C6. The public interest is best served in cable television by the franchise process by which the local government gives exclusive rights to furnish cable television to a community in exchange for certain promises of service by the cable television company.

D7. The First Amendment right of freedom of speech is being denied to community members in an area where there is cable television but there is no public access cable television.

E1. The availability of public access cable television ought to be required by law.

The first three statements in the Public Utility model refer specifically to cable as a common carrier (A6, A7, B2). Statements C6 and E1 refer to regulation that is allowed to serve the public interest. Statement D7 exemplifies how regulation can provide First Amendment opportunities by providing freedom of speech via public access cable television.

The data analysis will be presented in Chapter VI, Survey Results. It will include a demographic profile of the respondents and a profile of the cable system described. The frequencies of various responses will be compared to the telepublisher and public utility models provided above. A comparison will be made between how the respondents rated the public interest of various programming types and how often those programming types appear on the channels with which the respondent is associated. Frequencies will also be reported for the perceptions of the respondents on what best serves the public interest and the effectiveness of public access cable television.

7. ANALYSIS OF CABLE COMMUNICATIONS POLICY ACT OF 1984

The Cable Communications Policy Act of 1984 is the legislative equivalent to a birthright for cable television. Before the Cable Act, cable television was treated as ancillary to broadcasting. After the Act's passage, cable was regarded as a medium in its own right. In Chapter VII, Examination of the Cable Act and Recent Supreme Court Cases, the Cable Act will be examined for its view of the nature of cable and its view of access. Any references to the public interest will be noted. In addition, three recent Supreme

Court cases also will be examined. The cases of <u>City of Los Angeles v. Preferred Communications</u> (1986), <u>National Association of Broadcasters v. Quincy Cable TV, Inc.</u> (1986), and <u>TCI Cablevision v. Central Telecommunications</u> (1987) will be considered for their positions on the nature of cable television and their possible effects on the status of public access cable television.

CHAPTER V

INTERVIEW RESULTS

The debate over the future of the Communications Policy Act of 1984 was in progress during the summer of 1983 when the survey of local cable programmers was conducted. To develop appropriate survey questions, some of those involved in the debate were chosen for in person interviews. (See Chapter IV, Methodology) The survey questions were based on the interviewees' perceptions of cable television, public access cable television and the concept of the public interest. Their perceptions were considered along with the literature on the topic to derive the questions used in the survey to be analyzed here (See Appendix B, Survey Instrument). Interviews were conducted with U.S. House of Representatives Subcommittee on Telecommunications members and staff, an FCC official, and interest group representatives.

Six interest groups were represented. The National League of Cities was especially concerned with retaining the power of cities to decide on the provisions of the franchise with cable companies. The National Federation of Local Cable Programmers represents the interest of those responsible for access programming. The Telecommunications Research and Action Committee represents the concerns of the public on issues of media access. The Citizen Communication

Center, a public interest law firm (part of the Institute for Public Interest Representation at Georgetown Law School), represents citizen groups and not-for-profit organizations in communication matters. The Washington Center for Public Policy Research is a thinktank for public policy ideas.

The following individuals were interviewed.

House Subcommittee on Telecommunications

1. David Aylward, Chief Counsel and Staff Director
2. Dean Brenner, Policy Analyst
3. Rep. Albert Gore Jr. (D, Tennessee), Member
4. Tom Rogers, Legal Counsel
5. Rep. Al Swift, (D, Washington State), Member
6. Rep. Timothy Wirth, (D, Colorado), Chairman

Federal Communications Commission Staff

Stephen Ross, Chief, Cable Television Branch of Mass Media Bureau, FCC.

Group Representatives Interviewed on Issue of Cable Legislation

1. Sue Buske, Executive Director, National Federation of Local Cable Programmers

2. Dr. Henry Geller, Director, Duke University's Washington Center for Public Policy Research (In 1960s, Geller served as general counsel of the FCC. During the Carter administration, he served as assistant secretary of Commerce for communications and information and head of the National Telecommunications and Information Administration)

3. Jeffrey Olson, Citizens Communication Center lawyer

4. Cynthia Pols, General counsel for the National League of Cities

5. Lois Richardson, Assistant Director of Government Relations, National Cable Television Association

6. Sam Simon, Executive Director, Telecommunications Research and Action Committee. Simon is also the editor of ACCESS, published by TRAC. ACCESS is a publication "concerning media reform and citizen access to telecommunications."

1. DEVELOPMENT OF QUESTIONNIARE SECTIONS

The following sections present the comments by interviewees used to develop the statements used in the survey instrument. Concepts of cable television, public access cable television and the public interest were considered. Frequencies are not reported here.

The Nature of Cable Television (A)

Cable television was characterized by the interviewees in four different ways: (1) similar to another medium, (2) a common carrier, (3) a unique medium, or (4) a hybrid. Public policy research director Geller explained cable's hybrid nature. He said it is part broadcasting because it carries broadcast signals, part telepublisher because it presents such things as HBO and part telephone company, or common carrier. Public interest lawyer Olson said cable is ancillary to broadcasting.

Several comments wcable television. Rep. Swift said the core principle of the cable industry is to avoid being a common carrier. House policy analyst Brenner did not find the label "common carrier" useful. Public interest lawyer Olson said cable systems behave more like common carriers than broadcasters, although he saw the term "retransmitters" as more accurate. According to ACCESS editor Simon, in the best of all worlds, cable would be a common carrier.

While only NFLCP Director Buske referred to cable's unique nature, the hybrid concept was used by several interviewees, including Geller (See above). NCTA representative Richardson said cable is a combination of a lot of things. Subcommittee chief counsel Aylward called cable a hybrid or "weird duck." NLC general counsel Pols said, as a hybrid, cable doesn't fall into any existing framework which explains why there is so much dispute over its regulatory status.

The following statements were derived from these interviews as well as the literature on the subject for section A of the survey instrument. They were presented with an accompanying Likert scale for the respondent to express agreement/disagreement.

> 2. Cable television is like broadcasting because it carries broadcast stations.
>
> 3. Cable television is like a newspaper in that the owner- operator can decide what will be presented on his channels just as the newspaper publisher can decide what goes on his pages.

4. Cable television is like radio in that many stations are available.

5. Cable television is like radio in that it can appeal to several audiences with differing interests.

6. Cable television is like a common carrier or utility in that the cable owner-operator has no competition from any other cable owner-operator within his franchise district.

7. Cable television is like a common carrier or utility in that it is neutral to the content of what goes over the system, simply providing the means for others to communicate.

8. Cable television is not like any other medium.

9. Cable television combines the characteristics of several different media.

The First Amendment and Regulation of Cable Television (B)

Several general comments contributed to the development of statements for section B, the First Amendment and regulation of cable television. Subcommittee chairman Wirth said the First Amendment is blind to technology and must remain so. But policy analyst Brenner saw it as a First Amendment problem when one operator has control over so many channels. The cable operator is a monopolist in a franchise area, according to Olson, and this raises First Amendment issues. The First Amendment rights of cable operators ignore the First Amendment rights of viewers, said Olson.

Public access is an unobtrusive way of providing greater speech when the government has restricted the license for the communication medium to only one, according to ACCESS editor Simon. Public access gives citizens a right to use a monopoly system in their own community, he said. These comments were the basis for the statement that the right of free speech is meaningless without access to the mass media (See B3 below).

Another view of the relationship of the First Amendment to cable television was articulated by Rep. Gore. He said cable has the First Amendment rights of freedom of the press similar to those afforded newspapers. This was the basis for the statement that cable television operators' right to control what goes out over the wire should be protected by the First Amendment right of freedom of the press (See B1 below).

The statement that any communications business has a responsibility to provide the public something more than merely that which is the most popular (See B5 below) is a reflection of the social responsibility theory of the press as presented by Peterson (1956). But this statement is based on Rep. Swift's comments on the nature of any communication business:

> I believe that any communications business in a free society has a responsibility over and above the responsibilities other businesses have to be fair. . . .
>
> I think they have a responsibility to provide the public something more than merely that which is

> the most popular because information is so terribly important in a free society. And if you don't want to take on that additional responsibility, go sell shoes or buy a hardware store.

In this statement the public interest is not solely determined by the marketplace. The public interest is not merely what the public is interested in based on ratings, according to Swift.

The following statements comprise section B of the survey instrument with an accompanying Likert scale for the respondent to express agreement/disagreement.

1. Cable television operators' right to control what goes over the wire should be protected by the First Amendment right of freedom of the press.

2. Cable television monopolies should serve as common carriers of information and services produced by others.

3. The right of free speech is meaningless without access to the mass media.

4. A constitutional amendment that would expand First Amendment rights of freedom of the press to cable television should be passed.

5. Any communication business has a responsibility to provide the public something more than merely that which is most popular.

The Public Interest and Cable Television (C)

The interviewee perceptions of the public interest and cable television can be see most clearly in section C.

All three members of the House Subcommittee on Telecommunications who were interviewed mentioned localism (C1) as important to the public interest (Gore, Swift, Wirth). Specifically on this topic, Rep. Swift said, "People don't recognize some things until they're gone. I don't think Americans would recognize how much local there is in a television station until there ceased to be any." Rep. Swift was also working on the issue of broadcast deregulation at the time of this interview. The relationship of broadcasting to the public interest added to his perceptions of the concept of the public interest.

"The public interest is what the public is interested in," is not true; but it is beguiling, according to Rep. Swift. Public affairs does not draw a majority at any one time; but over a year, the majority does watch public affairs. So giving the public what it wants is an attractive view of the concept of the public interest included in the survey in C3 (See below).

Diversity was mentioned by several of the individuals connected with the Subcommittee on Telecommunications. The prime goal of the subcommittee is to encourage diversity consistent with the First Amendment, according to Chairman Wirth.

> That means encouraging diverse voices heard by the public. That is consistent with the First Amendment, the First Amendment as interpreted by the Supreme Court, saying we should have a very robust marketplace of ideas. And that robust marketplace of ideas is encouraging as many voices as the American people choose. Cable television is one of those diverse choices.

Simon also saw a maximum number of voices as important to the public interest (C10).

A "free marketplace of ideas" assures diversity of sources of programming, Brenner says. Aylward distinguished between diversity of information and diversity of information sources. These comments were the basis for the statement that a variety of information sources of cable television best serves the public interest (C4).

Geller distinguished another type of diversity. He said it is not in the public interest to have one entity control the content of 50 or 100 channels coming into the home. It should be noted that although one entity does control the decision of which channels a particular cable system will provide, numerous cable programmers separately decide what will appear on the networks which the cable operator chooses. Thus, the control of content by cable operators lies in their choices of networks for channels within their discretion--networks programmed by many different groups and individuals. Geller thus contributed to C5, the public interest is best served by having a variety of people in control of channels on cable television.

Pols indicated that the public interest is determined through the franchising process (C6). Rep. Gore indicated that Congressional hearings and lengthy deliberations are needed to identify where the public interest lies (C9).

FCC Cable Chief Ross said the marketplace will provide incentives to provide public interest programming (C7). Growth (C8) is a concept related to the marketplace. FCC Cable Chief Ross said to have access you must have a system that works. You must have a system making some money. NCTA representative Richardson agreed. "We feel consumers will benefit with lower rates," she said. Referring to things such as access channels, she added, "So many bells and whistles force you to charge higher rates for basic service." Thus the growth of cable television may serve the public interest (C8).

Another aspect of growth was addressed in terms of equity by Simon and Geller. Simon indicated that the greatest possible distribution of cable television was important to the public interest. Geller said, "You want it (cable) to go to all homes, not just the affluent." Getting cable television to everyone in a community may serve the public interest (C11).

The following statements were derived for the survey instrument with an accompanying Likert scale for the respondent to express agreement/disagreement.

1. Cable television programming that is local best serves the public interest.

2. Cable television programming that is informational best serves the public interest.

3. Giving the public what it wants on cable television best serves the public interest.

4. A variety of information sources of cable television programming best serves the public interest.

5. The public interest is best served by having a variety of people in control of channels on cable television.

6. The public interest is best served in cable television by the franchise process by which the local government gives exclusive rights to furnish cable television to a community in exchange for certain promises of service by the cable television company.

7. The marketplace is the best judge of the public interest.

8. The growth of cable television best serves the public interest.

9. Hearings and lengthy deliberations on cable television bills that come before Congress is the process that will determine the public interest for cable television.

10. A maximum number of voices on cable television best serves the public interest.

11. Getting cable television to everyone in a community best serves the public interest.

Public Access Cable Television (D)

Public access cable television was the topic of section D. The importance of an accurate perception of public access cable television was made clear by a question that ACCESS editor Simon recalled. The question was asked by Jim Collins of Texas in testimony before a congressional committee. "'Access. Isn't that where people take off their clothes and do wheelies on their motorcycles?'" This misperception is something Simon says he hopes to change.

Comments that contributed to the statements in this section were made about the relationship of public access cable television to such topics as diversity, the First Amendment rights of free speech and growth. Subcommittee legal counsel Rogers commented that public access cable television adds a major component to cable's diversity. (See D1 below.)

NLC legal counsel Pols said public access is important because it is getting a piece of the system for public purposes. Brenner said access is an important way the public can get services they wouldn't otherwise get. According to Simon, there is no historical equivalent to public access cable television. It is making people media literate, he said (D2).

Public access is an unobtrusive way of providing greater speech when the government has restricted the license for the communication medium to one, according to Simon (D7). Public access gives citizens a right to use a monopoly system in their community, he added.

The literature review presented earlier served as a basis for statements on the potential of public access cable television. The concepts that public access allows viewers to react to what they see (D3), make programming policy decisions (D4), and produce programs if they have access to program production tools (D5) and training (D6) have been presented in the literature regarding the potential of public access cable television to revive the idea of the town meeting and participatory democracy in the United States. (See literature review.)

The following statements were presented in the survey instrument with an accompanying Likert scale for the respondent to express agreement/disagreement.

1. Public access cable television provides for a variety of views to be heard in the cable television community.

2. When people make their own programs on public access cable television in their community, they are becoming media literate, able to read and write in the cable television medium.

3. Viewers of public access cable television can react to what they see and hear by producing their own programs as responses in their community.

4. Citizens can make programming policy decisions at a public access center in their community.

5. Community members will produce programs if they have access to training in the use of production tools that are available to them.

6. Community members will produce programs if they have access to training in the use of production tools that are available to them. repeat

7. The First Amendment right of freedom of speech is being denied to community members in an area where there is cable television but there is no public access cable television.

Availability of Public Access Cable Television (E)

Public access is an innovative idea, but how can it be translated into a reality? Is it permissible to require it by law? Section E dealt with these questions.

Public interest lawyer Olson said public access is important enough to be legislatively mandated (E1). Rep. Swift said some portion of cable channels ought to be made available to the public for voicing their opinions (E2). If maximum diversity can be provided by one editor, you only need one owner (E3). That's a dangerous idea, according to Aylward, whose comment was the basis for the statement that one owner of a cable franchise in a given community is all that is necessary to provide (public) interest programming (E3). The analogy of public access to public park lands was given by NFLCP director Buske. The analogy was the basis for E4: some cable channels ought to be set aside for public access just as public park lands were set aside 100 years ago.

The following statements were presented in the survey instrument with an accompanying Likert scale for the respondent to express agreement/disagreement.

1. The availability of public access cable television ought to be required by law.

2. Cable television channels ought to be set aside for public interest programming.

3. One owner of a cable franchise in a given community is all that is necessary to provide (public) interest programming.

4. Some cable channels ought to be set aside for public access just as public lands were set aside 100 years ago.

The statements above comprised sections A through E of the survey sent to a random sample of the membership of the National Federation of Local Cable Programmers over a year before the passage of the Cable Communications Policy Act of 1984. The results of that survey follow in Chapter VI.

CHAPTER VI

SURVEY RESULTS

The results of the survey of the National Federation of Local Cable Programmers, conducted in the summer of 1983, were analyzed to answer two questions. How do public access television stations serve the public interest (if indeed they do)? What are the public interest perceptions of those responsible for access cable television?

The results of this analysis will be presented in three parts. First, a demographic profile of the respondents to the survey, members of the National Federation of Local Programmers, will be presented. Second, a comparison of the responses to the two models of cable as telepublisher and cable as public utility will be made. Third, a description of the responses to each of the substantial sections of the survey will be provided.

1. DEMOGRAPHIC PROFILE

This section profiles the respondents of the survey of the National Federation of Local Cable Programmers. It is not a survey of access channels, so any reference to channels is information the respondents reported and is not representative of all access channels. Of those who responded (N = 323), 37.5% or 116 were women and 62.1% or

192 were men. Fifteen chose not to respond on the question of sex. The respondents seemed very well educated. More than 48% (48.6% or 157) reported having done postgraduate (post college degree) work and 32.5% (105) reported having graduated at least from college. It is not surprising that 29.4% (95) listed some area of communications as the area in which a degree was earned.

In the recoding of the status of the individual (See Chapter IV, Methodology), five categories were determined. As has been noted earlier (See Chapter IV, Methodology), "work" refers to an involvement that may be part-time or full-time, paid or volunteer. Category 1, cable interest but no access interest, counted at 9% (29). Category 2, those with an access interest but no work in that activity, tallied at 6.2% (20). Category 3, work in public access, was by far the largest category with 40.9% (132). Second in size was category 4, work in other access area, at 27.6% (89). Finally category 5, regulator/advisor category, amounted to 13% (42). A total of 3.4% (11) were impossible to recode due to insufficient information (See Table 1).

In the systems reported, public access is franchise dependent and cable operator dependent. Of the respondents who indicated the reason for establishing an access channel with which they are associated (N = 205), more than two-thirds, 69.3% (142) said the channel was established as

Table 1

Status of Individual Respondents

No Info.	Cable Interest	Access Interest	Work in Public Access	Work in Other Access	Regulator Advisor
3.4% (11) N = 323	9.0% (29)	6.2% (20)	40.9% (132)	27.6% (89)	13.0% (42)

the direct result of a franchise agreement. Only 2.4% (5) were established as a direct result of the FCC access rule. As has been noted earlier (See Chapter IV, Methodology), the number of respondents (N = 205) for this question (J1) differed from the number of respondents for other questions (N = 323) because it dealt specifically with public access. The respondents for Section J include those who "work" in public access as well as respondents from other categories (See Table 2).

Table 2

Cause of Access Establishment

	%	(no.)
a. direct result of the FCC access rule	2.4	(5)
b. direct result of the franchise agreement	69.3	(142)
c. both of above	19.0	(39)
d. other (please specify)	9.3	(19)
Not responding: 118; N = 205		

Another question specifically about public access dealt with the operation of public access centers (J4). Of those respondents indicating who operated the public access center with which they associated (N = 198), the majority (52%, 103), reported such centers were operated by the cable company. Almost one-third (30.3%, 60) were run by a nonprofit organization and 17.7% (35) were run by some other organization such as school or city government or some combination of cable company, nonprofit organization, and other organization (See Table 3).

Table 3

Operation of Public Access Center

Operators	%	(No.)
a. the cable company	52.0	(103)
b. a non-profit organization	30.3	(60)
c. other (please specify)	17.7	(35)
Not responding: 125; N = 198		

Public access seems to be doing the job that it was intended to do. In addition to providing a forum for citizens to speak, the most prevalent service provided by the public access cable channels was training. Of the 205 responding to this section on public access, 95.6% (196) reported working with public access centers that provided training. Other services included equipment rental and contract services provided by the staff.

Most respondents (N = 323) have been associated with cable for five years or less--65.6% (212). A total of 12.4% (40) have worked in cable 6-10 years and 5.3% (17) have worked in cable 11-25 years (See Table 4).

Table 4

Years in Cable Television

Years	%	(No.)
five years or less	65.6	(212)
6-10 years	12.4	(40)
11-25 years	5.3	(17)
Not responding or 0	16.7	(54)
N = 323		

The work reported in this survey, it has been noted, was both volunteer and paid, both part time and full time. The volunteer work was both part time and full time. Many part timers were unpaid but regular in their responsibilities.

More respondents were unpaid in cable than were paid. A total of 43.3% (140) said they were paid and 46.4% (150) reported they were unpaid. Thirty-three (10.2%) did not respond (See Appendix B survey question H3).

More respondents were part time than full time in cable work. Part timers accounted for 38.1% (123), while 37.5% (121) were full time. Those not answering were 24.4% (79) (See Appendix B, survey question H4).

Most of the public access channels and centers reported in the survey were just getting started, mostly in smaller markets. The longest period reported for public access channel cablecasting was 14 years. Of the 173 respondents who reported length of time for their channel's cablecasting, more than 75% (75.7% or 131) had been cablecasting for three years or less. The others (24%, 42) had cablecast from 3.5 to 14 years (See Appendix B, survey question J3).

Most respondents worked in cable markets of 50,000 or fewer cable subscribers. A total of 62.5% (202) were from such markets. Only 14.2% (46) reported from markets of 50,000 to 100,000 and 9.9% (32) reported from markets with over 100,000 cable subscribers (See Table 5).

In summary, the respondents said the public access channels with which they were associated were located in smaller markets, and were dependent on the franchise, the cable operator, and volunteers. They were fulfilling their mission as an outlet for free speech, however, and were providing training in use of video equipment. In addition, the public access channels were fairly new. The public access channels had cablecast less than 3 years and the respondents were relatively inexperienced, having worked in

Table 5

Number of Cable Subscribers in Each Franchise District

Subscribers	%	(No.)
a. less than 10,000	23.2	(75)
b. 10,001-50,000	39.3	(127)
c. 50,001-100,000	14.2	(46)
d. 100,001 and above	9.9	(32)
Not responding or 0	13.3	(43)
N = 323		

cable television five years or fewer. More were unpaid than paid and more were part time than full time. Public access was just getting started, mostly in smaller markets. Most worked in cable markets of 50,000 subscribers or less.

2. MODELS OF CABLE AS TELEPUBLISHER AND CABLE AS PUBLIC UTILITY

Based on the literature and interviews conducted, two models have been presented: cable as a telepublisher and cable as a public utility. The following presentation of these models includes the statements in the survey that represent the basic elements of these models. The face validity of this representation derives from the literature and interviews presented (See Chapter IV, Methodology)

The statements chosen for the telepublisher model include:

A3. Cable television is like a newspaper in that the owner-operator can decide what will be presented on his channels just as the newspaper publisher can decide what goes on his pages.

B1. Cable television operators' right to control what goes over the wire should be protected by the First Amendment right of freedom of the press.

B4. A constitutional amendment that would expand First Amendment rights of freedom of the press to cable television should be passed.

C3. Giving the public what it wants on cable television best serves the public interest.

C7. The marketplace is the best judge of the public interest for cable television.

E3. One owner of a cable franchise in a given community is all that is necessary to provide (public) interest programming.

The data provided in Table 6 indicate that the telepublisher model is unrepresentative of those responsible for access cable television. A majority of the respondents agreed with only half of the statements chosen. Specifically, a majority agreed that cable television is like newspapers (A3, 57.6%) and the cable operator should be protected by the First Amendment (B1, 50.8%). A majority also agreed that giving the public what it wants best serves the public interest (C3, 50.5%). Although a plurality (45.5%) favored a constitutional amendment to grant freedom of press rights to cable (B4), 29.7% disagreed and 24.8% were neutral or did not respond. More disagreed (48.3%) than agreed (40.6%) that the marketplace is the best judge of the public interest (C7). Finally, a majority (50.5%)

Table 6

Telepublisher Model

Statement	Agree %	Disagree %	Neutral/0 %
A3) Cable like newspaper	57.6	36.2	6.2
B1) 1st amendment to cable	50.8	36.2	12.1
B4) Constitutional Amend.	45.5	29.7	24.8
C3) Popular best serves public interest	50.5	31.9	17.7
C7) Marketplace best judge	40.6	48.3	11.2
E3) One owner can provide public interest	25.1	50.5	24.5
N = 323			

disagreed that a single cable owner can provide public interest programming (E3). Only 25.1% agreed that one cable owner can provide public interest programming and 24.5% were neutral or did not respond (See Table 6).

The statements chosen for the Public Utility model included:

> A6. Cable television is like a common carrier or utility in that the cable owner-operator has no competition from any other cable owner-operator within his franchise district.
>
> A7. Cable television is like a common carrier or utility in that it is neutral to the content of what goes over the system, simply providing the means for others to communicate.
>
> B2. Cable television monopolies should serve as common carriers of information and services produced by others.

C6. The public interest is best served in cable television by the franchise process by which the local government gives exclusive rights to furnish cable television to a community in exchange for certain promises of service by the cable television company.

D7. The First Amendment right of freedom of speech is being denied to community members in an area where there is cable television but there is no public access cable television.

E1. The availability of public access cable television ought to be required by law.

The Public Utility Model (See Chapter IV, Methodology) provided in Table 7 seems to represent the respondents with the exception of one statement. A majority (54.5%) of the respondents disagreed that cable is like a common carrier in that it is a neutral conduit (A7). Two-thirds or more of the respondents agreed with the other aspects of the public utility model: cable is like a common carrier in that there is not competition (A6, 75.9%); cable should serve as a common carrier (B2, 77.4%); the franchise process best serves the public interest (C6, 67.2%); the First Amendment is being denied where there is no access (D7, 68.2%); and access should be required by law (E1, 77.1%) (See Table 7).

Neither the telepublisher model nor the public utility model can fully describe the views of the respondents. Although the public utility model is more representative of the views of local cable programmers than the telepublisher model, the public utility model is not a completely compatible with their perceptions either. Both of these

Table 7

Public Utility Model

Statement	Agree %	Disagree %	Neutral/0 %
A6) Common Carrier/No Comp.	75.9	17.3	6.8
A7) Common Carrier/Neutral	37.5	54.5	8.1
B2) Cable as Common Carrier	77.4	12.4	10.2
C6) Franchise Process Best	67.2	17.3	15.5
D7) 1st Amendment denied without access	68.2	19.0	12.8
E1) Require access by law	77.1	12.7	10.2
N = 323			

models have considerable support, but there is not a clear-cut consensus. Following are data that can contribute to a more complete picture of the perceptions of those responsible for access cable television.

3. ANALYSIS BY CATEGORY

The Nature of Cable Television (A)

The rank order question A1 was not helpful in analyzing the nature of cable television (See Chapter IV, Methodology). With one exception, however, the respondents (N = 323) agreed with other statements (A2-A9) comparing cable to various media.

The respondents split in their judgments on cable as a common carrier. More than three-quarters (75.9%) agreed that cable is like a common carrier in that there is no competition from other cable operators (A6), the respondents clearly disagreed (54.5%) with the statement that cable is like a common carrier described as a neutral conduit (A7). The respondents agreed least (33.3%) with this comparison of cable to a common carrier as a neutral conduit.

The highest percentage of respondents (95.4%) agreed that cable is like radio when radio was described as appealing to several audiences with differing interests (A5). The second highest percentage of respondents (94.1%) agreed cable television combines the characteristics of several different media (A9) (See Table 8).

Table 8

Nature of Cable Television

Cable Like	Cable Interest	Access Interest	Work in Public Access	Work in Other Access	Regulator /Advisor	Total
A5 Radio	96.6	90.0	93.9	98.9	95.2	95.4
A9 Combines several	86.2	100.0	92.4	96.6	97.6	94.1
A4 Radio (Many Channels)	93.1	85.0	81.1	89.9	73.8	83.9
A6 Common Carrier (no competition)	75.9	58.6	75.0	80.3	80.9	66.7
A8 Not Like Others	41.4	55.0	64.4	53.9	59.5	58.2
A3 Newspapers	55.2	55.0	59.1	60.7	45.2	57.6
A2 Broadcasting	69.0	45.0	55.3	56.2	45.2	54.8
A7 Common Carrier (Neutral Conduit)	33.3	45.5	24.1	35.0	37.1	43.8

There was some variation among the categories of reported work in cable television. The categories included cable interest but no access interest; access interest; work in public access; work in other access area; and regulator/ advisor (See Chapter 4, Methodology). For example, in the top scoring variable, the comparison of cable to radio, (several audiences) (A5) three out of five groups also agreed most often with this comparison. Those with cable interest but no access interest (96.6%), work in public access (93.9%), and work in other access areas (98.9%) agreed most often with the comparison of cable to radio (several audiences). However, in the second highest scoring variable, respondents in two categories agreed most often that cable combines several media (A9). Those with an access interest (100%) and regulator/advisors (97.6%) agreed most often that cable combines aspects of several media.

Although several groups had ratings of neutral on the statement that cable combines several media, only one person (.3%) disagreed that cable combines several media. Seven disagreed (2.2%) that cable is like radio (several audiences).

In addition, a majority of respondents agreed that cable is like newspapers (can decide what will be presented) (57.6%)(A3) and like broadcasting (carries broadcast stations) (54.8%)(A2). However, not all category groups agreed. Regulators/advisors disagreed cable is like newspapers (A3)(54.8%) and cable is like broadcasting (A2)(50%). Those with an access interest also disagreed cable is like broadcasting (A2)(55%).

In summary, cable television combines the characteristics of several media and attracts several audiences. The majority of respondents agreed that cable is like radio, newspapers, broadcasting and a common carrier with no competition. The most popular comparisons of cable were to radio and to a combination of several media. As in radio, serving several audiences or narrowcasting differentiates cable from broadcast television that strives for the mass audience and high ratings.

Cable Television and the First Amendment (B)

In the section on cable television and the First Amendment, respondents agreed most frequently (89.8%) that any communications business has the responsibility to provide more than what is the most popular (B5). There was also a high level of agreement (86.4%) that free speech is meaningless without access to the mass media (B3) (See Table 9).

Although respondents disagreed that cable is like a common carrier in simply providing means for others to communicate (A7), they agreed (77.4%) cable should serve as a common carrier of information and services produced by others (B2).

Table 9

Cable Television and First Amendment

	Cable Interest	Access Interest	Work in Public Access	Work in Other Access	Regulator /advisor	Total
B5 More than popular	82.8	95.0	87.9	94.4	88.1	89.8
B3 Free speech meanless w/o access	93.1	90.0	86.4	85.4	85.7	86.4
B2 Cable should serve as common carrier	79.3	85.0	77.3	84.3	66.7	77.4
B1 Protect cable w 1st Amendment	50.8	65.5	45.0	51.5	53.9	42.9
B4 Amendment for cable's freedom of press	44.8	50.0	54.6	38.2	38.1	45.5

Consistent with their agreement that cable is like a newspaper, the majority agreed (50.8%) that cable operators' right to control what goes over the wire should be protected by the First Amendment (B1). A fairly large group here gave a neutral response (9.9%). There were also two categories, those with access interest (50%) and regulator/advisors (50%), who disagreed more than they agreed with this statement.

Respondents agreed least frequently that a constitutional amendment should be passed that would expand the First Amendment rights of freedom of the press to cable television (B4). Although a plurality (45.5%) agreed with an amendment for freedom of press to cable, 21.7% were neutral and regulator/advisors disagreed (45.3%) more than they agreed (38.1%).

In summary, respondents gave a mixed response on the issue of cable television and the First Amendment. The respondents agreed that cable operators should have First Amendment protection, but they also agreed that free speech is meaningless without access to the media. The respondents agreed most frequently that communications businesses have the responsibility to provide more than what is most popular.

Although the respondents did not agree that cable is simply a neutral conduit, they did agree that cable should serve as a common carrier for information and services produced by others. However, they also agreed, although not as frequently, that cable should have First Amendment protection and agreed more than disagreed, with the exception of regulator/advisors, that a constitutional amendment to grant cable the right of freedom of the press should be passed. (See Chapter VIII, Conclusions, for discussion of findings.)

The Public Interest and Cable Television (C)

Almost three-fourths of the respondents agreed that cable television programming that is local (C1, 73.7%) and informational (C2, 75.9%) best serves the public interest. More than two-thirds also agreed that getting cable television to everyone (C11, 79.9%) by a cable television company that has undergone a franchise process (C6, 67.2%) also best serves the public interest. A variety of people in control of channels (C5, 78.6%), a variety of sources (C4, 95.1%) and a maximum number of voices (C10, 84.5%) also best serve the public interest, according to more than two-thirds of the respondents (See Table 10).

Table 10

The Public Interest and Cable Television

Best Serves Public Interest	Cable Interest	Access Interest	Work in Public Access	Work in Other Access	Regulator /Advisor	Total
C4 Variety of sources	96.6	85.0	95.5	97.8	92.9	95.1
C10 Max. # of voices	89.7	85.0	81.1	85.4	95.2	84.5
C11 Getting cable to everyone	82.8	75.0	97.6	88.8	83.3	79.9
C5 Variety in control	89.7	70.0	74.2	84.3	81.0	78.6
C2 Informational	75.9	72.4	85.0	75.7	79.8	71.4
C1 Local	69.0	75.0	76.5	74.2	69.1	73.4
C6 Franchise	58.6	55.0	62.1	80.9	66.7	67.2
C8 Growth	69.0	55.0	62.9	66.3	54.8	62.2
C3 Give public what it wants	41.4	45.0	56.8	48.3	50.0	50.5
C7 Marketplace	31.0	45.0	37.1	44.9	50.0	40.6
C9 Congressional deliberations	28.8	13.8	30.0	32.6	29.2	21.4

Although respondents agreed most frequently (89.8%) that any communications business has the responsibility to provide more than what is the most popular (B5), a slight majority also agreed (50.5%) that giving the public what it wants on cable television best serves the public interest (C3). However, in the category frequencies, only those who worked in public access agreed by a clear majority (56.8%) of responses that what is popular best serves the public interest.

A majority, but less than two-thirds, agreed that the growth of cable television best serves the public interest (C8, 62.2%). On the other hand, a majority of those in public access disagreed that the marketplace is the best judge of the public interest for cable television. Overall, a plurality of the respondents (48.3%) disagreed that the marketplace is the best judge of the public interest.

The majority of respondents disagreed (52.0%) that hearings and lengthy deliberations on cable television bills that come before Congress is the process that will determine the public interest for cable television (C9).

In summary, the respondents agreed that diversity in sources, voices, control and audience best serves the public interest. The respondents also agreed that cable television programming that is local and informational also best serves the public interest.

The respondents agreed that the franchise process best serves the public interest. Without the franchise, public access and other access would be at the discretion of the cable operator. Although the respondents clearly agreed that the growth of cable television best serves the public interest, they did not agree in all categories that what is popular best serves the public interest. The respondents disagreed more than they agreed that the marketplace is the best judge of the public interest and they disagreed that congressional hearings and deliberations best serve the public interest. (See Chapter VIII, Conclusions, for discussion of the findings.)

Public Access Cable Television (D)

The respondents most frequently agreed (96.9%) that public access cable television provides a variety of views to be heard in the cable television community (D1). This result is similar to the finding that, according to the respondents (95.1%), a variety of sources best serves the public interest (C4). In the individual categories, those with an access interest agreed 100% that public access cable television provides a variety of views. In the category of regulator/advisor, none of the respondents disagreed that public access provides a variety of views (See Table 11).

Over two-thirds of the respondents agreed (68.2%) that the right of freedom of speech is being denied to community members in an area where there is cable television, but no public access cable television (D7).

Table 11

Public Access Cable Television

Public Access Allows	Cable Interest	Access Interest	Work in Public Access	Work in Other Access	Regulator /Advisor	Total
D1 Variety of views	89.7	100.0	97.0	98.9	97.6	96.9
D2 Media literacy	93.1	100.0	90.9	95.5	90.5	92.9
D3 Talk Back	96.6	100.0	93.9	98.9	97.6	95.7
D4 Programming policy decisions	72.4	85.0	73.5	75.3	83.3	75.5
D5 Production if access to tools	89.7	95.0	80.3	87.6	85.7	84.2
D6 Production if access to training	100.0	95.0	87.9	95.5	92.9	92.0
D7 1st amend. denied w/o public access	68.2	69.0	80.0	69.5	65.9	61.9

The respondents describe public access similarly to the way it is described in the literature on the potential of public access (See Chapter III, Literature Review). Over 90% of the respondents (92.9%) agreed that when people make their own programs, they are becoming media literate (D2). Over 95% of the respondents (95.7%) agreed that viewers can talk back to their television sets by producing their own programs (D3). Over 90% of the respondents agreed (92%) that community members will produce programs if they have access to training in the use of production tools (D6). Over 80% of the respondents agreed (84.2%) that community members will produce programs if they have access to program production tools (D5). The public access centers these respondents report on have a very high proportion of training in the use of video equipment.

More than three-quarters of the respondents agreed (75.5%) that citizens can make programming policy decisions at a public access center in their community (D4). This finding can be compared to the result reported earlier that over 75% of the respondents agreed that the public interest is best served by having a variety of people in control of channels on cable television (C5).

In summary, respondents viewed public access cable television as supporting many public interest values, especially in providing a variety of sources. The respondents most frequently agreed in this section that public access cable television provides for a variety of views to be heard in the cable television community.

All in all, the respondents agreed with the literature on the potential of public access to allow media literacy, media feedback and even programming policy decisions for citizens. They also agreed that community members will produce programs if they are provided training and production tools. On the question of the First Amendment, the respondents agreed that freedom of speech is being denied where there is cable television but no public access.

Availability of Public Access (E)

The respondents agreed that cable channels should be set aside for public interest programming, but they disagreed that a single cable owner in a given community is enough to provide public interest programming. In this section on the availability of public access, the respondents most frequently agreed (92.9%) that cable television channels ought to be set aside for public interest programming (E2). The respondents very frequently (88.8%) agreed that cable channels ought to be set aside for public access just as public park lands were set aside 100 years ago (E4). Over three quarters of the respondents agreed (77.1%) that the availability of public access cable television ought to be required by law (E1).

On the other hand, a majority of the respondents disagreed (50.5%) that one cable owner in a given community is all that is necessary to provide public interest programming (E3). On the question of a single cable owner, 22.3% were neutral and only 25.1% agreed (See Table 12).

In summary, respondents clearly agreed that cable channels should be set aside, even by law, for public interest programming in the form of public access cable television. They disagreed that one cable owner is enough to provide public interest programming. (See Chapter VIII, Conclusions, for discussion of findings.)

Table 12

Availability of Public Access Cable Television

Availability	Cable Interest	Access Interest	Work in Public Access	Work in Other Access	Regulator /Advisor	Total
E2 Set aside	93.1	100.0	90.2	95.5	92.9	92.9
E4 Like parks	82.8	95.0	88.6	93.2	83.3	88.8
E1 Required by law	82.8	85.0	74.2	83.2	66.7	77.1
E3 One owner enough	20.7	15.0	25.8	27.0	28.6	25.1

Programming Types and the Public Interest (F & G)

The programming types the respondents most frequently rated as most likely to serve the public interest were also those rated as often and most often provided by the channels with which they were associated. The respondents rated the following programming types as most in the public interest by at least 40% (See Table 13).

Table 13

Programming Types and the Public Interest

Programming Type	Most Likely to Serve the Public Interest %	(No.)
1) Community	47.4	(153)
2) Public Affairs	44.0	(142)
3) Health	41.2	(133)
N = 323		

Community programming was described under informational as community events and activities. Public affairs programming was described as programming about municipal services or local meetings. Information about drug abuse and free health clinics were given as examples of health programming.

The public interest programming ratings were then compared to the frequency of appearance of programming types on the respondent's channel (Table 14). A majority (53.6%, 173) of respondents rated community programming as being provided often to very often by the access channel with which he/she associated. While community programming was the most frequently rated as often to most often provided, public affairs was rated second (50.5%, 163).

In the third highest rating, however, there is a difference between public interest rating and frequency rating. The respondents rated entertainment programming as third

Table 14

Programming Types and Frequency of Appearance

	Frequency of Appearance: Often to Very Often	
Programming Type	%	(No.)
1) Community	53.6	(173)
2) Public Affairs	50.5	(163)
3) Entertainment	47.7	(154)
N = 323		

highest in the frequency rating (47.7%, 154) (See Table 14). Respondents rated health programming fourth with 34.3% (111).

The two most frequently rated programming types in the public interest, community and public affairs, were also the most frequently provided programming types on the reported channels. However, even though entertainment programming is not rated very highly (21.4%) in serving the public interest, it is ranked third in frequency of appearance on the channels with which these respondents associated.

In summary, respondents said the channels with which they associated provide programming they rate as most in the public interest. Two types of informational programming, community programming and public affairs programming, were rated by the respondents as most likely to serve the public interest and also rated as appearing often to very often on the cable channel with which they were associated. Informational programming was also identified in an earlier result (C2) as most likely to serve the public interest.

The majority of respondents indicated that community programming appeared often to very often on the channels with which they were associated. However, only a third of the respondents indicated that health programming appeared often to very often on those channels. In addition, public affairs programming was rated as both most likely to serve the public interest and provided by a majority of reported channels. Although not highly rated in the public interest, entertainment programming was reported third most frequently as appearing often on the channels with which the respondents associated. (See Chapter VIII, Conclusions, for discussion of findings.)

4. CHAPTER SUMMARY

In 1983, the public access channels described were cable operator dependent and largely run by the cable companies. The respondents were relatively inexperienced. Public access was just getting started, mostly in smaller markets.

The perceptions of those responsible for access cable programming more closely fit the public utility model than the telepublisher model, but there were variations in the perceptions that indicate a comprehensive view is somewhere in between.

The view that cable combines the characteristics of several media seems to best describe the perceptions of the respondents. The respondents agreed that cable is like radio, newspapers, broadcasting, and a common carrier with no competition. Judged to be most like radio, cable serves several audiences. Narrowcasting differentiates cable from network television.

Consistent with the view that cable television combines the characteristics of several media is the view that First

Amendment protection should be given to both cablecasters and to the public. The respondents agreed that cable operators should have First Amendment protection but also agreed that free speech is meaningless without access to the media. The respondents agreed that freedom of speech is being denied where there is cable television but no public access.

The respondents perceived the public interest is best served by what is diverse, local, and informational. The respondents agreed the franchise process best serves the public interest. These perceptions were matched by their views of public access cable television as providing a variety of views and allowing media literacy, media feedback and even programming policy decisions for citizens. Respondents most frequently rated community programming and public affairs programming as most likely to serve the public interest and also reported that these programming types were most frequently provided on the reported channels. Respondents clearly agreed that cable channels should be set aside, even by law, for public interest programming.

These were the views of those responsible for access cable programming almost a year and a half before the Cable Communications Policy Act of 1984 became law. The Cable Act and Supreme Court decisions following the passage of the Cable Act will be examined in Chapter VII.

CHAPTER VII

EXAMINATION OF THE CABLE ACT AND SUBSEQUENT SUPREME COURT CASES

The legislative branch has produced a model for cable television in the Cable Communications Policy Act of 1984. However, the judicial branch is still in the process of interpreting the laws related to cable television. In this chapter, the Cable Act will be examined for the model of cable television it provides and for the access cable regulation structure it provides.

Three Supreme Court cases decided after the Cable Act was passed also will be examined for the direction of the court on models for cable television, First Amendment issues, and implications for access cable television. These three cases have been chosen because they have reached the Supreme Court level on questions related to public access cable television since the Cable Act passed.

1. CABLE COMMUNICATIONS POLICY ACT OF 1984

The Nature of Cable Television

The Cable Communications Policy Act of 1984 (Cable Act) (98 Stat 2779) was enacted October 30, 1984 and took effect December 29, 1984 (See Chapter II, Historical Background). The Cable Act placed cable television somewhere between the telepublisher model and the public utility model. Daniel Brenner, a top legal aide to F.C.C. Chairman Mark Fowler, said the Cable Act can be found in the middle ground between these two extremes.

> "The act fixes cable at a point midway between a common carrier model and a First Amendment model. Under the act cable is not a pure First Amendment animal, entitled to the hands-off approach allowed for newspapers and magazines. Indeed, Congress has seen fit to provide less First Amendment protection to cable than for broadcasters, as cable, not broadcasters, is now subject to an access requirement." ("Farrow, Brenner Sort Through Cable Bill," 1984, p. 58)

Cable television is neither common carrier nor telepublisher as seen by the Cable Act. Instead, the Cable Act provides a new functional model for cable television. Cable is regulated when it resembles a common carrier as in the case of access channels. Cable is not regulated when it resembles a telepublisher as in the case of the channels it chooses to program.

Although a cable system may operate as a common carrier for a portion of its service (First Report and Order, 1969, p. 207), the Cable Act prohibits the regulation of cable television as a common carrier as a whole. "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service" (Sec. 621 (c), 98 Stat 2786, 47 U.S.C. 541). A true common carrier would not have the choice of deciding what services to offer. For example, American Telephone and Telegraph (AT&T) must serve everyone who wants its service. The Act also excludes the telephone company, or any other common carrier, from competing with cable television in video programming services (Sec. 613 (b)(1), 98 Stat 2785, 47 U.S.C. 533, 47 U.S.C. 201).

The Commerce Committee's Report on the Act explained the prohibition against common carrier or utility status.

> A cable system would not, for instance, be subject to rate of return regulation, or to the traditional common carrier requirement of servicing all customers indifferently upon request. . . , to the extent that the cable system is providing cable services. Nor would a cable service be subject to the regulation of rates, terms, or conditions. . . . (Committee, 1984, p.60)

The prohibition against utility status is supported by the rate deregulation built into the Cable Act. Among other issues, basic tier regulation has been dropped two years after the Act took effect (Sec. 623, 98 Stat 2788-2789, 47 U.S.C. 543).

The House Committee also wished to differentiate cable services from noncable services because of data transmission services. Data transmission can be provided by either telephone or cable technologies and is regulated by state and federal authorities in a jurisdiction separate from cable television services. The Committee Report explains:

> The Committee intends to leave the decision concerning the exercise of regulatory authority over noncable communication services to the appropriate regulatory bodies. This approach protects cable

> companies from unnecessary regulation, while reserving for state and Federal officials the authority they need to address the issue of competition between telephone and cable companies and the need to preserve universal telephone service. (Committee, 1984, p. 60)

While the Committee states its intent is to "protect cable companies from unnecessary regulation," the Cable Act also reflects Congress's concern with the economic viability of cable operators and the subsequent burden on cable subscribers. The Cable Act includes provisions that protect the cable companies from abuses such as theft of service (Sec. 633(a)(1), 98 Stat 2796, 47 U.S.C. 553).

While cable television is not a common carrier of cable services, neither is it a telepublisher as seen in the Cable Act. Cable companies must be licensed by a franchise, which may include a variety of provisions. In fact, the House version of the Cable Act (H. R. 4103) was named to emphasize the importance of the franchise and called the "Cable Franchise Policy And Communications Act of 1984." The franchise is necessary because the wiring of cable television requires the use of city-owned properties. Section 621 of the Cable Act authorizes the awarding of one or more franchises by a franchising authority (Sec. 621 (a)(1), 98 Stat 2786, 47 U.S.C. 541). The Cable Act also requires that a cable operator must have a franchise to provide service (Sec. 621 (b)(1), 98 Stat 2786, U.S.C. 541).

Franchise limitations on the cable system owner are intended to allow as little intrusion as possible on their First Amendment rights. However, the Cable Act also includes provisions that allow requirements necessary to cable television access, such as requirements for facilities and equipment needed in some cases for public access centers. According to Section 624 of the Cable Act a franchising authority

> . . . in its request for proposals for a franchise . . . may establish requirements for facilities and equipment, but may not establish requirements for video programming or other information services. (Sec.624 (b)(1), 98 Stat 2789-2790, 47 U.S.C. 544)

Although the request for proposal may not establish requirements for video programming or other information services, the franchise itself may require broad categories of video programming, such as children's programming (Sec. 624 (b)(2)(A)(B), 98 Stat 2790, 47 U.S.C. 544). But the Act prohibits the franchising authority from exercising any editorial control over the content of any cable service except educational and governmental channels (Sec. 613 (e)(2)). The House Committee reports they included the prohibition against editorial control ". . . to preclude undue government control of programming contrary to the First Amendment" (Committee, 1984, p. 58). Herein lies the qualified claim of cable operators to the telepublisher status they are seeking.

Access Cable Television

The First Amendment rights of viewers and listeners are in conflict with those of the cable operator when channels are set aside for access to cable television. In Midwest II (F.C.C. v. Midwest Video Corp., 1979) the Supreme Court prohibited the F.C.C. from requiring access and ruled that such a requirement is beyond the F.C.C.'s authority. The House Committee on Energy and Commerce has said they are aware that access provisions have been challenged in court. However, they say the provisions of the Cable Act are consistent with and further the goals of the First Amendment.

They appeal to the precedent of structural regulation which will foster the availability of a "diversity of viewpoints" to the listening audience. The Committee says the courts have held similar regulation to be consistent with the First Amendment (Committee, 1984, p. 31). They explain structural regulation as it has been seen in the communications industry.

> In pursuit of information diversity, governments have imposed a variety of regulation intended to clarify or alter the structure of the communications industry. In particular, such "structural" regulation of the media includes antitrust enforcement and the promulgation of rules limiting the cross-ownership of media properties in the same local market. (Committee, 1984, p. 31)

The Committee says the Supreme Court has upheld structural regulation where the governmental activity was designed to foster greater diversity in information sources. The Committee cites Associated Press v. United States (1945) where the Supreme Court upheld the F.C.C.'s newspaper-broadcasting cross-ownership rules (Committee, 1984, p. 32). The Committee concludes its discussion of structural regulation and access with this summary:

> Access channel requirements fit squarely within the category of limited structural regulation of the media that has been consistently upheld by the courts as a constitutionally permissible means of encouraging a diversity of information sources. (Committee, 1984, p. 33)

Thus the Committee views access within the tradition of structural regulation.

The Committee goes even further in its support of access regulations and ties them to the values of the First Amendment.

> . . . the purposes of access regulations serve a most significant and compelling governmental interest--promotion of the basic underlying values of the First Amendment itself. (Committee, 1984, p. 34)

Then, the Committee singles out public access channels in particular for their importance to the First Amendment expression of citizens.

> Public access channels are often the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. (Committee, 1984, p. 30)

Public access channels are singled out by the Committee as an opportunity for citizens to contribute to the diversity of sources on cable television.

The Cable Act specifically refers to public, educational and governmental access (PEG) as a group. For the Cable Act

> the term "public, educational, or governmental access facilities" means
> (A) channel capacity designated for public, educational, or governmental use; and
> (B) facilities and equipment for the use of such channel capacity; (Sec. 602 (13), 98 Stat. 2781, 47 U.S.C. 522)

PEG access channel capacity can be both required and enforced by the franchising authority, according to the Cable Act (Sec. 611 (b)(c)).

> Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, . . . (Sec. 611(c), 98 Stat 2782, 47 U.S.C. 531)

The franchising authority may enforce requirements for access channels and centers. These provisions by their nature include capital investment by the cable operator.

However, the cable operator may use this channel capacity if it is not being used for its designated purpose.

> . . . the franchising authority shall prescribe--
> (1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

> (2) rules and procedures under which such permitted use shall cease. (Sec. 611 (d)(1)(2), 98 Stat 2782, 47 U.S.C. 531)

This provision reflects the problem of unused channel capacity designated for public, educational or governmental access. The provision allows cable operators to use such channel capacity, but it also allows those working in access to get the channels back when such use is developed. The provision reflects the concern that access channels not be lost through lack of use.

PEG access channels limit the cable operator's First Amendment rights, since the cable operator has no editorial control over the access channels (Sec. 611 (e), 98 Stat 2782, 47 U.S.C. 531). By the same token, without editorial control, the cable operator also has no criminal or civil liability for programming on PEG access channels (Sec. 638, 98 Stat 2801, 47 U.S.C. 558).

To protect the funds for access facilities (See Sec. 611 (c) above), the Cable Act specifically separates those payments from the franchise fee the cable operator pays. The term "franchise fee" does not include

> . . . capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities. (Sec. 622 (g)(2)(C), 98 Stat 2788, 47 U.S.C. 542)

The Cable Act "grandfathers" in existing franchises that include requirements for access channels, facilities and equipment (Sec. 637, 98 Stat 2800-2801, 47 U.S.C. 557).

Besides a strong interest in the First Amendment rights of cable operators and viewers, the Cable Act intends to "encourage the growth and development of cable systems" (Sec. 601 (2), 98 Stat 2780, 47 U.S.C. 521). Section 625 establishes provisions for the modification of franchise obligations.

> These procedures are created because the Committee recognizes that cable operators compete in a changing marketplace. Modification in franchise obligations may be necessary to adapt to changes in market conditions and consumer demands. (Committee, 1984, pp. 70-71)

Section 625 of the Cable Act allows franchise requirement modifications of PEG access facilities or equipment (Sec. 625 (a)(1)(A)), but not access services (Sec. 625 (e)). Such modification only is allowed if the cable operator demonstrates it is "commercially impracticable" for the operator to comply (Sec. 625 (a)(1)(A) (i)) and equivalent services will be maintained after the modification (Sec. 625 (a)(1)(B)). The term "commercial impracticability" is defined in the Cable Act.

> . . . it is commercially impracticable for the (cable) operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the non-occurrence of which was a basic assumption on which the requirement was based. (Sec. 625 (f), 98 Stat 2791, 47 U.S.C. 545)

The House Committee further explains commercial impracticability with reference to the Uniform Commercial Code (UCC).

> This standard is meant to cover situations where, for example, particular equipment or facilities required by a franchise has not developed or functioned technologically as anticipated, or is not available; or is available only upon terms sufficiently more burdensome to the operator than when the offer to provide such facilities and equipment was made that courts in similar situations under the UCC have found impracticability; or the equipment or facilities were offered in order to provide services which regulation has prohibited the cable operator from offering. (Committee, 1984, p. 71)

The House Committee explains in its Report that ". . . the foreseeability of the change in conditions is a key factor for the court to consider under the UCC's doctrine of commercial impracticability" (Committee, 1984, p. 71). In other words, if the problem could be foreseen when the requirement was agreed to, commercial impracticability would not apply. Thus, it would not be acceptable under this doctrine to agree to a foreseeably impracticable requirement, such as public access, simply to gain the franchise.

"Needs and Interests" of Local Community

In addition to encouraging the growth of cable television, the Cable Act includes several provisions that "assure that cable systems are responsive to the needs and interests of the local community" (Sec. 601 (2), 98 Stat 2780, 47 U.S.C. 521). One such area is obscene programming. In addition to outlawing obscene programming (Sec. 639), the House Committee was concerned with programming containing indecent material that might be available to children. However the Committee also ". . . is very mindful of the constraints the First Amendment imposes in terms of the permissibility of governmental regulation of programming content" (Committee, 1984, p. 69). Therefore, the Cable Act requires the availability of a device called a lock box that would allow programming to be cablecast but not viewed in all cases. The Cable Act specifically states:

> In order to restrict the viewing of programming which is obscene of indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber. (Sec. 624 (d)(2)(A), 98 Stat 2790, 47 U.S.C. 544)

The Cable Act thus provides a rather creative solution to a thorny problem of conflictive rights of the cable operator, the cable programmer and some cable viewers.

Diversity in sources, ownership, audience and policy making are provided for in the Cable Act. Cable channels for commercial use, known as leased access channels, are required by the Cable Act (Sec. 612). The purpose of this requirement is to "assure that the widest possible diversity of information sources are made available to the public . . ." (Sec. 612 (a), 98 Stat 2782, 47 U.S.C. 532). Section 613 establishes cross-ownership rules and standards ". . . to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets" (Committee, 1984, p. 55).

To promote diversity in audiences, Section 621 protects potential subscribers from discrimination.

> In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides. (Sec. 621 (a)(3), 98 Stat 2786, 47 U.S.C. 541)

Thus so-called redlining of poor neighborhoods is prohibited. Less profitable poor neighborhoods cannot be excluded from a franchise since that would discriminate against potential viewers. To include as many as possible in the policymaking process in cable television, the Cable Act states that proceedings for franchise renewal should ". . . afford the public in the franchise area appropriate notice and participation" (Sec. 626(a), 98 Stat 2792, 47 U.S.C. 546).

In summary, the Cable Communications Policy Act of 1984 is the birthright legislation for cable television. It was born out of a compromise between cable operators, who want the right of way to wire cities, and the municipalities, who administer franchises to allow the wiring of cities. Federal legislators saw the need for a national policy to establish guidelines for the regulation of cable television. The Cable Act is an amendment of the Communications Act of 1934.

An analysis of the Cable Act has shown a view of cable television as neither a common carrier nor a telepublisher, but somewhere in between. The Act prohibits cable operators from being treated as common carriers when they are providing cable services. Cable companies are thus clearly differentiated from telephone companies and data transmission services.

However, neither is cable television viewed solely as a telepublisher. Municipalities are authorized to award franchises which can require various services from the cable operators, and the cable operators must be authorized to operate by the franchise. The cable operator's claim to the telepublisher status in the Cable Act lies in the prohibition of editorial control by the franchising authority, except in public, educational or governmental access channels. Thus access channels are a major block to the designation of cable operators as telepublishers. In the Cable Act, franchising authorities can require and enforce public, educational, and governmental access channel designations. This is similar to broadcasting with Equal Time and Fairness Doctrine regulations (Sec. 315, Communications Act of 1934). However, the designation of complete channels may be seen as more restrictive for the cablecaster. In addition, the regulation for the cablecaster is part of the franchise and can be different in every situation, but the broadcaster is subject only to F.C.C. regulations.

Although the term "public interest" is not specifically used in the Cable Act, serving community "needs and interests" is a specified purpose. One need and interest is the economic viability and growth of cable television. It will be necessary for cable television to grow so it can reach everyone who wants to subscribe. The Cable Act allows modification of franchise obligations to promote the economic viability of cable operators. Although PEG access facilities and equipment obligations may be modified, PEG access service obligations may not be modified.

Other community needs and interests are served by the requirement that a lock box be provided by the cable operator by sale or lease to allow programming to be cablecast but not viewed in some homes. This lock box option may help to meet the needs of some viewers to keep programming that may be considered obscene or indecent out of their homes. Diversity in sources, ownership, audiences and policymaking are also provided to serve community needs and interests.

Authorization of the franchises of municipalities to cable operators is an important aspect of the Cable Act. Without the franchise, public access and other access would be at the discretion of the cable operator. The franchise, especially the exclusive franchise that has protected the cable company from competition in the volatile marketplace, is being questioned in the courts.

2. JUDICIAL REVIEW

City of Los Angeles v. Preferred Communications

Perhaps the case that has the most direct bearing on the franchise that allows access to cable television is the case of City of Los Angeles v. Preferred Communications (1986). Utilities would not lease space on their utility poles to Preferred Communications unless Preferred first obtained a franchise from the city. The city of Los Angeles refused to grant a franchise to Preferred, stating Preferred had failed to participate in the auction awarding a single franchise. Preferred sued the City of Los Angeles and the Department of Water and Power in U.S. District Court.

The Preferred complaint alleged (1) cable operators are First Amendment speakers, (2) there is sufficient excess physical capacity and economic demand to accommodate more than one cable company, and (3) the city's auction process allowed the city to discriminate among franchise applicants based on what it deemed to be "best." The company claimed the city's system of awarding a limited number of franchises through competition violated both federal antitrust laws and the First Amendment. Supreme Court Justice Rehnquist reiterates the city's response to these allegations in his opinion of the Court.

> The City did not deny that there was excess physical capacity to accommodate more than one cable television system. But it argued that the

> physical scarcity of available space on public utility structures, the limits of economic demand for the cable medium, and the practical and esthetic disruptive effect that installing and maintaining a cable system has on the public right-of-way justified its decision to restrict access to its facilities to a single cable television company. (754 F. 2d, at 1401) (City of Los Angeles v. Preferred Communications, 106 S. Ct. 2034 (1986), p.2036)

Counsel for the city contends that the case involves a city's right to control the use of its property in connection with the construction of a cable system, not the First Amendment.

The Supreme Court has failed to resolve the issue. Instead, the Court has ordered a trial of a lawsuit by Preferred. A federal district court had dismissed the lawsuit without a trial. Judge Rehnquist states:

> We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely. (City of Los Angeles v. Preferred Communications, 1986, p. 2037)

Although the Court has not resolve the issue, it has given some indication as to the way it views the issue. "We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests." (City of Los Angeles v. Preferred Communications, 1986, p. 2037) The Court decision refers to the Midwest II decision which ruled that the F.C.C. may not require public access channels.

> We recently noted that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." (F.C.C. v. Midwest Video Corp., 440 US 689, 707 (1979) (City of Los Angeles v. City of Los Angeles, 1986, p. 2037)

The Court, however, also recognizes the rights of the city.

> . . . where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests. (City of Los Angeles v. City of Los Angeles , 1986, p. 2038)

Although there is no mention of the "public interest," the decision does use the term "competing societal interests" to describe the rights of the city and of those the city represents. Rehnquist then cites the O'Brien test for allowing government regulation.

> . . . a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (United States v. O'Brien, 1967, p. 377)

The O'Brien test, articulated by Supreme Court Chief Justice Warren, has been cited in several cable television cases including Quincy (see below). In the original case, the governmental interest was the Selective Service's need to ascertain readily people's availability to serve in the military. The defendant's interest was his freedom of expression under the First Amendment to burn his registration certificate. The Court decided the government's interest outweighed the private interest in this case.

A concurring opinion by Justice Blackmun describes the need for the trial at the district level to give the court information about the nature of cable television.

> As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations . . . , the court does not attempt to choose or justify any particular standard. (City of Los Angeles v. Preferred Communications, 1986, p. 9)

According to Justice Blackmun, the Court needs more information about the nature of cable television and has not yet made a judgment as to which First Amendment standard to use in evaluating cable television.

The Court decision refers to the Cable Act only in a footnote: "Congress has recently endorsed such franchise systems" (City of Los Angeles v. Preferred Communications, 1986, p. 2, footnote 1). However, Harold Farrow, the counsel for Preferred Communications, stated that the Cable Act is threatened by this judgment. Edward J. Perez, deputy city attorney for Los Angeles, agreed it could be harmful to the Cable Act.

> Farrow said that if Preferred prevails in the Supreme Court--even though the immediate effect would be only a return of the case to the district court for trial--"the Cable Act will begin to die a slow and just death." Perez said, "If we can't (regulate cable as we do), you can forget about the Cable Act. It says we can do what we are doing." ("Supreme Court Hears Preferred Arguments," 1986, p. 39)

Clearly the final decision of the Preferred case can have a damaging effect on the Cable Act and consequently on access cable television. If the case is decided in favor of Preferred, the cable industry could use the decision to challenge public access channels and other programming required by local governments in franchises.

The model for cable television thus has not been decided in the Preferred case and will not be decided until the lower court has presented the facts of the case.

National Association of Broadcasters v. Quincy Cable

Another case that may affect the future of access to cable television is the Quincy case. In Quincy, the Court ruled on the constitutionality of the so-called must-carry rules requiring cable operators to carry certain local broadcast channels on their systems. The Supreme Court denied review of National Association of Broadcasters v. Quincy Cable TV, Inc., that declared the F.C.C.'s original must-carry rules a violation of the First Amendment ("Cable Wins," 1986, p. 31) (106 S. Ct. (1986) 2889). Circuit Judge J. Skelly Wright began his decision with a definition of the must-carry rules.

> FCC regulations require cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast signal that is, "significantly viewed in the community" and otherwise considered local under the Commission's rules. (47

> C.F.R. Sec. 76.5-76.1 (1984)) (Quincy Cable TV v. F.C.C., 1985, p. 1437)

Turner Broadcasting Systems, Inc. (TBS), was one of two petitioners in this case. TBS petitioned the F.C.C. to institute rulemaking procedures to delete the must-carry regulations. TBS alleged that the rules "violate the First Amendment rights of cable programmers, cable operators, and the viewing public" (Quincy Cable TV v. F.C.C., 1985, p. 1437).

The case is named for the second petitioner, Quincy Cable TV, Inc. (Quincy), a cable system operator in Quincy, Washington. Quincy, 125 miles equidistant from Seattle and Spokane, sought review of an F.C.C. order requiring it to carry the signals of several local broadcast stations from both cities, which largely duplicated each other.

In the opinion of the U.S. Court of Appeals filed by Judge Wright, the court distinguishes between cable TV and broadcast TV.

> Cable television and ordinary commercial broadcast television operate on the basis of wholly different technical and entrepreneurial principles. (Quincy Cable TV v. F.C.C., 1985, p. 1438)

While broadcasters send signals antenna to antenna over the air, cable operators reach homes by wire and are not limited by the broadcast spectrum. In revenue matters, broadcasters sell time to advertisers, seeking a larger audience for a higher rate. Although cable systems also sell advertising, cablecasters charge subscribers a fee to raise revenue.

The court thus disagreed with what it called the most common approach in lower federal courts, "simply to treat cable and broadcast television as indistinguishable for purposes of First Amendment analysis" (Quincy Cable TV v. F.C.C., 1985, p. 1443) Judge Wright emphasizes that each medium is different.

> The Supreme Court has repeatedly stressed that "(e)ach medium of expression *** must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. (Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557) (Quincy Cable TV v. F.C.C., 1985, p. 1438)

To further distinguish cable television from the broadcast tradition, Wright states,

> We cannot agree . . . that the mere fact that cable operators require use of a public right of way . . . somehow justifies lesser First Amendment scrutiny. . . .
>
> Nor . . . can we concur in the suggestion that the "natural monopoly characteristics" of cable create economic constraints on competition comparable to the physical constraints imposed by the limited size of the electromagnetic spectrum. (Quincy Cable TV v. F.C.C., 1985, pp. 1449-1450)

Comparing cable to print, on the other hand, Wright states,

> . . . once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity [sic] for purposes of the First Amendment, the analogy to more traditional media is compelling. (Quincy Cable TV v. F.C.C., 1985, p. 1450)

By more traditional media, Wright is referring to the print tradition. While denying the analogy to broadcasting is applicable, Wright does not advocate denying all regulation.

> That cable television shares attributes of the more traditional press does not, of course, suggest that the First Amendment interposes an impermeable bulwark against any regulation. (Quincy Cable TV v. F.C.C., 1985, p. 1450)

Some regulation may be necessary just as libel is a restriction on a free press.

Wright compared the must-carry rules to the access rules requirement. Wright states that the must-carry rules, like the access rules, compromise the cable operator's editorial discretion. But unlike the access rules, the must-carry rules give that editorial discretion to local broadcasters.

> . . . unlike access rules, which serve countervailing First Amendment values by providing a forum for public or governmental authorities, the must-carry rules transfer control to local broadcasters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether. (Quincy Cable TV v. F.C.C., 1985, p. 1452)

Granted, the editorial discretion of the cable operator also is compromised by access rules. However, this infringement on the cable operator's First Amendment rights is compensated for. The First Amendment rights of the public are granted. Access channels create a forum for the public or governmental authorities.

The term "public interest" is referred to throughout the Quincy case which deals with the F.C.C.'s must-carry rules. Yet the public interest was not seen as justifying must-carry in this case. Instead, the Court refers to "competing interest." "Regulation of emerging video technologies requires a delicate balancing of competing interests" (Quincy Cable TV v. F.C.C., 1985, p. 1462). The competing interests must be demonstrated in order to be grounds for denying First Amendment rights.

> Even where the infringement on protected First Amendment rights is incidental to the pursuit of other legitimate objectives, the government must affirmatively demonstrate that the regulation is narrowly tailored to serve a substantial interest. (Quincy Cable TV v. F.C.C., 1985, pp. 1462-1463)

Although not explicitly stated, this reference is to the O'Brien test (see above) that to be acceptable, the regulation must further ". . . an important or substantial governmental interest" (United States v. O'Brien, 1967, p. 377). Thus, if the public interest standard or any similar interest standard is to be used, the regulation must be clearly constructed to serve that interest in the least restrictive manner.

The court's conclusion is that must-carry is unconstitutional.

> In the course of reviewing those petitions, we have concluded and now hold that the must-carry rules are fundamentally at odds with the First Amendment and, as currently drafted, can no longer be permitted to stand. (Quincy Cable TV v. F.C.C., 1985, p. 1438)

The critical phrase here is "as currently drafted." It may be that constitutional must-carry rules can be drafted by the F.C.C.. New must carry rules have been adopted (Report and Order, 1 F.C.C. Rcd 864, 886 (1986)). The question of their constitutionality may or may not be tested.

> The Quincy appeals court . . . did not say must-carry rules could not be written that would be constitutional. And it said the commission was free to try a rewrite. But it said the rules on the books--which require cable television systems to carry signals of local stations, regardless of the cable operators' wishes--were far too broad to meet the requirements of the First Amendment. ("Cable Wins," 1986, p. 31)

If must-carry is being challenged, the access requirement could also be questioned on similar grounds. Although the Quincy opinion differentiated access rules from must-carry by recognizing that access rules grant First Amendment rights to the public, the decision still could be used to challenge access rules. The Quincy court also has preferred the print model over the broadcasting model for cable television.

TCI Cablevision, Inc., v. Central Telecommunications, Inc.

Unlike the Preferred and Quincy cases that emphasized the First Amendment rights of the cable operator, TCI Cablevision v. Central Telecommunications (107 S. Ct. 1358 (1987)) was a decision that favored the natural monopoly characterization of cable television, part of the public utility model. The Supreme Court upheld a district court opinion that will be cited here.

The rights of two cable companies who wanted the franchise in the same city were in conflict in the Central case. TCI Cablevision, Inc., the franchise holder in Jefferson City, Missouri, did not participate in the franchise renewal requested by Jefferson City. Two other companies, including Central Telecommunications, Inc., did make a bid.

TCI argued it had a First Amendment right to retain its position in Jefferson City, while the City claimed the right to get the best cable operator for the community.

> (TCI said) . . . it had a first amendment right to continue to provide cable services in the City, and that the City thus had no right to award an exclusive franchise to another company. The City contended that its cable television market was a "natural monopoly" and that it could not create competition for its cable TV market without offering an exclusive franchise. (Central Telecommunications v. TCI Cablevision, 800 F. 2d 711 (8th Cir. 1986), p. 712)

The city council voted the franchise to Central but the Mayor vetoed it and the council was unable to override the veto. An ordinance providing TCI with the franchise got a tie vote that was broken by the mayor in favor of TCI. Central sued TCI

> . . . alleging that TCI had unlawfully interfered with the RFP (request for proposal for the franchise) process to deny Central the franchise and to retain an exclusive franchise for itself. (Central Telecommunications v. TCI Cablevision, 1986, p. 713)

The First Amendment nature of the Central case has to do with TCI's challenge to an exclusive franchising scheme, or situation in which only one cable operator is granted a franchise to provide cable services in an area.

> TCI's first contention is that it has a first amendment right to remain in the City's cable television market with or without a franchise from the City, and that, therefore, Central could not have been damaged when it lost the exclusive franchise. (1986, p. 713)

The Central case denies TCI had the First Amendment right to continue its cable operation in Jefferson City. "TCI's first amendment defense fails on its facts because it did not seek to simply remain in the market but to continue its monopoly" (1986, p. 713). Further, First Amendment values are considered for Central.

> It is difficult for us to see how, on this record, TCI's position enhances First Amendment values. It is true that TCI has a First Amendment interest in remaining as a cable television "speaker," but Central has a similar interest. Because the evidence shows that given the technology offered by the competing companies, there was economic capacity for only one speaker, it seems clear that Central's proposal went further in advancing the First Amendment interests of the viewing public in the greater variety of programming obtainable. (1986, p. 717)

The Court upheld the right of the City to create competition for an exclusive franchise to get the best possible service for the community. Consequently, Central had the right to the franchise if it was judged to be the best choice.

> We hold that Central did have a protectable interest because it proved to the satisfaction of the jury and the trial judge that the "natural monopoly" characteristics of the Jefferson City cable market justified the city in offering a de facto exclusive franchise in order to create competition for its cable television market. (1986, p. 717)

Another factor in the Court's decision is TCI's "excessive and intimidating conduct" (1986, p. 725). Cited in the case is a long and complicated effort by TCI to use its position to gain the franchise without going through legal channels. For example, TCI vice president and national director of franchising approached the city's cable television consultant Elmer Smalling with the following threat:

> "We know where you live, where your office is and who you owe money to. We are having your house watched and we are going to use this information to destroy you. You made a big mistake messing with T.C.I. We are the largest cable company around(.) We are going to see that you are ruined professionally." (1986, p. 718)

TCI's use of its monopoly power and influence in the above example and many other examples cited was considered by the court in its judgment against TCI and for Central.

The Court defines monopoly in its decision. TCI denied that it had monopoly power since Jefferson City regulated price and entry in the cable television market. The Court disagrees.

> We reject this argument. Monopoly power is the power to control prices or exclude competitors. . . . The mere fact that the Jefferson City cable market is regulated cannot hide the fact that TCI had monopoly power in the market, and it used that power and other methods other than superior ability to exclude competition. (1986, p. 726)

The judgment has held that TCI is a monopoly and therefore can be regulated.

The Central Court acknowledges the First Amendment and regulation problems in their decision.

> We recognize that there are profound first amendment implications inherent in the regulation of cable operators. . . . We are also aware of the difficulties inherent in the regulation of cable television programming. (1986, p. 716)

The Court refers to the Quincy and Midwest II cases regarding the First Amendment and regulation problem. Both of these cases prohibit regulation that impinge on the First Amendment rights of the cable operator.

The Court emphasizes a narrow view based strictly on the case at hand rather than a judgment on all cable operators' rights.

> Thus, we make clear, as did the Supreme Court in Preferred Communications, that we are unwilling to decide any question which is not squarely before us and on which there has not been a full development of the record. . . . (We) consider the "natural monopoly" question only in terms of the competing technologies offered by TCI and Central. (1986, pp. 716-717)

The Court thus presents a model of cable as a natural monopoly in the Central case, but will not generally apply its interpretation to cable television operators' First Amendment rights. However, by supporting the natural monopoly characteristic and consequently the public utility model in this case, precedent has been set for other similar cases that may include the validity of the mandatory public access provisions of some franchises.

Thus, First Amendment issues are dealt with in the Central case, but the First Amendment is not the grounds for the decision to grant damages to Central. Rather, the decision of the court to grant damages to Central is made on the basis of anti-trust law. The Court states:

> In sum, we hold that Central has sufficiently proved that it suffered damage to a protectable interest under the federal antitrust law and the State of Missouri's law. . . . (1986, p. 730)

The Supreme Court upheld the damages decision of the district court with actual damages for loss of the franchise at \$10.8 million and punitive damages at \$25 million, totaling \$35.8 million (pp. 731-732).

The Preferred, Quincy and Central cases do not clearly provide a model on the nature of cable television. However, the Preferred case did grant that cable operators do have some activities that "implicate First Amendment interests" (City of Los Angeles v. Preferred Communications, 1986, p. 5). The Quincy case also leaned toward the newspaper tradition in differentiating cable from broadcasting and questioning some grounds for its regulation (NAB v. Quincy Cable TV, 1986). In contrast to the above, the Central case found that the natural monopoly characteristics of cable can be grounds for denying First Amendment rights to some cable operators, thus considering a public utility type of model for cable (TCI v. Central, 1987).

The term "public interest" is not specifically used in the cases cited. Instead, in the Preferred case, the term "competing societal interest" is used to describe the rights of cities and those they represent when considering any limits on the rights of cable operators. The Quincy court cites "competing interests" and proceeds to outline the need for narrowly constructed regulations serving a substantial interest to override the First Amendment rights of cable operators. The Central court cites "protectable interest" in deciding to compensate Central for the loss of the franchise in Jefferson City.

It is not clear yet whether these Supreme Court cases have threatened the Cable Act's provisions. The litigation on the Preferred case is incomplete. The Quincy case challenges the F.C.C. rules, not the Cable Act. The Central Court denies that its decision on the natural monopoly characteristics of cable television has broad application. Senior legal counsel for the House Telecommunications Subcommittee Tom Rogers states:

> ". . . the Supreme Court in its Preferred and Quincy actions did not change the 'First Amendment framework' for cable television that Congress created in the Cable Communications Policy Act of 1984, . . ." ("Cable Wins," 1986, p. 33)

The Preferred, Quincy and Central cases seem to reflect the change in cable television and the relationship of cable operators to cities (Preferred), to broadcasting (Quincy), and to each other (Central).

CHAPTER VIII

CONCLUSIONS

The public interest standard has served as a measure of regulation by the FCC and its predecessor, the Federal Radio Commission, since the Radio Act of 1927. Differences exist as to where the public interest lies. At the federal level, the FCC decides specifically how to regulate in the public interest within the parameters defined by the Congress in the Communications Act and its amendments including the Cable Act. At the municipal and state level, regulators also make decisions about local regulation. The courts then interpret the decisions made by the FCC and local governmental authorities. How is regulation in the public interest defined? The amount and type of regulation varies from time to time as the regulators and lawmakers define the "public interest."

There are both pragmatic and idealistic views of the public interest in U.S. history. Pragmatists in mass communications view the pubic interest as depending on the marketplace. Idealists in mass communications view the public interest as depending on the local or federal government's protection of the individual's right to use the mass media for freedom of expression.

The regulatory philosophy varies from one of these extremes to the other depending mainly on the public's attitude toward government's role in society at various times and as interpreted by regulators who have been appointed by the administration the public has put in power.

The concept of public access cable television was developed in an idealistic era of U.S. history when consumerism movements were being emphasized and when civil rights was a dominant issue. When cable was coming into its own as a new medium in the late 1960s and early 1970s, the social responsibility theory of the press was strengthened by movements for greater public participation. Perceptions prevalent in society were that television was powerful and the viewer was passive. This combination was viewed as a threat to society and a democratic way of life. Cable television meant more of the same, unless the public could get control over some of the many channels cable would make available. The mood of the FCC was such that public access was mandated in 1972, but the courts struck down the authority of the FCC to require such public channels in 1978.

After the courts struck down the authority of the FCC to require public access channels, the local regulators continued to require them in cable franchises but no further effort was made by the FCC to support them. Thus, public access has been deemphasized.

In 1984, however, the Cable Act did support the requirement of public access channels by local regulators. The Cable Act represents an attempt to define the relationship among cable operators, government entities and cable programmers.

Congress and local cable programmers do not view marketplace competition as the sole measure of the public interest. In the Cable Act, Congress is concerned with diversity and protection of public access. In the survey conducted in this research, local cable programmers support access. This conception of the public interest states, protect the public's right to use the channels of communication regardless of the individual's economic ability to do so.

Passage of the Cable Act does not end the access debate. Although Congress may change its mind, it is more likely that the process of judicial review will continue the access debate. The process of judicial review already has begun to resolve the First Amendment questions raised by the Cable Act. If public access cable television is to survive, it will have to weather this pragmatic period of deregulation politics.

The conclusions presented here will consider four perspectives on the nature of cable television, public access cable television and the public interest. First, some of those responsible for the Cable Act have been interviewed. Second, a sample of members of the National Federation of Local Cable Programmers (NFLCP), some of those responsible for access cable television, have been surveyed. Third, the Cable Act itself has been analyzed. Fourth, Supreme Court cases decided after the passage of the Cable Act and relevant to public access cable television have been examined.

These perspectives will contribute to conclusions on a model for cable television or what cable is; the current legal status of cable television and cable access; and the future of cable access. The conclusions also will include suggestions for further study.

1. A MODEL FOR CABLE TELEVISION

To answer the question of freedom of the press for whom: the cable system operator or the pubic, models for cable television have been examined. The determination of First Amendment rights for a communications technology is first done by its comparison to existing communications media. In this research, the newspaper and public utility models have been set as extremes in a context that allows consideration of both roles in the development of a new and comprehensive view of cable television based on its unique structure and functions.

The Cable Act, survey respondents and post-Cable Act Supreme Court decisions support a three-part functional view of cable. First, the newspaper model is seen when the cable operator is fulfilling an editorial function in local origination cablecasting where programming is subject to the exclusive control of the cablecaster. The cable operator also fulfills an editorial or gatekeeping function in choosing what networks to include on channels in the cable system. The cablecaster should be protected by the First Amendment in this function.

Second, the common carrier or public utility model is seen when cable acts as a conduit. This conduit function satisfies "needs and interests of the community, "competing societal interests," and the "public interest." Cable functions solely as a conduit when it carries access channels. These access channels do fulfill the public interest, allowing infringement of the cable operator's First Amendment right in order to grant the citizen First Amendment rights. This is the essence of the First Amendment issue.

Third, cable has a retransmission function. Cable retransmits broadcast networks and in this instance should be subject to regulation under the broadcast regulatory model. Cable is a retransmission device only in this situation. The broadcast function is between the two extremes being considered here of telepublisher and public utility. It is interesting to note that the broadcast model is strongly supported in the NFLCP survey when respondents rate cable as most like radio with many audiences. The broadcast function is critical to the present status of cable television since retransmission is a predominant function at this time. Yet the broadcast function is seen more like radio than television because of the extended channel capacity of both radio and cable television. Also, like radio after deregulation, cable has freedom but with certain general requirements (See Chapter VII, Examination of Cable Act).

The Cable Model provided above is similar to the broadcast model in that both are subject to regulation. However, the Cable Model is not the same as the broadcast model, nor is it viewed that way by the Cable Act or by any Supreme Court decisions since the Cable Act. The functional Cable Model rests on the structural characteristics of cable television, which are different from broadcasting. Broadcast regulation is allowed because the scarce radio waves belong to the public. Therefore, the broadcaster must get a license to become a public trustee for the radio wave she is assigned. Cable regulation, on the other hand, is allowed because the cable operator must have permission to run the coaxial cable through public rights of way. This situation is economically feasible only for one cable operator in most situations, thus creating a natural monopoly. In addition, the broadcast model is only one element of the functional model for cable television.

Thus cable has two modes of operation--an originator and a relayer of programs. As a relayer, there is a gatekeeper function (selection of programming services). In the local origination function, the cable operator is gatekeeper except for local access channels which present speakers on a first come, first served basis. But once choices have been made, cable is a conduit for the free expression of broadcasters and other network programmers or of the public on access channels. The functional model is flexible enough to relate to both of these modes.

Freedom of the press for whom, the system owner or the public? The survey results support the answer that both the cable operator and the public should have freedom of expression in cable television. This is a contradictory finding only if a uniform model is posited. If a functional model can be applied, then the apparent contradiction is explained.

Inherent in the functional model is the answer that both have freedom of expression. It depends on who is expressing the ideas. Cable system owners have freedom of speech when they are choosing what network will be on which of their channels. Cable system owners also have freedom of the press when they produce locally originated programming. The public has freedom of speech when they use public access channels set aside for that purpose.

Another survey finding that can be explained by the functional model is the apparent contradiction that the respondents did not agree that cable is simply a neutral conduit, but they did agree that cable should serve as a common carrier for information and services produced by others. With the functional model, cable is not simply a neutral conduit, but it does serve as a common carrier for public and other access channels.

Finally, while agreeing that any communication business has the responsibility to provide more than what is most popular, survey respondents also agreed that giving the public what it wants best serves the public interest. Again, although this is contradictory if a uniform model is posited, a functional model explains the apparent contradiction. In a functional model, cable operators can be required to provide more than what is popular in the form of public access while at the same time using most of their channels to provide what is popular.

Conclusion

2. CURRENT STATUS OF CABLE TELEVISION AND PUBLIC ACCESS

To determine if public access cable television is in the public interest, an examination of the status of cable television and public access has been conducted. The term "public interest" is not mentioned in the Cable Act or in subsequent Supreme Court cases related to cable access.

However, other comparable terms are used, such as "needs and interests of the local community" (Cable Act), "competing societal interests" (Preferred case), "competing interests" (Quincy case) and "protectable interest" (TCI case).

By authorizing access to cable television, the authors of the Cable Act seem to value the same measures of the public interest supported by the respondents. Both the Cable Act and those responsible for access television value diversity in sources, ownership, audiences and policymaking.

The Cable Franchising Process

Both the Cable Act and the NFLCP survey respondents support the franchise process and respondents agree that it best serves the public interest. Cable systems exist by virtue of the franchises awarded by local governments. Since cable television requires laying coaxial cable, which necessarily disrupts the public domain, governmental permission must be obtained for the cable operator to proceed. The local government may mandate public access by requiring public access in the franchise. To require public access in a franchise is the most direct way for citizens to gain access to cable channels in a community that is acquiring a new cable system or that is allowing new bids where a system already exists.

The franchise situation can threaten the existence of access cable television in two ways. First, the Cable Act allows modification of the franchise. Facilities and equipment requirements may be waived if found to be "commercially impracticable." But cable companies may not be relieved of access service obligations. Those concerned about access must be vigilant and work with the franchising authority who will determine the conditions under which such modification may take place. Second, the Cable Act may be affected by various court cases that question the constitutionality of the regulations of cable television. Without the franchise, public access and other access would be at the discretion of the cable operator. The franchise, especially the exclusive franchise that has protected the cable company from competition in the volatile marketplace, is being questioned in the courts.

Judicial Review After the Cable Act

In the case of City of Los Angeles v. Preferred Communications (1986), the exclusive franchise legitimized in the Cable Act has been challenged. The Preferred case reflects the growing predominance of a voice that had been in the minority in the cable industry. Earlier in cable history, an exclusive franchise by cable companies was considered desirable because of the protection that gave from competition. Also, exclusivity allowed cable companies to obtain financing. The involvement of a second cable company after a cable system is already in place is called overbuilding. The majority in the cable industry do not see overbuilding as desirable.

> One senior industry source last week said that overbuilding, whatever the ultimate decision in Preferred, is regarded as impracticable because of the problems involved in raising money to build a system to serve an area already being served. ("Mooney on Preferred . . . ," 1986, p. 37)

If indeed cable companies do not desire to have competition in a particular market, then what is the intent of this litigation? It seems they are trying to attain the tele-publisher status by denying their position as a natural monopoly. The regulation of cable companies is based in part on the monopoly status they have in the media market and in part on the need for a franchise. Stephen Gard, constitutional law professor at Cleveland-Marshall College of Law, warns cities about the danger to their franchises.

> The cautious city today would not grant an exclusive franchise. A conscientious city today would go back to the drawing board to avoid an exclusive franchise situation." ("City was wired," 1986, p. 3B)

Without that monopoly status, perhaps the cable industry could be free of regulation and attain its desired status as a telepublisher. But, economically, it is hard to deny that cable is a natural monopoly.

In one case, however, a cable company has tried to deny its monopoly status while at the same time using its monopoly power to exclude the competition of others. In TCI

Cablevision v. Central Telecommunication (1987) (See Chapter VII), the Supreme Court supported a lower court ruling that TCI is a natural monopoly in Jefferson City, Missouri. It supported the exclusive franchise awarded by Jefferson City, Missouri, because the natural monopoly situation warranted the need for the city to create competition to get the best possible cable system. The city did this by open bids on the franchise even though TCI was established as a cable system there. When TCI used its monopoly power, threats and intimidation to get the franchise, the courts supported Central's challenge to TCI receiving the franchise and awarded Central both actual and punitive damages. Although the court states the natural monopoly designation applies only to this particular case, a precedent has been set to view some cable systems as monopolies.

The Preferred, Central and Quincy cases have implications for public access cable television. The Preferred case could threaten the legitimacy of the exclusive franchise and thus also threaten the existence of public access. The Quincy case specifically mentions access rules, comparing them to the must-carry rules they struck down. However, in that comparison, the court grants that the First Amendment rights of the public are served by access channels, lending some legitimacy to the imposition access channels make on cable operators' rights. The Central case, on the other hand, provides some hope for public access in providing a natural monopoly model for cable television at least in some cases.

Public Access Cable Television in 1983

A survey of the NFLCP membership was conducted in 1983 to determine how public access cable might serve the public interest. Of the members of the NFLCP surveyed in 1983, 40.9% (132) were associated with public access. Another 27.6% (89) associated with other areas of access such as educational, governmental, local origination or leased access. The responses of the NFLCP members associated with public access did not differ significantly from the responses of members in other areas of access. Respondents were generally inexperienced, having worked in cable for five years or less (65.6%).

Respondents' involvement or work in access was often volunteer and part time. Part-time work refers here to both paid and unpaid involvement. Slightly more respondents were part time (38.1%) than full time (37.5%). More respondents volunteered (46.4%) than were paid (43.3%).

Although the survey was of those working in access and not access channels or cable systems themselves, it is interesting to note various observations about the systems with which these NFLCP members associated.

The public access reported in this survey was just getting started, mostly in smaller markets. Of the respondents who reported that their public access channels had been cablecasting at all, over 75% had been cablecasting for three years or less. The majority of respondents reported from markets of 50,000 or fewer cable subscribers. The delay in wiring the bigger cities is a problem for cable. The problems of cable in this regard may also be the problems of access. Public access, like cable itself, is a new effort at innovation, which is not yet well-established.

Such a new effort requires involvement by many people at various levels of commitment. Many who responded to this survey were part time and many were volunteers. Those respondents who reported work in access may have been developing the programming and support for access centers and access channels. They may or may not have been working at a specific cable system.

In the systems reported, public access is dependent on the franchise and the cable operator. Although the Cable Act has assured the validity of the franchise, the franchise is being challenged in the courts (City of Los Angeles v. Preferred Communications, Inc., 1986). Also the majority of respondents associating with public access indicated that the public access center is operated by the cable company. If the existence of public access is at the discretion of the cable company, the future of public access is in question. The cable company is likely to choose more profitable channels than access channels. For example, Cable Value Network gives cable operators a percentage of what is sold on this shopping service to their subscribers. In addition, the cable companies normally respond to subscriber pressure and the pressure is greater for entertainment channels than access channels. This situation may also call into question the claim that public access contributes to diversity in sources. If the cable company operates the access center, its ownership may mute the diversification of voices of cable television.

From the reports of respondents associated with public access, it seems to be doing the job that it was intended to do. More than 95% of the public access channels with which the respondents associated provides training. Training is essential to public access to provide the opportunity for citizens to exercise their right of freedom of speech in the electronic media.

If those responsible for access to cable television believe that access channels serve the public interest, what do they do to serve the public interest? In addition to providing training in video production, respondents say the channels with which they associated also provide programming they rate as most in the public interest. Community programming and public affairs programming have been rated by the respondents as most likely to serve the public interest and also rated as appearing often to very often on the cable channel with which they were associated. Even though respondents did not rate entertainment programming very highly in serving the public interest, it is ranked third in frequency of appearance on channels with which the survey respondents associated. It may be that entertainment is needed to attract viewers to the public access channels.

Thus, the NFLCP membership and the Cable Act support the view that public access cable television does serve the public interest. The survey respondents have indicated public access serves the public interest by providing training in video production and by providing public interest programming. However, without legal requirements, the future of public access may be left to the cable operator. Although they are being challenged in court, legal requirements in the franchise are presently allowed by the Cable Act.

3. THE FUTURE OF PUBLIC ACCESS CABLE TELEVISION

If public access cable television is to survive deregulation politics, those responsible for access will need the support of the courts in interpretations of "public interest" for the Cable Act and other questions. In addition, local cable programmers will need the help of the community both to use existing public access channels and to protect their continued existence through franchise and popular demand. Furthermore, to encourage diversity of viewpoints, public access channels should be contracted out to third party groups that would make facilities available to the public. Specifically, public access centers need to be run by community organizations instead of by the cable operator or the municipal government.

Cable television is only the most recent technology to be a battleground for First Amendment issues of freedom of the press for whom: cablecasters or the public? Technological developments more recent than cable such as direct broadcast satellite (DBS) may develop their own public access and First Amendment models. But the First Amendment models that develop in cable television may set a precedent for these technological developments. The future of public access to cable television is therefore worthy of our attention and consideration.

4. SUGGESTIONS FOR FURTHER STUDY

The concept of the "public interest" may or may not continue to be used in this era of federal deregulation. With the shift from federal regulation under the FCC after Midwest II to local regulation under the municipal franchise, the use of the term "public interest" has been replaced by other phrases. The Preferred case uses the term "competing societal interests," citing the O'Brien test. The Cable Act uses the term "needs and interests of the local community." Is there a move away from the term "public interest"? Recent Supreme Court cases such as Preferred and recent legislation such as the Cable Act can be compared to earlier cases and legislation to determine if the "public interest" standard is still functioning as a consideration for allowing mandatory public access. The terminology and approach used by the FCC in the early 1970s might also be compared to the FCC's current perspective.

With the bicentennial of the Constitutional Convention, First Amendment issues will be an especially important consideration in research. To further support the functional model for cable television, further research must consider other aspects of freedom of expression for cable television. Other aspects include the use being made of public access cable television. The use of public access for obscene communication and for the expression of unpopular ideas needs to be explored. Should provision be made for expression of unpopular ideas even though the public at large could care less? Another aspect is the freedom of expression for the broadcaster on cable television. Is the broadcaster entitled to freedom of expression on cable channels? According to the revised must carry rules (Report and Order, 1 F.C.C. Rcd 864, 887 (1986)), the cable operator will be required to carry various broadcast channels but only for the next five years. The possible threat to the broadcaster's freedom of expression with the end of the must carry rules needs to be explored.

Determination of a First Amendment model for cable is critical for determination of policies. So the question becomes, "With the kind of device cable is, what kind of policies will best fulfill the public interest objectives as interpreted by the FCC and/or the franchising authority?" Research on public access policies as they have developed after passage of the Cable Act can be explored.

Models for more effective use of public access should be studied by researchers to determine what factors allow access channels to serve effectively as avenues of freedom of speech. One need is to develop a definitive list of access channels. No such list exists, although the NFLCP has a cumulative list of access channels as they hear about them. Although such a list would be difficult to develop, it would be possible with the cooperation of cable operators and local cable programmers. Such a list could be used to discover the current use of public and other access cable television channels. The FCC, Congress, public interest groups and cable programmers as well as cable operators might prove to be significant groups for study of factors that allow access channels to effectively promote freedom of speech.

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APPENDIXES

APPENDIX A

CHRONOLOGY OF PUBLIC ACCESS CABLE REGULATORY HISTORY

Rationale: Cases chosen if they related to public access or to issues involved in the debate: First Amendment and Cable, franchise validity, jurisdiction of FCC, cable as a monopoly and therefore subject to regulation.

Nonregulation in 1950s

1958 FCC declined to regulate cable as common carrier (Frontier Broadcasting, Memorandum Opinion and Order, 1958)

1959 Senate held hearings on cable control bill S. 2653.

1960 First cable bill, S. 2653, rejected.

1961 Court rejected restrictions upon CATV carriage on basis of "unfair competition." (Intermountain Broadcasting v. Idaho Microwave, 1961)

FCC Jurisdiction Over Cable Tied to Broadcasting in 1960s

1963 Microwave transmission of distant broadcast signals deemed subject to FCC regulation. (Carter Mountain Transmission v. FCC, 1963)

1965 FCC issued revised rules to govern carriage of local signals. FCC affirmed jurisdiction over systems served by microwave. (First Report and Order, docket nos. 14895 and 15233)

1966 FCC declared jurisdiction over all CATV systems and over cable as a whole. (Second Report and Order)

1968 Supreme Court upheld FCC's jurisdiction over cable television as ancillary to broadcasting. (U.S. v. Southwestern Cable Co.)

In Notice of Proposed Rulemaking and Notice of Inquiry FCC began to describe a common carrier function for CATV. FCC made reference to possible legislation on cable TV. Comprehensive cable TV regulation began with Distant Signal Freeze. FCC asserted more rigorous control over cable operations in top 100 markets. (Notice of Proposed Rulemaking and Notice of Inquiry)

"The function of CATV systems has little in common with the function of broadcasters." (Fortnightly v. United Artists Inc.)

The Right to Access Debate of the 1970s

1969 Supreme Court upheld Fairness Doctrine based on scarcity rationale. (Red Lion v. FCC)

FCC extended the Fairness Doctrine, Equal Time and sponsorship identification rules to cable operator. FCC extended its description of what became public access using the public interest standard.

FCC established the requirement of local origination of programming for all systems with over 3500 subscribers effective January 1, 1971. (First Report and Order)

1971 Sloan Commission on Cable Communication reported on the development of cable and called for the development of public access channels to achieve the potential of local involvement.

1972 FCC's rules on cable television upheld by the Supreme Court. (See First Report and Order, 1969) (U.S. v. Midwest Video Corp.)

New rules in major markets are enacted. These were the first comprehensive rules for cable television. Rules provided for public, educational, governmental (PEG) and leased access by requiring cable systems in the top 100 cable markets. (Cable Television Report and Order).

1974 Citizens do no have the right to access to newspapers. (Miami Herald v. Tornillo)

1975 HBO launched satellite delivery of programming services.

1976 Modification of the FCC's 1972 rules in the Cable TV Report and Order (1972) made access requirements applicable only to cable systems with more than 3500 subscribers. But in the absence of full demand, channels could be combined into one shared access channel. Each system was required to make equipment available at reasonable cost to those using channels and at no charge for programs not exceeding five minutes in length. (Report and Order Docket No. 20508)

1977 Cablecasting is not like broadcasting. (HBO v. FCC)

1978 The Supreme Court treats print differently from broadcast communication. (FCC v. Pacifica)

1978 The Eighth Circuit Court of Appeals declared that the FCC's 1976 rules impermissibly imposed a common carrier obligation on cable operators. (Midwest Video v. FCC)

1979 The Supreme Court determined that the FCC did not have the jurisdiction to require access channels. No ruling was made on the constitutionality of access rules. (FCC v. Midwest Video Corp.)

Regulation Focus Moves From FCC to Local Franchising Authorities in 1980s

1980 FCC eliminated distant carriage and syndicated exclusivity rule (Gullett)(original citation needed).

1982 The monopoly status of cable could justify restrictions on the cable system. But the Circuit Court remanded the Boulder II case for factual findings. (Community Communications Company v. City of Boulder)

The first amendment rights of the cable operator were not violated by the city of Indianapolis's franchising process. (Omega Satellites v. City of Indianapolis)

Court cited Boulder II and found Community Antenna Television to be a natural monopoly. (Hopkinsville v. Pennyroyal Cablevision Inc.)

1983 Red Lion (1969) applied to cable by a Rhode Island Dist. Court (Berkshire Cablevision Inc. v. Burke)

1984 The Supreme Court ruled the FCC can preempt state and local cable regulations. The Court struck down an Oklahoma law requiring the cable operator to delete all wine ads from out of state broadcast programming transmitted to in-state cable subscribers. (Capital Cities v. Crisp)

Cable Communications Policy Act of 1984 amended the Communications Policy Act of 1934 and validated local franchises and the local requirement for access channels.

1986 The Supreme Court refused to declare on the nature of cable and left the question pending until the District Court trial could provide more information. (City of Los Angeles v. Preferred)

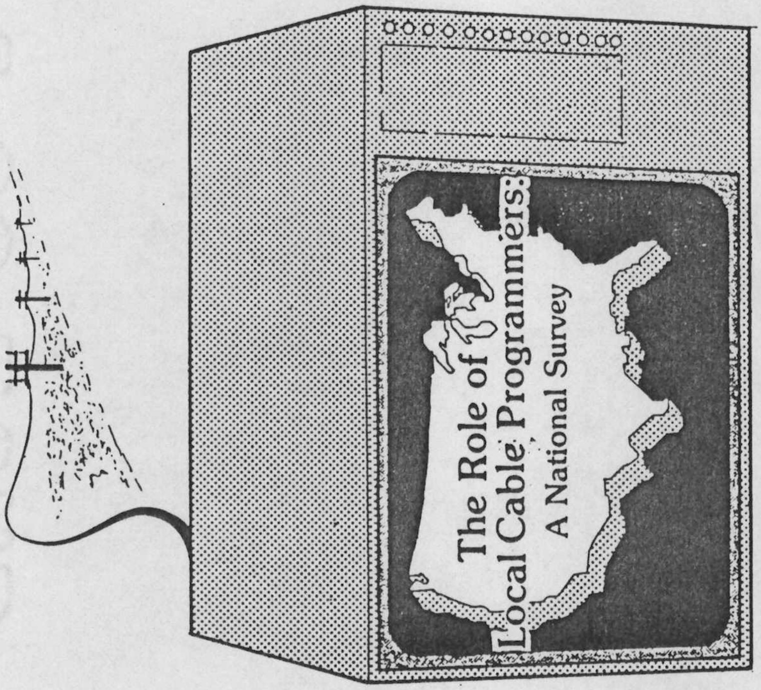
The Supreme Court declared the FCC's must carry rules unconstitutional. (NAB v. Quincy Cable TV)

The DC Circuit Court declares fairness does not apply to teletext because economic restraint is not in the public interest. (TRAC v. FCC)

1987 The Supreme Court determined that the natural monopoly characteristics of the cable market can justify an exclusive franchise in order to create competition for the cable television market. The first amendment does not protect an incumbent cable franchise holder from having to compete with other cable companies when its franchise is about to expire. (TCI Cablevision v. Central Telecommunications)

APPENDIX B

SURVEY INSTRUMENT



This survey will take only a short time to fill out. Please answer all of the questions, then seal the survey with the provided sticker. Drop the postage-paid booklet in the nearest mailbox. The deadline is August 5. Thank you for your invaluable help with this project,

Communications Research Center
University of Tennessee
Knoxville, Tennessee 37996-0330

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

BUSINESS REPLY MAIL

FIRST CLASS PERMIT NO. 477 KNOXVILLE, TENNESSEE

POSTAGE WILL BE PAID BY ADDRESSEE

College of Communications (298)
Communications Building 98
The University of Tennessee
Knoxville, TN 37916

In this questionnaire, access is defined as access by the non-professional to public access channels, and participation in the planning, management and administration of the media process.

A.

1. Rank order the following media with number 1 being the medium most like cable television and 6 being the medium least like cable television in terms of the kinds of things it can provide the viewer.

newspaper _______

magazine _______

radio _______

commercial television _______

telephone _______

postal service _______

INSTRUCTIONS: Answer the following by circling the number that corresponds to your response to the following statements, indicating whether you strongly agree, agree, slightly agree, are neutral, slightly disagree, disagree or strongly disagree.

	Strongly agree	Agree	Slightly agree	Neutral	Slightly disagree	Disagree	Strongly disagree
2. Cable television is like broadcasting because it carries broadcast stations.	1	2	3	4	5	6	7
3. Cable television is like a newspaper in that the owner-operator can decide what will be presented on his channels just as the newspaper publisher can decide what goes on his pages.	1	2	3	4	5	6	7
4. Cable television is like radio in that many stations are available.	1	2	3	4	5	6	7

	Strongly agree	Agree	Slightly agree	Neutral	Slightly disagree	Disagree	Strongly disagree
5. Cable television is like radio in that it can appeal to several audiences with differing interests.	1	2	3	4	5	6	7
6. Cable television is like a common carrier or utility in that the cable owner-operator has no competition from any other cable owner-operator within his franchise district.	1	2	3	4	5	6	7
7. Cable television is like a common carrier or utility in that it is neutral to the content of what goes over the system, simply providing the means for others to communicate.	1	2	3	4	5	6	7
8. Cable television is not like any other medium.	1	2	3	4	5	6	7
9. Cable television combines the characteristics of several different media.	1	2	3	4	5	6	7
B. 1. Cable television operators' right to control what goes over the wire should be protected by the First Amendment right of freedom of the press.	1	2	3	4	5	6	7
2. Cable television monopolies should serve as common carriers of information and services produced by others.	1	2	3	4	5	6	7
3. The right of free speech is meaningless without access to the mass media.	1	2	3	4	5	6	7
4. A constitutional amendment that would expand First Amendment rights of freedom of the press to cable television should be passed.	1	2	3	4	5	6	7

	Strongly agree	Agree	Slightly agree	Neutral	Slightly disagree	Disagree	Strongly disagree
5. Any communications business has a responsibility to provide the public something more than merely that which is the most popular.	1	2	3	4	5	6	7
C.							
1. Cable television programming that is local best serves the public interest.	1	2	3	4	5	6	7
2. Cable television programming that is informational best serves the public interest.	1	2	3	4	5	6	7
3. Giving the public what it wants on cable television best serves the public interest.	1	2	3	4	5	6	7
4. A variety of information sources of cable television programming best serves the public interest.	1	2	3	4	5	6	7
5. The public interest is best served by having a variety of people in control of channels on cable television.	1	2	3	4	5	6	7
6. The public interest is best served in cable television by the franchise process by which the local government gives exclusive rights to furnish cable television to a community in exchange for certain promises of service by the cable television company.	1	2	3	4	5	6	7
7. The marketplace is the best judge of the public interest for cable television.	1	2	3	4	5	6	7
8. The growth of cable television best serves the public interest.	1	2	3	4	5	6	7
9. Hearings and lengthy deliberation on cable television bills that come before Congress is the process that will determine the public interest for cable television.	1	2	3	4	5	6	7

	Strongly agree	Agree	Slightly agree	Neutral	Slightly disagree	Disagree	Strongly disagree
10. A maximum number of voices on cable television best serves the public interest.	1	2	3	4	5	6	7
11. Getting cable television to everyone in a community best serves the public interest.	1	2	3	4	5	6	7
D. 1. Public access cable television provides for a variety of views to be heard in the cable television community.	1	2	3	4	5	6	7
2. When people make their own programs on public access cable television in their community, they are becoming media literate, able to read and write in the cable television medium.	1	2	3	4	5	6	7
3. Viewers of public access cable television can react to what they see and hear by producing their own programs as responses in their community.	1	2	3	4	5	6	7
4. Citizens can make programming policy decisions at a public access center in their community.	1	2	3	4	5	6	7
5. Community members will produce programs if they have access to program production tools.	1	2	3	4	5	6	7
6. Community members will produce programs if they have access to training in the use of production tools that are available to them.	1	2	3	4	5	6	7
7. The First Amendment right of freedom of speech is being denied to community members in an area where there is cable television but there is no public access cable television.	1	2	3	4	5	6	7

	Strongly agree	Agree	Slightly agree	Neutral	Slightly disagree	Disagree	Strongly disagree
E.							
1. The availability of public access cable television ought to be required by law.	1	2	3	4	5	6	7
2. Cable television channels ought to be set aside for public interest programming.	1	2	3	4	5	6	7
3. One owner of a cable franchise in a given community is all that is necessary to provide interest programming.	1	2	3	4	5	6	7
4. Some cable channels ought to be set aside for public access just as public park lands were set aside 100 years ago.	1	2	3	4	5	6	7

F.

INSTRUCTIONS: RATE EACH TYPE of PROGRAM CONTENT USING THE FOLLOWING SCALE On a scale of 1 to 7, a rating of 1 indicates that this type of programming is most likely to serve the public interest and 7 indicates that this type of programming is least likely to serve the public interest. Indicate your answer by circling the appropriate number.

PROGRAM CONTENT	SERVING PUBLIC INTEREST						
	Most						Least
a. Entertainment (including various types of music and dance).	1	2	3	4	5	6	7
b. News programming (only those programs which present information events which occurred within 24 hours of the cablecast)	1	2	3	4	5	6	7
c. Public affairs programming (for example, programming about municipal services or local meetings)	1	2	3	4	5	6	7
d. Religious programming (sermons, religious services)	1	2	3	4	5	6	7

PROGRAM CONTENT	SERVING PUBLIC INTEREST						
	Most						Least
e. Instructional programming (intended to teach the audience how to perform a particular skill	1	2	3	4	5	6	7
f. Local sports programming	1	2	3	4	5	6	7
g. Party politics programming (such as electoral politics)	1	2	3	4	5	6	7
h. Children's programming (designed for an audience under 12 years of age)	1	2	3	4	5	6	7
i. Experimental art ("kinetic art" videotapes, abstract designs and experimental films)	1	2	3	4	5	6	7
j. Informational 1. Ethnic (such as Irish, Italian, Jewish, Afro-American, Puerto Rican)	1	2	3	4	5	6	7
2. Community (community events and activities)	1	2	3	4	5	6	7
3. Health (such as information about drug abuse, free health clinics)	1	2	3	4	5	6	7
4. Public relations (publicizing the activities of a particular group or organization)	1	2	3	4	5	6	7
5. Consumer (for example, programming on dangers of flammable clothing)	1	2	3	4	5	6	7
6. Issue politics (for example, programs supplied by Viet Nam Veterans Against the War)	1	2	3	4	5	6	7
k. Other (Please specify)							

G.

INSTRUCTIONS: Indicate below how often your channel provides the types of programming listed. On a scale of 1-7, a rating of 1 indicates the type of programming is provided very often and 7 indicates the type of programming is not at all provided.

	Very often	Quite often	Often	Sometimes	Seldom	Very little	Not at all
a. Entertainment	1	2	3	4	5	6	7
b. News programming	1	2	3	4	5	6	7
c. Public affairs programming	1	2	3	4	5	6	7
d. Religious programming	1	2	3	4	5	6	7
e. Instructional programming	1	2	3	4	5	6	7
f. Local sports programming	1	2	3	4	5	6	7
g. Party politics programming	1	2	3	4	5	6	7
h. Children's programming	1	2	3	4	5	6	7
i. Experimental art	1	2	3	4	5	6	7
j. Informational 1. Ethnic	1	2	3	4	5	6	7
2. Community	1	2	3	4	5	6	7
3. Health	1	2	3	4	5	6	7
4. Public relations	1	2	3	4	5	6	7
5. Consumer	1	2	3	4	5	6	7
6. Issue politics	1	2	3	4	5	6	7
k. Other (please specify)							

H.

INSTRUCTIONS: Please indicate your answers by checking the response which applies to you:

1. I work in the following area of cable television:

_____ a. Public access cable television station

_____ b. Local origination cable television station

_____ c. Educational access cable television station

_____ d. Governmental access cable television station

_____ e. Leased access cable television station

_____ f. Other (Please describe)______________________________

2. I have worked in cable television for _____ years (please specify).
3. I am a paid worker in cable television _____ (1) yes or _____ (2) no (Please specify)
4. I work _____ (1) part-time or _____ (2) full-time in cable television (Please specify)

   If part-time, please specify hours per week_____ .
5. My title in the field of cable television is ______________________________ (Please specify).
6. My line of business besides cable television is ______________________________ (Please specify).

I.

INSTRUCTIONS: Please answer the following questions for the cable television market you work in. Please answer all questions to the best of your knowledge. An estimate is preferred to no answer at all. "Don't Know" or "Not Applicable" may also be appropriate answers.

1. The number of cable television subscribers in the franchise district is

   _____ a. less than 10,000

   _____ b. 10,001-50,000

   _____ c. 50,001-100,000

   _____ d. 100,001 and above
2. The number of channels possible on our cable system is _____ . (Please specify)
3. The present franchise agreement ends (give year) _____ .

   The length of the franchise agreement is (give number of years) _____ .
4. The system I work in has two-way capability _____ (1) yes or _____ (2) no

   If yes, how often is it used? ______________________________

INSTRUCTIONS: IF YOUR RELATIONSHIP IS WITH A PUBLIC ACCESS STATION, PLEASE COMPLETE THE REST OF THE SURVEY. IF IT IS NOT WITH A PUBLIC ACCESS STATION, PLEASE SKIP TO SECTION K, PAGE 11.

J.

1. The public access station I work with was established as a

   _____ a. direct result of FCC access rule

   _____ b. direct result of franchise agreement

   _____ c. both of above

   _____ d. other (please specify) ______________________________

2. The organization that took responsibility for equipping the public access center was
   _____ a. the cable station
   _____ b. the local government
   _____ c. a non-profit organization
   _____ d. other (please specify) ______________________
3. The public access channel has been cablecasting for (specify number of years) _____ _____ _____
4. The public access center I work in is operated by
   _____ a. the cable company
   _____ b. a non-profit organization
   _____ c. other (please specify) ______________________
5. The total operating budget of the access center is
   _____ a. 0 to $25,000
   _____ b. $25,001 to $50,000
   _____ c. $50,001 to $100,000
   _____ d. $100,001 to $200,000
   _____ e. Over $200,000
6. This amount is used for (specify number of channels). _____
7. If your station combines local origination and access, indicate % of access here: _____
8. Hours of channel time available per day is: _____
   Days per week is: _____
9. Please specify what is being cablecast on the public access channel when regular programming is not on. ______________________
10. Please specify who has control of the public access channel when regular programming is not on. ______________________
11. The following services are provided at the public access station:
    _____ a. Training
    _____ b. Equipment rental
    _____ c. Contract services by staff
    _____ d. Other (please specify) ______________________
12. Audience research has been conducted at the public access center I work with. _____ (1) yes _____ (2) no

K.

INSTRUCTIONS: Please answer the following questions. Your answers will be used only to help us analyze your answers.

1. (check one) _____ Male or _____ Female
2. The last grade of school completed (check one)
   - _____ Grade school (0-7)
   - _____ Some high school (8-11 yrs.)
   - _____ Graduated high school
   - _____ Some college (1-3 yrs.)
   - _____ Graduated college
   - _____ Post-graduate work
3. Degree earned _____ (1) yes _____ (2) no
4. Please specify what the degree was in ______________________________
5. At my last birthday, I belong in the following age group (check one)

   _____ 17 or under _____ 18-24 _____ 25-34 _____ 35-44

   _____ 45-54 _____ 55-64 _____ 65-74 _____ 75 & order

L.

Is there anything else you would like to tell us about your role as a local cable programmer? If so, please use this space for that purpose. Also, any comments you wish to make that you think may help us in future efforts to understand what local cable programmers do will be appreciated either here or in a separate letter.

Your contribution to this effort is greatly appreciated

APPENDIX C

COVER LETTER

College of Communications

THE UNIVERSITY OF TENNESSEE, KNOXVILLE, TENNESSEE 37996-0313

Graduate Studies and
Communications Research Center
(615) 974-6651

July 22, 1983

You are one of a small number of local cable programmers who are being asked to give your opinions on cable television. The U.S. Senate recently has passed a cable television bill. A number of bills on this subject also have been introduced in the House of Representatives. These bills could greatly affect the future of cable television.

However, no one really knows how those involved in local cable programming perceive their role and how this role serves the public interest. This information could be very helpful to those in Congress who are working on cable legislation.

The sample being used was drawn randomly from the membership list of the National Federation of Local Cable Programmers. In order that the results will truly represent the thinking of local cable programmers, it is important that each questionnaire be completed and returned.

You may be assured of complete confidentiality. The questionnaire has an identification number for mailing purposes only. This is so that we may check your name off the mailing list when your questionnaire is returned. Your name will never be placed on the questionnaire. The deadline for the survey is August 5, 1983.

The results of this research will be made available to members of the House Subcommittee on Telecommunications and others working to develop this legislation.

I would be most happy to answer any questions you might have. Please write or call. The telephone number is (615) 974-6651.

Thank you for your assistance.

Sincerely,

Rose M. Kundanis
Project Director

Enclosures

APPENDIX D

FOLLOW-UP POSTCARD

August 1, 1983

Last week a questionnaire seeking your opinion about the role of local cable programmers was mailed to you. Your name was drawn in a random sample of members of the Nat'l Fed. of Local Cable Programmers.

If you have already completed and returned it to us, please accept our sincere thanks. If not, please do so today. Because it has been sent to only a small, but representative, sample of NFLCP members it is extremely important that yours also be included in the study if the results are to accurately represent the opinions of local cable programmers.

If you cannot meet the August 5, 1983, deadline, please complete and return the questionnaire as soon as possible.

Sincerely,

Rose M. Kundanis

Rose M. Kundanis, Project Director

APPENDIX E

FOLLOW-UP LETTER

College of Communications
THE UNIVERSITY OF TENNESSEE, KNOXVILLE, TENNESSEE 37996-0313

Graduate Studies and
Communications Research Center
(615) 974-6651

August 15, 1983

About three weeks ago I wrote to you seeking your opinion on cable television. As of today we have not received your completed questionnaire.

Our research unit has undertaken this study because of the belief that local cable programmers should be taken into account in the formation of public policies for the development of cable television.

I am writing to you again because of the significance each questionnaire has to the usefulness of this study. Your name was drawn through a scientific sampling process in which every member of the National Federation of Local Cable Programmers had an equal chance of being selected. In order for the results of this study to be truly representative of the opinions of all NFLCP members, it is essential that each person in the sample return the questionnaire.

A questionnaire is enclosed for your convenience. A number of people have written requesting results. If you will circle your ID number, I will send results to you when they are available.

Your cooperation is greatly appreciated.

Sincerely,

Rose M. Kundanis

Rose M. Kundanis
Project Director

Enclosure

APPENDIX F

SAMPLE ENVELOPE

College of Communications
UTK Com Bldg. 98
Knoxville, TN 37996-0313

[redacted]

BID 35 712731N1 07/27/83

RETURN TO SENDER
NOT DELIVERABLE AS ADDRESSED
UNABLE TO FORWARD

VITA

Rose Marie Kundanis was born in Oak Park, Illinois, on July 21, 1947. She attended Plato Elementary School in Chicago and was graduated from Austin High School in June 1965. The following September she entered the University of Illinois Chicago Circle, and in June 1969 she received a Bachelor's degree in Teacher Education History. In the fall of 1969 she began teaching history in the Chicago Public Schools at the Manley Branch of Marshall High School. In the fall of 1971 she began study toward a Master of Science degree at the University of Wisconsin, Madison. The Master of Science degree in Curriculum and Instruction was awarded in 1974.

Ms. Kundanis moved to Tennessee in 1974 to accept a teaching position at St. Andrew's School in St. Andrews, Tennessee. In 1978 she entered the Graduate School of The University of Tennessee, Knoxville, and began study toward a doctorate. From 1979 to 1981 she worked as a copy editor for the Tullahoma News in Tullahoma, Tennessee. In 1981 she accepted a teaching assistantship and continued her work toward a doctorate.

In 1983 she accepted an assistant professor position at Marietta College in Marietta, Ohio. As Director of Television for a new cable television facility, she worked in programming, news production and management in addition to teaching.

Ms. Kundanis moved to New Hampshire in 1986 to accept an assistant professor position in journalism at Keene State College. She is developing a broadcast journalism sequence at Keene State.

The author received the Doctor of Philosophy degree with a major in Communications in December 1987. She is a member of the Association for Education in Journalism and Mass Communication.