

Catholic University Law Review

Volume 35
Issue 3 Spring 1986

Article 8

1986

Preferred Communications, Inc. v. City of Los Angeles: Impact of the First Amendment on Access Rights of Cable Television Companies

Rosemary B. Healy

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Rosemary B. Healy, *Preferred Communications, Inc. v. City of Los Angeles: Impact of the First Amendment on Access Rights of Cable Television Companies*, 35 Cath. U. L. Rev. 851 (1986).
Available at: <https://scholarship.law.edu/lawreview/vol35/iss3/8>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

NOTES

PREFERRED COMMUNICATIONS, INC. v. CITY OF LOS ANGELES: IMPACT OF THE FIRST AMENDMENT ON ACCESS RIGHTS OF CABLE TELEVISION COMPANIES

Traditional media engaged in the dissemination of speech receive varying degrees of first amendment protection.¹ Because of the relative infancy of the cable television industry,² the applicable standards of first amendment protection are still evolving.³ During the developmental stages of cable reg-

1. For example, the Supreme Court has upheld government regulations of the editorial functions of radio and television but has struck down comparable regulations when applied to newspapers. *Compare* *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down state statute requiring newspapers to give political candidates equal reply time to editorial attacks), *with* *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the "fairness doctrine" as applied to broadcasters and basing the government's right to regulate the content of broadcast editorials on the medium's scarcity of spectrum space).

2. Cable television systems disseminate information, news, and entertainment by retransmitting programs of broadcast stations and by originating programs and special services. By way of an antenna, a cable system can receive local and distant broadcast signals and then transmit those signals to home television sets of subscribers. Most recently, systems originate and transmit their own programming, a process called cablecasting. *See* *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1029-30 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); *see also* *Omega Satellite Prod. Co. v. City of Indianapolis*, 694 F.2d 119, 121 (7th Cir. 1982); Note, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 *DRAKE L. REV.* 391, 391-92 (1978) (discussing the evolution of the cable medium from a retransmitter of broadcasting programs to an initiator of its own programs or information); Note, *Cable Franchising and the First Amendment: Does the Franchising Process Contravene First Amendment Rights?*, 36 *FED. COM. L.J.* 317, 319-20 (1984) [hereinafter cited as Note, *Cable Franchising*].

3. Cable television dates back to the 1950's when community antenna systems (CATV) simply provided better reception and carried more distant broadcast signals into the home. By the end of the decade there were roughly 640 cable systems serving approximately 650,000 subscribers. *See* *Besen & Crandall, The Deregulation of Cable Television*, 44 *LAW & CONTEMP. PROBS.* 77, 79-81 (1981). Six percent of the nation's households were cable subscribers by 1969 and the numbers continued to grow throughout the 1970's to more than 14 million subscribers—nearly 20% of all television households. *Id.* at 79. In the mid-1970's the technological development of cable systems and satellite service spurred the expansion of cable television systems. Cable companies began to offer nonbroadcast channels featuring movies, sporting events, religious programs, and special shows for children. *Id.* at 81.

ulation,⁴ operators seeking first amendment protection of their activities frequently have attacked two separate areas of governmental regulation: the establishment of channel and programming requirements⁵ and the licensing process itself.⁶

Responding to these challenges, courts have consistently recognized that cable operators engage in activities protected by the first amendment,⁷ but have been unable to establish firmly the permissible scope of government regulation. Bereft of any well-defined first amendment standards, courts have divided on the extent of protection the industry should be afforded.⁸ In determining the extent of permissible government regulation, courts have focused on the characteristics of the cable medium.⁹ In so doing, they primarily have compared the cable medium to two other traditional media models, broadcasting and the printed press, to determine whether sufficient similarities exist to justify the application of the respective regulatory constraints.¹⁰

4. See Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501 (1977) (discussing FCC and local government jurisdiction over the cable television industry); see also Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 138-43 (1976).

5. See, e.g., *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1438, 1462-63 (D.C. Cir. 1985) (holding FCC "must-carry" rules unconstitutional); *Midwest Video*, 571 F.2d at 1029 (challenge to FCC mandatory access and channel capacity requirements); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (challenge to FCC program limitations); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985) (challenge to state regulations that require cable operators to dedicate certain channels for public access).

6. See, e.g., *Tele-Communications v. United States*, 757 F.2d 1330 (D.C. Cir. 1985) (challenge to United States Air Force refusal to grant a cable franchise); *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (challenge to city ordinance requiring cable system to obtain cable franchise); *Century Fed., Inc. v. City of Palo Alto*, 579 F. Supp. 1553 (N.D. Cal. 1984) (challenge to city's franchise bidding system). Cf. *Hopkinsville Cable TV v. Pennyroyal Cablevision*, 562 F. Supp. 543 (W.D. Ky. 1982) (challenge to city's refusal to grant cable franchise).

7. See, e.g., *Omega Satellite*, 694 F.2d at 127; *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); *Midwest Video*, 571 F.2d at 1054 (dictum); *Century Fed.*, 579 F. Supp. at 1562; *Berkshire*, 571 F. Supp. at 980.

8. Compare *Tele-Communications*, 757 F.2d 1330 (D.C. Cir. 1985) (criticizing licensing regulations on first amendment grounds), with *Community Communications*, 660 F.2d 1370 (10th Cir. 1981) (licensing regulations upheld based on cable's disruption of the public domain).

9. See, e.g., *Omega Satellite*, 694 F.2d at 128; *Community Communications*, 660 F.2d at 1377-79; *Midwest Video*, 571 F.2d at 1053-57.

10. Compare *Community Communications*, 660 F.2d at 1379, and *Berkshire*, 571 F. Supp. at 984-85 (courts reject comparison between newspapers and cable), with *Midwest Video*, 571 F.2d at 1056 (analogizes newspapers and cablecasting).

In *Preferred Communications, Inc. v. City of Los Angeles*,¹¹ the United States Court of Appeals for the Ninth Circuit held that a city's franchising procedure could be an unconstitutional infringement upon the first amendment rights of cable operators.¹² The Ninth Circuit first engaged in a traditional first amendment analysis focusing on the nature of the medium being regulated.¹³ The court then shifted its focus away from the characteristics of the medium to examine the type of public property to which access was being sought.¹⁴ Here, the court applied the public forum doctrine and found the city's refusal to provide a cable franchise unconstitutional,¹⁵ at least where the available facilities were potentially capable of accommodating additional systems.¹⁶

Preferred Communications, Inc. (PCI), in an effort to set up a cable television system in Los Angeles, approached two utility companies to negotiate an agreement for use of their poles and conduit space.¹⁷ Both utilities required that PCI first obtain a city franchise to provide cable service.¹⁸ Los Angeles refused PCI's franchise request because it had not participated in an auction where the city awarded one franchise to each region.¹⁹

PCI then brought suit against the city alleging that the refusal to award it a franchise was a deprivation of first and fourteenth amendment rights, as well as a violation of federal antitrust laws and various other state laws.²⁰ The trial court granted the city's motion to dismiss for failure to state a claim upon which relief could be granted,²¹ finding that the city's franchising process did not violate the first and fourteenth amendment rights of a

11. 754 F.2d 1396 (9th Cir.), cert. granted, 106 S. Ct. 380 (1985).

12. *Preferred*, 754 F.2d at 1411.

13. *Id.* at 1403-07.

14. *Id.* at 1405-09.

15. *Id.* at 1407-09.

16. *Id.* at 1411.

17. *Id.* at 1400.

18. *Id.*

19. *Id.* at 1401. The California Government Code authorizes the licensing of a cable television system by a local municipality. See CAL. CODE § 53066 (West Supp. 1984). Los Angeles allocates cable franchises through an auction process. A company wishing to participate in the auction must pay or promise to pay a number of fees and must submit a detailed proposal outlining its proposed operations for a nine-year period. *Preferred*, 754 F.2d at 1400. Furthermore, the company must demonstrate that it has a strong financial base and "good character," that its operations constitute "sound business plans," and that it has "demonstrated business experience." *Id.* Bidders also must agree to share a percentage of future annual gross revenues with the city, to provide certain customer services, and to provide various mandatory access and leased channels. *Id.*

20. *Preferred*, 754 F.2d at 1399. The court dismissed without prejudice the two alleged state law violations for refile in state court. *Id.* at 1399 n.1.

21. *Id.* at 1399 (complaint dismissed without leave to amend pursuant to FED. R. CIV. P. 12(b)(6)).

prospective cable operator and that the city was immune from antitrust liability.²²

On appeal, a three-judge panel of the Ninth Circuit unanimously reversed the lower court's dismissal of the first amendment claim and affirmed its dismissal of the antitrust claims.²³ The case was remanded to the district court for resolution of the factual issue of whether the city had violated PCI's first amendment rights by refusing it access to public facilities.²⁴

This Note will outline pertinent provisions of the Cable Communications Policy Act of 1984, exploring Congress' mandate for local franchise regulation. It then will examine general first amendment standards established by the Supreme Court regarding permissible regulation of the media rights of broadcasters and the printed press. The examination will involve a discussion of the traditional comparative media analysis upon which numerous lower courts have relied in establishing standards of regulation for the cable industry. The Note will further explore those justifications for government regulation that focus on property use rather than on the nature of the medium itself. It then will analyze the court's reasoning in *Preferred Communications, Inc. v. City of Los Angeles* by first examining the public forum doctrine and then by determining whether the *Preferred* court correctly applied the doctrine. The Note will conclude with an assessment of the impact of *Preferred* on the first amendment rights of cable operators.

I. THE CABLE COMMUNICATIONS POLICY ACT OF 1984

Historically, cable television has been regulated through local government franchise processes.²⁵ Typically, municipalities issue franchises to cable operators entitling them to construct and operate a cable television system.²⁶ The general pattern has been for franchising authorities to issue only a single franchise for a given geographic location, even though the regulations usually do not preclude the issuance of a second franchise in the same area.²⁷

Through its enactment of the Cable Communications Policy Act of

22. *Id.*

23. *Id.* A dismissal is upheld if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In conducting the review, the court presumes that all allegations in the complaint are true, and all doubts are resolved in the plaintiff's favor. *Id.* See *infra* note 162 for discussion of the antitrust claim and the grounds for its dismissal.

24. *Preferred*, 754 F.2d at 1415.

25. See Note, *Cable Franchising*, *supra* note 2, at 323-24.

26. *Id.*

27. A recent survey showed that of the 4200 cities with cable television systems, 99.7% have only one franchisee. See Noam, *Towards an Integrated Communications Market—Overcoming the Local Monopoly of Cable Television*, 34 FED. COMM. L.J. 209, 242 n.148 (1982).

1984,²⁸ Congress specifically required that cable operators be franchised if they are to provide service.²⁹ The Cable Act set out a national cable communications policy that was intended to “establish guidelines for . . . Federal, State, and local authorities with respect to the regulation of cable systems.”³⁰ The national standards for cable franchising were an attempt to provide “the cable industry with the stability and certainty that are essential to its growth and development.”³¹

Section 621 of the Cable Act authorizes the franchising authority to award “1 or more franchises within its jurisdiction.”³² The term “franchising authority” includes “any governmental entity empowered by Federal, State, or local law to grant a franchise.”³³ This provision is designed to permit the franchising authority to determine the number of cable operators that will serve its jurisdiction.³⁴ Once a cable company is granted a franchise, it is authorized to construct a cable system over public rights of way and easements dedicated for compatible uses.³⁵ The cable operator must pay the installation and operation cost, ensure the continued safety and appearance

28. Pub. L. No. 98-549, § 2, 98 Stat. 2779 (1984) (codified at 47 U.S.C.A. §§ 521-611 (West Supp. 1985)) [hereinafter cited as Cable Act]. The Cable Communications Policy Act of 1984 is contained in title 6 of the Communications Act of 1934, as amended. The Communications Act of 1934 is codified in scattered sections of title 47 of the United States Code.

29. Cable Act, § 621(b)(1) (codified at 47 U.S.C.A. § 541(b) (West Supp. 1985)). Section 621(b)(2) of the Cable Act permits an operator who is lawfully servicing an area without a franchise to continue to do so unless the franchising authority requires the operator to acquire a franchise. *Id.* § 621(b)(2) (codified at 47 U.S.C.A. § 541(b)(2) (West Supp. 1985)).

30. Cable Act, § 601(3) (codified at 47 U.S.C.A. § 521(3) (West Supp. 1985)).

31. H.R. REP. NO. 934, 98th Cong., 2d Sess. 20 (1984), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4656. The stated purposes of the Act are to:

- (1) establish a national policy concerning cable communications;
- (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsible to the needs and interests of the local community;
- (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
- (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
- (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and
- (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

Cable Act, § 601 (codified at 47 U.S.C.A. § 521 (West Supp. 1985)).

32. *Id.* § 621(a)(1) (codified at 47 U.S.C.A. § 541(a)(1) (West Supp. 1985)) (emphasis added).

33. *Id.* § 602(9) (codified at 47 U.S.C.A. § 522(9) (West Supp. 1985)).

34. See H.R. REP. NO. 934, *supra* note 31, at 59, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 4696.

35. Cable Act, § 621(a)(2) (codified at 47 U.S.C.A. § 541(a)(2) (West Supp. 1985)).

of the property being used, and provide just compensation to any property owner who incurs damages in the course of installation and operation.³⁶

The Cable Act also establishes standards for mandatory commercial use channels.³⁷ As a condition of the franchise, the operator must devote a percentage of its channel capacity to commercial use by individuals unaffiliated with the operator.³⁸ The operator is prohibited from exercising any editorial control over the content of broadcasts aired on these channels.³⁹ This provision was designed to promote the first amendment goal of fostering "the widest possible dissemination of information from diverse and antagonistic sources."⁴⁰ In this respect, the Cable Act reflects the desire expressed in a number of Supreme Court decisions to promote the first amendment value of viewpoint diversity.⁴¹

II. THE FIRST AMENDMENT AS APPLIED TO VARIOUS MEDIA: IS THE PAST PROLOGUE?

In deriving a first amendment standard for cable television, courts have struggled to adapt historical first amendment jurisprudence to a new medium. The Supreme Court, although it has not assessed the first amendment rights of cable operators, repeatedly has considered the problem of applying broad first amendment principles to various methods of communication.⁴² In approaching this task, the Court has recognized that "each medium of expression . . . must be assessed for First Amendment purposes by stan-

36. *Id.* § 621(a)(2)(A)-(C) (codified at 47 U.S.C.A. § 541(a)(2)(A)-(C) (West Supp. 1985)).

37. *Id.* § 612 (codified at 47 U.S.C.A. § 532 (West Supp. 1985)).

38. *Id.* § 612(b)(1) (codified at 47 U.S.C.A. § 532(b)(1) (West Supp. 1985)).

39. *Id.* § 612(c)(2) (codified at 47 U.S.C.A. § 532(c)(2) (West Supp. 1985)). This section states:

A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

Id.

40. See H.R. REP. NO. 934, *supra* note 31, at 32, reprinted in U.S. CODE CONG. & AD. NEWS at 4669 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

41. See, e.g., *Red Lion*, 395 U.S. at 390 ("the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas"); *Associated Press*, 326 U.S. at 20 (The goal of the first amendment is to promote "the widest possible dissemination of information.").

42. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion) (billboard advertising); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (billing envelope inserts); *Carey v. Brown*, 447 U.S. 455 (1980) (picketing in residential areas); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (drive-in movie theaters); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space within city-owned transit system).

dards suited to it, for each may present its own problems."⁴³ Different first amendment standards have been formulated in response to each medium's unique characteristics.⁴⁴ Consequently, in order to determine the permissible degree of government regulation, a court must analyze any restraints in light of the medium's unique attributes.⁴⁵

Confronted with the problem of determining appropriate first amendment standards for the regulation of cable operations, lower courts have recognized these general guidelines and repeatedly have analogized cable to both broadcasting and the printed press.⁴⁶ Courts have analyzed three factors in their efforts to establish the permissible degree of government regulation over cable service: physical scarcity,⁴⁷ economic scarcity,⁴⁸ and consideration of cable's interference with the public domain.⁴⁹ The Supreme Court previously examined two of these rationales, physical and economic scarcity, with respect to broadcasting and the printed press.⁵⁰

The physical scarcity justification for government regulation applies where the medium itself inherently limits the number of persons who can provide service.⁵¹ The Supreme Court adopted physical scarcity as a justification for substantial government control over the broadcast medium because the available spectrum frequency for transmitting broadcast signals could not accommodate an infinite or even a large number of broadcasters.⁵² The economic scarcity rationale focuses on whether the medium has natural monopolistic tendencies thereby making new entries into the industry virtually impossible.⁵³ In contrast to its holdings regarding physical scarcity, the Supreme Court has rejected economic scarcity as a sufficient justification for mandatory access requirements over the printed press.⁵⁴ The third basis for

43. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

44. *Metromedia*, 453 U.S. at 501; *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

45. See Goldberg & Couzens, "Peculiar Characteristics": *An Analysis of the First Amendment Implications of Broadcasting*, 31 FED. COM. L.J. 1 (1978) (evaluating the "peculiar characteristic" rationale as a basis of government regulation of broadcasting).

46. See, e.g., *Omega Satellite*, 694 F.2d at 127-29; *Community Communications*, 660 F.2d at 1376; *Midwest Video*, 571 F.2d at 1052-57; *Home Box Office*, 567 F.2d at 43-51.

47. See *infra* text accompanying notes 57-77.

48. See *infra* text accompanying notes 78-101.

49. See *infra* text accompanying notes 102-22.

50. See *Miami Herald*, 418 U.S. 241 (1974) (addressing constitutionality of state's "right of reply" statute with regard to first amendment rights of the press); *Red Lion*, 395 U.S. 367 (1969) (addressing first amendment rights of broadcasters); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (same).

51. See *Red Lion*, 395 U.S. 367 (1969); *National Broadcasting Co.*, 319 U.S. 190 (1943).

52. See *National Broadcasting Co.*, 319 U.S. at 226-27.

53. See *Miami Herald*, 418 U.S. 241, 249-50 (1973).

54. *Compare National Broadcasting Co.*, 319 U.S. 190 (1943) (discussing physical scarcity

government regulation, cable's interference with the public domain, arises from cable's unique characteristics.⁵⁵ Numerous courts have maintained that the disruption caused by cable wiring to public streets and thoroughfares justifies increased regulation of the industry.⁵⁶

A. Physical Scarcity Theory as a Justification for Government Regulation

Based on broadcasting's inherent technological limitations,⁵⁷ the Supreme Court has upheld the ability of the Federal Communications Commission (FCC) to license individual broadcasters and to impose certain mandatory access requirements.⁵⁸ FCC broadcast licensing was first challenged under the first amendment in *National Broadcasting Co. v. United States*.⁵⁹ There, the Supreme Court held that a broadcaster's right to free speech does not encompass a right to use radio frequencies without a license.⁶⁰ The Court reasoned that the technical limitations of the electromagnetic spectrum mandate government allocation of available channels.⁶¹ Writing for the Court, Justice Frankfurter stated: "With everybody on the air, nobody could be heard [T]he radio spectrum is simply not large enough to accommodate everybody."⁶² Accordingly, the Court concluded that the FCC could regulate the medium and, as a condition of access, require that broadcasters serve the interests of the public.⁶³

rationale as applied to broadcasting) with *Miami Herald*, 418 U.S. 241 (1973) (discussing economic scarcity rationale as applied to the printed press).

55. See, e.g., *Community Communications*, 660 F.2d at 1377-78.

56. *Id. Accord Omega Satellite*, 694 F.2d at 127-28; *Berkshire*, 571 F. Supp. at 985.

57. *National Broadcasting Co.*, 319 U.S. at 226-27 ("Unlike other modes of expression, radio inherently is not available to all.").

58. See *supra* note 51.

59. 319 U.S. 190 (1943).

60. *Id.* at 226-27; see also *Red Lion*, 395 U.S. at 389 (observing that "[a broadcast] licensee has no constitutional right to be the one who holds the license").

61. *National Broadcasting Co.*, 319 U.S. at 226. This principle has been repeatedly affirmed. See, e.g., *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973); *Red Lion*, 395 U.S. at 388-89. A second basis for increased regulation of broadcasting is the impact theory. Under this theory, increased regulation is justified because of the medium's pervasiveness as evidenced by its substantial impact on the public. See, e.g., Geller & Lambert, *Cable, Content Regulation and the First Amendment*, 32 CATH. U.L. REV. 603, 615-16 (1983).

The Supreme Court relied in part on the impact theory to justify its decision in *Pacifica*, 438 U.S. 726 (1978). There, the Court upheld the FCC's power to issue administrative sanctions against a daytime broadcast of "indecent" language. *Id.* at 750-51. The Court based its decision on broadcasting's pervasiveness and the program's accessibility to children. *Id.* at 748-50. For a critical view of the impact theory, see, e.g., Geller & Lampert, *supra* at 615-17; Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 FED. COMM. L.J. 201, 207-09 (1978).

62. *National Broadcasting Co.*, 319 U.S. at 212-13.

63. *Id.* at 218-19; see also *Red Lion*, 395 U.S. at 385-86.

The Supreme Court elaborated on the scarcity principle in *Red Lion Broadcasting Co. v. FCC*.⁶⁴ In *Red Lion*, the Court upheld the constitutionality of the FCC fairness doctrine that requires broadcasters to air both sides of controversial public issues.⁶⁵ The broadcaster unsuccessfully argued that this doctrine interfered with editorial control of content in violation of the first amendment.⁶⁶ The Court rejected this claim, reasoning that scarcity permitted the government to impose restraints "on licensees in favor of others whose views should be expressed on this unique medium."⁶⁷ Justice White, writing for the majority, stated that the goal of the first amendment is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."⁶⁸ He therefore concluded that "[i]t is the right of the viewers and listeners, not the right of

64. 395 U.S. 367 (1969).

65. The fairness doctrine requires that broadcasters present controversial public issues and that each side is given fair coverage. *Red Lion*, 395 U.S. at 369. In 1967, the FCC promulgated rules regulating two aspects of the fairness doctrine dealing with personal attacks and with political editorializing. Personal Attacks, Political Editorials, 47 C.F.R. § 73.123 (1968).

It is noteworthy, however, that the fairness doctrine increasingly has come under attack. Critics argue that the doctrine stifles rather than enhances public debate because broadcasters may choose not to cover controversial issues in order to avoid the mandatory right-to-reply rule. See, e.g., Bazelon, *F.C.C. Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 230 n.58 (1975); Kaufman, *Reassessing the Fairness Doctrine*, N.Y. Times, June 19, 1983 (Magazine), at 16, 18-19.

As a result of criticism, the FCC presently is reconsidering the fairness doctrine and its chilling effect on broadcasters. Inquiry Into the General Fairness Doctrine Obligations on Broadcast Licensees, 49 Fed. Reg. 20,317 (1984) (to be codified at 47 C.F.R. § 73). The Supreme Court recently suggested that it would reconsider its *Red Lion* holding if the FCC demonstrated that the doctrine restrains rather than enhances free speech. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3117 n.12 (1984).

66. *Red Lion*, 395 U.S. at 395.

67. *Id.* at 390. Recently, however, the Supreme Court acknowledged that the spectrum scarcity rationale has come under increasing criticism. The Court stated:

Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete We are not prepared, however, to reconsider our long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

League of Women Voters, 104 S. Ct. at 3116 n.11 (1984).

Numerous scholars have taken the position that technological advances such as cable television, low-power television, and direct broadcast satellites undercut the scarcity rationale even as applied to broadcasters. See, e.g., Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982); Kaufman, *supra* note 65, at 18-19; see also *Loveday v. FCC*, 707 F.2d 1443, 1458-59 (D.C. Cir.), cert. denied, 464 U.S. 1008 (1983).

68. 395 U.S. at 390.

the broadcasters which is paramount."⁶⁹

The only court to approve physical scarcity as a justification for cable regulation was the United States Court of Appeals for the Eighth Circuit in *Black Hills Video Corp. v. FCC*.⁷⁰ Embracing the physical scarcity theory, the court upheld the FCC's power to regulate community antenna television systems that retransmit signals received from broadcasting stations.⁷¹ Significantly, however, many courts have rejected the *Black Hills Video* reasoning because of the technological advances of the cable industry since 1968.⁷² Cable television systems no longer serve solely as passive retransmitters of broadcast signals, but now originate programming and select which other stations' broadcasts they will carry.⁷³ Furthermore, the Eighth Circuit's later opinion in *Midwest Video Corp. v. FCC*⁷⁴ seriously weakened the acceptance of the physical scarcity rationale in *Black Hills Video*.

Still, courts have noted that there are some physical limitations imposed by the number of cables that can be strung from utility poles or buried underground.⁷⁵ While the need to regulate broadcast frequencies because of speaker interference is not an applicable concern for cable broadcasting, courts have recognized another type of scarcity justification⁷⁶ and another type of interference⁷⁷ that may justify a degree of government regulation of cable service.

B. The Economic Scarcity Rationale as a Justification of Government Regulation

Economic scarcity as a justification for government regulation of cable service has been far more controversial among the courts.⁷⁸ The economic scarcity rationale is a product of the cable industry's monopolistic tendencies. Cities have maintained that it is not economically feasible for more

69. *Id.* See also *National Broadcasting Co.*, 319 U.S. at 218-19.

70. 399 F.2d 65 (8th Cir. 1968).

71. *Id.*

72. See, e.g., *Omega Satellite*, 694 F.2d at 127 ("frequency interference [is] a problem that does not arise with cable television"); *Home Box Office*, 567 F.2d at 45 n.80.

73. See, e.g., *Midwest Video*, 571 F.2d at 1054-55; see also Note, *Cable Franchising*, *supra* note 2, at 319.

74. 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

75. See, e.g., *Omega Satellite*, 694 F.2d at 126; *Century Fed.*, 479 F. Supp. at 1563.

76. See *infra* text accompanying notes 78-101.

77. See *infra* text accompanying notes 102-22.

78. Compare *Home Box Office*, 567 F.2d 9 (1977) (rejecting the economic scarcity rationale as a justification for regulating the cable industry), with *Community Communications*, 660 F.2d 1370 (1981) (accepting the economic scarcity rationale as a justification for regulating the cable industry).

than one cable company to operate in a particular geographic area.⁷⁹ In response, courts have been forced to decide whether the industry's natural monopolistic qualities were an adequate justification for the proposed government restraint.

In *Miami Herald Publishing Co. v. Tornillo*,⁸⁰ the Supreme Court concluded that economic scarcity could not justify regulation of the print media. In that case, Tornillo brought suit against the newspaper for refusing to print his replies to editorials critical of his candidacy for state office, basing his claim on Florida's "right of reply" statute.⁸¹ The state relied on the concentration of the newspaper industry to justify the statute, maintaining that it was necessary to insure the presentation of all viewpoints where economic constraints limited the number of methods of communicating with the public.⁸² While agreeing that economic conditions virtually preclude new entry into the industry, the Court struck down the statute under the first amendment. It held that economic scarcity was inadequate to override the first amendment rights of the press.⁸³

Two United States courts of appeal have found that the economic scarcity rationale is equally inappropriate to justify regulation of cable television.⁸⁴ In *Midwest Video Corp. v. FCC*, the United States Court of Appeals for the Eighth Circuit reviewed FCC mandatory access and channel capacity requirements applicable to certain cable systems.⁸⁵ While holding that the FCC lacked statutory authority to promulgate such requirements,⁸⁶ the Eighth Circuit did express concerns over the first amendment implications of the FCC action.⁸⁷

The *Midwest Video* court concluded that the FCC's mandatory access rule prevented cable operators from retaining editorial rights and material selec-

79. See *Community Communications*, 660 F.2d at 1374.

80. 418 U.S. 241 (1973).

81. *Id.* at 244.

82. *Id.* at 249-51.

83. *Id.* at 258.

84. See *Midwest Video*, 571 F.2d at 1055-56; *Home Box Office*, 567 F.2d at 46; see also *Quincy Cable*, 768 F.2d at 1450-51. But see *Berkshire*, 571 F. Supp. at 985.

85. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1032 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979). The court here reviewed the FCC's 1976 Report that had altered the 1972 mandatory access rules in three major ways: it eliminated the top 100 market criteria thereby applying them to all cable systems with more than 3499 subscribers; it extended the compliance deadline for the 20-channel construction requirement to June 21, 1986, for most, but not all of the existing systems; and it required four access channels of large systems and required other systems to conglomerate access on one or more channels. *Id.* at 1033-34.

86. *Id.* at 1035.

87. *Id.* at 1052-57.

tion decisions over the four required public access channels.⁸⁸ In rejecting the government's power to compel public access, the court compared cablecasting to newspapers. It referred to cable operators as the creators of a "private electronic 'publication'" and criticized the Commission for ignoring the Supreme Court's holding in *Miami Herald*.⁸⁹ The court indicated that the rights of the public to engage in free speech should have been balanced against freedom of the press.⁹⁰ The court maintained that the Commission had improperly disregarded the latter consideration.⁹¹

In *Home Box Office, Inc. v. FCC*,⁹² the United States Court of Appeals for the District of Columbia Circuit also compared cable television to the printed press.⁹³ The court refused to accept the cable industry's natural monopolistic tendencies as a justification for government regulation.⁹⁴ It acknowledged that within the industry, the pattern has been for only one company to serve a given area, thus producing a noncompetitive monopolistic industry.⁹⁵ Aside from these economic concerns, the court did not find that any physical or electrical interference would limit the number of potential operators in a given locality.⁹⁶ Based on these findings, the court stated that "there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point."⁹⁷

Several courts, however, have held that economic scarcity will justify regulation of cable operations, finding that cable television and newspapers are constitutionally distinguishable.⁹⁸ These courts noted that the printed press, unlike cable television systems, had been virtually free from government regulation of its operations and content.⁹⁹ More importantly, these courts also found government franchising to be essential because the installation of cable systems interfered with the use of public streets and other municipal

88. *Id.* at 1055-56.

89. *Id.* at 1056. See generally Note, *Cable Television and Content Regulation: The FCC, The First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133 (1976).

90. *Midwest Video*, 571 F.2d at 1053.

91. *Id.*

92. 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

93. *Id.* at 46.

94. *Id.*

95. *Id.* But cf. *Quincy Cable*, 768 F.2d 1434 at 1450 (stating that "the tendency toward monopoly, if present at all, may be attributable more to governmental action—particularly the municipal franchise process—than to any 'natural' economic phenomenon").

96. *Home Box Office*, 567 F.2d at 46.

97. *Id.*

98. See, e.g., *Omega Satellite*, 694 F.2d at 127-28; *Community Communications*, 660 F.2d at 1378-79; *Berkshire*, 571 F. Supp. at 985; *Hopkinsville Cable TV*, 562 F. Supp. at 547.

99. *Community Communications*, 660 F.2d at 1379; *Berkshire*, 571 F. Supp. at 985.

facilities,¹⁰⁰ and thus provided the local municipality with a legitimate interest in limiting access to these facilities.¹⁰¹

III. DISRUPTION OF THE PUBLIC DOMAIN AS A JUSTIFICATION FOR GOVERNMENT REGULATION

In *Community Communications Co. v. City of Boulder*,¹⁰² the United States Court of Appeals for the Tenth Circuit recognized the disruption of the public domain caused by cable operations as a type of interference justifying government regulation.¹⁰³ The Tenth Circuit moved beyond a comparative media analysis by focusing on the property in question. To determine the permissible extent of regulation, the court looked to the nature of the public property to which access was being sought and to the interference resulting from access to that property.

The issue in *Community Communications* was whether the city's geographic districting plan violated the first amendment rights of cable operators.¹⁰⁴ The case arose following the issuance of a preliminary injunction against the City of Boulder¹⁰⁵ preventing Community Communications Company (CCC) from expanding its cable television services into the city.¹⁰⁶ Overruling the district court, the Tenth Circuit examined the degree of government regulation over cable operators permitted by the first amendment.¹⁰⁷ The court offered two justifications for the city's regulations: cable's disruption of municipal resources¹⁰⁸ and economic scarcity.¹⁰⁹

The court first noted that for cable operators to disseminate information,

100. *Omega Satellite*, 694 F.2d at 127; *Community Communications*, 660 F.2d at 1378-79; *Berkshire*, 571 F. Supp. at 985.

101. *Omega Satellite*, 694 F.2d at 127; *Community Communications*, 660 F.2d at 1378; *Berkshire*, 571 F. Supp. at 985.

102. 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

103. *Id.* at 1377-78.

104. *Id.* at 1373. In 1966, Boulder granted the plaintiff a 20-year revocable license, permitting the company to provide cable services to all residents of Boulder. Community Communications Co. (CCC) chose to serve only one area of Boulder until 1979 when it informed the city of its expansion plans. The city had also received a request from another company for a permit. Boulder conducted a study of the industry's technology and concluded that cable systems were natural monopolies. As a result of the study's findings, the city placed a moratorium on CCC's expansion efforts. This provided other companies the opportunity to bid on service to the other areas before CCC could monopolize the cable industry in Boulder. Shortly afterward, CCC filed a complaint against the city alleging its actions violated the Sherman Act and the first amendment. *Id.*

105. *Id.* at 1372.

106. *Id.*

107. *Id.* at 1375-80.

108. *Id.* at 1377-78.

109. *Id.* at 1378-79.

they must interfere with municipal facilities by stringing cable across poles or through underground conduits.¹¹⁰ In this respect, the court distinguished cable broadcasting from the printed press, which reaches its intended audience without any disruptive effect on public property.¹¹¹ Focusing on cable's disruptive effect on the public domain, the court concluded that cable broadcasters, in order to engage in first amendment activities, must necessarily obtain a license.¹¹² It reasoned that governmental interference with a cable operator's first amendment rights is justified to limit public inconvenience and to promote public safety.¹¹³

The second justification advanced by the court for cable broadcasting regulation was economic scarcity.¹¹⁴ The court distinguished cable broadcasting from the print medium in two ways. First, it noted that the press has traditionally been free from governmental control, whereas cable operators historically have been subject to various governmental restrictions.¹¹⁵ Relying on its earlier observations concerning the dissimilar effects of the two media on public property,¹¹⁶ the Tenth Circuit indicated that the economic scarcity rationale applies at the point where the municipality must grant or deny a request for a license.¹¹⁷ Responding to the natural monopolistic tendencies of the industry, the court maintained that the government must have some authority to assure, in the public interest, that "optimum use" is made of the cable medium.¹¹⁸ Interestingly, the court in *Community Communications* also suggested that the city's districting ordinance might be a justifiable means to avoid "an outmoded or less than state-of-the-art cable communications system."¹¹⁹

Because of cable's interference with public property and economic scarcity, the court concluded there was a greater need for government regulation over the cable industry than there was for regulation of the printed press.¹²⁰ This conclusion begged the question of the constitutionally permissible de-

110. *Id.* at 1377.

111. *Id.*

112. *Id.* at 1377-78.

113. *Id.* at 1378.

114. This argument was advanced by the City and rejected by the lower court. *Id.* at 1378-79.

115. *Id.* at 1379. See also *Berkshire*, 571 F. Supp. at 976 (distinguishing cable from newspapers because the print media historically has been free from governmental control over content).

116. *Community Communications*, 660 F.2d at 1379.

117. *Id.* ("[The city] must be permitted to deal with the effects of the scarcity that may attend the use of the license it is about to issue.").

118. *Id.*

119. *Id.*

120. *Id.*

gree of regulation. The court maintained that while the general rationale for allowing government regulation may be the same for cable as for broadcasting, the criteria upon which licensing decisions are based may be different for the two industries.¹²¹ *Community Communications* suggested three factors that may justify differences in the regulations applied to the cable medium: first, the degree of the medium's natural monopolistic tendencies; second, the potential for technological developments; and finally, the possible uses of cable as a form of two-way communication.¹²²

IV. THE TREATMENT OF CABLE REGULATIONS AS AN INCIDENTAL BURDEN ON SPEECH

In *Home Box Office*,¹²³ the court reviewed FCC regulations that limited the types of programming that cablecasters and subscription broadcast television stations could offer their customers.¹²⁴ Although the case was de-

121. *Id.* In identifying these criteria, the court cautioned that "the power to regulate is not one whit broader than the need that evokes it." *Id.* These criteria were to guide a more detailed inquiry by the district court into cable broadcasting's unique attributes based on a more fully developed factual record. *Id.* at 1380. The court of appeals concluded that the first amendment issues raised a presumption of irreparable harm for both the city and CCC. *Id.* The court, therefore, denied the district court's one-sided grant of preliminary injunctive relief to CCC and instead froze both parties in their present circumstances until a trial on the merits was conducted. *Id.*

122. *Id.* The court in *Omega Satellite* also addressed the permissible criteria for the city's franchising process. 694 F.2d 119 (7th Cir. 1982). It found that the city could regulate cable broadcasting to a greater degree than other nonbroadcast media. *Id.* at 127. The court based its decision on three factors: cable's interference with other potential users of the poles and conduits, its natural monopolistic tendencies, and its pervasiveness which triggers the need to protect children. *Id.* at 127-28.

With regard to the criteria upon which the city chooses an operator, the court conceded that the city may not have unfettered control over the criteria. *Id.* at 128. The court in *Omega Satellite*, however, observed that vague criteria for awarding a cable franchise may be constitutionally permissible because requiring specific criteria may be impractical. *Id.* The court further noted that the city's "cumbersome" and vague standards may be "the best possible—or at least a constitutionally adequate—accommodation between regulatory feasibility and the policy of the First Amendment." *Id.* at 128-29.

123. 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). Those aspects of *Home Box Office* dealing with the economic scarcity rationale are discussed *supra* at text accompanying notes 92-97.

124. *Id.* at 49. The Commission feared pay cable television would have adverse affects on conventional broadcasting by "siphoning" its programs. Siphoning occurs when a program aired on free television is purchased by a subscription cable channel. The Commission argued that the program purchased by the cable company no longer would be available to television networks or that its showing would be delayed. In either event, the Commission argued this phenomenon would prevent or delay viewing access to a segment of the American public. *Id.* at 24-25.

cided on statutory grounds,¹²⁵ the court also discussed the constitutional propriety of the FCC pay cable rules. In evaluating the first amendment issues, the court rejected both the physical and economic scarcity rationales for government regulation.¹²⁶ The court, acknowledging that the first amendment permits the regulation of "collateral aspects" of speech,¹²⁷ treated the FCC regulations as an incidental burden on the cable operator's free speech rights.¹²⁸ The *Home Box Office* court concluded that the regulations affected "a government interest . . . unrelated to the suppression of free expression"¹²⁹ stating that the proper test for the constitutionality of such regulations was outlined by the Supreme Court in *United States v. O'Brien*.¹³⁰

In that case, O'Brien had argued that the burning of his draft card was symbolic speech protected by the first amendment.¹³¹ The Supreme Court rejected the contention that all conduct is speech merely because the person engaging in that conduct intends to express an idea.¹³² The *O'Brien* Court held that where conduct contains both speech and nonspeech elements, incidental restrictions on first amendment freedoms are tolerated if there is "a sufficiently important governmental interest in regulating the nonspeech element."¹³³ The Court outlined a four-prong test to determine whether a government regulation is constitutionally permissible.¹³⁴ First, the government must have the constitutional power to promulgate the regulation; second, the regulation must further a substantial governmental interest; third, the interest which is being advanced must be "unrelated to the suppression of free expression"; and fourth, the regulation incidentally limiting activities within the scope of first amendment protection must be the least restrictive

125. The court held that the FCC lacked authority to promulgate the pay cable rules. *Id.* at 43-51.

126. *Id.* at 43-46.

127. *Id.* at 47. See generally Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 5 (1965).

128. *Home Box Office*, 567 F.2d at 47.

129. *Id.* at 48 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

130. 391 U.S. 367 (1968).

131. *Id.* at 376.

132. *Id.*

133. *Id.*

134. *Id.* at 377. The four-part *O'Brien* test, in full, is as follows:

[A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

means of furthering that interest.¹³⁵

In *Home Box Office*, a court for the first time applied the *O'Brien* test to determine whether government regulation of cable television was constitutionally permissible.¹³⁶ Under the analysis in *Home Box Office*, a regulation is constitutionally valid if it "further[s] an important or substantial governmental interest" and "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential for the furtherance of that interest."¹³⁷ In applying this test, the court in *Home Box Office* concluded that although the FCC regulations were content neutral, they did not satisfy the second prong of the *O'Brien* test.¹³⁸ The court held that the FCC had "not put itself in a position to know" whether its concerns about cable television's effect on local broadcasting were "real or merely . . . fanciful."¹³⁹ The Commission's "speculation and innuendo" failed to offer convincing proof of an existing problem and therefore did not demonstrate "an important or substantial governmental interest."¹⁴⁰

In *Berkshire Cablevision of Rhode Island v. Burke*,¹⁴¹ the federal district court also applied the *O'Brien* test to determine whether cable regulations were constitutionally permissible. In *Berkshire*, the cable company filed an application to operate a cable television system in Newport County, Rhode Island.¹⁴² Rhode Island regulations would have required Berkshire Cablevision to provide public, educational, and governmental channels.¹⁴³ Berkshire filed suit against Rhode Island claiming that the mandatory access requirements violated the first amendment rights of cable operators because the rules stripped them of control over their channels.¹⁴⁴ Refusing to equate cable and the print media, the *Berkshire* court accepted the economic scarcity rationale as a sufficient justification for the regulation of cable television.¹⁴⁵

The *Berkshire* court reasoned that the cable franchising process produced a natural monopoly making it unlikely that a second cable company could

135. *Id.* For a discussion of the *O'Brien* test, see Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483-90 (1975).

136. *Home Box Office*, 567 F.2d at 47-49.

137. *Id.* at 48 (quoting *O'Brien*, 391 U.S. at 377).

138. *Id.* at 49-50.

139. *Id.* at 50.

140. *Id.*

141. 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

142. *Id.* at 978.

143. *Id.* at 979.

144. *Id.* at 979-80. Additionally, Berkshire claimed that the regulations deprived it of its property, thereby violating the fourteenth amendment. *Id.* at 980.

145. *Id.* at 986.

build and operate a successful cable system in an area already being serviced.¹⁴⁶ While acknowledging that the Supreme Court had rejected the economic scarcity rationale as a justification for mandatory access requirements imposed on newspapers, the court nonetheless claimed that significantly different effects resulted from denying public access to the respective media.¹⁴⁷ It noted that a person who is denied access to the printed press is not effectively barred from expressing his views in that same print media because there are relatively inexpensive alternative ways to convey a printed message.¹⁴⁸ The court contrasted this situation to that where one is barred access to a cable station because he lacks any economically feasible alternative method of conveying his message within that same medium.¹⁴⁹ The court concluded that "scarcity is scarcity—its particular source, whether 'physical' or 'economic,' does not matter if its effect is to remove from all but a small group an important means of expressing ideas."¹⁵⁰ Accordingly, the district court in *Berkshire* recognized that the goal of the scarcity rationale, previously applied to the broadcast media in *Red Lion*, was the appropriate model for cable television.¹⁵¹

After establishing that the government may regulate cable operators' editorial control over their channels, the court then addressed whether the Rhode Island regulations were the least restrictive means of furthering the government's interest in allocating a scarce resource. Having determined that the Rhode Island access rules were content-neutral and only incidentally restricted the first amendment rights of cable operators, the district court applied the same *O'Brien* test that was used in *Home Box Office*.¹⁵² It concluded that the rules served substantial governmental interests by ensuring community participation in cable television programming.¹⁵³ The court noted that the rules furthered first amendment values of promoting the

146. *Id.*

147. *Id.* at 984-85.

148. *Id.* at 986 (noting that a person could distribute "a leaflet, pamphlet, or other relatively inexpensive form of 'publication'").

149. *Id.* *But cf. Miami Herald*, 418 U.S. at 256-58; *Home Box Office*, 567 F.2d at 48. Both courts observed that although not everyone can speak through a given medium because an individual cannot afford to do so, this does not justify government intervention. *Id.*

A potential problem with this argument is that the *Berkshire* court emphasized the available alternatives within the same medium yet ignored the realistic ineffectiveness of the alternative it proposed.

150. *Berkshire*, 571 F. Supp. at 986-87.

151. *Id.* at 986. The goal stated by the court was "to promote the First Amendment by making a powerful communications medium available to as many . . . citizens as is reasonably possible." *Id.* (emphasis in original).

152. *Id.* at 987-88. With regard to the *O'Brien* test used in *Home Box Office*, see *supra* text accompanying note 137.

153. *Berkshire*, 571 F. Supp. at 987.

“ ‘unfettered flow of information’ ” and a well-informed public by opening up cable television to all.¹⁵⁴ Ultimately, the *Berkshire* court found that the rules imposed no excessive restraint because cable operators were required to turn over only seven of their fifty channels and retained complete control over those remaining.¹⁵⁵

By relying on the *O'Brien* test, *Berkshire* and *Home Box Office* exposed the insufficiency of the comparative media analysis as a means of determining the appropriate limits of governmental regulation of cable television. In a similar fashion, *Community Communications* highlighted the inadequacy of the comparative media analysis by focusing on the uniqueness of the cable medium. Not surprisingly, *Preferred* also moved away from the comparative media analysis by augmenting its holding with the application of the public forum doctrine.

V. THE PREFERRED ANALYSIS

In *Preferred Communications, Inc. v. City of Los Angeles*,¹⁵⁶ the United States Court of Appeals for the Ninth Circuit addressed whether a city's policies of auctioning the right to provide cable service to a particular area and of limiting each area to a single franchise was an infringement of the first amendment rights of a cable operator. PCI approached two Los Angeles utilities in an attempt to lease space on their poles and conduits.¹⁵⁷ Both utilities informed PCI that it must obtain a cable television franchise from the city before such an agreement could be concluded.¹⁵⁸ PCI petitioned the city for a franchise and was refused because it had failed to participate in the auction process.¹⁵⁹ Subsequently, PCI brought suit against the city basing its claim on the first amendment and federal antitrust laws.¹⁶⁰ The district court dismissed the complaint and PCI appealed.¹⁶¹ The Ninth Circuit affirmed the district court's dismissal of the antitrust claims but reversed its dismissal of the first amendment claim.¹⁶²

154. *Id.* (quoting CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 19 (1974)).

155. *Id.* at 988.

156. 754 F.2d 1396 (9th Cir.), cert. granted, 106 S. Ct. 380 (1985).

157. *Preferred*, 754 F.2d at 1400.

158. *Id.*

159. *Id.* at 1401.

160. *Id.*

161. *Id.* at 1399. See *supra* note 23.

162. 754 F.2d at 1399. The court dismissed the antitrust claim based on the municipality's immunity from antitrust liability. *Id.* at 1415. Under the Sherman Act, states are immune from liability. *Id.* at 1415 (citing *Parker v. Brown*, 317 U.S. 341, 351 (1943)). Municipalities, however, are not automatically immune from liability. The court answered two questions in evaluating the city's immunity. The first was whether the city acted in response to a “clearly

Preferred was the first decision to hold cable licensing regulations unconstitutional.¹⁶³ The court's analysis appropriately may be divided into two distinct first amendment approaches. First, the court examined cable's first amendment rights, as earlier courts had done, by focusing on the medium being regulated.¹⁶⁴ Under this approach, the court distinguished government regulation of broadcasting from government regulation of cable.¹⁶⁵ The court concluded that the physical and economic scarcity rationales were insufficient to justify the franchising process at issue.¹⁶⁶

Moving away from the traditional media analysis, the court then evaluated both the type of property to which access was being sought¹⁶⁷ and whether the intended use was destructive to that property.¹⁶⁸ While conceding that some degree of regulation over the use of public facilities would be permissible, the court concluded that restricting access to only one company might overstep the bounds of permissible regulation if it could not be shown that the facilities would support only one system.¹⁶⁹ Further, the court focused solely on the property in question, employing the public forum doctrine,¹⁷⁰ to reinforce its conclusion that the limitations imposed by the city were potentially unconstitutional.¹⁷¹

A. *Preferred's Rejection of the Physical and Economic Scarcity Rationales*

In *Preferred*, the Ninth Circuit flatly rejected earlier judicial attempts to apply broadcasting standards to the cable industry.¹⁷² The court observed that the similarities between the two media were "superficial," concluding

articulated and affirmatively expressed" state policy that displaced competition with regulation. *Id.* at 1412. The court in *Preferred* held that the city's authority to issue franchises under § 53066 of the California Code constituted a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation." *Id.* at 1415 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

The second question the court briefly explored was the effect of its first amendment holding on the antitrust claim. *Id.* at 1412. The court rejected PCI's contention that because the franchising process violated the first amendment it necessarily should prevail on its antitrust claim as well. *Id.* at 1415. The court reasoned that the antitrust laws and the first amendment serve distinct purposes and are neither related nor dependent claims. *Id.*

163. *Id.* at 1396.

164. *Id.* at 1403-07.

165. *Id.* at 1403-04.

166. *Id.* at 1404-05. For a critique of the comparative media analysis approach, see Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1091-95 (1985).

167. *Preferred*, 754 F.2d at 1405-07.

168. *Id.*

169. *Id.*

170. *Id.* at 1407-09.

171. *Id.*

172. *Id.* at 1403.

that the differences between cable and over-the-air broadcasting mandate dissimilar first amendment standards.¹⁷³ The court rejected the city's contention that because pole and conduit space are to some "undetermined extent physically limited," it should be permitted to limit access to only one cable operator.¹⁷⁴ At the same time, however, the court did not rule out the possibility that physical scarcity might justify increased cable regulation where the structures are physically incapable of accommodating all those who seek access.¹⁷⁵ Thus, the *Preferred* court concluded that, based on PCI's allegations of available space on poles and in conduits, the city could not justify its denial by relying on the physical scarcity rationale unless it demonstrated that the required space could not be made available.¹⁷⁶

With regard to the city's argument that economic scarcity justified the regulations, the court accepted PCI's allegation that competition is a viable possibility in the Los Angeles cable market.¹⁷⁷ Although the court assumed that no natural monopoly existed, it rejected the Tenth Circuit's rationale in *Community Communications*.¹⁷⁸ The Tenth Circuit had distinguished cable from the print media by showing that cable's economic scarcity was accompanied by the disruptive use of public property, justifying the need for a government licensing process.¹⁷⁹ In *Preferred*, the court dismissed this reasoning as overly broad.¹⁸⁰ It refused to transform the need for a licensing process into a justification for creating a monopoly through the use of the city's auction process.¹⁸¹

B. *The O'Brien Test as Applied in Preferred*

The court in *Preferred* recognized the city's legitimate interest in minimizing the disruption of the public domain.¹⁸² The court further conceded that such an interest may require government regulation of a noncommunicative aspect of speech.¹⁸³ In assessing the reasonableness of a regulation aimed at the medium's noncommunicative aspects, the court relied on the *O'Brien*

173. *Id.*

174. *Id.* at 1404.

175. The court stated: "We express no opinion on the issue of the manner in which the City should allocate access to poles and conduits to competing cable systems when these structures are incapable of accommodating all those seeking access." *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1405.

179. *Id.* See *supra* text accompanying notes 114-19.

180. 754 F.2d at 1405.

181. *Id.*

182. *Id.* at 1406.

183. *Id.* at 1405.

test.¹⁸⁴

Preferred established that the city had legitimate interests in minimizing interference with the public domain.¹⁸⁵ Furthermore, the court conceded that this interest was “ ‘unrelated to the suppression of free expression.’ ”¹⁸⁶ Nevertheless, the court held that the city failed to meet the fourth prong of the *O’Brien* test because there were less restrictive means available to protect the city’s interest.¹⁸⁷ The means that the city adopted to effectuate its interest allowed only one cable company to operate a franchise.¹⁸⁸ The court reasoned that such a system created an unnecessary risk that city officials would discriminate in their choice of cable operators based on the content or views in their proposed programs.¹⁸⁹ *Preferred* held that this risk could be substantially lessened by means less restrictive of the first amendment rights of cable operators.¹⁹⁰

The court in *Preferred* distinguished between regulating the use of public property and effectively restricting the access of cable operators to the market.¹⁹¹ It balanced the city’s interest in minimizing disruption of the public domain against the risk that the auction system would restrict the editorial judgments of cable operators.¹⁹² The court found that the negative impact of the regulations on the editorial judgment of the cable operators outweighed the city’s interest.¹⁹³

C. *The Appropriateness of the O’Brien Test: Do the Facts Support the Application of the Test?*

The court in *Preferred* introduced the *O’Brien* test by citing the Supreme Court’s language in *Metromedia, Inc. v. City of San Diego*.¹⁹⁴ In *Me-*

184. *Id.* See *supra* notes 134-35 and accompanying text.

185. *Preferred*, 754 F.2d at 1406. The court also recognized the city’s legitimate interests in public safety and in the maintainance of public thoroughfares. *Id.*

186. *Id.* at 1405 (quoting *O’Brien*, 391 U.S. at 377).

187. *Id.* at 1406. The court stated:

It has not been alleged that public utility facilities owned or controlled by the City can only support the use of a single or a few cables. Indeed, PCI has alleged precisely the contrary. A different and more sharply focused response by the City could protect the legitimate interests of the City and its citizens.

Id.

Nevertheless, the court did not identify the “more sharply focused response” it maintained the city should take.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1406-07.

193. *Id.*

194. 453 U.S. 490 (1981); see *Preferred*, 754 F.2d at 1405.

tromedia, the Supreme Court recognized a legitimate government interest in controlling the noncommunicative aspects of speech.¹⁹⁵ Yet it cannot be said that *Metromedia* offers any support of the *Preferred* court's reliance on *O'Brien*. In *Metromedia*, the Court did not apply the *O'Brien* test. Rather, it held that a balancing test was required where regulation of a noncommunicative aspect of speech infringed on the communicative aspects.¹⁹⁶ The Court concluded that "the First Amendment interest at stake" must be weighed against "the public interest allegedly served by the regulation."¹⁹⁷ Assessing these interests required a "particularized inquiry into the nature of the conflicting interests at stake."¹⁹⁸ *Preferred*, without referring to the *Metromedia* inquiry, performed a cursory balancing test under the fourth part of its *O'Brien* analysis.¹⁹⁹

Another issue raised by *Preferred*'s application of the *O'Brien* test is whether a noncommunicative aspect of speech was, in fact, present. In *O'Brien*, the Court stated that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."²⁰⁰ The Supreme Court in *O'Brien* focused on the plaintiff's conduct in an effort to determine whether burning his draft card could be labeled "speech."²⁰¹ The Court concluded the "speech" and "nonspeech" elements involved there were combined and, accordingly, enunciated and applied its four-prong test.²⁰²

The difficulty in *Preferred* lies in identifying the "nonspeech" or "noncommunicative" conduct of the cable operator. While not specifically identifying this conduct, the court suggested that the disruption of the public domain caused by cable wiring is the noncommunicative aspect being regulated.²⁰³ The question that remains, however, is whether this disruption is due to a cable operator's noncommunicative conduct or whether it is simply

195. *Metromedia*, 453 U.S. at 502. As the Court stated, "the government has legitimate interests in controlling the noncommunicative aspects of the medium, . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects." *Id.*

196. *Id.*

197. *Id.* (quoting *Linmark Ass'n v. Willingboro*, 431 U.S. 85, 91 (1977) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975))).

198. *Id.* at 503.

199. *Preferred*, 754 F.2d at 1406-07.

200. *O'Brien*, 391 U.S. at 376.

201. *Id.* at 376-77. See also Ely, *supra* note 135, at 1494-95 (discussing the speech/nonspeech distinction).

202. *Id.* at 377-82.

203. *Preferred*, 754 F.2d at 1406.

the inevitable effect of the operator's attempt to engage in protected first amendment activities.

D. Preferred's Application of the Public Forum Doctrine

The Supreme Court developed the public forum doctrine in response to the recurring problem of determining when the first amendment gives an individual or group access to government property to engage in expressive activity.²⁰⁴ The public forum doctrine thus is employed to determine whether access will be granted to those who seek use of government property for free speech activities.²⁰⁵ In applying the public forum analysis, courts balance the government's interest in maintaining the property for its intended use against the first amendment rights of those who wish to use the property.²⁰⁶

Specifically, the Supreme Court has identified three categories of government-owned property: public forums, limited public forums, and nonpublic forums.²⁰⁷ The particular forum determines the extent to which the government can control access to the property. Traditional public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate,"²⁰⁸ such as streets and parks.²⁰⁹ In these places, the government may enforce content-based regulations only when such restrictions are necessary to serve compelling state interests and are narrowly drawn to achieve that end.²¹⁰

The second category is the limited public forum where the government designates property for use by the public for the exercise of first amendment rights.²¹¹ While the government is not required to establish such a forum, during the time that it does, the same standards applicable to streets and

204. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 105 S. Ct. 3439 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Hague v. CIO*, 307 U.S. 496 (1939). For a critical evaluation of the public forum analysis, see Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

205. See, e.g., *Perry Educ. Ass'n*, 460 U.S. at 45.

206. See, e.g., *Cornelius*, 105 S. Ct. at 3448.

207. See generally *Perry Educ. Ass'n*, 460 U.S. at 45-46 (summarizing the three categories of government-owned property).

208. *Perry Educ. Ass'n*, 460 U.S. at 45.

209. See *Perry Educ. Ass'n*, 460 U.S. at 45; *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

210. *Perry Educ. Ass'n*, 460 U.S. at 46. Also, content neutral regulations may be enforced if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative means of communication." *Id.*

211. *Id.* See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (school classrooms opened for

parks apply.²¹² The third type of forum is government property that is not open to the public for use as a forum for speech either by tradition or by designation.²¹³ Restrictions pertaining to nonpublic forums are permissible as long as they are "reasonable" and viewpoint neutral.²¹⁴

The court in *Preferred* found that public utility poles and underground conduits are not traditional public forums,²¹⁵ and thus followed the Supreme Court's holding in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*.²¹⁶ In *Vincent*, the Court upheld, against a first amendment challenge, a city ordinance prohibiting sign posting on public utility poles and other public property.²¹⁷ The Court reasoned that a city's "esthetic interest" in eliminating "visual blight" is a sufficient interest to prohibit the temporary use of its utility poles for posting political campaign signs.²¹⁸ The Court applied the *O'Brien* test, identifying that test as the "appropriate framework for reviewing a viewpoint neutral regulation of this kind."²¹⁹ The Court found that it was within the city's constitutional power to advance esthetic values and that this interest was unrelated to the suppression of ideas.²²⁰ The Court also concluded that the city's interest in avoiding visual clutter was substantial enough to justify the ordinance's effect on the taxpayers' expression.²²¹ Affirming the majority holding in *Metromedia*, the *Vincent* Court concluded that sign posting on public property "constitutes a significant substantive evil within the City's power to prohibit."²²²

After finding the ordinance valid under the *O'Brien* test, the Court ad-

use by student groups); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theaters).

212. *Perry Educ. Ass'n*, 460 U.S. at 46.

213. *Id.* (intra-school mailboxes); see also *Greer v. Spock*, 424 U.S. 828 (1981) (military bases).

214. *Perry Educ. Ass'n*, 460 U.S. at 46. The Court found that "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

215. *Preferred*, 754 F.2d at 1408.

216. 104 S. Ct. 2118 (1984).

217. *Id.* at 2124-36. In support of Roland Vincent, a candidate for the Los Angeles City Council, a group of his supporters attached campaign signs to utility poles. As required by the city's Municipal Code, these signs were removed from the poles. *Id.* at 2122-23.

218. *Id.* at 2128-30. The Court stated, "[t]he problem addressed by this ordinance—the *visual assault* on the citizens of Los Angeles . . . —constitutes a significant substantive evil within the City's power to prohibit." *Id.* at 2130 (emphasis added).

219. *Id.* at 2129.

220. *Id.* at 2129-32.

221. *Id.* at 2130-32.

222. *Id.* at 2130. Cf. *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) (plurality opinion) ("[T]he city's interest in . . . the quality of urban life is one that must be accorded high respect.").

dressed the taxpayers' argument that because utility poles are located on streets and thoroughfares, the poles should be treated as a public forum.²²³ The *Vincent* court concluded that telephone poles and lampposts were neither traditional nor limited public forums.²²⁴ Instead, it found the property to be a nonpublic forum.²²⁵ Based upon the nonpublic forum test, the Court concluded that the ordinance passed constitutional scrutiny because it served a legitimate interest, was viewpoint neutral, and alternative channels of communication were available.²²⁶ The Court found the taxpayers' reliance on the public forum doctrine to be "misplaced."²²⁷ Although the Court addressed the public forum issue, it questioned whether the public forum doctrine was the appropriate analytical tool for the case.²²⁸ In a footnote, the *Vincent* court stated that it is "of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum."²²⁹

In *Preferred*, the Ninth Circuit distinguished *Vincent* on several grounds.²³⁰ The court observed that stringing or laying cables, unlike sign posting, is basically compatible with the normal use of the city's poles.²³¹ Because the poles are a forum for cable conduit space, the poles may still serve as a "forum for expression via the cable medium" despite the fact that they are not a traditional public forum.²³² Thus, the court held that the facilities in question could be considered either a limited or a nonpublic forum.²³³ *Preferred* noted three facts that supported PCI's contention that the poles were limited public forums. First, California had statutorily dedicated "surplus space" on its utility facilities for cable companies' use.²³⁴ Second, the Los Angeles Department of Water and Power "ha[d] held itself out to cable companies as a provider of pole-attachment services."²³⁵ Third, the court observed that the existence of the city's franchising process indicated its desire to permit at least some access to these facilities.²³⁶

These three factors substantiated PCI's claim that the utility structures

223. *Vincent*, 104 S. Ct. at 2133-34.

224. *Id.* at 2134.

225. *Id.*

226. *Id.*

227. *Id.* at 2134.

228. *Id.* at 2134 n.32.

229. *Id.*

230. *Preferred*, 754 F.2d at 1408.

231. *Id.*

232. *Id.*

233. *Id.* at 1409.

234. *Id.* See CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1984).

235. *Preferred*, 754 F.2d at 1409.

236. *Id.*

were limited public forums.²³⁷ Treating these facilities as limited public forums, the court concluded that the City's licensing process was not a reasonable time, place, and manner regulation.²³⁸ *Preferred* found that both the city's solicitation of "bids" from prospective operators and its denial of access to all except the "highest 'bidder'" were an unconstitutional exercise of the city's licensing authority.²³⁹

The court in *Preferred* found that even if the public facilities at issue were nonpublic forums, the city's auctioning process was still constitutionally impermissible.²⁴⁰ For regulations of a nonpublic forum to be constitutional, they must be viewpoint neutral and reasonable.²⁴¹ The *Preferred* court declared that the city's current practice was not viewpoint neutral.²⁴² The court distinguished the city's practice of awarding a single franchise from an outright ban on the grounds that a ban, as in *Vincent*, is viewpoint neutral.²⁴³ It found that the city's attempt to award only one cable company a franchise "create[d] an impermissible risk of covert discrimination based on the content of the views expressed in the operator's proposed programming."²⁴⁴ In distinguishing *Vincent*, the Court maintained that the city could not grant one speaker access to the property and forbid access to all others.²⁴⁵

E. Preferred's Public Forum Analysis in Light of *Cornelius*

In determining whether the cable attachments to a telephone pole constitute a limited public forum or a nonpublic forum, it is necessary to examine *Preferred* in light of the subsequent Supreme Court decision in *Cornelius v. NAACP Legal Defense and Educational Fund*.²⁴⁶ In *Cornelius*, the Court addressed whether the Combined Federal Campaign (CFC) violated the first amendment rights of legal defense and political advocacy groups that were excluded from participating in the fundraising activities.²⁴⁷

237. "PCI's complaint sufficiently alleges that the utility facilities at issue *do* constitute a kind of public forum, either by tradition or by designation." *Id.* (emphasis in the original).

238. *Id.* at 1409.

239. *Id.*

240. *Id.*

241. See *Cornelius*, 105 S. Ct. 3439, 3451-54 (1985).

242. *Preferred*, 754 F.2d at 1409.

243. *Id.*

244. *Id.* (emphasis added).

245. *Id.*

246. 105 S. Ct. 3439 (1985).

247. *Id.* at 3446. CFC is an annual fundraising drive among federal employees conducted during working hours at the federal workplace. *Id.* at 3443. Participating organizations submit 30-word statements included in the campaign literature which then is distributed to federal employees. The only organizations permitted to participate in the CFC were tax-exempt, non-

Applying the public forum doctrine, the Supreme Court in *Cornelius* began its analysis by defining the relevant forum.²⁴⁸ The Court stated that in defining the forum, the correct analysis extended beyond simply identifying the government property at issue.²⁴⁹ Instead, the Court observed that the access sought by the speaker was the more appropriate focal point.²⁵⁰ Accordingly, the relevant forum in *Cornelius* was the CFC and not the federal workplace.²⁵¹ As applied to *Preferred*, the property at issue was the poles and conduit space, and the cable operator sought access to the place on these facilities where the cable wires attach.

In *Cornelius*, after identifying the forum, the Court concentrated on whether the forum was public or nonpublic.²⁵² In determining if the property was a public forum, the *Cornelius* Court looked to both the intent of the government and the nature of the property.²⁵³ Intent, *Cornelius* held, consists of the government's policy and practice in regard to the property at issue.²⁵⁴ With regard to the nature of the property, the Court focused on whether the property lent itself to use for expressive activity.²⁵⁵ *Cornelius* concluded that the government did not intend to open up the CFC to all tax-exempt organizations and that it therefore was not a public forum.²⁵⁶

Applying the *Cornelius* analysis to the facts in *Preferred*, the city's practice and policy did not evidence an intent to designate its facilities as a public forum open to all cable companies seeking access.²⁵⁷ Los Angeles always

profit charitable organizations that were both supported by public contributions and provided direct health and welfare services. The legal defense and political advocacy organizations that challenged the regulations were specifically excluded. *Id.* at 3443-44. See generally Note, *Forum over Substance: Cornelius v. NAACP Legal Defense & Educational Fund*, 35 CATH. U.L. REV. 307 (1986).

248. 105 S. Ct. at 3448. The Court first recognized that charitable solicitation of funds is a form of protected speech and, therefore, implicates first amendment interests. *Id.* at 3447. See also *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (establishing that soliciting funds is an interest protected by the first amendment).

249. *Cornelius*, 105 S. Ct. at 3449.

250. *Id.*

251. *Id.*

252. *Id.* at 3449-50.

253. *Id.*

254. *Id.*

255. *Id.* at 3450-51. In determining that the CFC was a nonpublic forum, the Court concluded that "[t]he Government did not create the CFC for purposes of providing a forum for expressive activity." *Id.* at 3451.

256. *Id.*

257. See *Preferred*, 754 F.2d at 1402 (city argues that it may limit access to one cable company); *Cornelius*, 105 S. Ct. at 3450. Here, the Supreme Court discussed *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). The Court noted as significant, the city's intent to limit access to advertising spaces on municipal buses. *Cornelius*, 105 S. Ct. at 3450 (emphasis added).

had limited pole access to one franchise and the relevant state statute permitted this limitation.²⁵⁸ The disruption to the public domain that results from allowing additional companies access to poles further supports the conclusion that the city did not intend to designate the facilities as a public forum and significantly undercuts PCI's argument that the facilities were limited public forums.²⁵⁹

The *Preferred* court noted that even if the poles and conduits were appropriately characterized as a nonpublic forum, the city's auction process would still be unconstitutional under the applicable test.²⁶⁰ With regard to nonpublic forums, *Cornelius* held that a regulation must be viewpoint neutral, there must be reasonable alternative means available for communication, and the regulation must be reasonable in light of the forum's purpose.²⁶¹ *Preferred* maintained that the city's practice was not viewpoint neutral²⁶² because it "create[d] an impermissible risk of covert discrimination based on the content or the views expressed in the operator's proposed programming."²⁶³ The legitimacy of this argument, after *Cornelius*, turns on whether the Supreme Court would accept the Ninth Circuit's conclusion that the risk of discrimination arising from the city's single franchise system warrants the finding of viewpoint nonneutrality.

The second prong of the *Cornelius* nonpublic forum analysis states that there must be reasonable alternative means for a cable operator to reach its intended audience. In *Preferred*, Los Angeles argued that PCI could use another company's wiring to transmit its programming.²⁶⁴ While the *Preferred* court found this alternative inadequate to protect PCI's ability to exercise expressive rights, it seems to be an alternative means sufficient to meet the *Cornelius* test.²⁶⁵ As the Court stated in *Cornelius*: "[t]he Government's decision to restrict access to a nonpublic forum need only be reasonable; it

258. *Preferred*, 754 F.2d at 1400-01; see also Cable Act, § 621(a)(1) (codified at 47 U.S.C.A. § 541(a)(1) (West Supp. 1985)) ("A franchising authority may award, in accordance with the provisions of this [subchapter], one or more franchises within its jurisdiction.").

259. The Court in *Cornelius* referred to its earlier decision in *Lehman*, 418 U.S. 298 (1974), where it determined that the city intended to limit advertising spaces on municipal transit buses and had done so for 26 years. *Cornelius*, 105 S. Ct. at 3450 (quoting *Lehman*, 418 U.S. 298 (1974)). An additional factor in *Lehman* was that the property was being used as commercial enterprise. *Cornelius*, however, did not distinguish the case on this point.

260. *Preferred*, 754 F.2d at 1409.

261. *Cornelius*, 105 S. Ct. at 3451-54.

262. *Preferred*, 754 F.2d at 1409.

263. *Id.* (emphasis added).

264. *Id.* at 1409-10.

265. See *Cornelius*, 105 S. Ct. at 3453. The Court stated, "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Id.*

need not be the most reasonable or the only reasonable limitation."²⁶⁶

The third prong of the *Cornelius* analysis of nonpublic forums examines whether the regulation is reasonable in light of the forum's purpose. PCI could strongly argue that since the poles are able to handle more cable attachments, limiting access to only one operator is unreasonable, especially in light of the first amendment values that such a practice undermines. The first amendment seeks to foster an "uninhibited marketplace of ideas."²⁶⁷ PCI might argue that the private marketplace, rather than the city, should control the success or failure of a cable company. By allowing more than one company to serve a given area, the additional space on the poles permits such a shift in control to occur.

F. Preferred's Holding in Light of the Cable Communications Policy Act

Congress passed the Cable Communications Policy Act of 1984 to implement a uniform regulatory scheme for cable television.²⁶⁸ The Act empowers local authorities to "award . . . 1 or more franchises within its jurisdiction."²⁶⁹ The Act's franchising model is similar to the Los Angeles franchising procedure.²⁷⁰ Despite this fact, the court in *Preferred* relegated its discussion of the Act to a footnote,²⁷¹ acknowledging a municipality's interest in "regulating disruption of public resources through a system of permits or franchises."²⁷² Yet *Preferred* directly attacked the Act's legislative history, which stated that the provision " 'grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area.' "²⁷³ The court in *Preferred* observed that while a city may issue franchises in order to prevent disruption, it has no authority to decide how many franchises will be issued as long as there is space available on the poles for additional systems.

The holding in *Preferred* must be seriously questioned because the Act plainly states that a city may grant one franchise in a single region if it so chooses.²⁷⁴ According to the Cable Act, it would seem that Los Angeles would not be required to grant PCI a franchise nor would PCI be permitted

266. *Id.* (emphasis added).

267. *Red Lion*, 395 U.S. at 390.

268. *See supra* note 31.

269. Cable Act, § 621(a)(1) (codified at 47 U.S.C.A. § 541(a)(1) (West Supp. 1985)).

270. *Preferred*, 754 F.2d at 1400 n.3.

271. *Id.* at 1411 n.11.

272. *Id.*

273. *Id.* (quoting H.R. REP. NO. 934, *supra* note 31, at 59, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 4696).

274. Cable Act, § 621(a)(1) (codified at 47 U.S.C.A. § 541(a)(1) (West Supp. 1985)).

to provide cable services without one.²⁷⁵ In *Preferred*, the court did not adequately address the applicability of the Cable Act to the matter before it. Incomprehensibly, it avoided any thoughtful discussion of its decision to dismiss this provision of the Cable Act out of hand. Regardless of whether the court thought the Act did or did not have bearing on the issues in *Preferred*, sound jurisprudence would dictate that the court address the matter in a straightforward manner. *Preferred* may be rightly criticized for abdicating its responsibility in this regard.

VI. CONCLUSION

In *Preferred Communications, Inc. v. City of Los Angeles*, the Ninth Circuit held that a city may not limit its franchise to one cable operator if space exists for additional cable attachments. The court applied three distinct analyses to arrive at this conclusion: the comparative media analysis, the *O'Brien* test, and the public forum doctrine. Each of these analyses, to varying degrees, inadequately addressed the underlying question of to what extent the government may regulate the provision of cable service. The comparative media analysis, while supplying helpful analogies, concentrates too heavily on the existing similarities and dissimilarities of the media rather than focusing on the unique attributes and corresponding needs of the cable medium. In addition, although the *O'Brien* test has proved helpful to several courts in achieving their desired ends, the test's applicability to the cable industry is questionable due to the result-oriented manner in which it is utilized. Further, the public forum test, while applicable to the question, must be adapted to the problem with sensitivity to the fact that its outcome will establish the degree to which the cable medium will be regulated.

Several courts have wrestled with the problem of determining the appropriate first amendment analysis to apply to the cable medium. *Preferred* presents the Supreme Court with the opportunity to finally elucidate the degree of government regulation over the cable medium permitted by the first amendment. Essentially, the Court must preserve the nature of the cable medium and the first amendment interests at stake. It must be cognizant of the legitimate and at times competing interests of cable operators, local governments and the viewing public. Above all, the Court must stay true to the essential purpose of the first amendment, which is to promote diversity of ideas. In so doing, the Court will decide ultimately whether the private mar-

275. See *supra* note 29.

ketplace or local governments should exercise control over the number of franchises that will be granted to a particular region.

Rosemary B. Healy