

REASON * February 1997

Judge Gags Rudy And Rupert

First Amendment mugged!

By [Michael McMenamin](#)

The First Amendment doesn't need friends like Ted Turner and Time Warner. In case you missed it, New Yorkers last fall had more than the Yankees to entertain them. They also had the spectacle of media titans Turner and Time Warner (which now owns Turner's CNN) squaring off against Rupert Murdoch's News Corporation and its new, 24-hour Fox News Channel. The dispute: Fox News's access to a channel on Time Warner's cable monopoly, which covers 1.1 million of New York's 1.6 million cable subscribers. That battle was many things to many people.

A spectacle? Sure. What else could you call Ted Turner's comparing the two competitors of CNN—Fox News Channel and MSNBC—to the Nazis and Japanese in World War II (“you die in one concentration camp as fast as another”); calling Murdoch a “scumbag” and a “pretty slimy character”; repeatedly comparing Murdoch to Hitler; and accusing Murdoch of having “bought the government of New York [city]”? While Murdoch didn't respond in kind—he never does—his New York Post did suggest that either Turner was “veering dangerously toward insanity” or he had “come off the medication he takes to fight his manic depression.”

A major business dispute? You bet. Especially when Time Warner, after its acquisition of Turner Broadcasting, allegedly backed out of an agreement to carry the new Fox News service upon Ted Turner's objection.

An antitrust matter? Absolutely. The only monopolies that exist today are those which governments provide, including Time Warner's cable operations in New York City. And the courts say there are things a normal business can do with impunity—like refusing to do business with a competitor of one of its subsidiaries—that a monopolist cannot. That's why Fox sued Time Warner in federal court. That's why New York Attorney General Dennis Vacco opened an antitrust investigation of Time Warner.

A case of political intrigue? Positively. After Time Warner changed its mind about Fox, New York Mayor Rudolph Giuliani joined sides with Fox. He proposed that Time Warner find room for Fox News by moving the History Channel or the Discovery Channel to one of the city's PEG (public, educational, governmental) cable channels, which it controls through its franchise agreements with Time Warner. Time Warner declined, and the mayor decided to run Fox News itself on a city-owned PEG channel. To avoid allegations of favoritism, the city also agreed to carry another news channel shut out by Time Warner, the Bloomberg News Service, which runs business news. Despite this, the mayor's political opponents accused him of a payoff to Murdoch, whose New York Post supported Giuliani's mayoral candidacy. Even Turner's wife, Jane Fonda, joined the fray, accusing Giuliani of catering to Murdoch because Fox Channel 5

employs the mayor's wife as a \$31,000-a-year reporter.

An unprecedented assault on Time Warner's First Amendment rights? I don't think so. Richard Aurelio, a longtime New York politician and now president of Time Warner's cable subsidiary, claimed it was "the most frightening exercise of political power that I have seen in my career, and I have been in politics and government for 40 years." Maybe it was, or maybe Aurelio is easily frightened. But the only assault on the First Amendment was Time Warner's lawsuit against the city in federal court, where it persuaded Judge Denise Cote, a recent Clinton appointee inexperienced in First Amendment law, to issue an unprecedented—and undoubtedly unconstitutional—prior restraint order against the city's carrying Fox News or Bloomberg News on one of its PEG channels. She later converted the temporary order to an injunction. To true friends of the First Amendment, that is *really* frightening.

That's where it stands as this article is written. But it won't end there. It will end in one way only: Fox News will be carried on cable in New York. The only questions are when and how. There are several routes to this end. The most likely is a deal between Time Warner and Fox once Time Warner recognizes that access to the satellite transmission facilities of News Corporation in Asia and South America is more important to their bottom line than Ted Turner's demonization of his competitors. Another way is for Time Warner to sell its interest in cable to its partner, US West. Those policies, presumably, would not be influenced by Ted Turner. If neither happens, the federal court system will eventually flush Time Warner's First Amendment claims into the only place they belong and recognize that the city has First Amendment rights, too.

In the meantime, First Amendment freedoms have again been tarnished by a major media player crying "Wolf!" when the only danger was to its economic interests. Unfortunately for friends of the First Amendment, Time Warner co-opted media law heavyweights like Floyd Abrams and James Goodale into parroting its somewhat strained claims that Mayor Giuliani had violated their client's free speech rights by exercising the city's own free speech rights on a city-owned channel.

Here's what Goodale said to The Wall Street Journal: "It's a classic First Amendment violation to have the mayor of a city force programming on the citizens of that city.... Suppose every mayor in the U.S. takes it upon himself to determine what programming should be carried on their cable system. Would a socialist mayor in, say, Burlington, Vt., mandate socialist programming or a Hispanic mayor of Miami call for Hispanic programming?" Abrams echoed Goodale. The issue, he said, was "Time Warner being compelled to carry speech which it doesn't want to carry."

Goodale and Abrams are among the country's most respected First Amendment lawyers, having represented such media outlets as NBC, CBS, and ABC, though not Fox. (I have represented media interests also, including the Fox Television affiliate in Cleveland and, on one occasion, CNN and Ted Turner.) Most media coverage of the case has echoed their views and ignored Judge Cote's unprecedented prior restraint against the city's use of its own PEG channels. The only notable exception was Nat Hentoff in *The Village Voice*, a zealous defender of First Amendment freedoms and not especially known as a Giuliani or Murdoch partisan. Unlike Abrams and Goodale, Hentoff is not a lawyer and has no media clients to please or offend. Hentoff may not always be right, but civil libertarians who end up on the side opposite him on a First Amendment issue ought to, at a minimum, recheck their premises.

Abrams and Goodale have spent many years of dedicated effort in the service of the First Amendment. But this time, they are dead wrong and Hentoff is right.

Here's why. Abrams and Goodale have made the common media mistake of thinking that the First Amendment is primarily, if not exclusively, for the benefit of the media, and that in any confrontation between the media and a public body, the First Amendment rights of the media are in jeopardy. Most of the time they would be right. This time they're not, and the reason is that a cable franchise operator is involved. It's not that cable operators don't have First Amendment rights; they do. And, in some ways, their rights are even greater than broadcasters', because they aren't hampered by the bogus "spectrum scarcity" argument that the Supreme Court has used to justify violating broadcasters' First Amendment rights.

Rather, the reason has to do with the nature of the arrangement between a city and a cable operator when it grants the operator a monopolistic right to provide a television service to its residents. When that happens, the 1984 Cable Communications Act permits a city to require the cable operator, as part of its franchise agreement, to set aside PEG channels for the city's use. The city of New York has five such PEG channels for its own use, pursuant to its franchise agreement with Time Warner. In turn, federal law specifically provides that "a cable operator shall not exercise any editorial control over public, educational or governmental use of" PEG channels. Exactly what part of that didn't Time Warner or Judge Cote understand?

It's possible that most media lawyers don't have much experience representing cities in their dealings with cable operators and have little occasion to consider the First Amendment rights of cities and their PEG channels. Time Warner's lawyers don't have that excuse. Fortunately, the Supreme Court recently had occasion to do so with the issue in its June 1996 decision in *Denver Area Educational Television Communications v. FCC*, which held unconstitutional that portion of the 1992 Cable Television Consumer Protection Act which permitted cable operators to censor or prohibit a city from broadcasting sexually explicit programming on its PEG channels. The Supreme Court held that cities with PEG channels at their disposal had their own First Amendment rights, with which the federal government could not interfere. As Justice John Paul Stevens wrote in a concurring opinion, "The federal government has no more entitlement to restrict the power of a local authority to disseminate materials on channels of its own creation, than it has to restrict the power of the cable operators to do so on channels that they own."

If the federal government acting through the Federal Communications Commission can't delegate to cable operators the power to ban sexually explicit programming from PEG channels, then the federal government, in the person of a U.S. District Court judge, cannot delegate to Time Warner the power to ban the Fox News Channel from one of New York City's PEG channels if that is how the city chooses to use that channel. To put it another way, Time Warner has no First Amendment rights at stake if New York City chooses to run Fox News on one of its PEG channels. As Justice Anthony Kennedy said in his concurring opinion in *Denver*, "In providing public access channels under their franchise agreements, cable operators therefore are not exercising their own First Amendment rights. They serve as conduits for the speech of others."

Moreover, there are no restrictions in the cable law on how cities choose to use channels that the Supreme Court has recognized they essentially own. Abrams was wrong when he claimed in a New York Times article that the city "may not stray into the commercial area in deciding

what to show” on its PEG channels. As Justice Kennedy also observed in his concurring opinion in *Denver*, “Congress has not, in the 1984 Act or since, defined what public, educational or governmental access means or placed substantive limits on the types of programming on those channels.”

The franchise agreement between the city and Time Warner is no more specific. The fact is that New York City has used its PEG channels for everything from broadcasting city council meetings to mayoral press conferences to Japanese language shows to Italian language game shows to horse racing. Yes, horse racing. And Time Warner never complained about the horse racing or anything else on PEG channels, let alone the nudity and sexually explicit programs on the PEG channels open to the public, which the city doesn’t control.

So if Giuliani is doing a favor for a political supporter by agreeing to run Fox News on the city’s PEG channel, he’s only exercising the city’s First Amendment rights. The legislative history of the 1984 Cable Act specifically stated that the PEG channels “will mean a wide diversity of information sources for the public—the fundamental goal of the First Amendment—without the need to regulate the content of programming provided over cable.”

Unfortunately, Judge Cote spent little time considering the city’s rights to use its cable channels. She clearly believed Giuliani was making a payoff to a political supporter, Rupert Murdoch, and she didn’t like it, so she had to somehow make Time Warner the injured party.

Here’s how she did it—and no, I’m not making this up. If New York City is allowed to carry Fox News on its own channels, it *might* become very popular. If it becomes very popular, then Fox *might* ask the city to take Fox News off the city’s channel and *hope* that the absence of Fox News will cause viewers to put pressure on Time Warner to carry Fox News on its own commercial channels. If Fox News is taken off the city channels, Time Warner might feel obligated, both for economic reasons and to keep their viewers happy, to put Fox News on their commercial channels, even though Ted Turner thinks Rupert Murdoch is a disgrace to journalism. And if all these things happen, then Time Warner’s First Amendment rights to choose what to run on its cable channels will have been violated by New York’s exercise of its own First Amendment rights to do what it chooses with its own channels. So, in the name of the First Amendment, a federal judge has forbidden New Yorkers to see Fox News.

If the people of New York City don’t like what Mayor Giuliani has done, they can do something about it at the next election. In the meantime, it should be none of Time Warner’s business, much less that of a federal court.

Contributing Editor [Michael McMenamin](#) is a lawyer in Cleveland.