
The Cable Act and Municipal Ownership: A Growing First Amendment Confrontation

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Introduction

In an increasing number of communities throughout the country, television viewers must depend on government-owned and controlled cable television systems for vital communications services. While perhaps relatively unremarkable when cable television was barely more than an antenna service delivering a minimum of local television signals to households deprived of adequate off-the-air reception, governmental ownership of this communications medium has become far more significant in light of the dramatic transformation in the size, character, and influence of cable over the past decade. Now, a cable operator supplies the local viewing public with a vast array of services, ranging from access to diverse community groups and ideas to the latest rage in music videos. Whereas cable operators

of the past may have offered little more than a powerful antenna service capable of distributing a handful of over-the-air television stations, the modern cable operator is an originator of news and public affairs, a source for commercial advertising and political announcements, the guardian of an increasingly important communications access system, and the principal (if not exclusive) video editor who must select among the more than one hundred satellite [\(note 1\)](#) and other program services available for inclusion on a system that, typically, has a capacity of only thirty to forty channels. [\(note 2\)](#)

Municipal [\(note 3\)](#) ownership and operation of cable systems is not new. Such ownership, in fact, can be traced almost to the beginning of the cable television business. [\(note 4\)](#) But, until recently, governmental ownership and control were both relatively limited and confined to fairly unique circumstances typically to a small community where, due to prevailing economic conditions, private ownership was unable to develop.

The last few years, however, have witnessed a disturbing new phenomenon. In community after community municipal authorities are either threatening or actually deciding to build and operate their own cable systems either in competition with or to supplant an existing private operator. [\(note 5\)](#) This is accomplished in one of two ways. First, a municipal authority can revoke or deny renewal of the franchise held by an incumbent private operator and replace that operator with its own system. Second, it can permit an existing private operator to remain in business but award itself a competitive franchise that allows the governmental unit to effectively overbuild the private operator.

Although many of these activities have been the subject of court challenges by incumbent operators on First Amendment, antitrust, and other grounds to date, such challenges have been uniformly unsuccessful. [\(note 6\)](#) The major reason is the current imprimatur of municipal ownership found in federal statutory law. Thus, the Cable Communications Policy Act of 1984 [\(note 7\)](#) (1984 Cable Act or 1984 Act) provides in Section 613(e)(1) that a State or [local] franchising authority may hold any ownership interest in any cable system. [\(note 8\)](#) The only restriction is that editorial control must be exercised through an entity separate from the franchising authority. [\(note 9\)](#) Surprisingly, this provision was not altered in the Cable Television Consumer Protection and Competition Act of 1992 [\(note 10\)](#) (1992 Cable Act or 1992 Act), even as Congress bestowed new powers on local franchising authorities in other significant respects. [\(note 11\)](#)

With such a sweeping statutory license, it is little wonder that, when confounded by various problems in dealing with private cable interests, local franchising authorities have increasingly turned to government ownership to secure a type of cable service more to their liking. And, as noted, the 1992 Act does nothing to arrest this trend. Indeed, in its rush to restrict perceived abuses in the cable industry and to spur the development of competitive multichannel providers, [\(note 12\)](#) Congress not only overlooked the problems of municipal ownership, it indirectly enhanced the ability of local authorities to reject private media ownership in favor of government ownership.

The issue of municipal ownership, therefore, if left unaddressed, may literally change the face of cable television in many communities. Instead of the evils some public officials have long attributed to monopoly private ownership, the pernicious and practical consequences of permitting unrestricted government ownership may prove far more profound and damaging to the public interest especially if cable television becomes a primary vehicle on the promised new electronic superhighway reaching into every home. Congress, the courts, and, perhaps most importantly, the state legislatures must examine and limit this disturbing trend. At the local level, where cable television is still regarded by many government officials as more of a public utility than as a communications medium, [\(note 13\)](#) there is little likelihood of a franchising authority pausing to debate these public policy and First Amendment issues before granting itself a franchise.

As successive sections of this Article will demonstrate, the trend toward municipal ownership of cable television has assumed decidedly new and different dimensions over the past few years. Despite a vastly changed cable television business, in many communities private ownership is being replaced or threatened by government ownership without any meaningful examination of the broad public interest implications underlying this transformation.

The prodigious changes in the cable television business, however, demand that the phenomenon of municipal ownership not proceed without a full airing of the important public issues involved. That examination must necessarily start with Section 533(e) of the 1984 Act, which, at present, sanctions municipal ownership without substantial

restriction. While Congress was, in 1984, cognizant of some of the public issues surrounding municipal ownership of cable, it was crafting legislation on a totally different cable landscape. As a communications business, in cities small and large, cable television has grown enormously in size, role, and prominence in the years since Section 533(e) was enacted. Unfortunately, in passing the 1992 Act, Congress was largely focused on reregulating certain consumer aspects of cable and spurring competitive ownership of multiple-channel video services, apparently even if such competition takes the form of government ownership.

Today, before municipal ownership spreads to more and larger communities, several important public policy issues must be raised and resolved. First, what, if any, public policy advantages attach to municipal ownership of cable systems when private ownership is demonstrably available? Second, even if certain advantages exist, should public monies and resources be directed to owning and operating cable television when other, more essential, community-wide services may be in need of greater attention, again especially in circumstances where a private operator is already in place or otherwise available to provide service? Third, in light of the pervasive communications role now played by cable in so many local communities, how does government ownership of this vital medium square with basic First Amendment values that underlie all federal communications policy?

Although all of these issues are important, this Article will deal almost exclusively with the third issue raised—the impact of municipal ownership on core First Amendment values. It will first explore the changing complexion of municipal ownership, highlighting a few prominent recent cases where municipalities have, after many years of private service, elected to build their own competitive cable systems. Second, this Article will examine the statutory framework that presently permits municipal cable ownership in virtually any circumstance, focusing on the factual and policy backdrop that led to enactment of 47 U.S.C. 533(e). Third, this Article will discuss some of the changes in the cable television business that necessarily heighten the potential First Amendment difficulties when local governments step into the role of communications provider. The increasingly diverse editorial functions now routinely performed by cable operators have greatly altered the nature of cable service. Even if well intended, public ownership in such circumstances can inevitably lead to abuses that not only drive out private competition, but far more importantly, undermine basic First Amendment principles and interests.

Finally, the Article will conclude that the problems created by municipal ownership are too persistent and complicated to be resolved by simply requiring, as in Section 533(e)(2), that the editorial function be entrusted to a local entity somehow separated from local franchising authorities. Rather, Section 533(e) should be replaced by a new provision that permits municipal cable ownership only as a last resort. Instead of affirmatively sanctioning municipal ownership, federal communications law should encourage private ownership and permit public ownership only in circumstances where, following a public proceeding, it has been determined that no private provider exists that is willing and able to provide cable service to the community in question. Moreover, in the absence of changes in federal law, state legislative bodies should formulate and announce their own public policy restricting municipalities from becoming a primary provider of mass media services.

I. The Changing Complexion of Municipal Ownership

Cable television is no longer merely a community antenna service. Direct government ownership and control of cable would cause little alarm if the cable television industry had not changed so drastically since its inception. The new nature of cable television, however, casts into much sharper relief the changes taking place in municipal ownership and control of the medium.

A. General Developments in the Cable Industry

Cable television today is vastly different and a far more important community medium than it was only a decade ago. It has, in a relatively short period of time, developed into an elaborate communications service that, in most communities, is the primary way the majority of the public receives its news, information, entertainment, and other television services. [\(note 14\)](#)

Although estimates vary, the first commercial community antenna (CATV) systems started providing service in the late 1940s or very early 1950s.[\(note 15\)](#) As recently summarized by the FCC, Cable systems began in areas with poor off-air television reception, and at first primarily offered improved reception of existing broadcast signals or imported a few distant signals.[\(note 16\)](#) The rapid development of satellite program delivery services changed matters dramatically. With a wide variety of news, information, and cultural and entertainment services suddenly available in even the smallest corner of America, the availability of and demand for cable television increased substantially, even in areas with good over-the-air reception.

In responding to these changes, cable television has been transformed from a mere retransmission service into an important communications medium.[\(note 17\)](#) Cable operators, whether privately- owned or municipally operated, must create and then constantly refine the programming lineup they offer subscribers. For example, cable operators must choose from among a vast array of programming services devoted to such subjects as news and political developments (C-SPAN I and II, Cable News Network, Consumer News and Business Channel), law (Courtroom Television Network), religion (National Jewish Television, VISN), music (MTV, VH-1, The Nashville Network), minority interests (Black Entertainment Television, Galavision), education (The Discovery Channel, Mind Extension University), sports (ESPN, SportsChannel), Hollywood feature films (Home Box Office, Showtime, American Movie Classics, Encore, The Movie Channel), and general entertainment programming (USA Network, WTBS, TNT). They must also decide whether to include special programming for children and adults (including potentially ribald material) and whether to cover local events and meetings (city council, local school boards, etc.).

In recognition of this changing role, the Supreme Court has stated that cable operators exercise a significant amount of editorial discretion regarding what their programming will include.[\(note 18\)](#) Similarly, it has stated that through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats.[\(note 19\)](#) As the Court of Appeals for the District of Columbia Circuit has noted, it is now clearly established that in selecting or creating programs and program sources to offer to their subscribers, cable operators engage in conduct protected by the First Amendment.[\(note 20\)](#)

B. Background and Recent Developments Relating to Municipal Ownership of Cable Television

Municipal ownership of cable television is nearly as old as cable television itself. According to one report, several municipal systems were in operation as early as 1950.[\(note 21\)](#) These pioneer systems were installed primarily because of community isolation and were a direct requirement for local T.V. reception.[\(note 22\)](#) In fact, the primary motivation for public ownership by such communities was usually an inability to attract the interest of private companies.[\(note 23\)](#)

The survey, conducted by the National Civic Review, reported that twenty-eight municipally-owned systems were in operation in 1981, most of which were in relatively small, remote communities.[\(note 24\)](#) Thus, seventeen of the twenty-eight communities reported as having some form of municipal ownership had fewer than 2500 residents and twelve (or more than 40 percent) had fewer than one thousand residents.[\(note 25\)](#) Ten years later, in March 1991, it was reported that sixty-two city-owned cable systems were already in full operation (including a number of overbuilds[\(note 26\)](#)) and that eighty-six additional communities in twenty states were at various stages of considering outright overbuilds to compete with the service of an existing private provider.[\(note 27\)](#)

More than numbers, however, were changing. As the same cable publication pointedly observed: Since deregulation [under the 1984 Act] terminated the ability of cities to lord over cable with the threat of rate control, they've resorted to more drastic threats: shorter franchises, multiple franchises and municipal overbuilds.[\(note 28\)](#) In other words, having been stripped of their pre-1984 Act leverage, local government officials, in increasing numbers, turned to municipal ownership and control as a means of bringing about changes in the level and nature of cable service in their communities.

Whether the restoration of rate regulation in the 1992 Act will diminish or change these developments in any significant respect remains an open question. Nevertheless, the expanded role of cable television and the increasing

sophistication of cities in dealing with the medium have changed the dynamics substantially. No longer content to base decisions regarding municipal ownership on need (as in the early years), local franchising authorities are now far more willing to wade into these waters with every intent of replacing incumbent private providers.

Three of the most prominent forays into municipal ownership have resulted in recent court decisions all of which have affirmed the aggressive tactics of local franchising authorities. Together, these cases aptly illustrate the rapidly changing complexion of municipal cable ownership.

1. Paragould, Arkansas

Paragould, Arkansas, is a community of approximately fifteen thousand, situated in the northeast corner of the state. It has no local television station and receives over-the-air television service from only one station, located in Jonesboro, approximately twenty miles away. Paragould has had cable television service since September 1965.[\(note 29\)](#) In 1986, the City placed an ordinance before Paragould voters authorizing construction of a city-owned system. On June 17, 1986, the voters, by a three-to-one margin, approved the ordinance and the City ultimately awarded a competitive franchise to its own Paragould City Light and Water Commission (CLW).[\(note 30\)](#)

In launching its rival system, Paragould raised \$3.22 million through a public bond issue.[\(note 31\)](#) The City began operations in March 1991 and, within six months, had acquired more than two thousand subscribers.[\(note 32\)](#) Its success was perhaps ensured by threats, spread through an aggressive marketing campaign, to raise property taxes to finance the system unless the City received at least 60 percent of the Paragould cable market.

In challenging the City's actions in federal court, the incumbent operator charged that the City had violated the antitrust laws and the First and Fourteenth Amendments, and had breached its franchise agreement. The operator claimed that by granting a franchise to the CLW, Paragould had facilitated monopoly leveraging or the use of monopoly power in one market to restrain competition in a second market. But the U.S. Court of Appeals for the Eighth Circuit found that the State of Arkansas had clearly authorized municipalities to enter the cable business and, as such, that the City was entitled to utilize its unique access to the existing governmental infrastructure, such as utility poles, rights of way, city employees, city vehicles, and office space.[\(note 33\)](#)

The operator also argued that its First and Fourteenth Amendment rights were violated because its franchise contained a provision requiring the operator to notify and gain approval from the City before soliciting advertising on its system, whereas the franchise between the City and CLW contained no such restriction. The operator claimed that this differing treatment infringed both its First Amendment speech rights and its Fourteenth Amendment equal protection rights.[\(note 34\)](#) But the court held that by entering into its earlier franchise agreement, the cable operator effectively bargained away some of its free speech rights and cannot now invoke the First Amendment to recapture surrendered rights.[\(note 35\)](#)

2. Niceville, Florida

Niceville, Florida, is a community of approximately 8500 located near the Gulf Coast in Florida's Panhandle. It has no local television station and receives its only over-the-air service from stations in the Pensacola/Mobile and Panama City television markets, each located more than thirty miles away.

The incumbent operator had been providing cable service for fourteen years when the Niceville City Council, in 1985, passed an ordinance authorizing the City's own system. This followed numerous consumer complaints regarding the private provider's service and a report favoring municipal ownership by a consulting firm hired by the City.[\(note 36\)](#) Among the motives attributed to city officials for launching a rival system were objections to the incumbent operator's editorial judgment and disagreements with the operator's policies as to certain religious programming.[\(note 37\)](#)

The incumbent operator filed suit, alleging that the City's conduct violated its constitutional rights of freedom of speech and due process. It sought damages, a declaration that the City's ordinance was unconstitutional, and injunctive relief against enforcement of the ordinance.[\(note 38\)](#) Ultimately, however, the U.S. Court of Appeals for the Eleventh Circuit found for the City. As to the incumbent's constitutional claim, the court found (a) that potential economic injury

did not rise to the level of a First Amendment injury and (b) that the private operator was not impeded in its continued ability to speak to Niceville cable viewers despite the presence of a competitive system operated by its local regulator.[\(note 39\)](#)

3. Morganton, North Carolina

Morganton, North Carolina, is a community of nearly fourteen thousand nestled in the foothills of the Pisgah National Forest. Without its own local television outlet, Morganton has been served by a private cable provider for more than twenty years. However, with its franchise set to expire in 1986, the private provider requested a five-year extension from the city council in 1983. The City refused and issued a Request For Proposals (RFP) in September 1984. In response to this RFP, the incumbent operator and two other privately-owned cable companies submitted franchise applications. Following a public hearing, the City of Morganton decided to (a) establish its own system, (b) deny the incumbent's request for renewal, (c) deny franchise applications submitted by the other two private companies, and (d) effectively prohibit (for a period of five years) the provision of cable television service in Morganton by anyone in competition with the City's system.[\(note 40\)](#)

In a familiar pattern, the City's decision was preceded by years of wrangling between the cable operator and the City Council over certain programming and operational judgments exercised by the system. For example, in 1979 the Council had conditioned its approval of a rate increase on the addition of a specific channel to the system's program line-up. In 1980, the City Council claimed that the system's introduction of HBO, its first satellite pay service, was a violation of the franchise. The Council also passed a resolution urging customers not to subscribe to the service until the Council could review it. Later, city officials demanded that the system rearrange its service offerings to add ESPN without any change in rates.[\(note 41\)](#)

Faced with a city decision that would put it out of business, the Morganton operator sued the City, alleging a violation of its First Amendment rights. In particular, the incumbent operator argued that it had the right to use the city-owned poles and rights-of-way indefinitely, notwithstanding the lack of a franchise. The district court, however, concluded that the City's refusal to renew was fully justified by the City's control over its public rights-of-way; did not violate the incumbent operator's First Amendment rights; and, in fact, furthered such substantial governmental interests as enforcing contracts, imposing public service obligations, and preventing public disruption.[\(note 42\)](#)

Municipal ownership, therefore, is no longer a rural novelty. It is a unique social experiment being conducted in more and different circumstances, placing in plain relief the problems and public policy issues that such ownership necessarily entails.

C. Factors Weighing Against Municipal Ownership in Circumstances Where Private Ownership is Available

In contrast to most municipal ownership situations in the past, which were confined mainly to isolated geographic areas, the more recent trend has been toward broader governmental ownership, often unleashed as a direct reaction to complaints or other confrontations with the incumbent private provider. It is one thing for a local government to establish its own system when economic or other factors have effectively precluded private ownership. It is quite another to launch such ownership either to replace longstanding service or in order to ensure a government-run alternative positioned to eventually supplant the private provider.

If private ownership has not developed in a given community in the face of a demonstrable need, it is difficult to challenge a local government's attempt, as a last alternative, to establish some form of governmental ownership. On the other hand, if private ownership already exists or would be readily available to provide new or continuous cable service, serious questions are raised by permitting a local franchising authority to (a) shut down the private provider and launch a replacement system of its own, (b) grant itself a competitive franchise and overbuild an existing private provider, or (c) simply launch new or replacement cable service without even considering private ownership.

Given the programming diversity, technological maturity, and operational sophistication of contemporary cable

systems, the question arises as to what overriding benefits derive from governmental ownership in situations where the availability of private ownership is not in doubt. Clearly, there is no prevailing evidence that a government agency makes a better or more consumer-responsive cable operator. In fact, a community launching its own cable service always does so without any experience in the cable television business usually proceeding on the unfounded proposition that operating a local cable system is not much different from operating a local water or electric-power system.

If local government franchising authorities become unusually vexed over rates, services, and other conditions of cable operation, they do not have to start their own businesses to bring about change. Even prior to the 1992 Act, which empowers municipal authorities in several critical respects, it was clear that the power of franchise renewal stood as a very effective tool in the hands of local regulators. There is little doubt that most private operators would respond favorably to pressure, when properly applied by the franchising authority, to bring about legitimate improvements. [\(note 43\)](#) Now, however, the 1992 Act gives local governments renewed power to regulate cable rates, [\(note 44\)](#) makes explicit their ability to impose customer service standards that exceed those adopted by the FCC or cover matters not dealt with by the FCC, [\(note 45\)](#) and clarifies their authority to extract more specific commitments in the area of technical performance standards. [\(note 46\)](#) Considering such expanded powers, the public policy rationale permitting municipal ownership under most circumstances is even more suspect.

When a municipality elects to be both regulator and communications service provider, questions arise concerning the allocation of community resources. For example, in Paragould the City elected to issue municipal bonds and threatened to raise local property taxes to achieve its purpose of overbuilding the existing private provider. In so doing, the City's priorities and projects in other areas of municipal government were obviously affected. [\(note 47\)](#) Especially in the 1990s, when all levels of government are strapped in their ability to provide vital services, it is questionable how essential it is for a municipality to expend any resources to develop a competitive or replacement city-owned and controlled cable communications service. [\(note 48\)](#)

Finally, it must be said that cable television, despite its heightened prominence in the lives of so many, is still not an essential community service on par with light, water, and power for which universal service is generally regarded as a social necessity. [\(note 49\)](#) While dependent on the use of certain public facilities to reach all subscribers along its path, the provision of cable service is a decidedly different activity, one whose primary purpose is not in supplying a vital energy source, but in bringing local residents an important complement to their daily lives. In performing this type of function that is, supplying news, entertainment, and general enrichment, instead of electrical energy the operation of a contemporary cable system necessarily invites First Amendment considerations.

II. The Cable Act and Constitutional Protection

The 1984 Act laid to rest any previous doubt whether municipalities and other local governmental entities could own and operate their own cable television systems. Thus, Section 533(e) provides as follows:

- (1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.
- (2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority. [\(note 50\)](#)

It is uncertain, however, whether Congress intended (or even imagined) that local government officials would become the aggressive provider of first choice. Indeed, although Congress considered certain proposals that would have restricted city-owned systems, it eventually opted for municipal ownership under a scheme whereby First Amendment interests would supposedly be preserved by requiring that any editorial role be performed by a separate entity (i.e., a governmental unit separate from the specific franchising authority). [\(note 51\)](#)

The broad context in which Congress addressed municipal ownership in the 1984 Act is summarized in the House

Committee Report as follows:

Cable ownership issues arise in three contexts: municipal ownership of a system; a city's acquisition of a system from a commercial operator in the event of a breach of the franchise or upon expiration of the franchise; and efforts to diversify the ownership of cable systems.

Most cable systems are owned and operated by commercial cable interests. Municipal ownership and ownership by non-profit entities like cooperatives have traditionally evolved in communities where private companies were not particularly interested in offering cable services because of expected low return on investment.

More recently, however, a number of larger cities have taken a close look at building their own cable systems as a profitable means of making cable more responsive to city residents' needs. While proponents applaud municipal ownership as a way to meet local needs, critics raise First Amendment concerns about government control of a part of the media. These concerns are addressed in the legislation. [\(note 52\)](#)

The method chosen by Congress to achieve the dual purpose of fostering cable competition while preserving First Amendment values was to permit city ownership, but only if a city's ability to exercise editorial control over the content of programming was somehow restricted. As explained in House Report 934, the intent was to:

bar[] the state or franchising authority from exercising any editorial control over the content of any cable service provided over that cable system (other than programming on any channel designated for educational or governmental use), unless the editorial control is exercised through an entity separate from the franchising authority. The Committee has included this requirement in order to preclude undue government control of programming contrary to the First Amendment. [\(note 53\)](#)

While this legislative history reflects a strong concern for protecting important First Amendment interests, no specificity is provided beyond the separate entity provision itself. Moreover, even though Congress obviously put substantial stock in the necessity of this separate entity requirement, little is said about how it was intended to work. Only the slightest hint is provided in this summation from Senate Report 67:

The committee [Senate Committee on Commerce, Science and Transportation] believes that Government control of the content of the programming on a Government-owned cable system is patently inconsistent with First Amendment principles. *No government, Federal, State, or local, should have the power or the ability to control news and information disseminated over any electronic medium.*

Therefore, the State, and so forth, would have to establish an independent board or separate management company, and such board or company shall not include any State or local office holder. The Committee believes that government officials should not participate in decisionmaking on matters affecting program content. [\(note 54\)](#)

In sum, Congress gave municipal ownership a major boost in the 1984 Act. While acknowledging the potential First Amendment problems that might lie down this road, Congress merely paused long enough to add the rather ill-defined separate editorial entity concept in 47 U.S.C. 533(e)(2). While regrettable, it is nevertheless understandable that, in the early 1980s, Congress saw little need to ponder this issue at great length. On the other hand, when the 1992 Act was being debated a decade later, cable had already developed as a full-fledged mass media provider to the majority of American homes. Given this dramatic turnabout in cable's role and level of influence, Congress either ignored or missed a vital opportunity to reflect anew on the dangers of sanctioning direct government ownership and control of local media.

Instead of addressing the issue of municipal ownership directly, as in the 1984 Act, it appears that in the 1992 Act the point was lost in larger issues. Indeed, Congress not only reaffirmed municipal ownership in the 1992 Act, it substantially exacerbated the problem by vesting local authorities with added regulatory powers. First, in rushing to rein in cable for perceived abuses in rates and services, while at the same time focusing on methods to encourage competitive alternatives to local cable service, Congress seems to have simply brushed aside any consideration of the

serious First Amendment and public policy issues posed by municipal ownership. Second, the 1992 Act actually facilitates expanded municipal ownership. Thus, Section 541(f) of the 1992 Act enables municipal franchise authorities to operate cable systems free of the extensive franchising requirements (including the payment of franchise fees) that they are empowered to impose on private cable operators. [\(note 55\)](#) The 1992 Act also exempts franchise authorities from damage liability. [\(note 56\)](#)

In addition, as noted, the 1992 Act also gives local franchising authorities new power to regulate the rates and services of private cable operators. [\(note 57\)](#) While these new regulatory powers over private systems may ultimately result in curtailing any future escalation of municipal ownership, the potential for governmental abuse remains. It is possible, of course, that cities will simply continue the trend toward favoring their own systems over private systems, increasingly comfortable in the view that they now have even greater power and means ultimately to supplant private providers. Moreover, even if they have no real intention of going into the media business, cities may nevertheless use their new power and leverage to threaten to build a competitive system in order to extract major commitments from private providers that they would otherwise be unable to achieve.

III. Cable's Developing Role as a Primary Communications Medium

Underscores First Amendment Tensions in Permitting Direct Governmental Ownership

As local franchising authorities look to ownership and control of their own cable systems, they do so against the backdrop of a cable and video marketplace vastly different from what existed in 1984, when federal communications law first formally authorized municipal ownership. These changed circumstances, where cable has assumed a more prominent mass media role, greatly heighten the important public policy issues underlying governmental ownership of this emerging communications service. For instance, if cable television in many communities is the sole video communications service, is it sound public policy to permit governmental ownership of that service if private ownership is readily available? Moreover, should not public and communications policy in this area seek to ensure government neutrality in the operation of this increasingly important local communications service?

This section begins by setting the constitutional framework in which these issues arise. It then proceeds to show how cable television has developed into a unique local communications service in which the system operator plays an increasingly active and ongoing editorial role. Finally, it shows that, as a practical matter, important First Amendment interests cannot be effectively preserved by attempting to separate the editorial function from other aspects of governmental ownership.

The First Amendment, [\(note 58\)](#) which operates to restrict the ability of government to censor or control individual speech, does not, in general, restrict the ability of a municipality to speak. [\(note 59\)](#) Thus, there is no outright constitutional prohibition on the ability of a municipality to operate cable systems.

The question raised here, however, is whether, as an overall communications policy issue, federal and state statutory law should permit even encourage municipalities to operate their own cable systems, [\(note 60\)](#) either exclusively or in competition with a private provider. A fundamental rationale for the protections afforded by the First Amendment is a healthy distrust of government. Thus, government as a speaker, selecting and filtering messages, is a role that rightfully has raised significant First Amendment concerns. The basis for these concerns is readily apparent in situations where the government's role as speaker has the effect of constricting the flow of information or ideas. [\(note 61\)](#) Government in such a situation is not merely adding its voice to the marketplace of ideas, but is acting to deter or limit other speakers from entering the marketplace.

The First Amendment requires, and the vitality of our democratic system depends on, a robust private press, not a government monopoly speaker. [\(note 62\)](#) John Stuart Mill formulated a widely-accepted public policy principle when he argued that government should not be entitled to a monopoly over the ideas or arguments the public hears. [\(note 63\)](#) This marketplace of ideas notion is built around two tenets of a democratic state: government is not infallible and

government cannot be the only provider of news and information.

The Supreme Court has held that operation of a cable system plainly implicate[s] First Amendment interests.[\(note 64\)](#) Although the standard by which these interests are to be judged remains unclear,[\(note 65\)](#) the Court's determination that the activities engaged in by cable operators warrant First Amendment protection is unquestionably correct.

Cable operators supply a wide array of programming, both as originators of program material and as editors facilitating the dissemination of program material produced by others. Indeed, cable system operators, whether private or government-owned, engage in at least three broad types of speech activities: (1) as originators of expression; (2) as disseminators of the expression of others; and (3) as gatekeepers for users of public, educational, and government access channels.

At the outset, any local government considering ownership of its own cable system must decide between having the most technologically sophisticated system capable of providing the most elaborate subscriber choices or having a more basic system better suited to the community's resources (dependent, of course, on public funds). However, even if a basic system is selected, important editorial choices must be made. As we have seen, given current channel capacity restrictions and the plethora of available program services, numerous choices must be made among the types of news, entertainment, and sports. For instance, does the operator want a shopping service, a religious channel, a sports channel, a comedy channel, a news channel, a channel devoted to minority interests represented in the community, or a channel devoted to adult or mature entertainment? Moreover, how should these services be packaged and priced, and should some (and, if so, which ones) be made available on a premium or pay-channel basis?

In addition to editorial choices in disseminating messages of others, even the smallest government-run cable system will face difficult decisions in originating messages of its own, as well as facilitating the speech of others in the community. Whether it is coverage of important public meetings or providing access to local politicians, choices have to be made even if the choices (by affirmation or non-action) are to limit or prohibit use of the system for such activities.

Some commentators, at least in the past, have sought to downplay the editorial role of cable operators, arguing that the selection of a particular program service, rather than specific programs, makes a cable operator unlike the newspaper editor who reviews each word before the material is published.[\(note 66\)](#) This analogy is not altogether valid, however, as different media have different needs, and the role of editor in one should not define or limit the role of editor in another. For example, the sheer magnitude of programming offered makes it virtually impossible for a cable operator to preview in advance each and every program segment that is scheduled to appear on a given cable network run. This is not to say, however, that cable operators are unfamiliar with the general content of the program services that they select or that such content is unimportant to the inclusion of a particular program service. Indeed, since many cable services are specifically designed to meet the viewing interests of highly discrete segments of the viewing audience,[\(note 67\)](#) the general thrust of the programming of a particular service is a prime factor in the initial selection and placement of that service on the cable system.

It is true that the vast majority of cable systems all carry certain cable networks,[\(note 68\)](#) and that these networks are also the most popular with subscribers. It would be incorrect, however, to conclude that the selection of these services is not an exercise in editorial discretion. Just as the decision of a newspaper to include a sports section in its daily edition is an editorial decision,[\(note 69\)](#) so too is the decision of a cable operator to include ESPN or a regional sports network in its program lineup. The fact that inclusion of ESPN is also, largely or in part, driven by a desire to maximize system subscribers does not remove this essential editorial element.

It is, therefore, not open to serious doubt that cable operators perform important editorial functions. That cable operators controlled by local governments can make editorial decisions free of government influence is a proposition that, on its face, seems to defy human nature and the inherent workings of the political process. Is it reasonable to assume, for instance, that a city (whether directly or through an editorial board selected by city officials or others) will not make some of its cable programming decisions based not just on the perceived needs of subscribers, but with a view toward the possible political fallout precipitated by a wrong, unpopular, or highly controversial decision? It would be an unusual local government official or employee who was not especially sensitive to public reaction and the

political position of his or her supervisors in government.

Similarly, decisions whether to cover local government meetings or to showcase community events necessarily become government decisions in the hands of a municipal cable operator, not decisions by a neutral unencumbered editor responding only to subscriber needs and interests. In the same vein, one has to question the propriety of government officials or their agents, in control of the sole or dominant local medium of mass communications, making decisions regarding which elements of the public (individuals, groups, associations, etc.) should have access to cable, and what regular or special local events should be covered. Will the local government controlled cable system also provide access to political candidates and provide a regular outlet for elected officials, such as a weekly Mayor's Report? Will, in the end, such systems permit programming that is openly critical of the local government establishment or that is politically or culturally unpopular with a majority of the local public?

It seems inconceivable, given cable's contemporary prominence and increased technical and programming sophistication that, in any municipal cable operation, government decision-making will not become intertwined with the editorial process. For this reason, the public policy and First Amendment issues raised by municipal ownership of cable television should be examined and carefully weighed *before* it is allowed to proceed. In fact, instead of its virtual encouragement by the 1992 Cable Act, federal and state law that establishes the permissible parameters of local government activities should create a presumption against such ownership in all circumstances where private ownership is demonstrably available. The First Amendment demands that this increasingly vital communications service not be so easily entrusted to local governments.

Moreover, the First Amendment issues posed by municipal cable ownership are not resolved by Section 533(e)(2) of the 1984 Cable Act. [\(note 70\)](#) That amorphous separate-entity standard, while acknowledging the need to limit a municipality's ability to control the form and content of information being provided by the cable system, does little to protect against the abuses it was designed to prevent. For example, the standard is so ill-defined that there are no limitations on the method of selecting the members of the entity that will exercise this vital editorial function. Nor are there any restrictions on the ability to remove members. Although the legislative history states that the entity should be independent, [\(note 71\)](#) no parameters are set to determine when the separate entity is truly independent. Is it enough that the members appointed by the franchising authority are not elected officials? May they be removed at will? At a minimum, it would seem that service on any such separate entity should be for a set term not subject to removal (except for good cause) and that the entity should be free from the regular budget process by some type of guaranteed appropriation.

The structure of the programming board utilized by the City of Niceville illustrates the abuses that can occur. There, the board was not set up until *after* the City had entered into affiliation agreements with nineteen program services. Two of its members were selected by the mayor and one member was selected by each member of the City Council. The board members were selected to serve for three year terms coincidentally, the exact length of the program affiliation agreements previously entered into by the City. [\(note 72\)](#)

Thus, the statutory mechanism currently in place to ensure that the free flow of information is not constricted by government intervention is woefully inadequate. Any benefits to be achieved are illusory because the franchising authority has the ability to maintain extensive controls over the supposedly separate entity.

The inadequacy of Section 533(e)(2) is further highlighted when it is recognized that there is no practical method for policing or monitoring the independence of any editorial board established by local franchising authorities. There are, in fact, no rules or regulations, no standards or guidelines, and no required involvement or review by the FCC [\(note 73\)](#) or any state agency. Rather, in the absence of a court appeal or declaratory ruling, municipalities are left to their own devices in ensuring that adequate editorial independence is maintained. In short, as to matters of editorial discretion, the guarded and the guardian are one in the same.

As mentioned, the level of concern might be lessened if the municipality merely were adding its voice to the marketplace. What, after all, can be wrong with providing potential cable subscribers with an additional programming choice? [\(note 74\)](#) The concern, however, is far more substantial if the end result of municipal ownership will be to drive an existing private cable operator out of business thereby constricting the free flow of information.

The cable system proposed by the City of Niceville is again illustrative of the problems that arise as a result of competitive municipal ownership. When the City announced its intention to build a competitive system, the incumbent private provider argued that the City had certain inherent advantages resulting from its dual role as regulator and competitor that would give the City an unfair competitive advantage.[\(note 75\)](#) More than that, the existing operator demonstrated why the City's action would ultimately drive its system out of business.[\(note 76\)](#)

For example, the incumbent's system was required to pay 5 percent of its gross revenues to the City as a franchise fee. The City's system would not.[\(note 77\)](#) Similarly, the City's system would not be subject to the property, sales, and income taxes that the incumbent operator is required to pay.[\(note 78\)](#) Furthermore, the City would be able to cross-subsidize its system by resorting to general municipal funds and to pledge tax revenues in order to raise capital, advantages obviously unavailable to the private provider.[\(note 79\)](#) In addition, as a result of the tax-favored treatment of municipal bonds, the City would be able to borrow funds for construction at significantly lower rates of interest.[\(note 80\)](#)

The advantages flowing to a municipally-owned system are perhaps even more pronounced in their ability to directly regulate a competitive private provider. The power to renew the franchise of the private operator and now, under the 1992 Act, to regulate the private operator's rates, puts the municipally-owned system at a distinct competitive advantage. Moreover, enabling municipalities to operate their own systems free of the extensive franchising requirements that they can impose on private operators,[\(note 81\)](#) and, at the same time, affording them a statutory exemption from damage liability,[\(note 82\)](#) greatly increases that advantage.

These provisions not only have the potential for elevating government speech over private speech, they also impermissibly place government in the position of competing against the very private cable operators whose prices they control (and part of whose capacity they regulate), creating the potential for abuse of regulatory power for both political and economic purposes. Empowering government to play an inherently conflicting role as a regulator and a favored player among cable operators distorts both the economic marketplace and the marketplace of ideas.[\(note 83\)](#)

Thus, municipalities seeking to operate their own cable systems have both the incentives and the means to control and even to eliminate any private competition. In light of the increasingly important role that cable plays as the provider of local news and programming, one must seriously question the wisdom of permitting direct governmental control over cable communication either on an exclusive or competitive basis when a private provider is ready and able to supply such service. As one respected commentator has noted: [O]ne of the necessary conditions for freedom of the press is the absence of government attempts to replace the private sector press with a government press.[\(note 84\)](#)

Conclusion

As shown, although Congress authorized municipal ownership in the 1984 Act, it did so with at least some recognition of the sensitive First Amendment issues involved. It was, moreover, taking such action in an environment where cable growth and deregulation were being strongly encouraged.

In eight short years, times and circumstances have certainly changed. Now, cable is a mature medium whose influence and practices are thought to warrant significant curbing. As a result, in an effort to rein in cable and spur the growth of competitive services, the 1992 Act fails to even address the First Amendment issues brought about by the enlarged media role of cable and the more active participation of municipalities.

While it might be said that the increased powers vested in local franchising authorities by the 1992 Act[\(note 85\)](#) may ultimately inhibit new efforts at municipal ownership, the potential for government abuse remains. By making municipal ownership easier and the leverage local authorities may exert over private operators greater, cities can rely on the threat of inaugurating a government-owned system to instigate changes and secure promises they might not otherwise obtain.[\(note 86\)](#)

Given a choice, cable communications should be provided by private sources, not government sources. This is especially so in smaller but significant communities where the only video outlet is the local cable system that is, the thousands of communities across the country large enough to support radio stations or newspapers (daily or weekly)

but not over-the-air television. [\(note 87\)](#) Our country's tradition of a free press is founded upon a recognition that the government should assume a neutral stance in the provision of general media services. Accordingly, any scheme that sanctions direct governmental ownership and control of a vital communications medium must, at a minimum, be preceded by a determination of whether there are any realistic, less threatening alternatives to governmental ownership and control, in given circumstances.

Furthermore, this issue should not be resolved by merely attempting to separate the editorial function from other municipal functions. When a municipality or other local government authority is permitted to own and control the local cable system, it is unrealistic to assume, whatever mechanisms are constructed, that government officials will not exercise some influence over decisions that affect such basic matters as what programs and services will be provided over the system. While the editorial choices may have been limited in years past when cable systems had only a twelve-channel capacity, this clearly is no longer the case. Today's cable operator, regardless of channel capacity and subscriber base, makes a wide range of ongoing editorial decisions. Technological developments that promise to introduce hundreds of channels and facilitate direct interactivity between operators and subscribers on most modern cable systems can only magnify and expand the nature of those decisions. [\(note 88\)](#)

In sum, Section 533(e) is outmoded and should be replaced by a provision that would permit municipal ownership and control only as a last resort. Instead of affirmatively sanctioning municipal ownership in almost any circumstance, federal communications law should discourage municipal ownership in order to preserve a healthy separation between the local government establishment and the video communications that are delivered directly into the homes of local viewers. Recent changes in the nature of cable television service and today's burgeoning video marketplace demand this type of policy reversal.

Only in circumstances where no private provider of cable communications services is available should municipal ownership and control be permitted. This determination should be made in a public proceeding conducted along the same lines as the existing franchise process even as part of the franchise process. For example, if a local government contemplated building its own new cable system, it should nevertheless be required to invite proposals by all interested parties. Only if a private party did not come forward and demonstrate its ability to construct an initial system could the municipal government proceed to build and operate its own new system. The same process and standard should apply where the municipal authority decides to revoke or deny the franchise of an existing private provider that is, it should not be permitted to award itself a franchise until and unless it is first determined that such replacement service would not or could not be supplied by a private provider. [\(note 89\)](#) In other words, if an independent, non-government party stood ready and willing to build, operate, or acquire a particular system, the franchising authority would be barred from ownership.

Finally, even in circumstances where a municipality qualified as the provider of last resort, operational control would have to be placed in the hands of a separate, non-governmental management company or special purpose public corporation sufficiently insulated from either arbitrary termination or the policy whims of local government officials. Unlike Section 533(e)(2), which merely requires separation of the editorial function, without defining either term, the law should require the entire cable function operational and editorial to be performed by a clearly autonomous governmental unit. Moreover, standards for such separation should be set by the Federal Communications Commission or an appropriate state regulatory body, and citizens and other interested parties should have a right to contest the implementation of such standards by local franchising authorities.

With these steps, Congress could more clearly preserve the important First Amendment principles plainly recognized to be at stake in these circumstances. Without such action, or without other changes instituted by the states or imposed by the courts, [\(note 90\)](#) it is likely that more and more municipalities will elect to operate cable systems in lieu of regulating cable systems. This role reversal would represent a decidedly unhealthy development for First Amendment principles long recognized to be at the heart of communications public policymaking in this country.

Notes

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1. See 61 *Television & Cable Factbook* (Services Volume) G-65 to G-80 (1993) (identifying at least 149 pay TV and satellite services available to cable systems). [Return to text](#)
2. These changes have taken place on two basic levels. First, until recently, most cable systems offered only a relatively limited menu of services consisting mainly of local TV stations, a few distant over-the-air stations, and a simple time and weather-type feature. Indeed, the typical system may have had only a 12-channel capacity. Today, however, 30, 40, or more channels is the standard, filled with a diversity of choices unimaginable only a few years ago. The advent of national satellite program services and the widespread availability of more sophisticated technical switching equipment at the local level by the mid-1980s permitted virtually unlimited forms of program origination and advertising, transforming local cable operators into electronic editors, which exercise discretion in selecting, arranging, and marketing a wide variety of news, informational, and entertainment program services. The Federal Communications Commission (FCC or Commission) recently reported that roughly 90% of all cable subscribers are served by cable systems offering 30 or more different channels. *In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable TV Serv., Report*, 5 FCC Rcd. 4962, para. 3 (1990); see also 61 *Television & Cable Factbook* (Cable Systems Volume) F-3 (1993) (reporting that as of November 1, 1992, nearly 60% of all cable subscribers were served by systems with 30 to 53 channels, while nearly 35% were served by systems with 54 or more channels). [Return to text](#)
3. Municipal is a shorthand term used throughout this article to denote any local governmental body, including cities, townships, boroughs, counties, and any other similar political units. [Return to text](#)
4. See *infra* notes 21-23 and accompanying text. [Return to text](#)
5. See, e.g., Roy Furchott, *Crackdown, Cablevision*, July 1, 1991, at 20, 20 (Franchise authorities, even in bucolic burghs, have developed new sophistication in approaching the franchise renewal process); see also Bob Boyle, *More Cities Want Into Cable Business, Multichannel News*, Nov. 18, 1991, at 84; Kathy Clayton, *Fight Over Fiber Build Continues in Missouri, Cable World*, Oct. 21, 1991, at 20, [Return to text](#)
6. Within the past two years alone, three of the leading cases have moved through the local and appellate courts only to be denied certiorari by the United States Supreme Court. See *infra* notes 30, 36, 42 and accompanying text. [Return to text](#)
7. Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified in scattered sections of 47 U.S.C. 521-611). [Return to text](#)
8. 47 U.S.C. 533(e)(1) (1988). [Return to text](#)
9. 47 U.S.C. 533(e)(2) (1988). The franchising authority may, however, exercise editorial control over any channel specifically designated for educational or governmental use. [Return to text](#)
10. Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.A. 521-611 (West Supp. 1993)). [Return to text](#)
11. See *infra* notes 43-46 and accompanying text. In one of the first constitutional challenges to the 1992 Act, several leading cable companies charged, inter alia, that certain new provisions relating to municipalities discriminated in favor of government speech against private speech. *Daniels Cablevision, Inc. v. United States*, No. 92-2292, 1993 U.S. Dist. LEXIS 12806, at *1 n.1 (D.D.C. Sept. 16, 1993). The challenged provisions included a new section permitting municipalities to operate their own systems without a franchise, 47 U.S.C.A. 541(f)(2) (West Supp. 1993), and another section granting municipalities immunity from civil damages in regulating privately-owned systems, 47 U.S.C.A. 635A(a) (West Supp. 1993). The district court found,

however, that [l]egislation authorizing the creation of municipal cable franchises to compete with private operators does not, by itself, violate the First Amendment or raise a free speech issue. *Daniels Cablevision*, 1993 U.S. Dist. LEXIS 12806, at *1 n.1 (citing *Warner Cable Comm., Inc. v. City of Niceville*, 911 F.2d 634, 635-40 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991)). [Return to text](#)

12. According to House Report 628, the legislation will protect consumers by preventing unreasonable rates, by improving the cable industry's customer service practices, and by sparking the development of a competitive marketplace. *H.R. Rep. No. 628*, 102d Cong., 2d Sess. 26 (1992); *see also S. Rep. No. 92*, 102d Cong., 1st Sess. 1 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1133 (The purpose of this legislation is to promote competition in the [Return to text](#)
13. *See* Bob Boyle, *Life at a Muni-Owned Cable System*, *Multichannel News*, May 4, 1992, at 26, 27 (quoting the manager of the city-owned system in Valparaiso, Florida, as saying, The residents [Return to text](#)
14. Cable television's nationwide reach rose to a record high of 65% in July 1993, according to data recently released by Arbitron. *Cable Penetration Reached 65%*, *Comm. Daily*, Sept. 20, 1993, at 6. look at this as a utility.). [Return to text](#)
15. *See Regulation of Community Antenna Systems*, *H.R. Rep. No. 1635*, 89th Cong., 2d Sess. 5 (1966); *see also S. Rep. No. 67*, 98th Cong., 1st Sess. 5 (1983). [Return to text](#)
16. *Florence Setzer & Jonathon Levy, Broadcast Television in a Multichannel Marketplace* 6 (FCC Office of Plans & Policy Working Paper No. 26, 1991). [Return to text](#)
17. As summarized by the Senate Report leading to the 1992 Act:

Most of America is now wired to receive cable; cable service is available to almost 90 percent of the homes in the country, and over 60 percent of these households subscribe to cable service. System capacity has increased; the average cable system offers about 36 channels, and this number is steadily increasing. Programming choices have also grown about 50 percent since the 1984 Act was passed, with many more offerings now being planned. *Cable television has become our Nation's dominant video distribution medium.*

S. Rep. No. 92, *supra* note 12, at 3, 1992 U.S.C.C.A.N. 1143-44 (emphasis added). [Return to text](#)
18. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). [Return to text](#)
19. *City of Los Angeles v. Preferred Comm., Inc.*, 476 U.S. 488, 494 (1986). [Return to text](#)
20. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1444 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (citations omitted). [Return to text](#)
21. *See* David W. MacKenna, *The Cabling of America: What About Municipal Ownership?*, 70 *Nat'l Civic Rev.* 307, 310 (1981). [Return to text](#)
22. *Id.* at 312. [Return to text](#)
23. *Id.* Other sources confirm the highly restricted development of municipal cable ownership. An article in the *University of San Francisco Law Review* in 1978 identified 19 communities owning and operating their own systems at that time. [Return to text](#)
24. MacKenna, *supra* note 21, at 311. Richard M. Synchef, *Municipal Ownership of Cable Television Systems*, 12 *U.S.F. L. Rev.* 205, 205 n.1, 235 n.158 (1978). [Return to text](#)
25. *Id.* [Return to text](#)

26. The term overbuild refers to a situation in which a new or second cable system is authorized and constructed (whether private or public) over the same lines and/or area served by an incumbent cable operator. [Return to text](#)
27. *Cable TV Municipal Overbuilds, Cable TV Franchising* (Paul Kagan Assoc., Carmel, Cal.), Mar. 25, 1991, News Roundup, at 1; *see also* Stacey Hobart, *Municipally Owned Cable Systems, Pub. Power*, Jan.- Feb. 1993, at 156 (reporting 63 municipally-controlled systems in operation). [Return to text](#)
28. *chising* (Paul Kagan Assoc., Carmel, Cal.), Mar. 25, 1991, at 4. [Return to text](#)
29. *59 Television & Cable Factbook* (Cable & Services Volume) A-103 (1991). [Return to text](#)
30. *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1312 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 430 (1991). [Return to text](#)
31. *Id.* [Return to text](#)
32. By early 1993 it was reported that the government-run Paragould system had increased its subscriber count to 3579 while offering 48 basic channels for \$12.50 per month. The private system, which remains in operation, was reported to have dropped to 4660 subscribers, and to be offering 45 channels for \$10.50. Vincente Padeloup, *Double Hit in Paragould, Cable World*, Apr. 19, 1993, at 6, 6. [Return to text](#)
33. *Paragould Cablevision*, 930 F.2d at 1313-14. [Return to text](#)
34. *Id.* at 1314. [Return to text](#)
35. *Id.* at 1315. [Return to text](#)
36. *Warner Cable Comm., Inc. v. City of Niceville*, 911 F.2d 634, 635 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2839 (1991). [Return to text](#)
37. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 2, 5, *Warner Cable Comm., Inc. v. City of Niceville*, 111 S. Ct. 2839 (1991) (No. 90-1463). In particular, the record reflects that some local officials in Niceville objected to the incumbent operator's decision to drop Praise the Lord's Inspirational Network, a satellite-distributed [Return to text](#)
38. *Warner Cable Comm., Inc. v. City of Niceville*, No. 85-4414-RV (N.D. Fla. Mar. 10, 1989). [Return to text](#)
39. *Warner Cable*, 911 F.2d at 638. [Return to text](#)
40. Brief for Plaintiff-Appellant at 6-7, *Madison Cablevision, Inc. v. City of Morganton*, No. 90-1500, 1991 U.S. App. LEXIS 27676 (4th Cir. Nov. 22, 1991) [hereinafter Plaintiff's Brief]. The City had engaged the services of an outside consulting firm that, following certain studies, concluded that existing cable service in Morganton was inadequate, that a more modern system was needed, and that a city-owned system was feasible. *Madison Cablevision, Inc. v. City of Morganton*, No. 90-1500, 1991 U.S. App. LEXIS 27676, at *2 (4th Cir. Nov. 22, 1991). [Return to text](#)
41. *Madison Cablevision* 1991 U.S. App. LEXIS 27676, at *21-*22. [Return to text](#)
42. *Madison Cablevision, Inc. v. City of Morganton*, No. SH-C-86-5, 1990 U.S. Dist. LEXIS 18794, at *16-20 (W.D.N.C. May 11, 1990), *aff'd per curiam*, No. 90-1500, 1991 U.S. App. LEXIS 27676 (4th Cir. Nov. 22, 1991), *cert. denied*, 112 S. Ct. 1670 (1992); *see also* Edward Hardy Lewis, *Municipal Ownership of Cable Television Systems: Madison Cablevision, Inc. v. City of Morganton*, 68 *N.C. L. Rev.* 1295 (1990). By the summer of 1993, Morganton's transformation from private to exclusive governmental cable ownership was virtually complete. The incumbent operator's franchise expired on June 30, 1993, and it was reported that the City's replacement system had passed nearly 6500 homes and was serving approximately 5300 subscribers. *See*

Chris Nolan, *The City that Works, Cablevision*, Aug. 9, 1993, at 32; Carl Wenschenk, *Another Chapter In Morganton, Cable World*, June 28, 1993, at 32. [Return to text](#)

43. Despite the general perception of lost power under the 1984 Act and complaints to that effect, cities were still able to wield considerable power, especially in the renewal process:

Cities are learning increasingly how to use that power to exact concessions from cable systems that potentially amount to re- regulation. They get leverage by threatening an overbuild, a municipal overbuild, a short review, franchise fees . . . , says [Return to text](#)

44. Section 3 of the 1992 Act amends 623 of the 1934 Communications Act. As amended, 623 provides, inter alia, that, in the event a cable system is not subject to effective competition John Mansel, a senior analyst with Paul Kagan Associates.

....

Threats of denied renewal and municipal overbuilds . . . once weighed about as heavily as a 12 ounce hammer in the hands of franchise authorities. Now that hammer has become a 10-pound sledge.

Furchott, *supra* note 5, at 21. [Return to text](#)

45. *See* 47 U.S.C.A. 552(c)(2) (West Supp. 1993). [Return to text](#)
46. *See* 47 U.S.C.A. 544(e) (West Supp. 1993). [Return to text](#)
47. It was recently reported that the citizens of Paragould will now have to face a special tax to pay off the \$3.2 million in bonds issued to fund the overbuild in that community. *See* Padeloup, *supra* note 32, at 6. [Return to text](#)
48. To those who might be tempted to argue that cities should enter the cable business in order to create a new general revenue source over and above the up-to-5% franchise fee they are presently permitted to extract as a matter of course it must be noted that (a) such revenues have yet to be proven (especially from the stand-alone, restricted-operation systems typically conducted by municipal governments) and (b) even if such revenues are sufficient to warrant and overcome the initial cost of construction or acquisition, cost is merely one of many factors that should be weighed in reaching a practical (as opposed to a pure policy) judgment as to whether cities should operate cable systems in the face of existing private service. [Return to text](#)
49. it an essential service, which are the two traditional tests of common carrier or utility status. *S. Rep. No. 67*, 98th Cong., 1st Sess. 29 (1983). [Return to text](#)
50. 47 U.S.C. 533(e) (1988). Apart from this federal enabling law, ownership of cable systems by local municipalities must also be tested against various provisions of state law that govern the permissible activities of local governments. *See, e.g., Warner Cable Comm., Inc. v. Borough of Schuylkill Haven*, 784 F. Supp. 203 (E.D. Pa. 1992). For most city-owned systems the right to own a cable system is derived, if at [Return to text](#)
51. *See* 47 U.S.C. 533(e)(2) (1988), all, by implication from broadly-worded statutes that grant a municipality the right to own and operate its own public utilities. Indeed, one court recently held that a public utility clause in the South Carolina Constitution did not authorize the City of Orangeburg to construct and operate its own cable system. *See South Carolina Disallows Municipal Ownership, Cable TV Law Rep.*, June 9, 1992, at 2 (summarizing *Sheppard v. City of Orangeburg*, 91 CP 38715 (C.P. Orangeburg County, S.C. May 27, 1992)). In contrast, of course, federal communications law now treats cable television as a medium of mass communications and not a public utility-type service. *See Communications Amendments Act of 1982*, Pub. L. No. 97-259, 115(c)(2), 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. 309(i)(3)(C)(i) (1988)) (defining media of mass communications as including services such as television, radio, and cable television that are substantially

- devoted toward providing programming or other information services within the editorial control of the [Return to text](#)
52. *H.R. Rep. No. 934*, 98th Cong., 2d Sess. 27 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4664. [Return to text](#)
 53. *Id.* at 58, 1984 U.S.C.C.A.N. at 4695. [Return to text](#)
 54. *S. Rep. No. 67*, *supra* note 15, at 21 (emphasis added). [Return to text](#)
 55. 47 U.S.C.A. 541(f) (West Supp. 1993). This section now provides that nothing in the Act shall (1) prohibit a local or municipal authority from operating as a multichannel video programmer in the franchise area, notwithstanding the granting of one or more franchises to others, or (2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor. [Return to text](#)
 56. 47 U.S.C.A. 555a(a) (West Supp. 1993). This section now provides that a franchising authority is exempt from damages in any suit involving any claim arising out of its regulation of cable service or from a decision of approval or disapproval with respect to the grant, renewal, transfer, or amendment of a franchise. Relief in such cases is specially limited to injunctive and declaratory relief. [Return to text](#)
 57. 47 U.S.C.A. 543(a)(2)(A) (West Supp. 1993). [Return to text](#)
 58. The First Amendment provides, in relevant part, that Congress shall make no law . . . abridging the freedom of [Return to text](#)
 59. *See Muir v. Alabama Educ. TV Comm'n*, 688 F.2d 1033, 1038 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). The government may add its voice to private voices provided it does not drown out private communication. *Laurence H. Tribe, American Constitutional Law* 12-4, at 807 (2d ed. 1988) (citations omitted).speech, or of the press *U.S. Const.* amend. I. [Return to text](#)
 60. In raising this issue, it is interesting to contrast the recent trend toward municipal ownership of local cable systems with the potential governmental ownership of local television stations, the other visual mass medium of communications regulated by the federal government. It seems fairly likely that any effort to supplant the private ownership of a major network television station with direct governmental ownership would generate a large public outcry in most American cities. There is, of course, no provision of federal communications law governing municipal ownership of commercial television stations comparable to 533(e) of the Cable Act. While the FCC has never addressed this issue in any broad policymaking fashion, it did, in television's infancy, award certain commercial television licenses to state universities. KOMU-TV, Channel 8, the NBC affiliate in Columbia, Missouri, licensed to the University of Missouri, and WOI-TV, Channel 5, the ABC affiliate in Ames, Iowa, licensed to Iowa State University, are such vestiges of the past. In addition, of course, federal law sanctions and affirmatively encourages state ownership of noncommercial, educational television stations. But the reasons support [Return to text](#)
 61. *Muir*, 688 F.2d at 1038 (citing *Schneider v. State*, 308 U.S. 147 (1939)); *see also* *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 733 (2d Cir. 1985) ([E]vils inherent in allowing government to create a monopoly over dissemination of public information in any form seem too obvious to require extended discussion.). [Return to text](#)
 62. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 219 (1966) ([T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.). A fundamental premise of the First Amendment is that oppressive government is best avoided through a watchful press that polices the government, not through a watchful government that polices the press. A basic assumption of our political system [is] that the press will often serve as an important restraint on government. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). [Return to text](#)
 63. *John Stuart Mill, On Liberty* 18 (David Spitz ed., Norton 1975). [Return to text](#)

64. ers news, information, and entertainment. It is engaged in `speech' under the First Amendment, and is, in much of its operation, part of the `press.');
65. The *Preferred* Court deferred any further First Amendment findings until a better factual record had been developed in the lower courts. *Preferred*, 476 U.S. at 495. [Return to text](#)
66. *See, e.g.*, Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 *Duke L.J.* 329. [Return to text](#)
67. Current examples of such niche services include Comedy Central, the Nashville Network, the Travel Channel, MTV, QVC Network, the Learning Channel, and the Weather Channel. [Return to text](#)
68. Although most of the highly popular cable networks are carried by most cable systems, seldom do two cable systems select precisely the same services to offer the public. This, as noted, is due to channel capacity problems, decisions regarding the relevance of certain services to the particular local community involved, and the need to select between a number of essentially duplicative program offerings. [Return to text](#)
69. For example, the *Wall Street Journal*, a national newspaper, includes no sports section, while *USA Today*, another national newspaper, makes its daily sports section a prominent feature. These fundamental decisions obviously were choices of editorial discretion. [Return to text](#)
70. 47 U.S.C. 533(e)(2) (1988); *see supra* text accompanying notes 50-51. [Return to text](#)
71. *H.R. Rep. No. 934, supra* note 52, at 58 , 1984 U.S.C.C.A.N. at 4695. [Return to text](#)
72. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, at 5-6 n.6, Warner Cable Comm., Inc. v. City of Niceville, 111 S. Ct. 2839 (1991) (No. 90-1463). [Return to text](#)
73. The FCC has, in fact, declined to adopt any rules in this area and the question of enforcement of 533(e)(2) remains highly uncertain. *See* Implementation of the Provisions of the Cable [Return to text](#)
74. It should be emphasized, however, that 47 U.S.C. 531 of the 1984 Act gives local governments ample authority to add their own voices to privately-owned systems by virtue of mandated public, educational, or government (PEG) channels. Not only may municipalities require and use such dedicated channels, private operators are specifically precluded from exercising any editorial control over the use of such channels. 47 U.S.C. 531(e) (1988).Comm. Policy Act of 1984, *Final Rule*, 50 Fed. Reg. 18,637, 18,647 (1985). [Return to text](#)
75. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 2, 6, Warner Cable Comm., Inc. v. City of Niceville, 111 S. Ct. 2839 (1991) (No. 90-1463). [Return to text](#)
76. *See id.* at 7. [Return to text](#)
77. *See* Brief Amicus Curiae for the National Cable TV Ass'n, Inc., in Support of Petitioner at 3, Warner Cable Comm., Inc. v. City of Niceville, 111 S. Ct. 2839 (1991) (No. 90-1463). [Return to text](#)
78. *Id.* [Return to text](#)
79. *Id.* [Return to text](#)
80. *Id.* at 3 n.1. [Return to text](#)
81. 47 U.S.C.A. 541(f) (West Supp. 1993). [Return to text](#)

82. 47 U.S.C.A. 555a (West Supp. 1993). [Return to text](#)
83. Among the 'evils to be prevented' by the first amendment press guarantee are 'not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters. . . .' *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 276-77 (D.C. Cir. 1975) (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936)). [Return to text](#)
84. See John E. Nowak, *Using The Press Clause to Limit Government Speech*, 30 *Ariz. L. Rev.* 1, 15 (1988). [Return to text](#)
85. See *supra* notes 44-46, 55-57 and accompanying text. [Return to text](#)
86. Even before the 1992 Cable Act bestowed new [Return to text](#)
87. Indeed, Paragould, Arkansas; Niceville, Florida; and Morganton, North Carolina, all hotbeds of recent municipal overbuild activity, see *supra* part I.B., are just such communities, having a sufficiently large population and economic base to support local radio and newspaper media, but not large enough to sustain a local television station, leaving cable as the only video communications medium. See *Editor & Publisher Yearbook 1993*, I-21, I-273, II-13; *Broadcasting and Cable Yearbook 1993*, B-27, B-78, B-262, C-110. Paragould supports a daily newspaper, *The Paragould Daily Press*, and three radio stations KDRS (AM), KLQZ (FM), and KDXY (FM); Morganton supports a daily newspaper as well, *The News Herald*, a low-power television station (W23AN), and three radio stations WCIS (AM), WMNC (AM) and WQXX (FM); Niceville supports a weekly paper, *The Bayou Times*, and a license has been granted to WNCV (FM) (not yet on the air; target date unknown). powers, cities had become increasingly adroit at using this type of leverage. For example, if certain program decisions or other changes undertaken by a private operator displeased local officials, and a franchise renewal was on the horizon, it was increasingly likely that such officials would attempt to flex their municipal muscle by holding out the prospect of operating a subsidized public cable system as an indirect method of bringing about desired changes on the private system. It is increasingly likely that many private operators will be facing renewal more frequently, given the trend toward shorter franchise renewal terms and the 36-month statutory window for initiating the formal renewal process. See 47 U.S.C.A. 546(a) (West Supp. 1993). [Return to text](#)
88. See, e.g., John Flinn, *The Future Rises in Castro Valley*, *Cablevision*, Oct. 18, 1993, at 42; Peter Lambert, *TCI's \$1.9 Billion Pledge for Superhighway*, *Multichannel News*, Apr. 19, 1993, at 1; Michael W. Miller, *Tomorrow's TV May Make You a Viewer-Doer*, *Wall St. J.*, Oct. 14, 1993, at B1; *The 500-Channel Universe According to Cox's Dalvi*, *Multichannel News*, July 19, 1993, at 1. [Return to text](#)
89. Under this new statutory structure, it would not be possible for a local government to authorize both a private system and its own competitive government system. It could, however, as now, request proposals and grant franchises for competitive private systems. In short, it could either be a regulator or a last-resort operator, but it could not be an operator-regulator in circumstances where private service is feasible. [Return to text](#)
90. In the absence of congressional action to change 533(e), state legislatures are clearly empowered to act on their own in both restricting municipalities from entering the mass media business and taking steps to ensure that if such activities are indeed permitted, a clear and convincing separation is maintained between the local political structure, and the agency or entity entrusted with the operation of the cable system. [Return to text](#)