Regulating Cable Television Rates: A Phantom First Amendment Problem

Matthew Jolly
REGULATING CABLE TELEVISION RATES: A PHANTOM FIRST AMENDMENT PROBLEM

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Abstract: Public concern over cable television's status as a monopoly has generated a movement to allow local franchising authorities to regulate cable service rates. Because the courts have yet to hear a First Amendment challenge to imposing rate regulation on a member of the media, the constitutionality of cable rate regulation is not settled. This Comment argues that the restriction on speech resulting from rate regulation is outweighed by the substantial government interest in preventing unfair monopoly pricing practices.

With the growth of the cable television industry, concern over monopoly pricing tactics has fueled a growing sentiment to impose rate regulation on cable operators. Cable operators currently operate without competition from other providers in 99.5% of cable-wired cities. Since cable television was deregulated in 1986, cable rates have increased 61%, triple the inflation rate. The National Cable Television Association insists that other mediums, such as broadcast television and the home video market, provide effective competition, but the Consumer Federation of America estimates that competition within the cable industry would reduce cable rates by 50%, saving consumers $6 billion a year. In response to national concern, the U.S. Senate recently passed the Cable Television Consumer Protection Act of 1992, a bill which amends title VI of the Communications Act of 1934 to restore the right of local regulatory authorities to regulate cable television rates.

The First Amendment status of imposing rate regulation on cable television has never been addressed by the courts. Other cable regulations have been struck down as violating operators' free speech, but the Supreme Court has yet to define the precise scope of First Amend-

2. Id.
3. The National Cable Television Association is a group of cable operators that conducts lobbying.
4. Hage et al., supra note 1, at 47-48.
ment protection afforded cable television. As a result, lower courts are divided over the extent of permissible regulation of the cable industry.7

Rate regulation should not be considered an abridgement of the First Amendment’s guarantee of freedom of speech. Rate regulation of cable operators does not violate the First Amendment because the restriction imposed on operator speech is outweighed by the substantial government interest in preventing monopoly pricing. Accordingly, the Supreme Court should uphold cable rate regulation in the face of First Amendment challenges.

I. REGULATING CABLE TELEVISION RATES

Whether because of economic scarcity or exclusive franchising, cable television enjoys local monopoly status and operates without competition from other operators.8 As a result, the operators’ ability to increase subscription rates is limited solely by the elasticity of demand9 and there is no need to price competitively.10 In addition, cable operators often obtain exclusive contracts to provide programming in a given area, making it difficult for new operators to break in.11 In some cases, the cable operators actually own the programming provider. The nation’s biggest cable operator, Telecommunications, Inc., owns an interest in TNT and the Discovery channel.12 Time Warner, the nation’s second largest cable operator, owns HBO and Cinemax.13 As a result, new cable operators cannot effectively compete because exclusive contracting and cross ownership prevents them from offering much of the programming available from established providers.

Cable television is subject to little effective cross-medium competition because of its ability to offer unique services. Broadcast television and newspapers cannot provide the diversity of programming available on multi-channel cable systems. Multipoint Distribution Ser-

7. See infra notes 30–33 and accompanying text.
8. Hage et al., supra note 1, at 47.
9. Elasticity of demand is simply a shorthand expression for the relationship between a particular change in the price of a product and the corresponding change in demand for it. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 6–7 (1985).
10. Id. at 17. If the demand is extremely elastic, cable’s monopoly power would be limited because any raise in cable rates would simply cause consumers to forego cable entirely. However, the fact that cable operators have been able to substantially raise rates while gaining customers indicates a demand curve that is not very elastic.
11. See Hage et al., supra note 1, at 47.
12. Id. at 48.
13. Id.
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Satellite Master Antenna Television (SMATV), and home satellite dishes are unable to effectively compete with cable because of high costs and technological limitations. SMATV has roughly one million subscribers whereas, in 1988, 42.8 million households subscribed to cable. As a result, although the service areas of SMATV and cable television often overlap, SMATV is limited to apartment buildings and other complexes and is not prevalent enough to compete with cable. The high cost of home satellite dishes has effectively limited their use to rural areas where cable television is unavailable.

None of these industries competes seriously with cable in their current state of development.

Regulating cable television rates is one way of curtailing cable's monopoly power, but it is a method that is potentially barred by the First Amendment. Whether rate regulation unconstitutionally restricts the free speech rights of cable operators depends both on the specific mechanisms of regulation that are implemented and on the scope of cable operators' expressive activities.

A. Pending Legislation: The Cable Television Consumer Protection Act

The Cable Television Consumer Protection Act, recently passed by the Senate, provides an illustrative example of the way regulation of cable television rates is likely to be implemented. The Act provides that, where a cable system is not subject to effective competition, either the Federal Communications Commission (FCC) or the local franchising authority can impose regulations to insure that basic cable service rates are reasonable. To determine whether a cable operator is subject to effective competition, the Act directs the regulating authority to consider the number of subscribing households in the community and the availability of more than one multi-channel video programming distributor providing comparable programming at comparable rates. The Act directs the regulating authority to consider

15. SMATV links units in a building complex to a single satellite receiver. See id. § 5.08.
16. Home dishes allow their owners to receive satellite broadcasts directly. See id. § 5.09.
18. See GOODALE, supra note 14, § 5.09.
20. Id. § 623. Basic service is the lowest tier of service subscribed to by at least 30% of cable customers. Basic service must include retransmitted local television broadcasts. Id. § 623(b)(1).
21. Id.
operators' rates in other markets, particularly operators subject to effective competition, to determine whether a given operator's rates are reasonable.\textsuperscript{22} The Act is an attempt to prevent the perceived unfair and inefficient rate practices that have resulted from the "undue market power" afforded cable operators by local monopoly status.\textsuperscript{23}

The Act, however, raises First Amendment concerns. Whether the Act or similar regulatory schemes would violate operators' free speech rights depends on the extent of First Amendment protection afforded the cable industry.

\textbf{B. Cable Operators' Status as First Amendment Speakers}

The Supreme Court stated in \textit{City of Los Angeles v. Preferred Communications, Inc.}\textsuperscript{24} that cable television "plainly implicates First Amendment interests."\textsuperscript{25} Preferred Communications sued the city, claiming that its First Amendment rights were violated when the city denied the company a cable franchise.\textsuperscript{26} The Court held that operators act as speakers for First Amendment purposes when they create their own programming for subscribers.\textsuperscript{27} In addition, operators act as First Amendment speakers when they select programming, determining what material is cablecast\textsuperscript{28} and whether material should be included as part of a higher tier of programming available only at an additional charge.\textsuperscript{29} The recognition of cable operators' status as speakers limits the ability of the government to regulate the industry without violating the First Amendment.

Since the \textit{Preferred Communications} decision, operators have attacked government regulation of the industry as an unconstitutional infringement of their First Amendment free speech rights. The operators have challenged access channel requirements,\textsuperscript{30} exclusive

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} \S 623(c)(3).
\item \textsuperscript{23} \textit{Id.} \S 2.
\item \textsuperscript{24} \textit{476 U.S.} 488 (1986).
\item \textsuperscript{25} \textit{Id.} at 494.
\item \textsuperscript{26} \textit{Id.} at 490.
\item \textsuperscript{27} \textit{Id.} at 494.
\item \textsuperscript{28} "Cablecast" refers to the carrying of programming on the cable wire network.
\end{itemize}
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franchising,^{31} mandatory service requirements,^{32} and franchise fees.^{33} The courts have split over whether the regulations violate the First Amendment.^{34} As a result, it is unclear what standard should be used to test the constitutionality of rate regulation.^{35}

II. FIRST AMENDMENT ANALYSIS OF CABLE TELEVISION REGULATION

Despite cable operators' status as First Amendment speakers, not all regulations imposed on cable television unconstitutionally infringe on free speech rights. Some regulations cannot be challenged under the First Amendment because they do not restrict speech.^{36} More importantly, regulations that restrict the speech of cable operators are constitutionally permissible if supported by a substantial government interest.^{37}

A. Regulations that Do Not Restrict Speech

Some media regulations do not infringe on First Amendment interests. To raise a First Amendment issue, a regulation must conflict with the interests that the First Amendment is intended to protect.^{38} Regulations that do not restrict speech or which actually serve First Amendment interests do not violate the First Amendment.^{39} Thus, in

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^{31} Many municipalities grant operators the exclusive right to provide cable service to their residents, resulting in a municipally-insured monopoly position. Cox Cable Communications, Inc. v. United States, 774 F. Supp. 633 (M.D. Ga. 1991) (striking down exclusive franchising); Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987) (striking down exclusive franchising).

^{32} Mandatory service requirements are imposed by municipal authorities to insure that an operator wires the entire city for cable upon being awarded a franchise. Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 399–406 (S.D. Fla. 1991) (upholding universal service requirements).


^{34} See infra notes 38–69 and accompanying text.

^{35} See supra notes 30–33 and accompanying text.

^{36} The sheer quantity of the literature discussing cable's First Amendment status serves as an indication of the confusion involved. See Patrick Parsons, Cable Television and the First Amendment (1987); George H. Shapiro et al., Cablespeech: The Case for First Amendment Protection (1983); Brenner, supra note 29.

^{37} See infra notes 70–94 and accompanying text.

^{38} The First Amendment serves two fundamental purposes: the protection of individual expressive activities and the advancement of the important state interest in the free flow of information. Parsons, supra note 35, at 79.

^{39} See id. at 79–92.
Citizens Publishing Co. v. United States the Supreme Court upheld the application of the Sherman Antitrust Act to the media, saying:

The First Amendment, far from providing an argument against [the] application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse sources is essential to the welfare of the public . . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

Because the Antitrust Act did not restrict free speech but rather preserved the First Amendment rights of the public, it did not conflict with the First Amendment.

1. Generally Applicable Regulations

Like other members of the media, cable television can be constitutionally subjected to generally applicable regulations because such regulations do not present a threat to free speech. For example, the media is subject to labor laws, antitrust laws, and generally applicable taxes. In Leathers v. Medlock, the Supreme Court upheld the extension of Arkansas' sales tax to cable companies in the face of a First Amendment challenge. The Court reasoned that generally applicable taxes do not present the threat of censorship inherent in taxes that single out the media. The breadth of the Arkansas tax limited its utility as a tool for the suppression of speech because an unduly burdensome tax would necessarily be imposed on a broad constituency. Courts have not viewed generally applicable regulations such as the Arkansas tax as a threat to free speech.

43. Associated Press v. NLRB, 301 U.S. 103, 132 (1937) ("The [press] has no special immunity from the application of general laws.").
44. Id.
48. Id.
49. Id. at 1444. Taxes which single out the media are unconstitutional. See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).
50. "[T]he general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition." Leathers, 111 S. Ct. at 1443.
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2. Non-Infringing Media-Specific Regulations: The Importance of Medium Characteristics

Media-specific regulations are likewise constitutional where the regulations do not infringe on First Amendment interests. Although courts have never dealt with the impact of cable rate regulation on the First Amendment, some courts faced with First Amendment challenges to other cable industry regulations have analogized cable to radio and broadcast television. In the case of radio and broadcast television, the Supreme Court has recognized that the scarcity of airwaves necessarily limits the number of speakers and thus conflicts with the First Amendment value of promoting the free flow of information. Accordingly, the Court has held that regulations which seek to compensate for this natural scarcity and promote the free flow of information are permissable even though they may restrict the speech of individual broadcasters.

For example, in Red Lion Broadcasting, Co. v. FCC, the Supreme Court upheld the imposition of limited access requirements on a radio broadcaster. The Court reasoned that the access requirements compensated for the scarcity of available frequencies by allowing other speakers to present their views within the medium. The requirements actually served First Amendment interests by insuring diversity and promoting the free flow of information.

Although cable is not a broadcast medium, some courts facing First Amendment attacks on industry regulation have analogized cable to radio and broadcast television. The courts point to three aspects of the medium that they contend limit the number of speakers and justify compensatory regulations. First, space limitations within utility

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51. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101-02 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-89 (1969) ("It is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

52. "[T]he people as a whole retain their interest in free speech . . . and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Red Lion, 395 U.S. at 390.


54. Id. at 400-01. The limited access requirements at issue in Red Lion gave individuals who had been subjected to a personal attack on the air a right of reply. Id. at 369-72.

55. Id. at 388-89.


easements, like the scarcity of frequencies available for broadcasting, limit the number of speakers able to utilize the medium. Second, cable television is a natural monopoly in which economic forces effectively limit the number of speakers within a given service area to one. Third, the courts point out that the disruption associated with the installation and maintenance of a cable system necessitates limiting the number of providers. The courts reason that exclusive franchising, access channel requirements, and franchise fees are justified because they are essentially compensatory measures that further First Amendment interests by protecting the rights of the viewing public.

A second body of decisions disputes the analogy of cable to radio and broadcast television, arguing that cable television more closely resembles newspapers. In the case of newspapers, there is no physical scarcity which limits the number of possible speakers. As a result, governmental interference with individual speech can not be justified as necessary to insure the free flow of ideas. For example, in *Miami Herald v. Tornillo*, the Supreme Court held that a statute imposing access requirements on newspapers was unconstitutional. The Court stated that economic forces limited the number of newspapers that Miami could support, yet still held that access requirements were an unconstitutional infringement on the paper's editorial discretion.

58. Regulations governing the required spacing between coaxial cables and other utility pipes or wires limit the ability of municipalities to add more services to its utility easements. There is simply a finite amount of space both on the poles and under the streets.


60. Like utilities, fixed costs and economies of scale make competition difficult, thereby discouraging potential competitors and resulting in the creation of monopolies. See *Hovenkamp*, supra note 9, § 1.5.


63. *Id.* at 986–87. The courts also point to these same characteristics of the cable medium as grounds for substantial government interest in regulating providers. See *infra* notes 86–89 and accompanying text.


66. *Id.* The statute at issue granted political candidates a right to equal space to reply to attacks on their record by a newspaper. *Id.* at 243–44.

67. *Id.* How broadly or narrowly to read the court's treatment of economic scarcity as a justification for media regulation is a matter of considerable debate. Some commentators argue that reading the decision as implicitly rejecting the economic scarcity rationale is not justified. See Jerome A. Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 GEO. WASH. L. REV. 1495 (1989); Debora L. Osgood, Note, *Expanding the
Courts analogizing cable to newspapers reject the contention that the cable medium is subject to physical scarcity similar to that of the broadcast media. The courts point out that as long as there is space for overbuilds, the court is not confronted with the situation where there are more speakers than the medium can handle. They dispute cable's status as a natural monopoly and reason that the Supreme Court effectively rejected economic scarcity as a basis for regulation in Tornillo. Finally, they reject the suggestion that the disruption of the public domain associated with cable installation is sufficient grounds for increased regulation. These courts point out that access requirements, exclusive franchising, and franchise fees would be unconstitutional if applied to newspapers and argue that there is no reason to treat cable differently.

B. Infringement on the First Amendment: When Infringement Is Impermissible

In contrast to broadcast regulation and generally applicable laws, many of the regulations imposed on cable operators infringe on First Amendment interests. Not all infringing regulations, however, are impermissible. To determine whether a regulation impermissibly infringes on First Amendment rights, the courts balance the restriction on speech against the government interest served by the regulation.

Different types of regulations require different levels of government interest to pass constitutional muster. Content-based government regulations are only justified if they are narrowly tailored to serve a compelling government interest. Courts that have found cable regu-


69. Overbuilds occur where municipalities add cable to space within existing easements. Many utility easements, both on poles and underground, are expandable. See, e.g., Century Fed., 710 F. Supp. at 1573–74.

70. Group W, 669 F. Supp. at 964.

71. Id. at 965; see supra note 63 and accompanying text.


75. Content-based regulations are regulations which target specific ideas or information. Lawrence H. Tribe, American Constitutional Law § 12-2 (1988).

76. Id. § 12-13.
lations to be content based have uniformly declared them unconstitutional. The constitutionality of content-neutral regulations, on the other hand, is determined by applying the test developed by the Supreme Court in *United States v. O'Brien*. The Supreme Court in *O'Brien* upheld a statute prohibiting the burning of draft cards in the face of a First Amendment challenge. The Court held that content-neutral regulations are constitutional if: (1) the regulation furthers a substantial government interest, (2) the government interest is unrelated to the suppression of free expression, and (3) the restriction on speech is no greater than is necessary to serve the government interest. The Court reasoned that because the government had a substantial interest in insuring the continued availability of draft cards and prohibiting the destruction of draft cards was an appropriately narrow means of protecting that interest, the statute did not violate the First Amendment.

The difference between the standards for content-based and content-neutral regulations is largely one of degree. Content-based regulations are only upheld in unusual circumstances where the government interest served by the regulation is of paramount importance. Content-neutral regulations are upheld as long as there is some government interest that outweighs the relatively minor infringement on speech.

Many cable regulations have been upheld as valid content-neutral regulations. The courts reasoned that the regulations served sub-

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77. The courts have never explicitly dealt with First Amendment challenges to rate regulation, but they have dealt with challenges to many other types of regulation of cable operators. See supra notes 30–33 and accompanying text.
79. Content-neutral regulations are regulations which constrict the flow of information without targeting specific ideas or information. See Tribe, supra note 71, § 12-2.
81. Id.
82. Id. at 377.
83. Id. at 381.
84. Examples of acceptable content-based regulations include defamation laws and prohibition of speech which advocates lawless action. See Tribe, supra note 71, § 12-2.
85. Id.
86. Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 404 (S.D. Fla. 1991) (upholding requirement of universal service throughout city as valid content-neutral regulation); Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 971 (N.D. Cal. 1987) (upholding requirement of disclosure of operator’s financial records); Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985) (upholding access requirements as valid content-neutral regulations supported by a substantial government interest); see also Chicago Cable Communications v. Cable Comm’n, 879 F.2d 1540 (7th Cir. 1989), cert. denied, 493 U.S. 1044 (1990) (upholding requirement that cable operators provide four and one-half hours per week of locally produced and oriented programming).
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Substantial government interests which outweighed the restriction on speech. In the case of access channel requirements, for example, the government interests served included promoting programming diversity and encouraging community participation in production. The court upheld the requirements because the restriction on speech was no greater than necessary to promote the interests being served.

Regulations that do not infringe on the First Amendment because they compensate for scarcity generated by medium characteristics are also justified as valid content-neutral regulations supported by a substantial government interest. The First Amendment goal of promoting the diversity of speakers and the free flow of information also serves as a government interest, justifying regulation. Further, many of the medium characteristics which impact First Amendment interests also impact distinct government interests. For example, limited space within utility easements both limits the number of speakers in the cable medium and restricts the ability of municipalities to grant future utility franchises to serve future needs. Thus, municipalities have an interest of their own to promote which is unrelated to the First Amendment interest of promoting the free flow of information.

Other content-neutral cable regulations have been struck down by courts where the government interest being served was insufficiently substantial. In Century Federal, Inc. v. City of Palo Alto, the district
court invalidated "state-of-the-art" requirements imposed on a local cable franchise. The court held that avoiding the harmful restriction imposed on cable operators' speech outweighed the government's interest in ensuring high quality service.

III. ANY INTRUSION BY RATE REGULATION ON THE FIRST AMENDMENT IS OUTWEIGHED BY STRONG GOVERNMENT INTERESTS

Rate regulation does not violate the First Amendment. Applying the tests set forth in Part II, rate regulation infringes on First Amendment interests because it is media specific. Further, rate regulation is not immune from First Amendment scrutiny because it does not compensate for characteristics of the cable medium which limit the number of speakers. When rate regulation is content neutral, however, it can be justified because it serves a significant government interest in preventing monopoly pricing practices. Courts considering cable rate regulations should uphold them in the face of First Amendment challenges.

A. Rate Regulation Infringes on First Amendment Interests

Rate regulation impacts First Amendment interests. Unlike labor and antitrust laws, rate regulation is not a generally applicable law. Because rate regulation is media specific, it potentially restricts operator speech. Further, rate regulation does not compensate for medium characteristics which limit the number of speakers. Therefore, unlike broadcast access requirements, the restriction on operator speech caused by rate regulation is not outweighed by the competing First Amendment interest in promoting the free flow of information.

1. Rate Regulation Is Subject to First Amendment Scrutiny Because It Is Not Generally Applicable

Rate regulation restricts speech because it is not a generally applicable law. Unlike labor and antitrust laws, rate regulation singles out a member of the media. Rate regulation poses a potential threat of censorship not found in generally applicable regulations because it is

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96. A "state-of-the-art" cable system required that the system be fully two-way and interactive and that two coaxial cables be installed. Id. at 1556.
97. Id. at 1556-57.
98. Id.
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media specific. As a result, courts addressing rate regulation will be concerned that the mechanisms of regulation will be used to assert government control over operator speech.

Rate regulation could adversely impact speech because it is media specific. Although the overall impact on speech would be minimal, it would be significant enough to require scrutiny under the First Amendment. Rate regulation could restrict operator speech by inhibiting the willingness and ability of cable operators to deliver programming. Even if regulatory authorities choose not to change cable rates at all, the threat of crippling regulation might operate effectively as a censor. Fear of regulatory retaliation could have a chilling effect on a cable operator's willingness to carry controversial or critical programming.

In addition, rate regulation would impact revenues, perhaps forcing cable operators to cut costs. Less money would be available to expand the wire network and increase market penetration, slowing the expansion of cable's audience. Similarly, less money would be available to spend on programming. Overall quality might deteriorate with low production values diminishing viewership and undermining the operator's ability to effectively communicate. The operator could be forced to raise the price of tiered programming to compensate for revenue shortfalls, thereby decreasing the number of subscribers.

Finally, rate regulation might prevent operators from creating

100. For example, in Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), the Supreme Court held that taxes which single out the media violate the First Amendment. See supra notes 43–48 and accompanying text.

101. See, e.g., Minneapolis Star, 460 U.S. at 585 (the threat of severe taxation from a media-specific tax could operate as a censor in violation of the First Amendment). Rate regulation, however, can be distinguished from an unconstitutional tax on the media in other respects. See infra note 145 and accompanying text.

102. Shapiro et al., supra note 35, at 157. It is important to note, however, that revenues would only be affected to the extent that they are unreasonable. Thus while operators would perhaps have less money, it is in some sense only their ill-gotten gains which they would be losing.

103. Id.; see, e.g., Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) ("The tax here involved is bad not because it takes money from the pockets of the [publishers] . . . . It is bad because it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees.").


105. See Shapiro et al., supra note 35, at 157.

106. Id.
programs at the "margin of interest" because they would no longer be profitable, thereby adversely affecting the diversity of available programming.

Although rate regulation might adversely impact operator speech, the scope of that impact is limited. Rate regulation would only restrict operator speech if current revenues are being spent on increasing the quality and availability of programming. To the extent rate regulation reflects a competitive market price, however, the reduction in revenues caused by rate regulation should simply act to reduce profits that would otherwise go into the pockets of cable operators. So long as only monopoly profits are reduced, the effect of rate regulation on the quality, diversity, and availability of programming should be minimal. Just as the "freedom to combine to keep others from [speaking]" is not guaranteed by the First Amendment, neither is the freedom to realize monopoly profits from speech.

2. Rate Regulation Is Not an Attempt to Compensate for Characteristics of the Cable Medium Which Impact Speech Interests.

Rate regulation is not an attempt to compensate for medium characteristics which limit the number of speakers. Cable rate regulation restricts individual speech without substantially increasing the amount and diversity of programming. This distinguishes rate regulation from the access requirements imposed on radio and broadcast television where the small restriction imposed on individual speech is outweighed by the competing First Amendment value of promoting

107. Programs at the "margin of interest" are programs which appeal only to a narrow segment of the cable audience rather than the mainstream. Losing such programs could have a significant impact on the types of programming available.


109. Some commentators point out that regulation of basic cable service rates will not hinder growth in the cable industry because basic service is not the avenue for current growth. Rather, growth is occurring primarily in higher tier or specialty services and in local advertising, neither of which is regulated under the current bill. Id.

110. See infra notes 120-25 and accompanying text.

111. Citizen's Publishing v. United States, 394 U.S. 131, 140 (1969); see supra note 41 and accompanying text.

112. See supra part II.A.2.

113. In fact, by forcing cost-cutting measures, rate regulation could limit the availability and diversity of programming. See supra notes 96-103 and accompanying text.

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the free flow of information. Thus, courts faced with a First Amendment challenge to rate regulation need not determine whether cable television is more analogous to broadcast or print media. Even if space limitations within utility easements or economic forces limit the number of speakers within the cable medium, rate regulation conflicts with the First Amendment because it is not an attempt to compensate for scarcity by increasing speaker access to the medium.

B. Although Rate Regulation Infringes on First Amendment Interests, the Infringement Is Outweighed by the Substantial Government Interest in Preventing Unfair Monopoly Pricing Practices

Although rate regulation restricts speech, it is constitutional because the restriction imposed on operator speech is outweighed by the substantial government interest in preventing unfair prices. Whether a given government interest is sufficiently substantial depends in large part on a subjective weighing of the restriction on speech against that interest. Here, the potential restriction on operator speech is limited because rate regulation is content neutral and only affects monopoly profits. Given the current status of the cable industry, the significant government interest in preventing unfair market practices by monopoly providers outweighs the relatively minor restriction on operator speech.

I. Cable Rate Regulation Is Content Neutral

The Cable Television Consumer Protection Act provides an example of a content-neutral mechanism for imposing cable rate regulation. Although the Act applies only to basic service, basic service is defined in a content-neutral manner. To prevent cable operators from tiering out of rate regulation, the Act provides that regulation

114. See supra note 50 and accompanying text. Here, although the restriction imposed on operator speech is small, there is no corresponding attempt to significantly promote the free flow of information.
115. See supra notes 55–56 and accompanying text.
116. See supra notes 57–58 and accompanying text.
117. This subjective element accounts for the disagreement among courts over the constitutionality of specific cable regulations. See supra notes 30–33.
118. See supra notes 8–18 and accompanying text.
119. It is possible that content-based rate regulation could be imposed. Such regulation would likely be unconstitutional because it would not be narrowly tailored to serve a compelling government interest. See supra notes 70–74 and accompanying text. However, content-neutral rate regulation is much more likely because it would effectively address the current problems of the cable market.
can be imposed on the lowest tier of service subscribed to by at least thirty percent of the cable system's customers if fewer than thirty percent subscribe only to basic service.121 This distinction is not based on content, however, since the programming included in either basic or tiered service is left to the discretion of the operator.122 Thus, under the current Act and any likely legislation responding to monopoly pricing concerns, rate regulation applies to all cable operators, without regard to the content of their programming. Courts addressing this type of content-neutral regulation should apply the O'Brien test.123

2. Rate Regulation Is Constitutional Under the O'Brien Test

Cable rate regulation is constitutional under the O'Brien test.124 First, rate regulation furthers a substantial government interest in preventing unfair monopoly pricing. Second, the government interest in preventing pricing abuses is unrelated to the suppression of free expression. Finally, the restriction on speech is no greater than is necessary to serve the government interest being furthered.

a. Rate Regulation Furthers the Substantial Government Interest in Preventing Unfair Cable Rates

The government interest served by rate regulation is the prevention of unfair monopoly pricing practices.125 Cable's monopoly status is economically inefficient and unfair to consumers. As local monopolies, cable providers can increase rates to maximize profits without fear of being undercut by competitors.126 Rate regulation provides a framework of accountability for subscription rates normally provided by a competitive market. In a competitive market, a customer can switch to a different provider if service is inadequate or pricing is

121. Id. § 623(b)(1).
122. "A cable operator may add to or delete from a basic cable service tier any video programming other than retransmitted local television broadcast signals." Id. § 623(b)(3). The requirement that local broadcast signals be retransmitted does not mean that the Act is content-based. The cable operator must carry the local signal as part of its basic service regardless of the content of the broadcast. Thus, the Act's "must carry" provision is not an attempt by the government to control the content of cable television, it simply limits the content control given to the operator.
123. United States v. O'Brien, 391 U.S. 367 (1968); see supra notes 74–78 and accompanying text.
124. Id. at 377; see supra notes 75–79 and accompanying text.
126. As monopolies, cable operators can increase the unit price until the revenue gained is outweighed by the revenue lost through decreased sales. HOVENKAMP, supra note 9, § 1.2. The result is waste because consumers buy less of the monopolized product even though it costs less in terms of real resources to produce. Id. § 1.3.
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unfair. No such opportunity exists where the provider is a monopoly. In place of the consumers' ability to purchase cable services from a competitor, rate regulation invests local franchising authorities with the power to insure reasonable rates. Regulatory accountability allows the viewing public to have an impact on cable rates and service without foregoing cable entirely.

It is not the role of the courts to determine whether rate regulation is the best solution to the problem of monopoly pricing in the cable industry. Regulation of industries has often been criticized as expensive, ineffective, and unfair. Concern over the effectiveness of regulation combined with a faith in free market mechanisms served as the engine driving the deregulation of cable television and other industries in the 1980s. Whether the free market or a regulatory regime better deals with the problem of monopoly power, however, is a policy question that should be resolved at the legislative level. Rate regulation satisfies the first element of the O'Brien test because it is a reasonable attempt by the government to further its substantial interest in preventing unfair monopoly pricing by cable operators.

b. The Interest Served by Rate Regulation Is Unrelated to Suppression of Speech

The government interest in controlling monopoly pricing is not related to the suppression of free expression. The Cable Television Consumer Protection Act, for example, does not arbitrarily single out a small group of providers within the cable industry and present the potential for abuse involved in intramedium discrimination. Neither is there any evidence that the drive for regulation of cable rates is motivated by a desire to suppress the speech of cable opera-

128. Id.
130. Under the Cable Television Consumer Protection Act, viewers could operate through the local regulatory agency to insure reasonable rates. Without regulation, the only way subscribers can affect cable rates is to cancel their subscriptions and go without cable service.
131. See, e.g., Breyer, supra note 123, at 1–4.
132. See Hage et al., supra note 1, at 43–44.
133. Thus it is not the courts’ job to determine whether rate regulation is the best means for dealing with monopoly power as long as it does further the government interest in preventing unfair pricing.
134. See Minneapolis Star & Tribune v. Minnesota Comm’r of Revenue, 460 U.S. 575, 591–93 (1983) (use tax on newspaper supplies held to violate the First Amendment because it singled out a small group of publishers within the press).
Rather, rate regulation is motivated by the desire to prevent unfair monopoly pricing, to promote fairness and efficiency. As a result, rate regulation satisfies the second part of the O'Brien test.

c. The Restriction Imposed on Speech by Rate Regulation Is No Greater than Necessary

The restriction on speech imposed by rate regulation is no greater than is essential to further the government interest in preventing monopoly pricing practices. First, rate regulation would only affect providers who have local monopolies. Providers who were competing with other cable operators or with similar mediums would not be subject to rate regulation. Second, only monopoly profits would be affected. The ability of cable operators to market and deliver their programming would not be substantially impaired. In addition, the potential for abuse by the regulatory agency would be checked by the courts and the FCC. Thus, if a regulator is abusing its authority in an attempt to control programming content, the operator can file a complaint with the commission or challenge the regulator's actions in court.

Antitrust laws will not provide a less restrictive solution to monopoly pricing practices. Antitrust laws are designed to remove private impediments to a competitive market. In the case of cable, the obstacles to workable competition are not private; rather, they are inherent in the industry. Because of the fixed costs associated with wiring a city for cable service, operators find it progressively cheaper to supply extra units of service. This economy of scale is sufficiently great such that the unit cost of service would rise significantly if more than one operator served a given area. As a result, new operators

135. See Grosjean v. American Press Co., 297 U.S. 233, 242–51 (1936) (tax on small group of newspapers was unconstitutional because it was an attempt to limit circulation of information).
136. See supra part III.B.2.a.
137. In the Cable Television Consumer Protection Act, regulation is only authorized where the operator is not subject to effective competition. S. 12, 102d Cong., 1st Sess. § 623(b)(1) (1991).
138. Id.
139. See supra note 105 and accompanying text.
141. See BREYER, supra note 123, at 159 ("Antitrust is not . . . an effective way to control the market power of a natural monopolist.").
142. Id. at 159.
143. For a short explanation of natural monopoly theory, see HOVENKAMP, supra note 9, § 1.5.
144. Id.
are unwilling and unable to compete with established providers.\textsuperscript{145} Further obstacles to a competitive market result from the practice of exclusive franchising.\textsuperscript{146} Antitrust laws do not provide an effective alternate solution to the problem of monopoly pricing because the problem of cable's undue market power is not the result of private impediments to competition.

Taxing monopoly profits is not a less restrictive solution to the problem of unfair pricing in the cable industry.\textsuperscript{147} Taxation potentially impacts speech in much the same way as rate regulation because it reduces revenues.\textsuperscript{148} Further, a tax would not necessarily eliminate the burden placed on consumers. It would simply transfer excess profits from the operator to the government. In addition, taxes that single out the media are presumptively unconstitutional because there are less restrictive means for generating revenue.\textsuperscript{149} Courts might be suspicious that a tax on the cable industry was really a revenue generating measure in disguise and consequently hold it unconstitutional. As a result, taxing the cable industry is not a less restrictive solution to monopoly pricing.\textsuperscript{150}

IV. CONCLUSION

Courts considering cable television rate regulation should hold that such regulation is constitutional under the First Amendment. Although rate regulation impacts operator speech, the impact is minimal because rate regulation only affects monopoly profits and it is imposed without regard to program content. Given the current condi-

\begin{itemize}
  \item \textsuperscript{145} In addition, exclusive contracts and cross ownership between operators and programming providers make it difficult for new operators to break in. See supra notes 8-13 and accompanying text.
  \item \textsuperscript{146} See supra note 31 (discussion of exclusive franchising).
  \item \textsuperscript{147} The government need not apply the least restrictive regulation imaginable to pass the \textit{O'Brien} test. Courts need not conjure up every conceivable alternative means by which the government might achieve its interest. Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1559, 1569 n.16 (N.D. Cal. 1988).
  \item \textsuperscript{148} A tax designed to prevent monopoly profits would tax all profits over a specified percentage at a rate of 100%. See Breyer, \textit{supra} note 123, at 164–71. Taxation would cause operators to cut costs, decreasing the availability and diversity of programming. Any attempt by operators to pass on the tax to the consumers would fail since the increased revenues would be taxed at the 100% rate.
  \item \textsuperscript{149} See Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585–86 (1983) (taxes which single out the media are unconstitutional because revenue can be generated just as effectively by generally applicable taxes without endangering free speech). In contrast, there is no less restrictive method than rate regulation for eliminating unfair pricing.
  \item \textsuperscript{150} Another possible alternative solution would be nationalization of the cable industry. Nationalization, while solving many of the economic problems, would result in an extreme form of government control over the content of programming.
\end{itemize}
tions of the cable industry, the government interest in insuring fairness and accountability for cable rates outweighs the potential impact on operator speech. The balance of interests favors rate regulation.