EXTENDING *PRUNEYARD*: CITIZENS' RIGHT TO DEMAND PUBLIC ACCESS CABLE CHANNELS

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> Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.[1]
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> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press . . . , as we must here, we remain mindful of the fact that the latter occupy a preferred position.[2]
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> [J]udicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas.[3]

Shopping centers became the new frontier of free speech jurisprudence during the 1960s.[4] As the mall transformed the American civic landscape, supplanting and privatizing the town square, the doctrine of the public forum, originally conceived to protect speech in public space, was transplanted to protect speakers on certain types of

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1 Denver Educ. Tele-Communications Consortium, Inc. v. FCC, Nos. 95-124, 95-227, 1996 U.S. LEXIS 4261, at *132 (U.S. June 28, 1996) (Kennedy, J., joined by Ginsburg, J., concurring in part and dissenting in part).

2 Marsh v. Alabama, 326 U.S. 501, 509 (1946).

3 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 314 n.14 (1984) (Marshall, J., joined by Brennan, J., dissenting).

4 See, e.g., Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 318-19 (1968) (analogizing shopping mall to company town earlier found, in *Marsh*, to be engaged in state action, and ruling that employees have right to picket in shopping center). See generally Curtis J. Berger, *Pruneyard* Revisited: Political Activity on Private Lands, 66 N.Y.U. L. Rev. 633 (1991) (reviewing free speech in shopping centers).

private property.[5] While the Supreme Court subsequently extinguished the federal constitutional right to speak in private shopping centers,[6] its decision in *PruneYard Shopping Center v. Robins*[7] left open the door for a more robust reading of the public forum doctrine under state constitutional law.

An appreciation of the importance of diverse viewpoints and of the commingling of those viewpoints in a democratic society animates the protection of public speech achieved by the public forum doctrine.[8] This Note proposes that cable access advocates should ground a similar claim to access under the public forum doctrine as it has been interpreted in state courts. Cable television, and soon the new technologies of communication labeled the "information superhighway," will far outstrip the shopping mall in altering the terms and domain of public discourse.[9] The arguments that commended extension of the public forum doctrine to the mall thus resonate even louder in the context of those communications media.[10]

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[5] See *Logan Valley*, 391 U.S. at 319-20 (analogizing mall to town square, necessitating public function analysis); cf. *Marsh*, 326 U.S. at 503 ("[T]he town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation."). Some date the acceptance of the "public forum doctrine" to the Supreme Court's decision in Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972). See, e.g., Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1714 (1987) (noting that Supreme Court first used words "public forum" in *Mosley* (citing Harry Kalven, Jr., The Concept of the Public Forum: *Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1)). Throughout this Note, the term "public forum" is used, ahistorically, to denote the principle that speech in public spaces (or private spaces cloaked with a public function) merits special protection.

[6] Concluding that it was contradictory to allow labor picketing in a mall, as it had in *Logan Valley*, but not to allow the protest against the Vietnam War at stake in Lloyd Corp. v. Tanner, 407 U.S. 551, 561-64 (1972), the majority in Hudgens v. NLRB, 424 U.S. 507 (1976), announced "that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case." Id. at 518.

[7] 447 U.S. 74 (1980).

[8] See, e.g., Richard Sennett, The Fall of Public Man (1976) (tracing history of public space and discourse from Roman Empire to present); Berger, supra note 4, at 637-48 (extolling importance of public forums as central to realization of democratic values).

[9] See generally Samir Jain, Note, The Message in the Medium: The First Amendment on the Information Superhighway, 107 Harv. L. Rev. 1062 (1994) (analyzing new information technologies in light of First Amendment doctrine). The Supreme Court addressed the sweeping power of the cable industry in its recent decision in Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2451-55 (1994). As Part III.A, infra, demonstrates, while the *Turner Broadcasting* decision did not speak directly to claims for public access, it did affirm the importance of diversity more generally by accepting the constitutionality of "must-carry" rules (which require cable operators to carry broadcast television stations), subject to additional findings of fact by the lower court. Id. at 2470-72.

[10] See, e.g., David J. Goldstone, The Public Forum Doctrine in the Age of the Information Superhighway, 46 Hastings L.J. 335, 350-54 (1995) (applying public forum doctrine to information superhighway, emphasizing its potential as outlet for "personal expression").

This Note explores the analogy between the shopping center and cable television and proposes the application of the public forum doctrine to cable systems as an argument for public access channels.[11] The implications of this analogy, if successful, are twofold. First, if cable is a public forum, it provides a new and powerful argument for access advocates in cities that, while wired for cable, are without access channels.[12] Second, it staves off attempts by cable operators to rid themselves of terms in franchise agreements requiring access channels, as those agreements come up for renewal. These channels, an underutilized yet potent medium of citizen discourse, are under steady attack by the cable industry[13] and Senators Jesse Helms and Strom Thurmond.[14]

The public forum doctrine was extended to the shopping mall during an era of expanding federal free speech rights.[15] The federal doctrine contracted in 1976,[16] but the mall was reclassified as a public

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[11] This argument is suggested in Jain, supra note 9, at 1091, and in Mark Mininberg, Circumstances Within Our Control: Promoting Freedom of Expression Through Cable Television, 11 Hastings Const. L.Q. 551, 596-97 (1984). Cf. Denver Educ. Tele-Communications Consortium, Inc. v. FCC, Nos. 95-124, 95-227, 1996 U.S. LEXIS 4261, at *94, *112-*18 (U.S. June 28, 1996) (Kennedy, J., joined by Ginsburg, J., concurring in part and dissenting in part) (concluding that public access channels are public forums). Cable systems deliver video images from a central transmission facility to subscribing households, each of which is connected to the facility by cables traveling through public easements (underground utility conduits or aboveground utility poles). See Daniel L. Brenner et al., Cable Television and Other Nonbroadcast Video § 3.03 (1991). Public access channels are cable channels reserved for public, educational, or governmental use. They are made available to the public on a first-come, first-served basis. Access channels have been set aside as a result of negotiations between a local franchising authority and a cable operator bidding for a franchise to operate a cable system within a community. Cable Act of 1984, 47 U.S.C. § 531 (1994). There is another category of access channels that this Note does not discuss—leased access channels. These channels are made available for commercial use, as mandated by federal law. Cable Act of 1984, 47 U.S.C. § 532 (1994). By contrast with public access channels, cable operators charge programmers for the use of leased access channels. Id.

[12] A 1984 study found that less than 10% of cable systems provided public access channels. Dom Caristi, Expanding Free Expression in the Marketplace: Broadcasting and the Public Forum 108 (1992) (citing R. Garray, Cable Television 68 (1988)).

[13] One example of industry efforts in this direction has been the attempt by cable operators and broadcasters to invalidate the permissive authority, derived from the 1984 Cable Act, of municipal franchising authorities to require and enforce public access obligations. See, e.g., Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 6-7 (D.D.C. 1993) (dismissing claim by plaintiffs that 1984 Cable Act interfered with their free speech rights by cabining editorial discretion).

[14] See, e.g., 138 Cong. Rec. S647 (daily ed. Jan. 30, 1992) (submission of Sen. Helms) (decrying cable access programming); 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (submission of Sen. Thurmond) (same).

[15] *Logan Valley* was decided in 1968, during the height of the Warren Court.

[16] See Hudgens v. NLRB, 424 U.S. 507, 519 (1976) (finding no federal constitutional right protecting speech on private property of shopping center).

forum as a precept of *state* constitutional law in 1980 with the Supreme Court's decision in *PruneYard*.[17] In that case, the Court held that a state could expand citizens' rights beyond those guaranteed by the federal Constitution, provided such expansion did not violate another's federal constitutional rights. The protection of speech rights in private shopping centers by the State of California at issue in *PruneYard* violated neither (a) the First Amendment, by infringing the speech rights of the owners of the PruneYard,[18] nor (b) the Fifth Amendment, by effecting an uncompensated taking of the PruneYard's property.[19] These two prongs of federal constitutional analysis constitute what will be referred to as "the *PruneYard* test."

This Note engages in an analysis parallel to that undertaken in *PruneYard*. Part I situates the *PruneYard* decision within the public forum doctrine, then considers the similarities and differences between cable systems and shopping centers. Part II explores the history of access regulation, comparing attempts to promote diversity in newspapers, broadcast television, and cable. Part III subjects cable access regulations to the First Amendment prong of the *PruneYard* test, in light of the (murky) standard of intermediate scrutiny applied by the Supreme Court to cable television in *Turner Broadcasting System, Inc. v. FCC*.[20] Finally, in anticipation of a potential challenge by cable operators to access regulations, Part IV analyzes cable access regulation under the second prong of the *PruneYard* test—the takings

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17 447 U.S. 74 (1980).

18 Id. at 87-88.

19 Id. at 88.

20 114 S. Ct. 2445 (1994). While the recent Supreme Court decision in Denver Educational Tele-Communications Consortium, Inc. v. FCC, Nos. 95-124, 95-227, 1996 U.S. LEXIS 4261 (U.S. June 28, 1996), provides an additional gloss on the Court's First Amendment analysis of cable television, the Court's six opinions do little to clarify the decision in *Turner Broadcasting*. For the purposes of this Note, the more recent case is inapposite. The issue before the Court—whether Congress could permit and encourage cable system operators to censor "indecent" programming on public and leased access cable channels—was addressed without engaging in the larger question of whether the requirement that cable operators provide those channels in the first instance was permissible. See *Denver Educ. Tele-Communications*, 1996 U.S. LEXIS 4261, at *27-*30 (Breyer, J., plurality opinion). While the larger question was controversial, it was left for another day, compare id. at *121-*22 (Kennedy, J., joined by Ginsburg, J., concurring in part and dissenting in part) ("The constitutionality under *Turner Broadcasting* of requiring a cable operator to set aside leased access channels is not before us." (citation omitted)) with id. at *162 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in part and dissenting in part) ("Though the constitutionality of leased and public access channels is not directly at issue in these cases, the position adopted by the Court in *Turner* ineluctably leads to the conclusion that the federal [leased] access requirements are subject to some form of heightened scrutiny."). As a result, an analysis of the continued viability of public access requirements must begin and end with the analogy to must-carry as assessed by the *Turner Broadcasting* Court.

clause of the Fifth Amendment.[21] This Note concludes that, following *PruneYard*, public access advocates can and should pursue a strategy of claiming speech rights that may be more broadly enforceable under their state constitutions, unimpeded by cable operators' arguments based on either the First or Fifth Amendments to the United States Constitution.

I
PRIVATE PROPERTY AND THE PUBLIC FORUM DOCTRINE

The public forum doctrine protects speech in, and a speaker's right of access to, spaces that fulfill an important communicative function in the community.[22] This Part explores the doctrine, and in particular, its application by courts protecting speakers' access rights to property that, while private, plays a vital role as an arena for discourse. The paradigmatic example of a public forum on private property has been the modern shopping center. While the Supreme Court has reversed field in this area, retreating from an earlier position in which it privileged the speech rights of the public over the speech and property rights of the shopping-center owner, the Court has left room for states to prefer the rights of the public.[23] This Note urges states to apply the public forum doctrine to cable television, guaranteeing citizens a right of access to a potentially powerful medium of public discourse.[24]

Section A reviews the public forum doctrine. Section B refracts that doctrine through the principles articulated in *PruneYard Shopping Center v. Robins*,[25] the germinal case supporting the characterization of a shopping center as a public forum. Section C then compares the salient characteristics of shopping centers and cable systems.

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[21] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Such a challenge was endorsed by at least one circuit. See Midwest Video Corp. v. FCC, 571 F.2d 1025, 1057-59 (8th Cir. 1978) (suggesting that takings clause barred FCC from imposing public access regulations on cable systems), aff'd on other grounds, 440 U.S. 689 (1979).

[22] See, e.g., Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). See generally Post, supra note 5 (describing history and theory of public forum doctrine).

[23] See infra Part I.B.

[24] For a general discussion of the public forum doctrine and new communications and information technologies, see Goldstone, supra note 10 (arguing that information superhighway comprises both public and private forums).

[25] 447 U.S. 74 (1980).

A. The Public Forum Doctrine

The public forum doctrine has emerged over the last sixty years as a nuanced approach to the protection of speech in public places and, in some limited instances, in private places that have become forums for public discourse.[26] The concept of the public forum has its roots in the Supreme Court's opinion in *Hague v. Committee for Industrial Organization*,[27] in which government officials were barred from restricting speech on public streets.[28] Over time, the principle that streets must be reserved for public discourse has been extended to embrace other public, and even private, spaces.[29]

A public forum, first and foremost, is a forum in which ideas are exchanged, where discourse is more likely to receive a hearing than in other, less public places.[30] Valid restrictions on speech within public forums must be content-neutral, serve a significant governmental interest, and leave open alternative channels of communication.[31] These conditions constitute what are referred to as "time, place, or manner" restrictions.[32]

Furthermore, alternative channels of communication must offer similar opportunities to reach an audience.[33] As the Ninth Circuit has

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26 See generally Kalven, supra note 5, at 21 (delineating early contours of public forum doctrine).

27 307 U.S. 496 (1939).

28 Id. at 516 (invalidating ordinance requiring permits for public gathering as "instrument of arbitrary suppression of free expression").

29 See generally Laurence H. Tribe, American Constitutional Law §§ 12-24 to -25 (2d ed. 1988) (analyzing development of public forum doctrine); Kalven, supra note 5, at 10-21 (same); Post, supra note 5, at 1718-58 (same). While the public forum doctrine has come to represent a modern attempt by the Court to balance competing interests against the First Amendment, and has evolved into one of the more tangled areas of doctrine, this Note confines its discussion of the public forum to the narrower principle that speech in public (and sometimes private) spaces is entitled to protection because of the nature of the space.

30 See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 55 (1983) ("In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject."); Tribe, supra note 29, § 12-24, at 987 ("The designation 'public forum' thus serves as shorthand for the recognition that a particular context represents an important channel of communication in the system of free expression.").

31 See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980) (articulating definition and analysis of time, place, or manner regulations); see also Tribe, supra note 29, § 12-24, at 992-93 (defining constraints on speech restrictions in public forum).

32 *Consolidated Edison*, 447 U.S. at 535.

33 See Thomas I. Emerson, The Affirmative Side of the First Amendment, 15 Ga. L. Rev. 795, 807-08 (1981) ("The system demands access to an audience, and places where people congregate in public are natural locations for those seeking to reach potential listeners."); cf. Schneider v. State, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exer-

said: "A law allowing free expression in public parks only for a few minutes at 6 a.m. hardly provides an adequate replacement for the right to free, untrammeled debate in that forum."[34] The need for alternative channels of communication was recently affirmed when the Fourth Circuit invalidated federal restrictions on ownership of cable systems by telephone companies.[35] The court's reasoning was based in part on its conclusion that nonvideo channels of communication left open to phone companies did *not* constitute adequate alternative channels.[36] If nonvideo alternatives are inadequate for the phone company, they must also be inadequate for the aspiring public access cable programmer. Furthermore, because of the absence of access requirements for other media, some dissenting voices may be entirely unable to reach an audience without public access channels.[37]

The principle that alternative channels of communication must be available raises the more general question of how much access is required. Is there a presumptive right of access to the public forum for all speakers or only a guarantee that access will be meted out according to nondiscrimination principles? This Note takes the position that the First Amendment commands the former rule—access must be available for all who seek it, regulated if necessary by content-neutral time, place, or manner restrictions.[38]

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cised in some other place."), quoted in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (suggesting that even presence of alternatives might not justify suspension of right to speak in public).

[34] Preferred Communications, Inc. v. City of L.A., 754 F.2d 1396, 1410 (9th Cir. 1985), aff'd, 476 U.S. 488 (1986). The Ninth Circuit ruled that the leased access opportunities offered to cable operators not designated the exclusive franchisee by Los Angeles did not constitute adequate alternatives to control over an entire cable system. See also Schad v. Mount Ephraim, 452 U.S. 61, 75-76 (1981) ("To be reasonable, time, place, and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication." (citing Grayned v. City of Rockford, 408 U.S. 104, 116, 118 (1972); Kovacs v. Cooper, 336 U.S. 77, 85-87 (1949))).

[35] Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 199-203 (4th Cir. 1994), vacated and remanded, 116 S. Ct. 1036 (1996) (per curiam) (vacating and remanding for determination of mootness).

[36] Id. at 203 n.37 ("The appellants do not seriously suggest that the telephone companies' ability to transmit non-video programming with full editorial control serves as a channel of communication that is a viable alternative to the provision of 'video programming.'").

[37] See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-58 (1974) (finding unconstitutional Florida statute requiring newspapers to publish editorial replies); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 130-32 (1973) (finding First Amendment does not require FCC to "mandate a private right of access to the broadcast media").

[38] For a more complete discussion of these two models of public access, see Sheila M. Cahill, Note, The Public Forum: Minimum Access, Equal Access, and the First Amendment, 28 Stan. L. Rev. 117, 118-32 (1975) (tracing development of conflicting minimum access and equal access approaches to public forum speech regulation).

B. *Public Speech on Private Property:* PruneYard

The Bill of Rights generally protects individuals against the authority of the government, rather than against the authority of other individuals or private actors.[39] Therefore, to bring the First Amendment to bear against a private actor, a party must persuade a court that the private actor is undertaking a function typically fulfilled by,[40] or in some way acting under the authority of,[41] the state.

Courts have extended the public forum doctrine to private property when they have deemed the owner of that property to be fulfilling a state function.[42] The most notable example is the case of *Marsh v. Alabama*,[43] in which the Supreme Court found a privately owned company town to have supplanted the role of the state to such a degree that people in the town were entitled to constitutional protection against the company's actions.[44] At issue was an attempt by a Jehovah's Witness to distribute materials within the town. That attempt was interrupted by the owners of the town, who demanded the plaintiff desist pursuant to a company rule, and had her arrested under a state criminal statute.[45] The Court ruled that the town had assumed most of the functions of government, necessitating First and Fourteenth Amendment analyses under which the ordinance was found unconstitutional.[46]

The primary doctrinal offspring of *Marsh* have been the cases addressing the expressive rights of individuals in privately owned shopping centers.[47] The Supreme Court analogized shopping centers to

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[39] See Tribe, supra note 29, § 18-1, at 1688 (discussing state action doctrine).

[40] See id. § 18-5, at 1705-11 (describing public function doctrine).

[41] See id. § 18-4, at 1703-05 (defining "under color of law" requirement for constitutional claims).

[42] See, e.g., Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391, 394-96 (7th Cir. 1975) (finding that, because it was "functional equivalent of a municipality for its residents," company-owned migrant labor camp was public forum); cf. Frisby v. Schultz, 487 U.S. 474, 481 (1988) (characterizing residential street as public forum, despite difference in character from other, more public streets); Carey v. Brown, 447 U.S. 455, 460 (1980) (finding prohibition on peaceful picketing on residential streets and sidewalks to be regulation of constitutionally protected expressive conduct).

[43] 326 U.S. 501 (1946).

[44] See id. at 505-10 ("The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees.").

[45] See id. at 503-04.

[46] Id. at 507-10.

[47] See Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (denying First Amendment claim by labor picketers in shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) (denying First Amendment claim by war protesters in shopping center, on grounds that their speech was unrelated to activities of businesses in shopping center and therefore could be conducted as effectively outside of mall); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 318-19 (1968) (reversing injunction preventing

the company-owned town in its first decision in this area.[48] Subsequent decisions narrowed the scope of that opinion, and the Supreme Court finally overruled it, holding in *Hudgens v. National Labor Relations Board*[49] that the federal Constitution did not guarantee individuals the right to speak in privately owned shopping centers.[50]

In 1980, the Court in *PruneYard Shopping Center v. Robins*[51] held that state constitutions *may* extend individual rights beyond those provided for in the federal Constitution.[52] A student organization had been barred from distributing pamphlets and collecting signatures for a petition within the PruneYard Shopping Center.[53] The students sought an injunction in California state court to prevent the shopping-center owner from denying them access to the mall, claiming that the owners had violated their speech rights as guaranteed by the California Constitution.[54] The defendants argued that forcing them to allow speech in their mall would (a) enforce a right not explicitly protected by the federal Constitution;[55] (b) effect a taking in violation of the Fifth and Fourteenth Amendments;[56] and (c) infringe on their own free speech rights as protected by the First and Fourteenth Amendments.[57]

The Court rejected these arguments in turn. It found that although prior decisions barred a federal constitutional claim that free speech principles protected speech on private property in the absence of state action, those decisions did not preclude an assertion of *state* authority in support of such speech, provided no federal constitutional right was violated in the process.[58]

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labor picketing in shopping center, reasoning that injunction violated First Amendment because center closely resembled company town to which state action doctrine was applied in *Marsh*).

48 *Logan Valley*, 391 U.S. at 319-20 (holding that public may "exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put").

49 424 U.S. 507 (1976).

50 Id. at 518. See supra note 6 for a more complete discussion of reasoning.

51 447 U.S. 74 (1980).

52 Id. at 88.

53 Id. at 77.

54 Id.

55 Id. at 80-81.

56 Id. at 82-85.

57 Id. at 85-88.

58 Id. at 81. The extension of speech rights in *PruneYard* was accomplished through an expansive reading of the speech clause of the California Constitution. Id. at 80. That clause reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. 1, § 2. The expansive reading in *PruneYard* was justified as a legitimate exercise of the state's police power. *PruneYard*, 447 U.S. at 81 (noting that prior cases limiting federally protected speech rights did not "limit the author-

The Court denied the PruneYard owners' contention that to permit the students access to the mall, and to protect their right to speak, would be to infringe on the PruneYard's speech rights as guaranteed by the federal Constitution. The mall owners relied in part on *Miami Herald Publishing Co. v. Tornillo*,[59] a case that found unconstitutional a Florida statute mandating a right of reply for political candidates attacked in the press.[60] In rejecting this claim, the *PruneYard* Court noted that the PruneYard had no analogous editorial function to protect.[61] The PruneYard owners also drew on *Wooley v. Maynard*,[62] in which the Supreme Court overturned a state law requiring the display of the state motto on license plates, holding that it was a form of forced speech prohibited by the First Amendment.[63] The *PruneYard* Court distinguished *Wooley* because there the government was the author of the forced message, the publication of which served no governmental interest.[64] By contrast, the PruneYard was not being required to post a particular state message, and it was also easier for the mall owners to disavow any connection to the speech of the students.[65]

Addressing the takings claim, the Court acknowledged that the speech activities of the students represented an intrusion into the

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ity of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"). While the language of the California Constitution differed from that used in the federal Constitution, and thus could plausibly be read to protect speech on the private property of others, similar language has not always led other state courts to so broadly read their own constitutions. Compare Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719, 720-21 (Ariz. 1988) (interpreting Ariz. Const. art. II, § 6, which reads "Every person may freely speak, write, and publish on all subjects," to require state action, and upholding ban on speech in shopping center) and SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1214-18 (N.Y. 1985) (reaching same conclusion under N.Y. Const. art. I, § 8, containing identical language) with Bock v. Westminster Mall, 819 P.2d 55, 59-63 (Colo. 1991) (broadly reading Colo. Const. art. II, § 10, "every person shall be free to speak, write or publish whatever he will on any subject," to protect right to speak in private shopping mall) and Lloyd Corp. v. Whiffen, 773 P.2d 1294, 1299-1302 (Or. 1989) (avoiding constitutional issues, instead refusing to enjoin speech in private shopping mall because injunction would impair public interest in speech, since Or. Const. art. I, § 8, provides only that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever").

59 418 U.S. 241 (1974).

60 Id. at 256-57. See infra notes 101-09 and accompanying text for a more complete discussion of *Tornillo*.

61 *PruneYard*, 447 U.S. at 88 ("[T]he [right of reply] statute was found to be an 'intrusion into the function of editors.' These concerns obviously are not present here." (quoting *Tornillo*, 418 U.S. at 258)).

62 430 U.S. 705 (1977).

63 Id. at 714-17.

64 *PruneYard*, 447 U.S. at 87.

65 Id.

owners' right to exclude.[66] However, the takings claim was undermined by the public's heavy use of the mall—at the invitation of the owners, it was visited by 25,000 shoppers a day—and the consequently minimal impairment in value represented by the added presence and speech of the students.[67] The Court also noted the strong governmental interest advanced by granting the students access, an interest promoted through an exercise of the police power that was clearly related to that interest.[68] Concluding that neither the First Amendment nor the federal property rights of the PruneYard owners had been infringed, the Court upheld the students' rights of expression and petition on private property.[69]

Under *PruneYard*, states can, through an expansive reading of their constitutions, extend speech rights beyond those enunciated in the federal Constitution. Since *PruneYard*, several state courts have followed California in extending speech rights to protect speech on the private property of others.[70] Their analyses have generally focused on whether the extension of those rights violates the federal rights of the property owner.[71] Cable access advocates should be able to claim similarly broad speech rights, based on an expansive reading of state constitutions. At least in the states that have followed California, access advocates have a credible argument that *PruneYard* mandates public access channels. The success of this strategy will turn on

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[66] Id. at 82.

[67] Id. at 82-84.

[68] Id. at 84-85.

[69] Id. at 88.

[70] See Berger, supra note 4, at 633-36 (reviewing case law on speech in shopping centers). Results have been mixed, with the majority of courts denying expanded speech rights, while a number of courts favor citizens' speech rights over property rights. Compare New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 771 (N.J. 1994) (upholding right of access to shopping center), cert. denied, 116 S. Ct. 62 (1995) and Bock v. Westminster Mall, 819 P.2d 55, 61 (Colo. 1991) (same) and Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 591 (Mass. 1983) (same) and Lloyd Corp. v. Whiffen, 773 P.2d 1294, 1301 (Or. 1989) (same) and Alderwood Assocs. v. Washington Envtl. Council, 635 P.2d 108, 116-17 (Wash. 1981) (same) with Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719, 723-24 (Ariz. 1988) (declining to uphold right of access to shopping center) and Cologne v. Westfarms Assocs., 469 A.2d 1201, 1210 (Conn. 1984) (same) and Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., L.P., 392 S.E.2d 8, 10 (Ga. 1990) (same) and SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1218 (N.Y. 1985) (same). Although the record on speech in shopping centers would appear to offer little promise to cable access advocates seeking helpful, analogous precedent, the discussion in Parts III and IV of this Note suggests that the claims mall owners make against a speaker's access to their property are stronger than those cable operators would be able to make.

[71] See, e.g., *New Jersey Coalition*, 650 A.2d at 779-80; *Bock*, 819 P.2d at 62; Lloyd Corp. v. Whiffen, 849 P.2d 446, 449-50 (Or. 1993).

the applicability of the *PruneYard* analysis to the cable context.[72] Before turning to that analysis, the next section tests more fully the analogy between cable access and speech in shopping centers.

C. *Shopping Centers and Cable Television Systems*

For commentators writing about cable television, shopping centers have provided a natural analogy.[73] Both play a central role in civic life and public discourse, as primary loci for the gathering of people and thus as places in which a speaker can best reach an audience. In this way, the mall and cable television have inherited the legacy of the company town in *Marsh v. Alabama*.[74] Both forums are part of a general trend away from public space: the shopping center as a replacement for the downtown shopping area with its public spaces,[75]

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[72] As an initial matter, the cable advocate has the implicit approval of Congress, see, e.g., Cable Act of 1984, 47 U.S.C. § 531(a)-(b) (1994) (permitting municipalities to require cable access channels in exchange for franchises to operate cable systems), and of the most recent federal court to rule on the constitutionality of access regulations, see Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 6-7 (D.D.C. 1993) (upholding the constitutionality of those provisions in the Cable Act). This approval suggests a reluctance on the part of the legislative and judicial branches to find the violation of the federal Constitution necessary to invalidate the expansion of rights represented by *PruneYard* and, by analogy, access channels. However, the Supreme Court's decision in FCC v. Midwest Video Corp., 440 U.S. 689, 708 (1979) (invalidating FCC regulations requiring provision of public access channels by every cable system above certain subscriber base as beyond authority of FCC), has the same effect as Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (denying federal speech right to demonstrate on private property of shopping-center owner). In both situations, speech advocates are forced to base future claims on state constitutional grounds because the federal claim was denied. However, in the case of federal public access requirements, a congressional mandate (as differentiated from FCC regulatory action) may be constitutional, as the Court in *Midwest Video* expressly declined to decide on the constitutionality of the access regulations. *Midwest Video*, 440 U.S. at 709 n.19 ("[W]e express no view on [the First Amendment] question, save to acknowledge that it is not frivolous and to make it clear that [it] did not determine or sharply influence our construction of the statute.").

[73] See, e.g., Caristi, supra note 12, at 40 (juxtaposing shopping center and cable access in discussion of public forum doctrine); Warren Freedman, Public Speech on Private Property 61-82 (1988) (analyzing shopping centers and cable access against backdrop of Fifth Amendment); Tribe, supra note 29, § 12-25 (framing discussion of private forums as "[f]rom shopping centers to the media"); cf. Goldstone, supra note 10, at 367 (analogizing entire information superhighway to shopping mall); Jain, supra note 9, at 1091-93 (exploring similarities and differences between speech on "information superhighway" and in shopping centers); Herbert I. Schiller, Public Way or Private Road?, Nation, July 12, 1993, at 64-65 ("Much like shopping malls, in which store sites are offered on the basis of the likely revenues the establishment will generate, future transmissions [on the information superhighway] will be determined by commercial criteria.").

[74] 326 U.S. 501 (1946).

[75] See, e.g., Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324-25 (1968) (documenting rise of shopping mall); New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 766-68 (N.J.

and cable television as the dominant system for the delivery of televised media, thought by some to have displaced all civic life.[76]

There are other, more pedestrian similarities. The shopping center consists of a variety of stores, each of which exercises autonomous "editorial control" over its inventory selection, yet each of which must, at least initially, secure the approval of the center owner, who is trying to make her facility as attractive as possible to the public. A cable system consists of channels, space on which is allotted to programmers who exercise autonomous editorial control over program content, each of whom must have been selected by the cable operator in her efforts to make her service as attractive as possible to the public.[77] In both contexts, the fact that the mall or cable system owner is at least one step removed from the "products" being provided to the public reduces the likelihood that the public will associate those products with the owner of the complex or system. To put it another way, we often stroll through malls (or flip through channels) undisturbed by the stores (or programs) that are of no interest to us. Rather, we search for that which does interest us—and as long as we find *that*, we continue to frequent the mall and subscribe to cable.

Offsetting these similarities are three critical distinctions between shopping centers and cable systems, one of which weakens a cable access claim based on *PruneYard* and state constitutional interpretation and two of which strengthen that claim. First, the cable operator has a stronger speech claim against the imposition of public forum

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1994) (same; noting that "shopping centers . . . have in fact significantly displaced downtown business districts as the gathering point of citizens").

[76] See, e.g., Robert D. Putnam, Robert Putnam Responds, in Unsolved Mysteries: The Tocqueville Files, Am. Prospect, Mar.-Apr. 1996, at 26 (attributing decline in civic life to hegemony of television) (responding to critiques of Robert Putnam, The Strange Disappearance of Civic America, Am. Prospect, Winter 1996, at 34).

[77] Market economics would suggest that this is the most efficient manner in which to allocate channel space. See generally Mark S. Fowler & Daniel L. Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207 (1981) (urging replacement of broadcast licensing regime with market-based system vesting licensees with property rights). However, to equate the economic marketplace with the marketplace of ideas is to miss the point of this core motive force behind the First Amendment. The marketplace of ideas is a paean to viewpoint diversity. A diverse range of ideas may not survive the test of the economic market—particularly when entry into that market requires the substantial capital needed to build a cable system or develop programming that will attract advertising revenue. See generally Jerome A. Barron, Freedom of the Press for Whom?: The Right of Access to Mass Media 4-7 (1973) (analyzing barriers to media present in American society); Jerome A. Barron, Access to the Press: A New First Amendment Right, 80 Harv. L. Rev. 1641, 1666-67 (1967) [hereinafter Barron, Access to the Press] (identifying need for new conception of First Amendment that includes right of access to press); Emerson, supra note 33, at 807-31 (arguing that constraints on access to audiences create an affirmative obligation on government to promote free expression through provision of facilities for speakers).

status than the mall owner. Mall owners are not generally thought of as "speakers,"[78] while cable operators are considered to be engaged in speech meriting some protection under the First Amendment.[79] Thus, any intrusion into the speech functions of a cable operator demands closer attention than similar intrusions against a shopping-center owner.

Conversely, the access advocate's claim is strengthened because the cable operator has a weaker argument than does the mall owner that the imposition of access requirements will effect a taking of her property. The mall is *real* property; the cable system is *personal* property, and as such, entitled to a lower level of protection under the Fifth Amendment's takings clause than real property.[80]

Lastly, an access advocate's claim is strengthened by characteristics inherent to cable access and telecommunications that raise important issues regarding alternative channels of communication,[81] issues that are less pronounced in the shopping-mall context. For example, although the absence of a right of access to a shopping center does not preclude a speaker from reaching her audience in alternative public spaces, lack of access to a cable system may prevent the speaker from reaching her audience through alternative video communications media. Although there are a multitude of alternative media to which a speaker may gain access, including the Internet and the ever-available

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[78] See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (distinguishing speech claim of newspaper in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) from that made by mall owner, because the mall owner has no parallel claim of "'intrusion into the function of editors'"); cf. Jain, supra note 9, at 1091-92 (suggesting that speakers on information superhighway would be entitled to greater First Amendment protection than owners of PruneYard shopping center).

[79] See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."); Leathers v. Medlock, 499 U.S. 439, 444 (1991) ("[Cable television] is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'"). For further discussion of a cable operator's First Amendment rights, see infra Part III.

[80] See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992) (noting lesser degree of protection accorded personal property (citing Andrus v. Allard, 444 U.S. 51, 66-67 (1979))). For further discussion of personal and real property distinction, see infra Part IV .

[81] The existence of alternative channels of communication is an important element in the inquiry into the legitimacy of any regulation of speech. See, e.g., Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 288 (1984) (upholding restriction because it did not impede access to alternative channels of expression); Tribe, supra note 29, § 12-24, at 990-91, § 12-25, at 999-1001 (discussing absence of alternative avenues of communication as factor in public forum analysis); cf. Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 202-03 (4th Cir. 1994) (invalidating regulations preventing phone companies from offering video services on alternative ground that such regulations failed to leave open alternative channels of communication), vacated and remanded, 116 S. Ct. 1036 (1996) (per curiam).

pamphlet, the power of visual mass media is hardly interchangeable with these alternatives.[82]

In addition, the shopping mall provides more options for alternative forums than the cable context. Even where the shopping center is a unique forum, analogous public spaces are typically available; for example, shopping-center parking lots may be viable communicative alternatives to the interior spaces of the shopping center. Cable systems are, by contrast, almost always the only cable system in their viewing area.[83] That monopoly status means that cable operators control access to alternative channels of information for households that depend on cable retransmission to receive television signals (sixty percent of television households nationwide[84]). The Court in *Turner Broadcasting* referred to this control as stemming from the cable operator's "gatekeeper" or "bottlenecking" role.[85] Thus, while individuals seeking access to a large number of people in person may be able to find them in the center of town, or in the shopping-center parking

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[82] The force of a televised image far outstrips that of even the most well-written or shocking pamphlet. See, e.g., *Chesapeake & Potomac Tel. Co.*, 42 F.3d at 203 n.37 (recognizing that ability of phone companies to transmit nonvideo signals was not "a viable alternative to the provision of 'video programming'"). See generally Todd Gitlin, The Whole World Is Watching (1980) (documenting impact of television news on American attitudes towards Vietnam War); H. Marshall McLuhan, The Global Village (1961) (speculating about societal impact of then-current information technology); H. Marshall McLuhan, The Medium is the Massage (1967) (same). Although the Internet enables one to transmit visual and even video images, the hardware, software, and technical know-how to do either successfully are beyond the economic and educational capacity of a vast majority of the United States population. By contrast, the very nature of public access cable television is to provide access to a cable audience without the expenditure of money, making it an economically democratic communications medium. The cost of communicating has been a background consideration in a series of free speech decisions the last half of this century. See, e.g., Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); see also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 314 n.14 (1984) (Marshall, J., joined by Brennan, J., dissenting) ("[T]his case . . . lends credence to the charge that judicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas."); Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting) ("There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places."). To the extent that an alternative channel of communication is either less potent (the pamphlet) or prohibitively expensive to those seeking access to the public forum (the Internet), it would appear to be an inadequate alternative.

[83] Less than one percent of communities wired for cable are served by more than one operator. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 39 n.16 (1993), vacated and remanded, 114 S. Ct. 2445 (1994).

[84] *Turner Broadcasting*, 114 S. Ct. at 2454.

[85] Id. at 2466 ("A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.").

lot, cable access programmers, denied access by a cable operator, are unlikely to find other ways to reach the television audience with video messages.[86] Furthermore, speakers who hold certain minority viewpoints may be unable to reach an audience through any form of mass communication because of the absence of any right to access to more traditional media.[87] Under the public forum doctrine, the limited number (or absolute absence) of alternatives to cable television strengthens the argument for public access.[88]

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Although the *PruneYard* Court easily dismissed the mall owners' claim that allowing a right of access on the part of unwanted speakers to the mall represented an infringement of the owners' First Amendment right to editorial control, a First Amendment claim by a cable operator in an analogous situation would demand greater attention. The Supreme Court has explicitly recognized that cable operators may claim a First Amendment right protecting their editorial discretion.[89] In order to establish a right of access to cable under the public forum doctrine as articulated in *PruneYard*, access advocates must limit the protection due that editorial discretion. This is accomplished in the next two Parts of this Note. Part II mines the history of access regulations imposed on newspapers, television broadcasting, and cable, in

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[86] In fact, under the logic applied by Congress in passing the "must-carry" provisions of the 1992 Cable Act § 4, 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(A) (1994), and by the *Turner Broadcasting* Court in finding those provisions constitutional, *Turner Broadcasting*, 114 S. Ct. at 2466, the "bottleneck control" cable operators enjoy over the television programming to which a cable subscriber may have access pushes cable television ever closer to the standard announced in Marsh v. Alabama, 326 U.S. 501 (1946), in that it becomes the sole source of electronic information. Id. at 507 ("Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."). For a more complete discussion of bottleneck control, see infra Part III.

[87] The Supreme Court has endorsed the importance of minority viewpoints in broadcasting. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 600-01 (1990) (upholding affirmative action in granting of broadcast licenses). Although the Supreme Court has recently overruled *Metro Broadcasting*'s principal holding that intermediate scrutiny should be applied to benign racial classifications designed to ameliorate past discrimination, see Adarand Constructors v. Pena, 115 S. Ct. 2097, 2112-13 (1995), diversity retains its vitality in the absence of racial classifications. Thus, provided a regulatory scheme to promote viewpoint diversity is neutral as to race (or other suspect classifications) and content (as would be public access regulations), that scheme would presumably escape the strict scrutiny mandated by *Adarand*. See infra Part III.B for a more complete discussion of diversity and the appropriate level of scrutiny.

[88] See supra notes 29-34 and accompanying text.

[89] See Denver Educ. Tele-Communications Consortium, Inc. v. FCC, Nos. 95-124, 95-227, 1996 U.S. LEXIS 4261, at *36-*38 (U.S. June 28, 1996) (Breyer, J., plurality opinion); *Turner Broadcasting*, 114 S. Ct. at 2456 (quoting Leathers v. Medlock, 499 U.S. 439, 444 (1991)).

search of the most appropriate First Amendment standard to apply to cable access regulation. Part III uses the *PruneYard* analysis to test cable access regulations against the First Amendment. It locates the cable operator within the landscape of media regulation, relying on the Supreme Court's decision in *Turner Broadcasting System, Inc. v. FCC*[90] to draw out the First Amendment standard currently protecting the speech rights (including the editorial control) of cable operators. Part IV completes the *PruneYard* analogy by examining access regulations within the context of the takings clause.

II
A History of Access Regulation

This Part first explores the level of protection due cable television under the First Amendment and then compares attempts to mandate access to the press, broadcast television, and cable. It concludes by considering whether the cable operator's editorial discretion should be protected by the higher standard applicable to newspapers, by the somewhat looser standard applied to broadcast television, or by a third standard crafted specifically for cable. This Note takes the position that cable access regulations should be evaluated under the third standard, applying an intermediate level of scrutiny.

A. The Elusive Categorization of Cable Television

From its introduction, cable television has both defied categorization as a media and eluded the application of a consistent First Amendment standard.[91] At stake in this battle over the categorization of cable television is the constitutionality of all forms of regulation currently imposed on cable operators, and, of course, the continued constitutionality of access regulations.

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[90] 114 S. Ct. 2445 (1994).

[91] When cable was first developed, it was viewed as a conduit for programming developed by others, leading broadcasters fearing the market threat posed by cable to urge regulation of the new industry under the common carrier regime. The FCC declined to do so in 1959. Douglas H. Ginsburg et al., Regulation of the Electronic Mass Media 70 (2d ed. 1991). In subsequent cases, courts treated cable operators as though they were television broadcasters. See Berkshire Cablevision v. Burke, 571 F. Supp. 976, 985-87 (D.R.I. 1983) (applying Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), and its looser level of First Amendment protection accorded broadcast television to cable television), vacated as moot, 773 F.2d 382 (1st Cir. 1985). Recently, cable operators have sought, and in some cases been granted, the higher degree of protection accorded newspapers. See, e.g., Leathers v. Medlock, 499 U.S. 439, 444 (1991) (extending speech and press protections of First Amendment to cable operators); Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, 1555 (N.D. Cal. 1987) (analogizing function of newspaper editors to that of cable operators).

The *PruneYard* Court easily dismissed the shopping-center owners' speech claim by distinguishing *Miami Herald Publishing Co. v. Tornillo*,[92] in which a right-of-reply statute that required newspapers to make space available to political candidates subject to personal attacks was ruled a violation of the editorial discretion—as protected by the First Amendment—of the *Herald*. The Court found the concern about editorial discretion misplaced in connection with a shopping center.[93] Had the shopping center been successfully compared to a newspaper, its owners' First Amendment claim would have been far more compelling. Similarly, if a cable operator succeeds in analogizing her enterprise to a newspaper, she will be able to defeat a *PruneYard*-based access argument.

The initial confusion about cable's status centered on whether cable operators were common carriers[94] or broadcasters.[95] This uncertainty served to justify the FCC's early reluctance to assert jurisdiction over the industry. While the FCC had jurisdiction over both common carriers and broadcasters, the regulatory regimes applied to each differed considerably, creating a lacuna into which fell cable, a mongrel technology.[96] The ambiguity persisted through the end of the 1970s and was the basis for the Supreme Court's rejection of federal public access requirements imposed by the FCC on all cable operators.[97] The Telecommunications Act of 1996 clarified the field some-

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92 418 U.S. 241 (1974).

93 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

94 Common carriers (for example, the telephone company or the railroads) enjoy monopoly status in the provision of service to the public. In return, they are required to provide service to every member of the public, often at rates established by the government. The early role of cable as a conduit for the transmission of broadcast signals to outlying areas was most similar to the role of the common carrier. Common carriers traditionally are not deemed speakers for the purposes of the First Amendment. See Ginsburg et al., supra note 91, at 56-68.

95 Broadcasters enjoy the ability to transmit radio or television signals through the air, pursuant to licenses granted by the FCC under authority of the Communications Act of 1934. 47 U.S.C. § 301 (1994 & Supp. V 1996). In contrast to common carriers, broadcasters are accorded protection as speakers under the First Amendment. The level of protection accorded broadcasters has varied over the last 70 years. See infra notes 112-18 and accompanying text for discussion of the fairness doctrine.

96 Midwest Video Corp. v. FCC, 571 F.2d 1025, 1030 (8th Cir. 1978) (citing series of FCC reports throughout 1960s evincing Commission's conclusion that cable was neither common carrier nor broadcaster), aff'd, 440 U.S. 689 (1979).

97 FCC v. Midwest Video Corp., 440 U.S. 689, 704-09 (1979) (holding that § 3(h) of Communications Act of 1934 barred federal public access requirements which imposed common carrier obligations on broadcasters). However, arguments have been made that it is consistent with prior Supreme Court decisions to treat cable as a hybrid common carrier and broadcaster, bifurcating its role much as the Court bifurcated the role of the Associated Press in Associated Press v. United States, 326 U.S. 1, 19-20 (1945) (determining that AP's status as newsgathering *business* could be separated from its editorial functions—its role as *speaker*, noting that "[f]reedom to publish is guaranteed by the Constitution, but

what by creating the unitary category of telecommunications carrier.[98] It remains unclear how (or indeed, if) this legislation will result in the development and application of a similarly unified theory of the First Amendment, or whether continued functional distinctions between common carriers and video programmers will lead courts to preserve doctrinal distinctions.

The cable industry has been arguing for the last decade and a half that cable operators and programmers should receive the same First Amendment protection granted publishers of newspapers, magazines, and books—that cable operators, as speakers, should be viewed as distinct from and entitled to greater free speech protection than television or radio broadcasters.[99] Television broadcasters, municipalities, and public access advocates, on the other hand, have remained steadfast in their contention that cable operators and programmers are more similar, for First Amendment purposes, to broadcasters than to newspapers and other traditional media.[100]

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freedom to combine to keep others from publishing is not"); see also Brief of American Civil Liberties Union, Amicus Curiae at 10 n.9, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (No. 93-44) (citing *Associated Press*, noting bifurcation of roles of business and speaker).

98 Telephone companies, cable operators, and other entities performing functions traditionally viewed as common carrier or broadcasting will now be regulated under the new law. Telecommunications Act of 1996, Pub. L. No. 104-104, § 3(49), 110 Stat. 56, 60 (1996) (defining "telecommunications carrier"); id. § 301(j), 110 Stat. 56, 117 (defining common carrier responsibilities); id. § 302, 110 Stat. 56, 118-25 (governing video services offered by phone companies).

99 See Leathers v. Medlock, 499 U.S. 439, 444 (1991) (establishing that cable operators are engaged in speech and thus entitled to some First Amendment protections); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1447-50 (D.C. Cir. 1985) (invalidating must-carry rules because they violate even less stringent standard of First Amendment analysis, yet suggesting that cable is entitled to higher degree of protection than television), cert. denied, 476 U.S. 1169 (1986); Home Box Office, Inc. v. FCC, 567 F.2d 9, 43-46 (D.C. Cir.) (finding important differences between cable and broadcast television and invalidating cable regulations), cert. denied, 434 U.S. 829 (1977). See generally Ithiel de Sola Pool, Technologies of Freedom 246 (1983) (proposing that "the First Amendment applies fully to all media").

100 The interests motivating the position of each of these partners are somewhat divergent. For example, television broadcasters urge continued imposition of must-carry regulations on cable to ensure channel space for television broadcasts. By contrast, municipalities have until recently clung to their ability to grant exclusive franchises to cable operators, in order to extract the most favorable terms from franchise applicants. See, e.g., Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, 1557 (N.D. Cal. 1987) (invalidating franchise process that required applicants to provide state-of-the-art cable to all households in Palo Alto, Atherton, and Menlo Park, including five public, educational, and governmental ("PEG") channels, eight leased channels, universal service, and interactive capability). Access advocates have been motivated by a desire to establish or preserve access rights. See, e.g., Michael I. Meyerson, The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements, 4 Comm/Ent 1, 2 (1981) (advocating preservation and extension of cable access requirements be-

To better understand the First Amendment standards applicable to the categories of newspaper, television broadcaster, and cable operator, the discussion now turns to a brief history of the regulation of each of these categories.

B. Access to Communications Media

Since cable access regulations are but one of several attempts to carve out a right of access to various communications media, cable regulations are best understood in light of those other attempts. The next three sections consider in turn the history of access rights to the press, broadcast television, and cable television.

1. Access Requirements for the Press

The Supreme Court, in *Miami Herald Publishing Co. v. Tornillo*,[101] ruled unconstitutional any regulation of the press that interfered with editorial control.[102] In a passage pivotal for those contesting the relevance of *Tornillo* to cable, the Court acknowledged that, although newspapers represented economically scarce forums for discussion,[103] regulation of that "scarcity" could not be reconciled with the First Amendment.[104] This conclusion was reached by privileging the rights of the press as speaker above those of the citizen

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cause they "further the goals of the First Amendment"); Deborah L. Osgood, Expanding the Scarcity Rationale: The Constitutionality of Public Access Requirements in Cable Franchise Agreements, 20 U. Mich. J.L. Ref. 305, 305 (1986) (same). A deeper analysis of these interests is beyond the scope of this Note.

101 418 U.S. 241 (1974).

102 At issue in *Tornillo* was a fifty-year-old Florida statute requiring any newspaper that published material attacking a candidate for public office to provide space in its pages for that candidate to respond. Id. at 244 & n.2. This statute was invoked by Patrick Tornillo, Jr., a candidate for the state legislature, when two articles decrying his candidacy appeared in the *Herald*. Id. at 243. Rather than concede reply space to Tornillo, the *Herald* appealed the constitutionality of the statute all the way to the Supreme Court. Id. at 245-47. The Court found that the statute violated the First Amendment, because it interfered with the constitutionally protected discretion of the editors to choose the material that would appear in their paper. It also threatened to chill controversial speech—speech the editor might avoid for fear of triggering the right of access. Finally, the statute was rejected because it had the potential to force speech, as the paper might be compelled to respond to Tornillo's reply. Id. at 256-58. For an additional discussion of *Tornillo*, see Fred W. Friendly, The Good Guys, the Bad Guys, and the First Amendment 192-98 (1976).

103 *Tornillo*, 418 U.S. at 249-51, 249 nn.12-17 (listing statistics which proved that "effective competition" between newspapers existed in only four percent of large cities in United States).

104 Id. at 258; see also Preferred Communications, Inc. v. City of L.A., 754 F.2d 1396, 1404 (9th Cir. 1985) ("[W]e note that the Supreme Court [in *Tornillo*] rejected an argument that rested a particular government regulation of the press on economic scarcity."), aff'd, 476 U.S. 488 (1986).

as speaker.[105] That logic continues to stand in the way of arguments that rely on the scarcity of cable systems as a justification for cable regulation.[106]

Tornillo has come to stand for the principle that if a speaker is proven analogous to a newspaper, that speaker could ward off attempts by governmental authority to mandate speech, either by the speaker, or by a third party through the speaker.[107] Furthermore, any requirement that certain speech by the speaker would trigger an access right on the part of the third party would be subject to strict scrutiny as a content-based regulation of speech.[108] Finally, *Tornillo* established that editorial discretion was a form of speech protected by the First Amendment.[109]

The decision in *Tornillo* stands in sharp contrast to the First Amendment standard applied to television broadcasters, exemplified by *Red Lion Broadcasting Co. v. FCC*,[110] in which the Court upheld

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105 The Court's emphasis on the *Herald*'s speech rights can be read as a defense of the press's property interest in speech, an interest elevated by the Court above the speech right claimed by Tornillo. Cf. Ginsburg et al., supra note 91, at 424-25 (discussing perception of some in cable industry that First Amendment claims were actually attempts to secure cable operators' economic interests).

106 See, e.g., Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456-57 (1994) (refusing to use economic scarcity as rationale for abrogating editorial control by cable operator). But see id. at 2466 (noting cable operator's complete control over access to video signal transmission as rationale for regulation).

107 *Tornillo* was reinforced by the Court's ruling in Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1, 20-21 (1986), where the Court found unconstitutional a California utility commission decision requiring a public utility to enclose in its monthly bills to customers a newsletter published by a citizen's advocacy organization that was critical of the utility's rate-setting policies. The commission had imposed this requirement in response to the utility's practice of enclosing its own newsletter with its bills to customers. The Court rejected the state commission's argument that the envelopes were the property of the ratepayers, deciding instead that the requirement amounted to forced speech, which was tantamount to censorship and presumptively invalid following *Tornillo*. Id. at 10-15. The analogy between a cable system and the Pacific Gas & Electric Co. would be more precise if the utility had been mandated to mail the consumer newsletter in four of 50 envelopes it sent to customers each month. The utility argued successfully that the requirement might chill its speech and that it would force the utility to associate with speech with which it disagreed, possibly forcing the company to respond. Id. at 15-17.

108 See *Turner Broadcasting*, 114 S. Ct. at 2465 (characterizing access right at issue in *Tornillo* as content-based "impermissible intrusion on newspapers' 'editorial control and judgment'" (quoting *Tornillo*, 418 U.S. at 258)).

109 *Tornillo*, 418 U.S. at 258 ("It has yet to be demonstrated how governmental regulation of [editorial control] can be exercised consistent with First Amendment guarantees . . . .").

110 395 U.S. 367 (1969). See infra notes 114-15 and accompanying text for a more complete discussion of the case.

the fairness doctrine. Although *Red Lion* preceded *Tornillo* by five years, it was entirely ignored by the *Tornillo* Court.[111]

2. *Access Requirements for Broadcasters*

The fairness doctrine,[112] adopted in the late 1950s, provided a number of access rights for those subjected to negative publicity by radio or television broadcast stations.[113] These rights were triggered by what was (or was not) said by other speakers, much as the right of reply struck down in *Tornillo* provided access in response to the content of another's speech. Based on the principle that the FCC licensed broadcasters as public trustees, the fairness doctrine was a codification of the responsibilities incumbent upon a public trustee. The imposition of that obligation to serve the public interest was upheld by the Supreme Court in *Red Lion* because of the physical scarcity inherent in, and the public nature of, the broadcast spectrum.[114] Thus, if a

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111 Friendly, supra note 102, at 194-95 (suggesting that Supreme Court was divided on constitutional status of fairness doctrine, and that to mention *Red Lion* would have been to invite dissent in *Tornillo*).

112 Pub. L. No. 86-274, 73 Stat. 557 (1959) (codified as amended at 47 U.S.C. § 315(a) (1994 & Supp. V 1996)).

113 The fairness doctrine regulated the editorial functions of broadcast licensees. Licensees were required to provide balanced coverage (of "contrasting points of view") on controversial issues of public concern. Ginsburg et al., supra note 91, at 443.

114 The doctrine was challenged by Red Lion Broadcasting in 1969. Red Lion owned a Pennsylvania radio station that broadcast a syndicated radio show that contained a bilious personal attack on the author of a book critical of Barry Goldwater. The author demanded access to Red Lion's facilities, pursuant to the fairness doctrine, so he could reply to the attack. The radio station appealed the fairness doctrine to the Supreme Court, which held that "Congress and the [Federal Communications] Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials." *Red Lion*, 395 U.S at 396. That exception to the First Amendment was based on the distinctive characteristics of the medium of broadcasting, and particularly on the scarcity of frequencies available. Id. at 387-92. The Court narrowed the right of access in a subsequent case, making clear that parties have no right to run paid editorial advertisements against the wishes of the broadcast station. See CBS v. Democratic Nat'l Comm., 412 U.S. 94, 131-32 (1973). Although the holding in *CBS* may appear to undermine cable access rules, deeper analysis of the decision limits its scope to broadcasting. The basis for the decision was that the Federal Communications Act prohibited the imposition of common carrier obligations on broadcasters. Providing a right of access to any party able to pay the costs of advertising was viewed by the Court as tantamount to imposing common carrier status on broadcasters. Id. at 110-14. Similar reasoning guided the Court's invalidation of a federal requirement that cable operators provide PEG access. See FCC v. Midwest Video Corp., 440 U.S. 689, 706-09 (1979) (basing rejection of FCC cable access requirements in part on narrow reading of Communications Act of 1934, 47 U.S.C. § 153(h), which limited FCC's ability to impose common carrier obligations on broadcasters). However, the authority for local franchising authorities to impose access rules on cable operators does not derive from, nor is it limited by, the Federal Communications Act, and therefore is not affected by *CBS*. Local franchising authorities were given explicit power by Congress to impose access obligations on cable system operators in

party seeking access to a media outlet can successfully analogize that media to broadcasting, access may be granted under *Red Lion*.

Although the Supreme Court's precedents still permit a right of access to broadcast media, the Commission suspended enforcement of the doctrine in 1987, following five years of internal discussion.[115] Nonetheless, the principles of spectrum scarcity remain a touchstone for access jurisprudence, resurfacing as recently as *Turner Broadcasting System, Inc. v. FCC*.[116] Although the *Turner Broadcasting* Court rejected spectrum scarcity as it applied to and provided justification for cable regulation,[117] it is generally accepted that the imposition of the fairness doctrine on the speech of broadcasters opened the door for similarly intrusive regulations on cable operators.[118]

3. *Access Requirements for Cable Operators*

The existing access obligations of cable system operators arise from negotiated franchise agreements. Those negotiations are conducted under the auspices of the Cable Act of 1984, which permits local franchising authorities to require cable operators to provide free channel space to public, educational, and governmental program-

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the Cable Act of 1984, 47 U.S.C. § 522(9) (1994) (granting power to local authorities to enforce access requirements as part of franchise agreements).

115 See Syracuse Peace Council v. FCC, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654, 669 (D.C. Cir. 1989) (upholding FCC's decision to cease enforcement of fairness doctrine). The decision was based on a belief that the administration of the doctrine involved the FCC in an inappropriately detailed examination of the content of broadcast speech, and in the FCC's contention that sufficient alternative channels of communication existed such that the doctrine was no longer necessary. See Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 147 (1985) (concluding that interest in viewpoint diversity is fully served by "multiplicity of voices in the marketplace" and that governmental intrusion into content of programming unnecessarily restricts journalistic freedom of broadcasters). Since that decision, Congress has reinstated several elements of the doctrine, providing a right of reply by candidates for political office to personal attacks, 47 C.F.R. § 73.1920 (1995), and to editorial advertisements critical of the candidate, 47 C.F.R. § 73.1930 (1995).

116 114 S. Ct. 2445 (1994).

> Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence, . . . and see no reason to do so here. The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium.

Id. at 2457.

117 Id.

118 See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1443-44 (D.C. Cir. 1985) (noting that courts in past had erroneously applied lesser scrutiny to cable, analogizing it to broadcast media), cert. denied, 476 U.S. 1169 (1986). Current federal regulation of the cable industry in fact imposes the fairness doctrine on cable operators. 47 C.F.R. ch.1 § 76.209 (1992).

mers,[119] and requires all cable operators of a certain size to lease (at cost) channels to what are termed "leased access programmers."[120] This Note suggests that access rights may be secured outside the context of, and despite their absence in, negotiated franchise agreements. The following discussion describes the nature of the intrusion by public access rules into the speech rights of the cable operator.

Cable access channels differ markedly as a form of access regulation from both the right-of-reply statute invalidated in *Tornillo* and the fairness doctrine upheld in *Red Lion*. Rather than relying on the content of speech to trigger access, access channels provide discrete space for public access on a first-come, first-served basis, regardless of what the speaker says. Any interference with the editorial function of the cable operator as a result of access requirements is consequently more limited than that resulting from rights of reply, since access requirements exist independent of other program content and should therefore in no way invade editorial discretion.[121] In fact, the operator retains complete control over the nonaccess channels, which at least in larger urban systems represent the vast majority of channels available.[122] The operator can program those channels as she wishes, without fear that the content of a particular program might trigger a demand for access by a party named in that program, or by a party representing a viewpoint different from that aired on the program.[123] By not linking the right of access to what the speaker says, cable access channels retain a content-neutral character lacking in right-of-reply regulations.[124]

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119 47 U.S.C. § 531 (1994).

120 47 U.S.C. § 532 (1994).

121 Cf. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2460-61, 2464-66 (1994) (distinguishing incursion into editorial function of cable operator from right-of-reply statute at issue in *Tornillo*).

122 Even considering the further limitations on editorial control posed by rules requiring carriage of broadcast television signals, large capacity cable systems retain control over most channels. For example, as of April 30, 1996, only 24 of 76 channels on Time Warner Cable of New York City were occupied by retransmitted broadcast programming or public, educational, governmental, or leased access programming. See author's remote control on file with the *New York University Law Review*; see also infra note 138. But see *Turner Broadcasting*, 114 S. Ct. at 2475-76 (O'Connor, J., concurring) (arguing that must-carry rules represent imposition of carriage requirements on one-third of system capacity).

123 See Tribe, supra note 29, § 12-25, at 1001 n.27 ("When the right of access is granted outright, however, rather than predicated on the owner's behavior, the possible chilling effect seems slight.").

124 Cf. *Turner Broadcasting*, 114 S. Ct. at 2460-64 (must-carry rules are content-neutral despite interference with absolute editorial control of cable operators).

If cable is treated as a newspaper, regulations that impede the full editorial discretion of the operator (and access channels fall within that description) may be deemed content-specific,[125] invalid under the strict standard set by *Tornillo*, and a violation of the operator's First Amendment rights, thus precluding application of the public forum doctrine to cable under *PruneYard*.[126] On the other hand, if cable is analogized to broadcasting,[127] or granted special status as a medium not entitled to the same protection as the press,[128] access rules more closely resemble economic regulations, similar to those upheld in *Associated Press v. United States*,[129] and therefore do not represent a violation of the First Amendment rights of the operator.[130]

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[125] Access regulations could be determined content-specific by virtue of the fact that they favor one category of speakers (access programmers) over commercial cable programmers and other programming chosen by the cable operator. See, e.g., id. at 2478 (O'Connor, J., concurring) (concluding speaker-based discrimination coupled with content preference on face of must-carry statute constituted content-based discrimination necessitating strict scrutiny).

[126] See, e.g., Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552 (N.D. Cal. 1987). The district court, consistent with its analogy to *Tornillo*, found that the access requirements were unconstitutional because of twin impermissible effects on the cable operator's freedom of speech. Id. at 1554-57. First, the court feared that access programming could indirectly force the cable operator to speak, either in response to criticism by access programmers or to disassociate the operator from programming the operator found offensive. Id. at 1554-55. The court then inferred all of the potential problems of the right-of-reply statute: because the cable operator would be unable to control the programming on the access channel, it might feel compelled to refrain itself from speech that might generate debate on the access channels, in turn forcing the operator to respond. Id. (As though public debate were something to avoid.) Second, the court found cable access programming an intrusion into the editorial discretion of the cable operator. This led to the conclusion that access requirements were content-based, and therefore subject to strict scrutiny. Id. at 1555. The court found neither the requisite compelling governmental interest or the narrowly drafted regulation, and concluded that access requirements were unconstitutional. Id.

[127] See Berkshire Cablevision v. Burke, 571 F. Supp. 976, 985-88 (D.R.I. 1983) (finding cable more similar to broadcast television than newspapers and therefore entitled to lower standard of protection under First Amendment than that mandated by *Tornillo*), vacated as moot, 773 F.2d 382 (1st Cir. 1985).

[128] See *Turner Broadcasting*, 114 S. Ct. at 2466-67 (refusing to analogize cable television to either newspapers or broadcasters in divining appropriate First Amendment standard for cable operators and broadcasters).

[129] 326 U.S. 1, 20 (1945).

[130] The ACLU, in its amicus brief filed before the Supreme Court in *Turner Broadcasting*, suggested that cable, like the Associated Press, could be conceptualized as having two right-bearing identities: one economic and the other as a speaker. Must-carry and access rules, under this formulation, would be permissible as economic regulations. Brief of American Civil Liberties Union, Amicus Curiae at 9-11, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (No. 93-44). Alternatively, such regulations could be governed by the intermediate standard articulated by the Supreme Court in United States v. O'Brien, 391 U.S. 367 (1968), provided that the disputed regulation is targeted at the noncommunicative aspects of speech; in other words, that the regulation is content-neutral. A content-neutral regulation is valid if "it furthers an important or substantial governmen-

Despite the content neutrality of access rules, the fact that they do impinge on the editorial freedom of system operators—to program the full range of channels as they see fit and to decline to speak if they so choose—does raise significant First Amendment concerns if cable is accorded the First Amendment status of a newspaper. Part III takes up that question, applying the First Amendment prong of *PruneYard* to cable access requirements.

III
PUBLIC ACCESS REQUIREMENTS AND THE FIRST AMENDMENT

Turner Broadcasting System, Inc. v. FCC[131] takes some initial, albeit uncertain, steps toward the articulation of a First Amendment cable doctrine. This Part examines *Turner Broadcasting* to gain insight into the Supreme Court's assessment of the First Amendment status of cable television. The Part then analogizes the must-carry rules at issue in *Turner* to public access regulations. In light of the *Turner Broadcasting* Court's decision to apply intermediate scrutiny to must-carry, this Part applies that level of scrutiny to public access requirements, concluding that diversity is a compelling governmental interest directly served by public access regulations. This analysis is undertaken in order to subject cable access regulations to the first prong of the *PruneYard* test—one that public access regulations satisfy.

A. Turner Broadcasting System, Inc. v. FCC

In *Turner Broadcasting* the Supreme Court began for the first time to define the contours of the First Amendment as applied to the cable industry.[132] At issue were regulations promulgated by the FCC mandating the retransmission of broadcast television signals by cable

tal 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." Id. at 377, cited in *Turner Broadcasting*, 114 S. Ct. at 2469.

131 114 S. Ct. 2445, 2469-72 (1994) (upholding must-carry rules, despite infringement of editorial function of cable operators, because of "bottleneck control" exercised by cable operators, provided evidence of such control is adduced on remand); see supra note 20 for a discussion of the more recent decision in Denver Educational Tele-Communications Consortium, Inc. v. FCC, Nos. 95-124, 95-227, 1996 U.S. LEXIS 4261 (U.S. June 28, 1996).

132 Prior decisions by the Supreme Court had skirted the issue of the constitutional status of cable. See, e.g., City of L.A. v. Preferred Communications, Inc., 476 U.S. 488, 495 (1986) ("We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question . . . without a fuller development of the disputed issues in the case."); FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979) ("The court below suggested that the [FCC's public access] rules might violate

operators.[133] The regulations were challenged by cable system operators and by cable programmers, each of whom alleged that the must-carry rules infringed on their First Amendment rights to respectively select and sell cable television content.[134] The Supreme Court concluded that the First Amendment challenge was most appropriately analyzed under intermediate scrutiny[135] and remanded the case for further fact-finding on the nature of the governmental interest.[136] The decision was supported by a bare majority of five and diluted by the presence of four concurring (and in two cases, dissenting) opinions.[137] Despite the fragmented voice of the Court, three discernible First Amendment principles emerged.

First, the Court distinguished cable from broadcasting for First Amendment purposes. The level of regulation permissible with respect to broadcasters is justified on the basis of physical spectrum

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the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question.").

133 *Turner Broadcasting*, 114 S. Ct. at 2452-54. "Must-carry" rules mandate the carriage by a cable operator of certain local broadcast signals. First introduced by the FCC in the 1960s, they represent a continuing effort by the FCC to protect the broadcast industry from the threat of market fragmentation posed by cable television. See 47 U.S.C. § 534 (1994); see also *Turner Broadcasting*, 114 S. Ct. at 2469-70 (reviewing history of must-carry regulations); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1440-43 (D.C. Cir. 1985) (same), cert. denied, 476 U.S. 1169 (1986).

134 *Turner Broadcasting*, 114 S. Ct. at 2460.

135 Id. at 2469.

136 Id. at 2470-72.

137 Justice Kennedy wrote the plurality opinion. A unanimous Court joined the first Part. Id. at 2450-51. All but Justice Stevens joined the first two sections of Part II (addressing First Amendment status of cable as distinct from broadcasting, but still somewhat different from that accorded newspapers, at least with respect to must-carry rules). Id. Chief Justice Rehnquist and Justices Blackmun, Souter, and Stevens joined the last two sections of Part II (determining that must-carry rules are content-neutral) and the first section of Part III (applying *O'Brien* test to must-carry rules and finding sufficient asserted governmental interest in protecting broadcast television). Id. Only Chief Justice Rehnquist and Justices Blackmun and Souter joined the final section of the opinion (holding government had not demonstrated broadcasting to be sufficiently endangered to justify must-carry rules, and remanding for further fact-finding). Id. In addition, Justice Blackmun concurred in the result and the remand. Id. at 2472-73. Justice O'Connor wrote a more extensive concurring opinion arguing that must-carry rules are content-based and should therefore be subject to strict scrutiny. Id. at 2475-81. This concurrence was joined by Justices Ginsburg and Scalia, and by Justice Thomas, who concurred in Parts I and III and dissented from Part II (maintaining that must-carry rules fall short even of content-neutral scrutiny). Id. at 2475. Justice Stevens, while concurring in the judgment and with part of the plurality opinion, found the Congressional findings underlying the regulations sufficient to justify the content-neutral test adopted by the majority. Id. Finally, Justice Ginsburg wrote a concurrence arguing that strict scrutiny was warranted in analyzing must-carry rules because, while they did not discriminate in favor of viewpoint, they did do so on the basis of speaker and the content of a particular speaker's speech. Id. at 2481. Pursuant to the plurality opinion, she recommended remand while urging Justice O'Connor's standard on the lower court. Id.

scarcity; the Court found that scarcity absent in contemporary cable systems.[138]

Second, the Court was similarly reluctant to hold cable regulations to the standard established in *Tornillo*.[139] The Court rejected Turner Broadcasting's analogy between the must-carry rules and the right-of-reply law invalidated by *Tornillo*. The Court determined that must-carry rules were not triggered by content[140] and that must-carry rules did not force cable operators to speak.[141] In addition, and in contrast to *Tornillo*, the Court found that cable operators enjoyed and exerted a tremendous degree of control ("bottleneck" control) over rival speakers within their media, far beyond the power of a monopoly newspaper.[142]

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138 The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium.

Id. at 2457. But see Berkshire Cablevision v. Burke, 571 F. Supp. 976, 985-86 (D.R.I. 1983) (analogizing "natural monopoly" characteristic of cable franchising system—where one system operator selects programming for entire area—to broadcast spectrum scarcity), vacated as moot, 773 F.2d 382 (1st Cir. 1985). For further discussion of this broader definition of scarcity, see Meyerson, supra note 100; Osgood, supra note 100.

139 "*Tornillo* and *Pacific Gas & Electric* do not control this case . . . ." *Turner Broadcasting*, 114 S. Ct. at 2465. But see id. at 2476 (O'Connor, J., concurring in part and dissenting in part) ("[C]able programmers and operators stand in the same position under the First Amendment as do the more traditional media.").

140 "They are not activated by any particular message spoken by cable operators and thus exact no content-based penalty." Id. at 2465.

141 "Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." Id.

142 [T]he asserted analogy to *Tornillo* ignores an important technological difference between newspapers and cable television. Although a daily newspaper and a cable operator both may enjoy monopoly status in a given locale, the cable operator exercises far greater control over access to the relevant medium. A daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers' access to other competing publications—whether they be weekly local newspapers, or daily newspapers published in other cities. Thus, when a newspaper asserts exclusive control over its own news copy, it does not thereby prevent other newspapers from being distributed to willing recipients in the same locale.

The same is not true of cable. When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.

Id. at 2466.

Third, having found must-carry rules content-neutral,[143] the Court concluded that they should be subject to intermediate scrutiny under the test enunciated in *United States v. O'Brien*.[144] That test provided that

> a content-neutral regulation will be sustained 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."[145]

The Court declined to apply the test, instead remanding for further fact-finding on whether an important governmental interest was (a) implicated and (b) narrowly served by must-carry rules.[146]

While *Turner Broadcasting* was limited to consideration of the First Amendment vitality of federal regulations mandating the carriage of broadcast television signals by cable system operators, and in fact was contested primarily by broadcast and cable behemoths, its holding also can be used to test the constitutionality of public access cable channel requirements. Both sets of regulations infringe a cable operator's rights in similar fashion—by reducing the absolute editorial control an operator might enjoy over her system in the absence of such regulation. Both also serve roughly the same governmental interest—viewpoint diversity[147]—although they privilege very different

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143 Although the [must-carry] provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to . . . broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming. . . . [H]ence, an operator cannot avoid or mitigate its obligations under the [1992] Act by altering the programming it offers to subscribers.

Id. at 2460.

144 391 U.S. 367 (1968). The Court remanded the case to the district court for further fact-finding on the extent of the governmental interest in must-carry rules, and specifically on the degree to which cable television actually threatens the broadcast television industry. The lower court was instructed to conduct that fact-finding pursuant to the *O'Brien* test. *Turner Broadcasting*, 112 S. Ct. at 2469-72.

145 Id. at 2469 (quoting *O'Brien*, 391 U.S. at 377).

146 Id. at 2470-72.

147 "The [public access] provisions were enacted to serve a significant regulatory interest, *viz.*, affording speakers with lesser market appeal access to the nation's most pervasive video distribution technology." Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 6-7 (D.D.C. 1993) (upholding provisions of Cable Act of 1984, 47 U.S.C. §§ 531-32, permitting local franchising authorities to mandate access channels). The court held the access provisions to intermediate scrutiny under *O'Brien*. Id. at 4-5. Under that test, the governmental interest in diversity was strong and the attendant infringements on the speech of cable operators minimal enough for the court to characterize the regulations as constitutional. Id. at 6-7.

On the interests motivating the must-carry rules, see *Turner Broadcasting*, 114 S. Ct. at 2461 (discussing Congress's interest in preserving free local broadcast television); see also Josephine I. Aiello, Case Comment, Congressional Cable-Vision: *Turner Broadcasting v.*

groups of speakers (television stations versus citizens as access programmers), and the must-carry rules also serve two additional interests: the preservation of free broadcast television and the promotion of fair competition in the television industry.[148] The comparison turns then on two questions, per *O'Brien*: (1) the extent to which diversity alone is a legitimate governmental interest; and (2) the extent to which cable access requirements are narrowly tailored to promote that interest. If diversity is a legitimate governmental interest and access requirements are sufficiently narrowly tailored, *Turner Broadcasting* suggests that those requirements should survive intermediate scrutiny.[149]

The next section explores the underlying governmental interests motivating both must-carry and public access, then considers the extent to which public access regulations are more narrowly tailored to serve that interest than are must-carry rules. It concludes that the diversity interest can stand alone as a legitimate governmental interest—and in fact serves as the cornerstone of the governmental interest in broadcast television—and that public access regulations more directly and narrowly advance that interest than do must-carry rules.

FCC, 8 Harv. J.L. & Tech. 231, 235-36 (1994) (noting *Turner Broadcasting* Court's finding that "Congress's 'overriding objective' was the preservation of free broadcast television"); Nichelle Frelix, Note, *Turner Broadcasting v. FCC*: Modern Communications Development and the Evolving First Amendment, 16 Whittier L. Rev. 685, 723-24 (1995) (arguing that Congress passed 1992 Act because of "its desire to restore a level playing field among competitors in the market"); Jeff Gray, Note, *Turner Broadcasting System, Inc. v. FCC*: The Need for a New Approach in First Amendment Jurisprudence of the Cable Industry, 29 U.S.F. L. Rev. 999, 1017-18 (1995) (same; suggesting as well that Court should have considered diversity interest in favoring broadcast over cable television programming); Scott A. Samuels, Casenote, Intermedia Discrimination in the Information Age: The Implications of *Turner Broadcasting System, Inc. v. FCC*, 3 Geo. Mason Independent L. Rev. 403, 404 (1995) (arguing that Court's ruling in *Turner* was "counterproductive to Congress' goal . . . of promoting a diversity of views in the television marketplace").

148 While the Court declined to rule on the importance of the governmental interests allegedly advanced by Congress in support of must-carry, it did acknowledge that were these interests in fact threatened by market conditions and well-served by the must-carry rules, the rules would be legitimate. The Court then remanded for further fact-finding. *Turner Broadcasting*, 114 S. Ct. at 2469-70.

149 This comparison, in addition to being wholly prospective, also leaves aside a critical distinction between must-carry and public access rules—that the former have been created by Congress, while the latter, at least in the context of this Note, would be created by state courts. While this distinction may lead state courts to hesitate when asked to extend their state constitutional free speech doctrine to mandate public access to cable television, it does not a priori invalidate the access claim. Nor should it color the analysis of access regulations under *O'Brien*'s intermediate scrutiny—a judicially crafted remedy is as amenable to that analysis as a legislative regulation.

B. *Public Access Better Serves Diversity*

The promotion of a diverse marketplace of ideas is an animating principle of free speech jurisprudence.[150] Viewpoint diversity is valued because of a belief that we, the public, benefit from hearing a multitude of voices in our collective capacity as listeners.[151] The wider the range of viewpoints articulated in public discourse, the more likely truth will be discovered. A variant of that argument tells us that without a diverse airing of views on questions important to the governing of our society, we are unlikely to sustain and honor democratic values, as those values depend for their vitality on spirited and inclusive discussion and consideration of every viewpoint.[152]

There is a divergence between those who embrace diversity for what it does for society in the role of listener and those who argue for free speech for its value in advancing self-expression. For example, Alexander Meiklejohn is often quoted for his statement that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[153] Those who argue for self-expression would not stop there, but would insist on the independent value of an opportunity for each person desiring to speak to do so.[154] While must-carry rules honor the "public-as-listener" form of diversity, they fall short

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150 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."); see also *Turner Broadcasting*, 114 S. Ct. at 2470 ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); New York Times v. Sullivan, 376 U.S. 254, 266, 269-71 (1964) ("[The First Amendment] 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

151 See, e.g., *Red Lion*, 395 U.S. at 390 ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); Associated Press v. United States, 326 U.S. 1, 19-20 (1945) ("[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . .").

152 See Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968) ("[F]ree and open debate is vital to informed decision-making by the electorate."). See generally Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 24-28 (1960).

153 Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973) (noting that public interest is paramount concern in context of selling commercial time to people who wish to discuss controversial issues (quoting Meiklejohn, supra note 152, at 26)).

154 See, e.g., Caristi, supra note 12, at 12-15 (discussing role of free speech as means to self-fulfillment of individuals); Steven H. Shiffrin, The First Amendment, Democracy, and Romance 140-47 (1990) (suggesting Ralph Waldo Emerson's conceptions of free speech,

when measured against the self-realization model of free speech ("public-as-speaker"). Public access regulations, on the other hand, advance both.[155]

Diversity, and in particular the value of diversity to the listening public, has long been a centerpiece of federal communications regulation.[156] One of the first cable cases emphasized the roots of the FCC's authority to regulate broadcast television: the advancement of "long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and services."[157] The

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dissent, and reason itself urge full-throated dissent as critical means to realize and celebrate one's humanity).

155 While "public-as-listener" diversity may have been the primary governmental interest underlying the Court's ratification of must-carry in *Turner Broadcasting*, public access cable programming better serves that interest than broadcast television. Cass Sunstein's reading of *Turner Broadcasting*, as an elucidation of a new First Amendment approach laced with "Madisonian" overtones, supports this point. He argues that the Court, despite its array of opinions, speaks with one voice in endorsing the value of diversity even if that diversity is only satisfied by "forcing" cable operators to speak. Cass R. Sunstein, The First Amendment in Cyberspace, 104 Yale L.J. 1757, 1774-77 (1995) [hereinafter Sunstein, Cyberspace]. Public access cable seems even closer to his vision of Madisonian free speech, given its potential as a forum for public discourse and deliberation. For a deeper discussion and defense of Madisonian principles of speech, see Cass R. Sunstein, Democracy and the Problem of Free Speech 18-23 (1993).

156 See supra note 87. The recent Supreme Court decision in Adarand Constructors v. Pena, 115 S. Ct. 2097, 2112-13 (1995), is limited in its overruling of Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), in so far as *Adarand* disapproves race-based discrimination in service to diversity and rejects the *Metro Broadcasting* Court's reading of the Fourteenth Amendment's equal protection clause in that context. However, the value of diversity, if advanced without resort to racial classification, remains intact. The public access scheme proposed in this Note would allocate space on access channels on a first-come, first-served basis without reference to race, and thus would remain unaffected by *Adarand*. Similarly, the recent Fifth Circuit decision in Hopwood v. Texas, Nos. 94-50569, 94-50664, 1996 U.S. App. LEXIS 4719 (5th Cir. Mar. 18, 1996), in no way minimizes the value of diversity nor subjects its promotion to strict scrutiny in the context of cable access. As with *Adarand*, the decision in *Hopwood* was limited to racial classification schemes and to a repudiation of diversity as an interest sufficiently compelling to survive strict scrutiny under the Fourteenth Amendment. Id. at *35.

157 United States v. Midwest Video Corp., 406 U.S. 649, 667-68 (1972) (upholding federal rule requiring cable systems to originate local programming). The FCC subsequently proposed, in lieu of the local origination requirement, alternative regulations mandating all cable systems of a certain size to provide public access channels. Report and Order in Docket No. 20508, 59 F.C.C.2d 294 (1976). These were invalidated by the Supreme Court, FCC v. Midwest Video Corp., 440 U.S. 689, 708 (1979), as outside the Commission's jurisdiction. However, that decision explicitly declined to decide the constitutionality of the regulations, leaving diversity intact as a legitimate governmental interest. Id. at 709 n.19; see also United States v. Southwestern Cable, 392 U.S. 157, 174 (1968) (upholding must-carry regulations in order to advance governmental interest that "'all communities of appreciable size [will] have at least one television station as an *outlet for local self-expression*'" (emphasis added)). Although access requirements were barred at the federal level in the second *Midwest Video* decision, subsequent legislation empowered localities to

Turner Broadcasting Court affirmed the continuing importance of diversity, recognizing "that public access to a multiplicity of sources is a governmental purpose of the highest order."[158]

Considering the consistent value placed on diversity in First Amendment jurisprudence, diversity would appear, standing alone, to

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enforce local access regulations. 47 U.S.C. §§ 531-32 (1994). That power was granted in furtherance of the goal of diversity, H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984) (purpose of Cable Act was to promote "First Amendment's goal of a robust marketplace of ideas—an environment of 'many tongues speaking many voices'").

158 Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2470 (1994); see also 1992 Cable Act, 47 U.S.C. § 521(a)(6) (1994) (findings of Congress) (affirming governmental interest in "promoting a diversity of views"). Following *Turner Broadcasting*, the Fourth Circuit issued an opinion in Chesapeake & Potomac Telephone Co. v. United States, 42 F.3d 181 (4th Cir. 1994), vacated and remanded, 116 S. Ct. 1036 (1996), in which it embraced diversity as a governmental interest. The case, brought by a telephone company challenging federal restraints on ownership of cable systems by common carriers (including telephone companies), 47 U.S.C. § 533(b) (1994 & Supp. V 1996), repealed by Telecommunications Act of 1996, Title III, § 302(b), 110 Stat. 56, 124, alleged that the diversity interests purportedly advanced by the federal law were in fact frustrated by it. *Chesapeake & Potomac*, 42 F.3d at 185, 187 (identifying "widest possible diversity of information sources and services to the public" as purpose of Cable Act of 1984, 47 U.S.C. § 521(4)); see also 47 U.S.C. § 521(b)(1) (1994) (findings of Congress) (identifying "[the promotion of] the availability to the public of a diversity of views and information through cable television and other video distribution media" as purpose of must-carry legislation). The court recognized the importance of viewpoint diversity as a compelling governmental interest, then invalidated the ownership rules because they were not narrowly tailored enough to prevent the perceived threat to diversity posed by cross-ownership (namely, the predicted anticompetitive market behavior of telephone companies if they were allowed to compete with cable operators) without trenching unnecessarily on the speech rights of the phone companies. *Chesapeake & Potomac*, 42 F.3d at 198-202. The court suggested in dicta that a less restrictive approach would enable phone companies to provide video programming while reserving some channel capacity for the common carriage of others' programming—a solution remarkably similar to the current public access regime. Id. at 202 n.34. The court went on to determine that, in addition to failing the least-restrictive-alternatives test, the ownership regulations failed to leave open alternative channels of communication by completely barring phone companies from the transmission of their own video programming in their service areas. Id. at 202-03. In support of this analysis, the court cited a series of cases that established a presumption against absolute bans. Compare City of LaDue v. Gilleo, 114 S. Ct. 2038, 2046 (1994) (finding ban on signs on private property invalid because deprived homeowner of any channel through which to communicate her views) and Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (finding absolute ban on distribution of literature unconstitutional because it left no alternative channels of communication) with City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986) (finding that ordinance that left available mere five percent of city for adult theaters did provide ample alternative channels of communication).

It would be ironic indeed if the public interest in diversity would prevent an absolute limit on the video speech of a phone company while not similarly reversing limits on the video speech of members of the public. Such a distinction would expose the economic superstructure of free speech jurisprudence, as it could only be justified because the phone company is prepared to pay for its speech while the public access programmer cannot afford to do so. Cf. supra note 82 (exploring relative importance and impact of video as medium for expression).

constitute a governmental interest sufficient to satisfy the intermediate-level scrutiny mandated by *Turner Broadcasting*. Public access requirements similarly survive the final element of intermediate-scrutiny analysis—they are narrowly tailored.

Unlike must-carry rules, which require cable operators to set aside one channel for each broadcast station requesting carriage (in many cases amounting to one-third of the channel capacity of a system[159]), public access rules represent a proportionately smaller intrusion into the editorial discretion of the cable operator.[160] In addition, public access channels are host to a wide variety of viewpoints.[161] Contrary to public perception, people are watching those channels.[162] While it is difficult to test diversity empirically, the trend towards concentration of ownership[163] would appear to increase homogeneity of program content in broadcast television and in turn suggest that it may be host to an ever-narrower range of viewpoints. Concurring in *Turner Broadcasting*, Justice O'Connor urged the application of strict rather than intermediate scrutiny to must-carry rules and suggested that a public access scheme would be preferable to the must-carry regime.[164] Her authority for advancing a compelled access approach

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159 See *Turner Broadcasting*, 114 S. Ct. at 2476 (O'Connor, J., concurring) (arguing that loss of discretion over significant number of channels deprives cable programmers from opportunity to access those channels).

160 Public access requirements typically involve a maximum of four channels set aside for use by public, educational, governmental, and commercial leased access programmers. See Brenner et al., supra note 11, §§ 6.04-.05 (describing regulation of such channels under 1984 Cable Act).

161 Access channels have "been used to promote nonprofit community organizations, involve senior citizens, present political issues, teach the mentally retarded to communicate, discuss current events, and present artists and entertainers." Wally Mueller, Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response, 38 DePaul L. Rev. 1051, 1064-65 (1989).

162 According to evidence adduced during the FCC's rulemaking related to the 1992 Cable Act, 30 million homes have at least one access channel on their cable system; according to a study also presented during the rulemaking, 47% of cable viewers watch access channels. Brief for Petitioners at 8, Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 471 (1995) (No. 95-227), aff'd in part and rev'd in part, 116 S. Ct. 2374 (1996).

163 See, e.g., Edmund L. Andrews, A Measure's Long Reach, N.Y. Times, Feb. 2, 1996, at A1 (describing media company and television network mergers in anticipation of passage of telecommunications bill and its relaxation of cross-ownership and ownership concentration rules).

164 Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system or timesharing arrangement. Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another.

targeted at empty channels was *PruneYard Shopping Center v. Robins*.[165]

The fact that access channels represent a more targeted, less intrusive regulation, perhaps capable of surviving even the strict scrutiny proposed in *Turner Broadcasting* by Justice O'Connor, suggests that they are at least as narrowly tailored (and probably more so) than the must-carry rules. Access rules thus better serve the same specific governmental interest as must-carry rules—blunting the effect of the cable operator's "bottleneck control" over local television programming. They therefore cannot be considered violative of the First Amendment rights of cable operators.

This Part has satisfied the First Amendment test of *PruneYard*; the next Part considers whether access requirements constitute a violation of the Fifth and Fourteenth Amendments[166] as an uncompensated taking of the cable operator's private property—*PruneYard*'s second prong.

IV

ACCESS REQUIREMENTS AND THE FIFTH AMENDMENT

For cable access requirements to enjoy state constitutional protection similar to that extended to student speakers in *PruneYard*, the imposition of access requirements must be defended against a takings challenge parallel to that raised by the owners of the PruneYard.[167] In light of the growing strength of the "property rights movement"[168]—the civil rights of the 1990s—such a challenge may find a receptive audience in some courts, or at the very least, support in analogous federal law.[169]

Turner Broadcasting Sys. Inc. v. FCC, 114 S. Ct. 2445, 2480 (1994) (O'Connor, J., concurring). See infra Part IV for a discussion of the takings clause issues Justice O'Connor left aside.

165 447 U.S. 74 (1980). O'Connor noted that "[i]f Congress finds that cable operators are leaving some channels empty—perhaps for ease of future expansion—it can compel the operators to make the free channels available to programmers who otherwise would not get carriage." *Turner Broadcasting*, 114 S. Ct. at 2481 (O'Connor, J., concurring) (citing *PruneYard*, 447 U.S. at 88).

166 The Fifth Amendment is applicable to the states through the Fourteenth Amendment. See Chicago Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 238-39 (1897).

167 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82-85 (1980). For a more complete discussion of the case, see supra text accompanying notes 51-69.

168 See, e.g., James W. Ely, Jr., A Breather On the Takings Clause, A.B.A. J., Jan. 1996, at 42 ("Property rights have become one of the defining issues in the larger philosophical debate going on today in American politics and government.").

169 This movement has extended the discourse of rights, and the rhetoric surrounding the protections of the Fifth Amendment, to grazing rights on federal land and the "right" to develop wetlands unimpeded by environmental regulation. See generally H. Jane Lehman, Property Rights Fight Heats Up on Hill; Environmental Concerns, Reimburse-

This Part considers whether efforts to impose access requirements by a municipality (through a franchise agreement) or a court (as a result of access litigation) would withstand a potential takings clause challenge by affected cable operators. The discussion begins with a categorization of the property interest to which cable operators lay claim.[170] Having identified that interest, the analysis examines the rights threatened by cable access requirements—specifically, the loss of the right to exclude. After delineating a property interest and an infringement of that interest, this Part then considers—both within the context of current takings doctrine and, in particular, in light of the nexus requirement as applied in several recent Supreme Court decisions[171]—whether a takings challenge can be sustained. It concludes that such a challenge could not be sustained.

A. The Nature of the Cable Operator's Property Interest

Cable operators may be able to assert a right to build, own, operate, and even renew a franchise for a cable system in a city.[172] Recent cases have gone so far as to suggest that cable conduits function, for the purposes of cable transmission, as public forums.[173] The public

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ment Costs at Center of Debates, Wash. Post, Feb. 18, 1995, at F1 (chronicling rise of property rights movement); Keith Schneider, Landowners Unite in Battle Against Regulators, N.Y. Times, Jan. 9, 1995, at A1 (same).

170 The discussion in this Part refers to opportunities to profit from an exclusive claim over cable conduits (as granted in many franchise agreements) as a property *interest*, while reserving judgment on whether that interest merits distinction (and thus heightened protection) as a property *right*. In the context of this discussion, right is used to signify the existence of a vested and legally enforceable claim, while interest is used to denote a claim that may not rise to the level of a right.

171 See Dolan v. City of Tigard, 114 S. Ct. 2309, 2320-22 (1994) (determining that requirements imposed on property owner failed to satisfy essential nexus test, and were therefore invalid); Nollan v. California Coastal Comm'n, 483 U.S. 825, 839-42 (1987) (same). The nexus test requires that burdens imposed on a property owner must be related to the public interest motivating the imposition of those burdens. Id. at 836-37.

172 See City of L.A. v. Preferred Communications, Inc., 476 U.S. 488, 493-96 (1986) (remanding case and indicating that grant of exclusive cable franchise for South Central Los Angeles may present colorable First Amendment claim, in light of area's capacity to support more than one system); Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1338 (D.C. Cir. 1985) (finding cable operator's claim that refusal to renew franchise of appellant in combination with appellee's continued policy of exclusive franchising was justiciable under First Amendment).

173 See Preferred Communications, Inc. v. City of L.A., 754 F.2d 1396, 1408 (9th Cir. 1985) ("It is possible, therefore, that although the . . . conduits are not public forums by tradition or designation, [they] may nevertheless serve as a forum for expression via the cable medium."), aff'd, 476 U.S. 488 (1986); *Tele-Communications of Key West*, 757 F.2d at 1338 ("Applying [the] public forum jurisprudence to the factual allegations in TCI's complaint, we find that TCI has adequately alleged a First Amendment cause of action."). Pursuant to the public forum doctrine, once the conduits have been opened for expressive activity to one cable operator, the government can impose only time, place, and manner

forum analysis, applied to cable conduits, precludes municipalities from imposing anything but time, place, or manner regulations on the use of cable conduits, and may indeed give rise to a claim of right by a cable operator seeking to build a second system.

As the momentum behind the property rights movement grows,[174] it is likely that a cable operator seeking renewal of a franchise will argue that conditioning renewal on the continued availability of access channels violates the property rights vested in the operator as a result of the prior franchise.[175] Cable operators who are already franchised under agreements that do not require public access channel capacity have an even stronger property-based claim against the subsequent introduction of access requirements.[176]

The cable operator's right to operate a franchise is not, however, a claim of title to the land under which the cable wires must run. It is better characterized as a claim to economic benefit, realized from an investment in the construction of a cable system—essentially, an interest in personal property.[177] This type of claim, while an acknowledged property right,[178] does not entitle the claimant to the same protections

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restrictions on speech in those forums. See *Preferred Communications*, 754 F.2d at 1409 ("While the City may promulgate reasonable time, place, and manner regulations, it may not limit access under the circumstances set forth in the issue before us." (citations omitted)). This argument does not lead to the conclusion that public access is a legal right, as it may be if the cable *system* itself is considered a public forum. It does suggest that the right of a system operator (or the franchise authority) to exclude other systems from use of the utility conduit is limited by the status of the *conduit* as a public forum.

174 See supra note 169. The claim a cable operator could make is similar to those being made by ranchers claiming that the rescission of water and grazing rights on federal lands constitutes a compensable taking. See generally David Abelson, Water Rights and Grazing Permits: Transforming Public Lands Into Private Lands, 65 U. Colo. L. Rev. 407, 409-10 (1994) (reviewing history of ranchers' claims of property interests in water and grazing rights on public lands).

175 The rights of cable franchisees seeking renewal of their franchises are now protected under the Cable Act of 1984, 47 U.S.C. § 546 (1994) (outlining specific procedural safeguards governing franchise renewal process and delineating permissible grounds for nonrenewal).

176 A similar argument was seriously considered by the Eighth Circuit in its decision in Midwest Video Corp. v. FCC, 571 F.2d 1025, 1057-58 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979). At issue was a federal regulation that required cable operators to provide public access channels. Midwest Video argued that the federal rule effected a taking and also limited, without due process, the cable company's right to economic benefit. The Eighth Circuit appeared to credit that argument. Id. at 1057. The Supreme Court, in affirming the lower court, expressly declined to address the property claims. FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979).

177 "Personal property" is defined as "everything that is the subject of ownership, not coming under the denomination of real estate." Black's Law Dictionary 1217 (6th ed. 1990).

178 For a prime example of the applicability of property law and the diminished force of the takings doctrine in the domain of a right to economic value to be realized from nonreal property, see Andrus v. Allard, 444 U.S. 51 (1979). In *Andrus*, the property right at stake

accorded the owner of real property in the face of governmental regulation limiting the property's value.[179] Applied to the cable operator, this analysis lessens the force of her property-rights-based resistance to access regulations. Nonetheless, an economic interest in selling the transmission capacity of a cable system is reinforced by the right to exclude. If a cable operator must allow access to all programmers, she loses some of the bargaining leverage that enabled her to profit from the system in the first instance. Absent the right to exclude, the cable operator would be transformed into a common carrier, able to charge a fee for carriage of programming but unable to discriminate between programs. The Supreme Court has interpreted the Federal Communications Act to bar cable operators from being regulated as common carriers,[180] suggesting that the cable operator's speech right begins with her ability to choose programming. Case law explicitly protecting the cable operator's editorial discretion confirms this.[181] The next

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was the right to sell eagle feathers for a profit, a right compromised by federal wildlife regulations. Id. at 54-55. The Supreme Court held that such an infringement was not a taking. Id. at 68. The decision was at least partially grounded on the fact that the appellant had no real property interest, but rather a profit interest in the sale of eagle feathers, a property interest which could be realized in an alternative fashion, id. at 66-67, as can a cable operator's "right" to profit from sale of channel space reserved for free public access (through the increase in fees for commercial channels).

179 [I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992); see also *Andrus*, 444 U.S. at 66 ("[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim."); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974) ("[S]tate lawmakers, in the exercise of the police power, were free to determine that certain uses of property are undesirable."); Everard's Breweries v. Day, 265 U.S. 545, 563 (1924) (holding that restrictions on appellants' ability to profit from sale of liquor did not constitute uncompensated taking); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264, 303 (1920) (holding that war-time prohibition measures were not an "appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use"). These cases outline the forfeiture doctrine. *Lucas* has been credited with separating the takings doctrine from forfeiture; in delineating a higher standard of protection for real property, Justice Scalia, writing for the Court, cleared the way for the continued erosion of the government's ability to regulate land. The flip side of that distinction is that it leaves undisturbed the government's ability to regulate personal property. See John A. Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 Colum. J. Envtl. L. 1, 2 n.11 (1993) (describing bifurcation of takings doctrine into real and personal property regimes after *Lucas*).

180 *Midwest Video*, 440 U.S. at 702-04.

181 See, e.g., Preferred Communications, Inc. v. City of L.A., 754 F.2d 1396, 1410 n.10 (9th Cir. 1985) ("[Cable operators'] First Amendment protection is not diminished because they distribute or present works created by others."), aff'd, 476 U.S. 488 (1986). The cable operator's speech rights can thus be viewed as a proxy for her property interest—to the

section weighs the operator's right to exclude, in light of the diminished protection accorded nonreal property interests.

B. *The Right to Exclude*

Long recognized as integral to an owner's interest in private property, the right to exclude puts the "private" in private property. A threshold inquiry in assessing the objection to access requirements made on property grounds is whether cable operators continue to enjoy a right to exclude, or whether, like the mall owners in *PruneYard*, that right has been diluted to the point that further infringement ceases to be a taking.

Kaiser Aetna v. United States[182] provides a clear statement of the principles underlying the right to exclude, while defining the conditions under which the infringement on a private property owner's right to exclude constitutes a taking. In that case, a private developer dredged a body of water in Hawaii, converting it from a landlocked pond into a marina with access to the ocean.[183] Following the construction by the developer of a residential subdivision around the marina, the federal government attempted to enforce public access to the waterway.[184] The Supreme Court found the government's efforts an excessive exercise of police power and therefore a taking requiring just compensation.[185] The decision turned on the Court's concern that the developer had a legitimate, investment-backed expectation that it would be able to sell houses in a subdivision boasting a private marina—expectations based on the government's initial indication that the marina could remain private.[186]

The Court's decision in *Kaiser Aetna* contrasts with its ruling in *PruneYard*,[187] in which the Court determined that the right to exclude others from the shopping center had already been diluted by the 25,000 shoppers who visited the mall each day, and by the fact that the center was a commercial establishment open to, and in fact dependent

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extent that she can control the content of the transmissions over her system, she can extract a profit from those transmissions.

182 444 U.S. 164 (1979).

183 Id. at 165-66.

184 Id. at 165-69.

185 Id. at 180.

186 Id. at 176-80. These facts bear some similarity to a situation in which a cable operator enters into a franchise agreement without access provisions, only to have the agreement changed as a result of litigation by access advocates. A significant difference, however, is that the nonreal property of the cable operator enjoys a lower standard of protection than the real property of the developer of the marina. Cf. Andrus v. Allard, 444 U.S. 51, 66 (1979) (according interest in anticipated gain lesser protection under Fifth Amendment); Humbach, supra note 179, at 2.

187 447 U.S. 74 (1980).

upon, public traffic.[188] The Court found that any infringement by the students of the mall owners' right to exclude was minimal in light of that dilution, and therefore did not rise to the level of a taking.[189]

At first glance, cable systems appear more closely to resemble the pond in *Kaiser Aetna* than the shopping center at issue in *PruneYard*. Cable systems are not open to the public. The only situations in which access is not restricted to programmers selected by the operator involve those systems that operate under franchise agreements that already mandate some degree of public access programming.[190] For cable operators not subject to access requirements by the terms of their franchise agreements, the claim to a right to exclude raises a legitimate question. The access-free cable operator can argue that her investment-backed expectation of complete editorial control is undone by the subsequent imposition of access requirements by a court.

Assuming arguendo that cable operators have a claim to some right to exclude, the analysis now turns to current takings doctrine. Within that context, the question is whether the limitation of the cable operator's right to exclude (however attenuated) through the imposition of public access requirements constitutes a compensable taking. If it does, cable access requirements may not survive the test articulated in *PruneYard*.

C. *Current Takings Doctrine As Applied to Cable Access Requirements*

In order to sustain a takings challenge, a property owner must demonstrate that the infringed "use interest" was her property in the first instance.[191] This section applies that analysis to the imposition of

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188 Id. at 78.

189 Id. at 84 ("[A]ppellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"). In contrast to *Kaiser Aetna*, the expectations of investors in the PruneYard were rooted precisely in the hope that their right to exclude *would* be diluted—by a steady stream of shoppers.

190 The existence of public access channels in a system may serve to preclude an operator from arguing in renewal negotiations or in litigation, pursuant to *Kaiser Aetna*, that its investment-backed expectations rested on the operation of a cable system free of public access, since those investments were made within the context of a franchise agreement that included provisions for public access. The strongest argument a cable operator can make for the protection of the right to exclude is actually best considered in the context of the attendant loss of editorial discretion. This argument was at the core of the challenge raised by Time-Warner Cable and Daniels Cablevision in recent litigation against the FCC and the 1984 Cable Act's rules enabling franchise authorities to impose access obligations on cable operators. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 6 (D.D.C. 1993).

191 "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry

cable access rules, and to the infringed interests of the cable operator. It concludes that access rules do not in fact deprive cable operators of an interest, much less a right, to exclude others from the limited use of their facilities.

Cable operators do not own the real property (the utility conduits) on which a cable system has been built.[192] At most, the operator can assert a property interest in the system hardware,[193] and an expiring interest in a right of access to utility conduits.[194]

A cable operator party to a franchise agreement that does not include access requirements would have two responses to an attempt

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into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992).

192 Cable systems consist of transmission facilities and cables, through which programming is transmitted. The system, so defined, is personal property. The cable either runs underground, in utility conduits, or is strung aboveground, from utility poles. Either method of installation requires the occupation of a public easement over real, public property. See Brenner et al., supra note 11, § 3.03[1]. In almost every system, cables also run across public easements over private property, necessitating a physical occupation of private real property by the cable company. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 n.16 (1982) (holding that occupation of 1.5 cubic feet of space on appellee's property by cable company was compensable taking). The fact that the cable company relies on a grant of access by the municipality in every case and an additional grant in some cases by private property owners, see Cable Holdings v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 602 (11th Cir. 1992) (finding utility easement on appellee's property was not dedicated for "general use of all utilities"; thus, occupation by appellant was taking), suggests that the cable operator can assert no independent claim to the real property over which her cables run.

193 While the operator does not have title to the public rights-of-way, she does own the cable system. Access requirements have no meaning absent that system—a municipality has not, after all, secured public access to cable if it allows its citizens access to the utility conduits through which the system runs. Thus, the property the municipality needs access to is the property—the wires and transmission equipment that make up the system—owned by the operator. Although the access channels will not be used by the government (except for those channels reserved explicitly for government use), the imposition of access requirements on a cable operator by a court bears some similarity to the claiming of an easement over a property owner's chicken farm for low-flying military aircraft at issue in United States v. Causby, 328 U.S. 256 (1946). In that case, the Court found the easement to constitute a taking because its use by the government had destroyed productive use of the property as a chicken farm. Id. at 259. By contrast, access requirements do not destroy all productive use of the property, but leave intact the owner's ability to profit from utilization of the unregulated portion of the property. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 135 (1978) ("The Landmark Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion.").

194 Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1341 (D.C. Cir. 1985) (rejecting appellant's claim that Air Force had abrogated appellant's property interest in easement in utility conduits because appellant's claim expired with franchise agreement).

by access advocates to impose access requirements ex post facto.[195] In that context, the cable operator's investment-backed expectation, like that of the developer in *Kaiser Aetna*, was that she would be able to exclude access programmers. Similarly, the cable operator would clearly be suffering an uncompensated loss (of profits from the channels to be dedicated to free public access) due to court-imposed regulation.

However, in order to successfully challenge access obligations on takings grounds, the cable operator must still demonstrate that she enjoys the right to exclude access programmers.[196] Recent decisions characterizing utility conduits as public forums[197] undermine such an argument. If utility conduits are public forums, even if only in the context of the transmission of cable programming, regulation of access to that forum can consist only of time, place, and manner restrictions—for example, a cable operator could restrict access programming to a narrow range of channels.[198] An outright ban on public access, however, if enacted by the state, would be unconstitutional, since it would fall outside of those narrow exceptions.[199] Even assum-

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195 If a cable operator who has previously agreed to access requirements attempted to characterize such requirements as a taking, either in the context of franchise renewal negotiations or in an attempt to defeat the access terms of an existing agreement, that operator would have to demonstrate that the municipality had not already compensated her for the diminution of her profit interest in the system through the franchise fee and rate-setting negotiations. Had access requirements not been included in the request for proposals the city distributed, it is likely that a higher franchise fee may have been sought and received by the city, or that the rates the operator would be entitled to charge to customers would have been lower. The economic cost of access channels was, in one fashion or another, included in the bargained-for price of the franchise. That fact vitiates any takings challenge raised by a current or prospective cable operator. Also, following *Kaiser Aetna*, a cable operator would have a hard time proving she had harbored reasonable investment-backed expectations such that she would not be subject to the access requirements she had agreed to as part of the initial franchise. See Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 7 (D.D.C. 1993) ("Nor do the PEG . . . access provisions overreach. PEG use is negotiable . . . .").

196 See supra note 191.

197 Preferred Communications, Inc. v. City of L.A., 754 F.2d 1396 (9th Cir. 1985), aff'd, 476 U.S. 488 (1986); cf. *Tele-Communications of Key West*, 757 F.2d at 1338-39 (holding that cable operator had stated cognizable First Amendment claim in challenging restriction of its speech under public forum doctrine). For a more complete discussion of these cases, see supra notes 172-73 and accompanying text.

198 See, e.g., *Preferred Communications*, 754 F.2d at 1409. In even more limited circumstances, the government can impose content-based restrictions, but only if they are narrowly tailored to serve a compelling governmental interest. Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45-46 (1983). Preservation of a cable operator's right to exclude others from use of her system hardly qualifies as a compelling governmental interest.

199 Cf. Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting) (objecting to flat ban on loudspeakers because ban left no affordable alternative means of communication); Schneider v. State, 308 U.S. 147, 164-65 (1939) (invalidating flat ban on leaflets).

ing that the cable *system* itself is not a public forum,[200] if the cable operator is operating a private system within a public forum (the utility conduit), it would be anomalous to permit a private actor to so absolutely control access to that forum. Such a sweeping delegation of state power would be tantamount to allowing a private party to sell parade permits on the Washington Mall.[201] The only way to understand that delegation would be to acknowledge the subordination of free speech to property interests, insofar as it limits access to, and control of, a public forum to those with the capital to build a cable system.[202] It follows that the *right* to exclude access programmers from a public forum never vested in the cable operator in the first instance,

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200 A result not reached by the court in either *Preferred Communications* or *Tele-Communications of Key West.*

201 While the Supreme Court endorsed the limited right of the Ancient Order of Hibernians to control the use of some of the streets in South Boston for the purpose of exercising their free speech rights, see Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338 (1995)—such right being limited in its exercise to one day per year—it seems unlikely that the Hibernians would be given the power to control the streets of South Boston every day of the year, or even every Sunday. Yet this seems closer to what cable operators are seeking.

202 In fact, the limitation on access to the public forum represented by utility conduits may be more narrow still—given the infinitesimal number of cable operators with any local competition. Only 53 of 11,000 communities nationally are served by more than one cable operator. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 40 n.16 (D.D.C. 1993), vacated and remanded, 114 S. Ct. 2445 (1994). Although some of that statistic can be explained by the now-prohibited practice of exclusive franchising, many believe cable is a paradigmatic natural monopoly, and that the entrance of competitors into markets already wired for cable is unlikely and unwise. See, e.g., Andrew A. Bernstein, Note, Access to Cable, Natural Monopoly, and the First Amendment, 86 Colum. L. Rev. 1663, 1679 (1986) (arguing that natural monopoly status of cable, coupled with disruption inherent in installation of additional systems, represent strong reasons for preserving cable's monopoly status). The limitation on access to the forum of the utility conduits may preclude all but those operators who were the first to enter that particular market. By delegating the power to regulate speech in a public forum (the utility conduit) to a private actor (the cable operator), the state may be investing the private actor with a public function, thereby triggering public forum analysis under Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc., 745 F. Supp. 65 (D. Mass. 1990). In that case, the district court ruled that the once-public streets between the shopping-center buildings were constitutionally public, or at the very least, actions on the part of the management of the center were state action if taken with respect to limiting the public's use of those walkways. Id. at 74. This case closely parallels public access cable in several respects. First, the court drew a distinction between the public areas of the marketplace (the streets in question) and the shopping areas. Id. at 73. Second, the court noted that the land on which the marketplace was located was not owned by the shopping center, but leased from the city of Boston. Id. at 71 n.10. Finally, and most importantly, the court focused on the fact that the walking areas between the buildings were intended by the city to remain public—much as public access channels are clearly delineated in franchise agreements with cable operators. Id. at 73. The court viewed this reservation as the creation of a perpetual easement vested in the public. Id. Reasoning that the marketplace management was limiting who could use that easement, and therefore performing a public function, the court subjected the restrictions on speech to strict First Amendment scrutiny, which they did not survive. Id. at 74-76.

and therefore that an action circumscribing that "right" cannot constitute a taking.

Even if a cable operator were able to defeat an access argument based on the public forum status of utility conduits, she would still face an uphill struggle in her efforts to characterize access requirements as takings. Takings doctrine divides into two general categories: permanent physical occupations and regulatory takings that diminish the economic value of property, albeit without a physical occupation. If governmental action falls into the first category, it is a taking requiring compensation even if the intrusion is minimal.[203] If governmental regulation falls into the second category, it becomes subject to a detailed factual analysis conducted against the shifting backdrop of ambiguous case law.[204] That analysis balances the governmental interest driving the regulation against the diminution in value of the property resulting from the regulation.[205]

Although "[it] seems settled that regulation goes 'too far' and thus constitutes a compensable taking if it deprives the property owner of such an essential attribute of property ownership as the right to exclude trespassers,"[206] the elimination of a cable operator's right to exclude public access programmers from a limited, segregated block of channels would appear to be something less than the deprivation of the right to exclude trespassers, provided that that block as a whole constitutes a small percentage of the total channel capacity of

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203 See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 434-35 (1982) (holding that statute requiring landlords to allow cable company to string cables on their buildings and install transformer boxes on roofs, although having minimal impact on value of buildings, was compensable taking); Tribe, supra note 29, § 9-5, at 599-604 (arguing that takings jurisprudence draws bright line in characterizing all "physical invasions," no matter how small, as takings).

204 See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."). The *Lucas* Court conceded that regulation depriving an owner of all of the economic value of her property can be fairly characterized as a physical occupation. Id. at 1017. However, case law still permits substantial diminution of an owner's property through regulation, provided that regulation serves a governmental interest. See generally Penn Cent. Transp. Co. v. New York City, 438 U.S 104, 131 (1978) ("[D]iminution in property value, standing alone, cannot establish a 'taking' . . . and that the 'takings' issue . . . is resolved by focusing on the uses the regulations permit."); Euclid v. Ambler Realty Co., 272 U.S. 365, 384, 396-97 (1926) (upholding zoning regulation despite 75% diminution in value); Hadachek v. Sebastian, 239 U.S. 394, 405, 412-14 (1915) (upholding ordinance despite at least 92.5% diminution in value).

205 Agins v. Tiburon, 447 U.S. 255, 260-61 (1980) ("Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests." (citation omitted)).

206 Tribe, supra note 29, § 9-4, at 595 n.1.

the system.[207] In contrast to the diminution of a cable operator's right to exclude as a result of public access requirements, the right to exclude is more typically an indivisible right—once strangers are allowed onto the owner's property against her wishes, her right to exclude is "extinguished." This contrast between the diminution of a discrete portion of the cable operator's right to exclude and the destruction of the marina developer's indivisible right to exclude in *Kaiser Aetna* parallels the contrast between the diminution of a discrete portion of the operator's editorial control and the evisceration of the *Miami Herald*'s editorial discretion at stake in *Tornillo*.[208]

The effect of an infringement of the cable operator's right to program all of the channels on her system as she sees fit is, in any case, offset by the public interests motivating public access requirements. The primary interest at stake is the promotion of a diverse marketplace of ideas; in the case of cable access regulation, this is an interest amplified by the "bottleneck control" exercised by cable operators.[209]

Because the imposition of access requirements on a cable operator imposes an individualized burden on that cable operator, the weighing of the public interest against the diminution of the cable operator's property interest may fall within the framework articulated by the Supreme Court in two recent decisions limiting the government's ability to exact unconstitutional conditions[210] from property owners

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[207] See id. at 597.

[208] For a more complete discussion of *Tornillo*, see supra notes 101-09 and accompanying text.

[209] See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2466 (1994) (emphasizing power of cable operator's "bottleneck control" and ability to limit access to viewing households). See supra notes 139-42 for a more complete discussion of this aspect of cable operation and the attendant First Amendment implications.

[210] For a more general discussion of the current state of the doctrine of unconstitutional conditions outside of the limited area of takings, compare Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1419 (1989) (defending doctrine of unconstitutional conditions as safeguard against indirect burdening of liberty by government) with Richard A. Epstein, The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 6-10 (1988) (recasting unconstitutional conditions doctrine within context of bargained-for consent by recipients of government benefits). Although the doctrine, as articulated in the recent takings cases discussed here, seems to be gaining strength, it has simultaneously fallen from favor as a more generally applicable doctrine of statutory review. See, e.g., Rust v. Sullivan, 500 U.S. 173, 192-200 (1991) (refusing to invalidate as unconstitutional condition statute implementing "gag rule," preventing federal grantees from counseling abortion as alternative family planning method). It is unclear whether the takings trend will grow to encompass regulation of nonreal property under the rubric of a strengthened yet particularized doctrine of unconstitutional conditions, or if regulation of nonreal property and the economic interests therein (such as the regulations on cable considered in this Note) will be subject to a lesser standard of scrutiny as a result of the more general decline in the unconstitutional conditions approach. The answer to that question is speculative and beyond the scope of this Note.

who petition the government for approval to utilize their property in a manner regulated by the government.[211] The Supreme Court's decisions in *Nollan v. California Coastal Commission*[212] and *Dolan v. City of Tigard*[213] require that a nexus exist between the governmental interest at stake and the exacted conditions.[214] Once the nexus has been shown to exist, *Dolan* further requires that the government prove that the conditions are "roughly proportionate" to the impact of the utilization of the property.[215] While both cases found the challenged governmental conditions to be takings requiring compensation, a similar analysis suggests a different result when applied to cable access requirements. Since the cable operator is not the owner of real property, her interest is lessened.[216] Furthermore, the nexus between the infringement of the operator's property interest and the governmental interest served—given the "bottleneck control" the *Turner Broadcasting* Court identified as the potential result of cable television if left unregulated—would appear to satisfy even the exacting standard of "rough proportionality" enunciated by the Supreme Court in *Dolan*.[217]

In light of the foregoing, and despite the ever-broadening definition of a compensable taking, the imposition of public access requirements on a cable operator, even when imposed on a franchise holder by a court responding to access litigation, would appear to fall short of effecting a compensable taking. Thus, public access requirements satisfy the second prong of *PruneYard*, enabling a classification of cable systems as public forums. This clears the way for access advocates to demand access channels on cable systems without access, and fore-

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211 See Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-22 (1994) (holding that government had imposed unconstitutional condition on petitioner by conditioning zoning variance on construction of walkway across petitioner's property and by limiting scale of development because such impositions failed nexus and rough proportionality tests); Nollan v. California Coastal Comm'n, 483 U.S. 825, 838-42 (1987) (holding conditioning of permit to build house on dedication of easement across owner's beachfront property was not related to stated governmental interest in offsetting loss of public ocean views resulting from construction and that, failing nexus test, condition was unconstitutional).

212 483 U.S. 825 (1987).

213 114 S. Ct. 2309 (1994).

214 Id. at 2317-18; *Nollan*, 483 U.S. at 837.

215 *Dolan*, 114 S. Ct. at 2319-20.

216 Thus far, unconstitutional conditions takings cases have involved claims by owners of real property against governmental entities. See id. at 2313 (Dolan owned hardware store and adjacent parking lot.); *Nollan*, 483 U.S. at 827 (Nollans owned beachfront lot.). A lower standard of protection has been suggested for the adjudication of takings claims involving personal property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992); see also supra notes 177-79 and accompanying text (exploring distinction between real and personal property).

217 114 S. Ct. at 2309.

closes arguments by franchisees attempting to evade existing access obligations.

CONCLUSION

Under the doctrine of *PruneYard Shopping Center v. Robins*, cable systems can be construed as public forums. Such a designation represents, in this context, a minor restriction on the property and speech rights of the cable operator. While the speech implications may be more serious than those at stake in *PruneYard* (in which the Court declined to view a shopping center as a speaker), the Supreme Court's recent affirmance of must-carry rules, which encroach on the speech rights of operators in the same manner as access requirements, suggests that those speech claims fail to rise to the level of proof of a constitutional violation. Similarly, the property claims, while not insubstantial, fall short of a violation of the operator's Fifth Amendment rights. Finally, the imposition of access requirements by a court, or the negotiation of access requirements within the context of a franchise agreement, represents the exercise of police power permitted by the *PruneYard* Court to create broader speech rights. These arguments suggest the outlines of a legal claim to public access cable channels.

Cable access channels have suffered from poor production values and, at times, a lack of interest from citizens as viewers and as participants. The medium is poised for change. The technologies of video production and computer graphics have progressed to a point where sophisticated tools are within affordable reach of access programmers. The sensibilities and power of the Internet have steeped a new generation (or at least a small part of a new generation)[218] in the power of communications technology.

Despite these heartening developments, the future of American communications is not necessarily a democratic one. As the continued assault on cable access indicates, the cable industry is dedicated to maximizing the profits from its share of the communications industry. The parties before the Court in *Turner Broadcasting*—cable operators, cable broadcasters, and television broadcasters—provide a sobering look at the cast of characters on stage in the battle over the

218 Even its most ardent supporters acknowledge that the Internet is available to only a small, highly literate, affluent (or at least academically connected) segment of the United States population. Those limitations are even more apparent outside of the United States. Despite the elite cast of characters "surfing the Net," the medium has been widely credited with playing an important if not instrumental role in social and political transformations throughout Eastern Europe and in China.

future of our communications infrastructure.[219] The cable industry championed its free speech rights in an effort to solidify its control over the programming transmitted over its systems, while network television invoked diversity and the marketplace of ideas in defense of rules that would ensure networks' continued presence on cable television.

One response to the increasing concentration of power over public discourse is to fight at the local level to increase the "outlets for community self-expression."[220] The power of video images is undeniable, the power of televised images more so.[221] Public access cable channels represent a vehicle for their transmission by a more diverse group of speakers. The arguments contained in this Note attempt to sketch out a strategy for claiming those channels in the interests of promoting a public discourse absent in our society. It remains for advocates in communities around the country to employ that strategy.

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[219] For a discussion of the interests involved in *Turner Broadcasting*, see Sunstein, Cyberspace, supra note 155, at 1766-68.

[220] United States v. Midwest Video Corp., 406 U.S. 649, 667-68 (1972).

[221] See Denver Educ. Tele-Communications Consortium, Inc. v. FCC, Nos. 95-124, 95-227, 1996 U.S. LEXIS 4261, at *132 (U.S. June 28, 1996) (Kennedy, J., joined by Ginsburg, J., concurring in part and dissenting in part) ("Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media.").