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The First Amendment and Cablevision: Preferred Communications, Inc. v. City of Los Angeles

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THE FIRST AMENDMENT AND CABLEVISION: *PREFERRED COMMUNICATIONS, INC. V. CITY OF LOS ANGELES*

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.*

I. INTRODUCTION**

Freedom of speech and freedom of the press, the right to communicate free of governmental interference, are central to the continued existence of a free society.[1] It is the government's paramount obligation to protect these rights by remaining neutral toward those who communicate as well as toward the content of their communication. When the government fails to meet this obligation, freedom of speech is denied.

In the context of cable television (CATV), freedom of speech means the right to communicate in the market-place of ideas without fear of prior restraint or content-based discrimination. Currently, the right of CATV operators to exercise free speech is under attack by local cable franchising authorities. Local franchising provisions[2] pose a serious threat to the free speech rights of cable operators. These provisions authorize franchising authorities[3] to limit access to public rights-of-way and public easements within their jurisdiction,[4] regardless of the physical

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* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

** The author would like to thank Professor Judith Finn for her assistance with this Note.

1. G. SHAPIRO, P. KURLAND, & J. MERCURIO, 'CABLESPEECH' vii (1983) [hereinafter cited as SHAPIRO].

2. Local franchising provisions often contain a section similar to that of Section 621 of the Cable Communications Policy Act of 1984, §§ 601, 621, 47 U.S.C. §§ 521, 541 (1984) [hereinafter cited as the "Act"]; *see also infra* notes 16-20 and accompanying text discussing the local franchising provisions of the city of Los Angeles.

3. The term "franchising authority" means "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(9) (1984). An example of a franchising authority would be a municipality.

4. *See* 47 U.S.C. § 541(a)(2) (1984). "Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which [are] within the area to be served by the cable system and which have been dedicated for compatible uses. . . ." *Id.* A cable system is defined as a "facility, consisting of a set of closed transmission paths and associated

ability of these public facilities to accommodate more than one cable system.

In essence, franchisors are authorized to impose prior restraints in violation of the United States Constitution. Additionally, local franchising provisions extend the power of franchising authorities well beyond the reasonable time, place, and manner restrictions[5] allowed to be imposed on other forms of speech. As a result, franchisors may not only limit the number of cable operators who gain access to the market, but they may also award cable franchises to the operator whom the franchisor "deems" best suited, using content-based criteria.[6] If franchisors are permitted to continue exclusive franchising practices and content-based discrimination, freedom of speech will no longer exist for CATV operators; local franchisors will have successfully suppressed the first amendment rights of the telecommunications media.

Cable operators claim that local franchising provisions authorizing franchisors to award *"one or more"* CATV franchises within a single jurisdiction constitute prior restraints upon CATV communications in violation of the first amendment.[7] Cable operators also argue that the use of prefranchise regulations[8] results in content-based discrimination, because franchising authorities are able to disguise selections based on personal preference by claiming that the choice was made in the "best interest" of the public. Cable operators, however, feel that they are in a better position than franchising authorities to determine the public interest.[9] To protest these alleged infringements of their first amendment rights, cable operators have sought vindication through the courts.

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signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . ." *Id.* § 522(6).

5. *See infra* note 180 and accompanying text.

6. *See infra* notes 111-25 and accompanying text discussing content-based franchise regulations and how the regulations interfere with a cable operator's exercise of editorial control and free speech rights.

7. Cable operations are protected by the first amendment. *See* Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829, *reh'g denied*, 434 U.S. 988 (1977).

8. Prefranchise regulations are requirements the franchising authorities impose upon potential franchisees. These regulations purportedly serve as a vehicle for selecting the cable operator "best" able to meet the interests of the public in receiving the widest possible diversity of information sources and services. *See infra* note 24 for a list of prefranchise regulations.

9. Cable operators believe that they can best serve the public's needs because their operations are subscriber-based. As a result, economics dictate that the cable operators either meet their subscribers' demands or go out of business.

On the other side, franchising authorities maintain that limiting the number of CATV operators in a given area is necessary to ensure that the public receives the widest possible diversity of information sources and services.[10] Franchising authorities also argue that these regulations are necessary because of the limited capacity of public facilities, which in turn limits the number of available cable spaces.[11] In addition, franchisors contend that cable operations must be regulated, because installation of cable causes substantial disruption of the public domain.[12] Finally, franchisors believe that the award of a cable franchise results in a "natural monopoly"[13] for the cable franchisee, therefore, prefranchise regulations are necessary to assure that no class of potential residential cable subscribers is denied cable on the basis of economic status.[14] Thus, franchising authorities contend that regulation of cable is justified under local governmental provisions and state police power privileges, and is necessary to preserve the public's interest in diversity of information sources and services.

A thorough statement of the arguments and authorities for both sides of this controversy can be found in *Preferred Communications, Inc. v. City of Los Angeles.*[15]

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10. The concept of the widest possible diversity of information sources and services is derived from the goals of the first amendment and the general purposes of the Act. The 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 responsive to the needs and interests of the local community; (3) establish guidelines for the exercise of [f]ederal, [s]tate, 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 subchapter; and (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. §§ 521(1)-(6) (1984).

11. This argument has been commonly referred to as one of "physical scarcity." The concept of physical scarcity was first recognized in the area of broadcast operations in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). *See infra* notes 142-45 and accompanying text, discussing the misapplication of the scarcity rationale as applied to cable television operations.

12. Public domain is defined as public utility poles, ducts, streets, and other public facilities used in the installation of CATV. *See infra* notes 153-62 and accompanying text, where disruption of the public domain, an argument alleged in favor of increased governmental regulation of CATV operations, is discussed.

13. The "natural monopoly" or "economic scarcity" argument arises from exclusive franchising practices and the franchisor's desire to "best" serve the interests of the public. *See, e.g., Boulder*, 660 F.2d at 1376-79.

14. 47 U.S.C. § 541(a)(3) (1984).

15. 754 F.2d 1396 (9th Cir. 1985), *aff'd on other grounds*, 106 S.Ct. 2034 (1986).

II. STATEMENT OF THE CASE

A. *Facts of* Preferred

Preferred Communications, Inc. (PCI) was organized to operate a CATV system in the South Central District of the city of Los Angeles.[16] In pursuit of cable attachment space, PCI contacted both the Pacific Telephone and Telegraph Company and the Los Angeles Department of Water and Power and learned that it was required to obtain a franchise before it could lease public utility poles to install its cable.[17] Subsequently, PCI petitioned the city for a franchise.[18] Upon petition, PCI learned that the city employed an auction process in making franchise selections and required all potential cable franchisees to comply with a variety of preconditions before it would consider their franchise bids.[19] Once all acceptable bids were submitted, the city would then select one cable operator who it deemed would "best" serve each district of the city.[20]

PCI refused to participate in the city's selection process, because it believed the process infringed upon its first amendment rights.[21] As a result of PCI's refusal to participate in the selection process, the city turned down PCI's request for a franchise and refused to permit PCI to operate a CATV system in the South Central District of Los Angeles.[22]

In response to the city's decision, PCI brought a Section 1983 civil rights action against the city of Los Angeles and the Los Angeles Department of Water and Power in the Southern District of California alleging abridgment of its first amendment rights.[23] PCI based its allegations on the alleged unreasonableness of the city's prefranchise requirements[24]

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16. *Preferred*, 754 F.2d at 1399-1400.
17. *Id.* at 1400.
18. *Id.*
19. *Id.*
20. *Id.* at 1401.
21. *Id.* PCI argued that the city's decision to pick the operator it deemed "best" amounted to content-based discrimination.
22. *Id.*
23. *Id.* at 1399. The first amendment rights claimed by PCI were the right to free speech and the right to exercise editorial discretion.
24. *Id.* at 1400. The pre-franchise requirements as set out in *Preferred* are as follows:

> A potential bidder must pay a $10,000 filing fee and a $500 good faith deposit and must agree to pay up to an additional $60,000 to reimburse the City for expenses incurred in holding the auction. It must provide the City with a detailed proposal outlining its intended operations over the succeeding nine years and must demonstrate to the satisfaction of the City that it has a "sound financial base," that its proposed operations constitute "sound business plans," and that it has the proper "character qualifications" and "demonstrated business experience." The City also requires hopeful bidders to agree to pay the

and on the alleged unconstitutionality of the city's exclusive franchise practices.[25]

At trial, PCI contended that it was a first amendment speaker.[26] Further, PCI claimed that it was unconstitutional to prohibit first amendment speakers from using public facilities designated as forums for cable communications when the facilities were physically capable of accommodating more than one speaker.[27]

The city's argument centered on its authority, pursuant to Section 621 of the Act and the California Government Code, to impose prefranchise regulations.[28] According to the city, local franchising provisions allow it to implement prefranchise regulations to achieve three goals: (1) to control the use of physically limited public facilities;[29] (2) to prevent excessive disruption of public streets and easements from installation of cables;[30] and (3) to assure that the cable operator best serves the public's interest.[31] The city also claimed that it was specifically authorized to award "one or more" cable franchises in an area within its control; thus, its practices were proper.[32]

B. *Procedural History*

After the district court dismissed the complaint, PCI appealed to the United States Court of Appeals for the Ninth Circuit, requesting rec-

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City a percentage of future annual gross revenues and to provide a variety of customer services, including at least 52 channels of video service and interactive (two way) service.

More significantly, the City exacts a commitment to provide various mandatory access and leased access channels. Bidders must agree to provide, without compensation, two channels for use by the City and by other government entities, two channels for use by educational institutions, and two channels for use by the general public, along with staff and facilities to aid in programming. Bidders must further agree to provide two leased access channels as well. An undertaking to provide portable production facilities and to permit free use by the city of all poles, towers, ducts, and antennas is also required.

Finally, potential cable operators must agree to leave a variety of business decisions to the discretion of the City. Pricing and customer relations are left to the City's control. The operator must form a "cable franchise advisory board," subject to City approval. Lastly, the City reserves the right to inspect the cable operation upon demand and requires a waiver of any right to recover for damages or other injury arising from the cable franchise or its enforcement.

Id. at 1400-01.

25. *Id.* at 1401.

26. *Id.* at 1403-04.

27. *Id.* at 1405-09.

28. *Id.* at 1400 & n.3; *see* 47 U.S.C. § 541 (1984); CAL GOV'T CODE § 53066 (West Supp. 1986).

29. *Preferred*, 754 F.2d at 1404.

30. *Id.* at 1405-06.

31. *Id.* at 1404-05.

32. *Id.* at 1400 & n.3.

ognition of its constitutional claims.[33] On a *de novo* review of the case, the Ninth Circuit held that the city could not limit access to public facilities to a single cable operator when those facilities could accommodate more than one CATV operator.[34] The court reasoned that the city's interest in protecting the public domain did not justify auctioning off the right to operate a cable television system.[35] The court also stated that PCI's right to exercise editorial discretion outweighed the city's desire to select the cable operator it deemed "best."[36]

The United States Supreme Court granted certiorari, but on review announced that it did not have sufficient facts to resolve the first amendment issues.[37] However, the Court held that PCI's complaint should not have been dismissed by the district court for failure to state a claim.[38] Instead, the Supreme Court stated that PCI had presented a colorable first amendment claim and that a trial court was the proper forum in which to develop the facts of the case.[39]

III. THE PREFERRED COMMUNICATIONS DECISION

The Ninth Circuit Court of Appeals, in a unanimous decision, held that a city may not constitutionally limit access by means of an auction to a given region, nor to a single CATV operator, when public utility structures and other public facilities are physically capable of accommodating more than one CATV system.[40] The *Preferred* court analyzed PCI's intended cable operations and the city's franchising practices in light of four factors: (1) the differences between the cable and broadcast medias; (2) the concept of natural monopoly as a justification for governmental regulation; (3) the disruption of public resources as a basis for governmental regulation; and (4) the public forum doctrine as a check on

33. *Preferred*, 754 F.2d at 1399.
34. *Id.* at 1411.
35. *Id.* at 1406 & n.9.
36. *Id.* at 1406-07.
37. 106 S.Ct. 2034 (1986). In City of Los Angeles v. Preferred Communications, Inc., the United States Supreme Court granted PCI certiorari on two issues: (1) Does the first amendment require a city to allow all who wish to install and operate cable television systems to have access to the city's utility poles, ducts, and other public properties, to the extent that those facilities have capacity not presently needed for other municipal purposes? (2) Is Section 621 of the 1984 Cable Communications Policy Act, which authorizes the city to limit access to public utility poles, ducts, and other public facilities by granting a franchise to a single cable television operator or to fewer operators than facilities can physically accommodate, unconstitutional? *Id.* at 2036-37.
38. *Id.* at 2036.
39. *Id.* at 2038.
40. *Preferred*, 754 F.2d at 1411. "[C]apable of accommodating more than one cable system" refers to the available "surplus space" on public utility poles typically used to string cables.

governmental control of the communications industry.[41] From its analysis of these four factors, the court found that CATV operations were entitled to greater first amendment freedoms than broadcast operations. As a result, the court in *Preferred* held that the city's attempt to restrict PCI's exercise of its first amendment rights by auctioning off a single CATV franchise in an area allegedly capable of accommodating more than one operator was unconstitutional.[42]

The *Preferred* court rejected the city's contention that CATV was more like broadcast, and thus subject to the type of stringent regulation standards espoused in a previous Supreme Court opinion, *Red Lion Broadcasting Co. v. FCC*.[43] Moreover, the court rejected the city's contention that CATV is subject to physical scarcity because of PCI's allegation that available space on public utility poles existed.[44] In addition, the court found CATV existed as a separate medium of communication and, therefore, should be regulated by standards best suited to that medium, despite artificial similarities between broadcast and cable operations.[45]

Next, the city asserted that a CATV operator, once franchised, enjoyed a natural monopoly.[46] The *Preferred* court declined to decide the issue of whether a natural monopoly would justify application of broadcast standards to CATV, because PCI alleged that competition was economically feasible in the Los Angeles area.[47] However, the court referred to another Supreme Court decision, *Miami Herald Publishing Co. v. Tornillo*, and pointed out that the Supreme Court in that case had rejected application of access regulations to the press merely because economic conditions made entry into the newspaper markets difficult.[48] In

41. *Preferred*, 754 F.2d at 1403-09. The *Preferred* court discussed a fifth factor pertaining to mandatory and leased access channels, and the city's power to restrict access to the cable market. *Id.* at 1409. Although the court did not decide the issue of whether the city may validly require cable operators to "turn over" channels for use by the public, educational institutions, and the government (PEG channels), the court did state that the access requirements posed a serious threat to the exercise of PCI's editorial discretion rights. The court reasoned that the city's access regulations provided no adequate alternative for PCI's right to operate a CATV system. *Id.* at 1410. For information on mandatory and leased access requirements see 47 U.S.C. §§ 532-533 (1984).

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

43. *Id.* at 1403; *see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

44. *Preferred*, 754 F.2d at 1404. The court was required to take PCI's allegations as true in reviewing the district court's dismissal of PCI's complaint. *See* Conley v. Gibson, 355 U.S. 41 (1957).

45. *Preferred*, 754 F.2d at 1403. *See also infra* notes 168-71 and accompanying text discussing the *Preferred* court's failure to distinguish completely between cable and broadcast, and to include standards exclusively applicable to cable.

46. *Preferred*, 754 F.2d at 1404. The *Preferred* court failed to discuss the factors creating economic scarcity.

47. *Preferred*, 754 F.2d at 1404.

48. *Id.* at 1404 (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)).

essence, the mere fact that economic conditions make entry into the print or cable communications market difficult does not give government the authority to impose a limited right of access to the press or CATV.

The *Preferred* court subsequently examined the city's contention that the natural monopoly characteristics of CATV were related to disruption of the public domain, and therefore, permitted a greater degree of regulation.[49] The court pointed out that several cases have concluded that cable's alleged natural monopoly characteristics justify some degree of regulation.[50] Although the court in *Preferred* recognized that a cable company disrupts the public domain when installing cable and maintaining CATV operations, it refused to find that the city's interest in protecting the public domain justified the city's effort to auction off the right to operate a CATV system.[51] Ironically, the court noted that the city's exclusive franchise practices contributed to the natural monopoly of which it complained.[52] Consequently, the city's legitimate state interest in protecting public facilities from substantial disruption extended only to regulations which reached the non-communicative aspects of speech.[53] Accordingly, the court in *Preferred* found that the city's means, an auction process, left the city open to claims of discrimination and prior restraint of the first amendment rights of bidding CATV operators.[54]

A. *Definition of Cable Television*

Cable television developed as the result of community response to deficiencies in television broadcast services in rural areas.[55] Early CATV systems were used to retransmit distant television signals into the homes of cable subscribers.[56] Cable operators retransmitted these distant signals by strategically placing antennas in elevated areas.[57] Once antennas

49. *Id.* at 1405.

50. *Id.* at 1405. *See also* Berkshire Cablevision v. Burke, 571 F. Supp. 976, 985-86 (D.R.I. 1983) (wherein the court held that "economic scarcity" justifies government regulation); Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 127-28 (7th Cir. 1982) (the court found that interference with the use of telephone poles and underground ducts permits government regulation of cable operators); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981) (the circumstances surrounding cable broadcasting permit government regulation).

51. *Preferred*, 754 F.2d at 1404-06.

52. *Id.* at 1405.

53. *Id.* The phrase "noncommunicative aspects of speech," generally refers to non-content elements, those which the government may reasonably regulate.

54. *Id.* at 1409. An auction process is generally used to select the cable operator the franchisor deems "best." Content-based discrimination occurs when the franchisor selects the franchisee on the basis of programming offered and not on the basis of available utility space.

55. M. HAMBURG, ALL ABOUT CABLE § 1.02 (rev. ed. 1981).

56. *See* SHAPIRO, *supra* note 1, at 1.

57. *Id.*

were in place, CATV systems received the signals of television broadcasting stations, transmitted them to a "head-end" site,[58] and ultimately distributed them by wire, coaxial cable, or optic fiber into the homes of subscribers.[59] Originally, CATV operators did not produce their own programming, nor recompense broadcasters for the television signals retransmitted.[60] Thus, early CATV systems had relatively few channels, and functioned in a limited capacity as mere carriers of distant broadcast signals.

Because of technological innovations, today's CATV systems are labyrinthine in both structure and function, offering as many as 200 channels on increasingly smaller cables.[61] In addition, CATV operators are no longer mere carriers of broadcast signals. Rather, CATV operators are programmers, editors, and marketers.[62] While continuing to distribute broadcast signals, CATV operators now decide whether and how to produce their own programs; choose programming; and package, price, and market the chosen services.[63] As a result, the CATV industry has changed dramatically since its inception.[64]

58. A head-end site is much like a traffic light, because it controls the flow of distant signals to subscribers.

59. SHAPIRO, *supra* note 1, at 1.

60. CATV Report and Order, 36 F.C.C.2d 141, 315-17 (1972).

61. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), *cert. denied*, National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 106 S.Ct. 2889 (1986).

62. *See* SHAPIRO, *supra* note 1, at 3.

63. *Id.*

64. In the United States, regulation of cable is divided between local franchising authorities and the FCC. I. POOL, TECHNOLOGIES OF FREEDOM 157 (1983). The Communications Act of 1934 grants the FCC the authority to regulate cable. Communications Act of 1934, 47 U.S.C. §§ 151-234 (1982). The Cable Communications Policy Act of 1984 grants authority to regulate cable to local franchising authorites, *see supra* note 2. Since the onset of cable regulation, there has been a continuing debate between the government and cable operators as to how each medium should be characterized. The government argues that the cable industry should be subject to the same regulations as the broadcast industry. Cable operators, however, believe that the cable industry is more akin to the press, entitling the cable industry to full first amendment protection.

Congressional oversight during the development of CATV gave rise to many jurisdictional challenges to the FCC's authority to regulate cable growth. The FCC initially became interested in CATV in March of 1952, when it presented a memorandum to the Senate Committee on Interstate and Foreign Commerce. *See* HAMBURG, *supra* note 55, at § 1.02. The FCC presented two questions in its memorandum: (1) whether CATV operations constituted broadcast operations within the meaning of the 1934 Act; and (2) whether CATV operations should be classified as interstate commerce by common carriers. *See id.* § 1.03. The Senate Committee concluded that the FCC had jurisdiction only over broadcasters and common carriers and that the FCC could take no action to regulate CATV services. *Id.*

Eventually, jurisdictional questions regarding the FCC's authority to regulate CATV growth culminated in courtroom battles. In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), a television broadcast operator sought an order limiting the ability of a television-signal carrier to retransmit programs from Los Angeles to a San Diego broadcasting station via CATV. *Id.* at 160. In its review of *Southwestern Cable*, the United States Supreme Court examined the functions of

Regulation of CATV communications is necessary in order to establish an effective nationwide network of telecommunications.[65] What is unclear, however, is the proper approach and degree of CATV regulation necessary to further the public's interest in diversity of information and the CATV operator's interest in the first amendment. The fundamental conflict in the area of CATV regulation is whether CATV is more similar to the broadcast media or to the print media.[66] Although the court in

CATV in light of its previous interpretations of the 1934 Act. The Court stated that CATV performed either, or both, of two functions. First, CATV operations supplement broadcast operations by facilitating the reception of broadcast signals in difficult-to-service areas. Second, CATV systems transmit distant television broadcast signals to subscribers from outside state boundaries. *Id.* at 160-63. Therefore, CATV systems could expand the nationwide system of communications by performing intrastate and interstate functions, which requires supervision by the FCC. *Id.* at 168-69.

The Court in *Southwestern Cable* justified its holding on a broad reading of the language of the 1934 Act. The Court noted that the FCC had regulatory power over all forms of electrical communication, and " 'all interstate . . . communications by wire or radio,' " including CATV operations. *Id.* at 173. Moreover, the Court stated that regulation of CATV was "reasonably ancillary" to the effective performance of the FCC's duties. *Id.* at 178, 180-81.

A second notable courtroom battle questioning the FCC's regulatory authority over CATV concerned origination regulations designed to prevent CATV systems from "siphoning" broadcast signals. In United States v. Midwest Video Corp., 406 U.S. 649 (1972), a CATV operator challenged the FCC's authority to prescribe regulations requiring CATV systems serving 3,500 or more subscribers to produce local programs and to have available facilities for the production of such programs. *Id.* at 654; *see also* First Report and Order, 20 F.C.C. 2d 201, 223 (1969). The United States Supreme Court held that the FCC's origination requirements were " 'reasonably ancillary' " to the effective performance of its responsibilities of avoiding adverse effects on broadcast operations and encouraging CATV operators to follow statutory mandates. *Midwest Video*, 406 U.S. at 663. The Court concluded that the FCC's origination requirements served to " 'further the achievement of long established regulatory goals in the field of televisions broadcasting.' " *Id.* at 667-68 (quoting First Report and Order, 20 F.C.C. 2d 201, 202 (1969)). The Supreme Court's opinions in both *Southwestern Cable* and *Midwest Video* illustrate two concepts of early cable regulatory law. First, the FCC has expansive jurisdictional authority under the Federal Communications Act of 1934 to control technological developments in the rapidly changing field of CATV. *See Home Box Office*, 567 F.2d at 27. Second, and paradoxically, the FCC's authority to regulate CATV is only as expansive as is necessary to achieve its "long established" goals — to implement an effective and cost efficient national system of communications. *Id.* at 28. Thus, to a certain extent, the FCC's authority to regulate CATV is limited by its own regulations.

In 1977, the FCC decided to relax its origination requirements and streamline its regulatory burdens on CATV operators. As a result, diverse state regulatory franchising schemes were implemented. *See* C. FERRIS, F. LLOYD, & T. CASEY, CABLE TELEVISION LAW: A VIDEO COMMUNICATIONS PRACTICE GUIDE, STATE AND MUNICIPAL FRANCHISING OF CATV, § 13.09 (1983).

65. *See* 47 U.S.C. § 521(1)-(6) (1984) (listing the six purposes of the Cable Communications Policy Act of 1984); *see also supra* note 10.

66. The modern era of CATV regulation begins with § 621 of the Cable Communications Policy Act of 1984. *See* 47 U.S.C. § 541 (Supp. 1986). Section 621 is one of several sections in the Cable Communications Act designed to establish franchise procedures and standards that encourage CATV growth and responsiveness to local needs. *See, e.g.*, 47 U.S.C. §§ 521, 531-32, 542 (Supp. 1986). Moreover, these sections purportedly assure that CATV communications provide, and are encouraged to provide, the widest possible diversity of information sources and services to the public. *Id.* § 521(4).

Section 621 and its legislative history are one-sided. Congress provided a franchising authority with the discretion to determine the number of CATV operators to be authorized to provide service in a particular geographic area. H.R. 4103, 98th Cong., 2d Sess., 130 CONG. REC. 10, 427-29 (daily

Preferred failed to take advantage of the opportunity to develop a legal argument distinguishing cable from broadcast, the public forum doctrine and the limitations imposed upon governmental regulatory bodies by the *O'Brien* standard suggest that CATV is more like the print media. In essence, CATV is the electronic press.[67]

B. *Fundamental Distinctions: Broadcast-Cable or Cable-Print*

The fundamental conflict over regulation of CATV centers on the functional classification of CATV operations[68] and whether CATV is more similar to the broadcast medium (broadcast-cable) or the print medium (cable-print).

Proponents of stringent governmental regulation of CATV argue that cable is more like broadcast due to the similar operations within each industry. For instance, both broadcast and cable operators are licensees who must secure an operator's license from the controlling authorities before each may set up their respective operations.[69] In addition, advocates of the broadcast-cable model of regulation contend that cable is subject to economic and physical scarcity,[70] much like broadcast.

Economic scarcity, in terms of over-the-air broadcast operations, refers to the ability of a single over-the-air broadcast operator to monopolize spectrum frequencies without regard to the diversity of information being broadcast. In reponse to problems of economic scarcity, the FCC promulgated and enforced the "fairness doctrine" which prohibits a single broadcast operator from ignoring diversity of public opinion. Similarily, broadcast operations are subject to physical scarcity, because of the limited nature of the airwaves. As a result, broadcasters are regulated in a manner that seeks to avoid the interference caused by two

ed. Oct. 1, 1984). In so doing, Congress implied that the grant of a franchise by a municipality is like a license, and therefore a privilege. However, a conflict arises when a municipality grants only one privilege despite physical room for more than one service. A section 621 franchise is a prerequisite to a CATV operator's ability to provide CATV service. 47 U.S.C. § 541(b)(1) (Supp. 1986). Therefore, exclusive franchising conditions obviously limit a cable operator's ability to engage in first amendment expression. The same is true of prefranchise regulations which often require a cable operator to bargain away its first amendment rights. Both exclusive franchising practices and prefranchise regulations go to the heart of the cable operator's argument that their free speech rights have fallen victim to the discriminatory practices of franchisors.

67. *See* Shapiro, *supra* note 1, at 80-89.

68. *See* Comment, Berkshire Cablevision v. Burke: *Toward a Functional First Amendment Classification of Cable Operators*, 70 IOWA L. REV. 525 (1985).

69. Broadcasters are licensed by the FCC, and cable operators are licensed by state or municipal authorities who typically auction CATV franchises to a single CATV operator.

70. *See* Comment, *supra* note 68, at 530-35.

broadcast operators using the same frequency at the same time.[71]

Advocates of stringent governmental regulation of CATV claim that CATV is subject to physical scarcity, because public rights-of-way and utility facilities are limited in the number of cables they can support. Because public facilities are physically scarce, those advocating the position of the broadcast-cable model of regulation contend that exclusive franchising practices provide an efficient method of regulating the use of public facilities, while at the same time ensuring that the public's interest is served.[72]

Lastly, those desiring to have cable regulated under broadcast standards argue that the disruption caused to the public domain by installation of cables and maintenance of cable operations justifies the award of a single cable franchise,[73] regardless of available cable space on or under public facilities. The rationale for this position is rooted in the state's exercise of its police powers to preserve the public rights-of-way for their normal uses. Proponents argue that the operation of CATV from on or under public rights-of-way is not a normal use of such facilities.[74]

Opponents of government regulation assert that CATV is analogous to the print media because of a similar capacity to provide a wide variety of information from varying sources at one time, and because of the similar exercise of editorial discretion. Although network (over-the-air) broadcast operators exercise some editorial discretion, both the cable and the print medias enjoy wider latitude in selecting the programs or articles to be aired or published.[75] Further, those who argue for the print-cable model of regulation contend that neither economic nor physical scarcity factors are present in CATV operations.

It is the contention of print-cable model advocates that, although economic forces make entry into the medium of cable communications difficult, they are not absolute; they do not justify the auctioning off of an exclusive cable franchise. Likewise, print-cable advocates contend that CATV is not subject to forces of physical scarcity because of technological innovations which prevent physical interference between cables and because of the ability of cable operators to offer up to 200 channels of

71. *Id.*

72. *Id.* at 535 n.82.

73. *Id.* at 532 n.83.

74. *See* Shapiro, *supra* note 1, at 183.

75. *See* Comment, *supra* note 68, at 533-34 (discussing the similarities and differences in print and cable).

programming on increasingly smaller cables.[76]

Proponents of the print-cable model of regulation reject the notion of exclusive franchising based on the inherent disruption to the public domain generated by the installation and maintenance of cable operations. Proponents of the print-cable model of regulation also argue that the use of public rights-of-way by cable operators in the installation and maintenance of their cable systems is compatible with the normal use of the facilities, and therefore, are not a legitimate justification for exclusive franchising practices. Accordingly, when a local government elects to franchise a single cable operator on the basis of undefinable and uncompelling circumstances, the proponents of the print-cable model contend that the government is discriminating against and violating the free speech rights of cable operators.

The broadcast and print approaches to regulation of CATV are derived primarily from the Supreme Court's holdings in two cases: *Red Lion Broadcasting Co. v. FCC*[77] and *Miami Herald Co. v. Tornillo*.[78] The *Red Lion* and *Miami Herald* cases illustrate the antagonistic approaches to application of first amendment principles in the communications industry.

1. The *Red Lion* or Broadcast Approach

In *Red Lion Broadcasting Co. v. FCC*,[79] the United States Supreme Court upheld the application of the FCC's "fairness doctrine," as applied to radio broadcasters, because the spectrum frequencies used by radio broadcasters were physically scarce.[80] Generally, the physical scarcity theory contained within *Red Lion* is used in current cases challenging the propriety of governmental regulations limiting the number of CATV systems in a given area. Using *Red Lion*, advocates of a broadcast-cable model of regulation contend that CATV is subject to physical interfer-

76. *See supra* note 64 and accompanying text; *see also* SHAPIRO, *supra* note 1, at 188-89.
77. 395 U.S. 367 (1969).
78. 418 U.S. 241 (1974).
79. *Red Lion*, 395 U.S. at 400-01.
80. *Id.* at 388-90. *See also* Comment, *supra* note 68, at 528-29 (the author discusses the functional debate concerning classification of CATV operations). The fairness doctrine provides that broadcast licensees may be required to devote a reasonable portion of broadcast time to discussion of controversial public issues. 395 U.S. at 369, 376-77. The Court in upholding the FCC's fairness doctrine order as applied to the Red Lion Broadcasting Co., pointed to the fact that broadcasters are licensees of the airwaves and not owners. *Id.* at 394. Accordingly, because the airwaves are physically limited by interference occurring when speakers use the airwaves at the same time, the Court in *Red Lion* concluded that the first amendment right of the public to receive information outweighed the rights of broadcasters to monopolize the airwaves. *Id.* at 387-90.

ence, and thus physical scarcity.[81] Moreover, *Red Lion* is used to illustrate concern over the monopolistic tendencies of CATV systems. By analogizing to broadcasting, these advocates assert that the public has a paramount right to receive information from diverse sources.[82]

In *Community Communications v. City of Boulder*,[83] the United States Court of Appeals for the Tenth Circuit addressed a cable operator's claim concerning the geographic districting ordinances of the city of Boulder, Colorado.[84] The cable operator claimed that districting ordinances violated free speech rights because they authorized the award of a single cable franchise without regard to available cable space or to definable criteria from which to select the "best" CATV operator.[85] In contrast, the city of Boulder alleged that "cable systems are natural monopolies, so that subjecting them to some reasonable regulation designed to achieve optimal use of the cable broadcasting medium does not offend the first amendment . . . and [that] the districting ordinance . . . is a content-neutral regulation . . . ."[86]

The Tenth Circuit Court of Appeals recognized the city of Boulder's need to ensure that optimum use is made of CATV in the public's best interest.[87] The court went on to analogize CATV operations to broadcast operations based on the concepts of physical and economic scarcity.[88] Moreover, the court distinguished cable from print by pointing out that the installation of cable causes substantial disruption to the public domain, whereas the dissemination of newspapers causes minimal disruption.[89] The court also noted that the award of a CATV franchise

81. *See* Shapiro, *supra* note 1, at 194-95.

82. Application of *Red Lion* in case law discussing regulation of CATV has its genesis in the FCC's determination that the fairness doctrine should also govern CATV operations. *See* Report and Order, 49 F.C.C. 2d 1090 (1974). The FCC's rationale for imposing the fairness doctrine on cable operators was grounded in its fear that the growth of cable would destroy local broadcast programming. *See* Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968). Therefore, the FCC claimed it had authority to apply the fairness doctrine to CATV, because such action was "reasonably ancillary" to the FCC's regulation of the broadcast industry. *See supra* note 61 discussing the "reasonably ancillary" standard set out by the Supreme Court in *Southwestern Cable*; *see* Shapiro, *supra* note 1, at 68. Note, however, the FCC never directly applied the fairness doctrine in litigation with CATV operators. *See* 49 F.C.C. 2d at 1109; *see also* Shapiro, *supra* note 1, at 70.

83. 660 F.2d 1370 (10th Cir. 1981).

84. The term "districting ordinance" refers to the city's practice of limiting the award of CATV franchises to the cable operator deemed "best" able to meet the needs of the "public". In essence, the districting ordinances in *Boulder* are similar to the exclusive franchising practices used by the city in *Preferred*; the auction process is the common denominator. *See Boulder*, 660 F.2d at 1375.

85. *Boulder*, 660 F.2d at 1372 & n.1.

86. *Id.* at 1375.

87. *Id.* at 1379.

88. *Id.* at 1378-79.

89. *Id.* at 1377-78.

meant lengthy commitments by both the cable operator and the city.[90] As a result of these commitments, the court found that the city had a legitimate economic interest in assuring its public that a CATV franchisee will not become an "outmoded or less than a state-of-the-art" operation.[91]Accordingly, the court in *Boulder* held that "the City's districting ordinances might be justifiable as a means"[92] of preventing such an occurrence.

The United States Court of Appeals for the Ninth Circuit, in *Preferred Communications, Inc. v. City of Los Angeles*, rejected the city's contention, similar to that asserted by the city of Boulder in the *Boulder* case,[93] that the concepts of physical and economic scarcity, as developed in *Red Lion*, applied equally to CATV.[94] Instead, the court in *Preferred* pointed out that CATV is a medium of communication different from broadcast, and therefore, deserves to be regulated by standards designed specifically for CATV.[95] In support of its position, the court noted that the United States Supreme Court in *Red Lion*, recognized the need for applying different first amendment standards to each media, due to variences in the operational characteristics in each medium.[96]

In its analysis, the court in *Preferred* noted that on the issue of physical scarcity it was obliged to accept PCI's allegations that there was space available on the city's public utility poles and in its conduits to accommodate additional cable operations when PCI petitioned the city for a franchise.[97] However, the court alluded to other cases which had expressly rejected the notion that physical scarcity is applicable to CATV

90. *Id.* at 1379. The long commitment refers to the city's interest in awarding a franchise to the cable operator that will best serve the city over an extended time period and the cable operator's interest in obtaining the greatest possible return on its investment during that time period. *Id.*

91. *Id.*

92. *Id.* The means would be justifiable only to the extent that the regulations applied to the noncommunicative aspects of speech. *See infra* note 122 discussing the *O'Brien* standard and its application to exclusive franchising practices. The court in *Boulder* expressly applied the *Red Lion* physical and economic scarcity rationale. *Boulder*, 660 F.2d at 1378-80. However, the court cautioned that "the power to regulate [CATV] is not one whit broader than the need that evokes it." *Id.* at 1379. The court in *Boulder* further acknowledged that the "full panoply of principles governing the regulation of wireless broadcasters" did not necessarily apply to CATV. *Id.*; *see contra* Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968) (involving the FCC's efforts to regulate early CATV systems under the guise of physical scarcity).

93. In *Preferred*, the city maintained that physical and economic scarcity as well as disruption to the public domain were factors sufficient to justify its efforts to limit access to available facilities by means of an auction process. *Preferred*, 754 F.2d at 1402.

94. *Id.* at 1403-04.

95. *Id.* at 1403.

96. *Id.* (citing *Red Lion*, 395 U.S. at 386).

97. *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (discussing the standard of review of a complaint dismissed for failure to state a claim).

operations.[98] Though the court in *Preferred* acknowledged that the capacity of public utility facilities might in fact be limited it failed to offer any suggestions to the city as to alternative means of allocating its resources.[99] However, the court did suggest that the auction process used by the city was not sufficient.[100]

The court in *Preferred* declined to decide the issues of whether CATV is a natural monopoly and of whether economic scarcity justifies governmental regulation, because PCI alleged that "competition for cable services was economically feasible in the Los Angeles area."[101] The court did note, however, that the United States Supreme Court, in *Miami Herald Publishing Co. v. Tornillo*,[102] rejected a similar argument concerning governmental regulation of the press.[103] Also, the court in *Preferred* recognized that several courts have concluded that cable's alleged natural monopoly characteristics justify some degree of governmental regulation,[104] but refused to accept that a franchising authority may *create* a monopoly via an auction process merely because "cable's disruption of the public domain gives rise to a need for licensing . . . ."[105]

2. The *Miami Herald* or Print-Cable Approach

In *Miami Herald Publishing Co. v. Tornillo*,[106] the United States Supreme Court held that,

> [a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether

98. *Preferred*, 754 F.2d at 1404 (citing Midwest Video Corp. v. FCC, 571 F.2d 1025, 1054 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); Omega Satellite Products v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) ("[F]requency interference [is] a problem that does not arise with cable television."); Home Box Office, Inc. v. FCC, 567 F.2d 9, 45 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("[A]n essential precondition of [the broadcast] theory —physical interference and scarcity requiring an umpiring role for government — is absent.").

99. *Preferred*, 754 F.2d at 1404.

100. *Id.* at 1406.

101. *Id.* at 1404.

102. 418 U.S. 241 (1974).

103. *Id.* at 257.

104. *See* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981) (the court compared government regulation of cable and print based on each medium's respective degree of disruption to the public domain). The court in *Boulder* tied disruption of the public domain with factors of economic scarcity and concluded that governmental regulation best served the public's interest in preserving the public domain and its interest in receiving the widest possible diversity of information.

105. *Preferred*, 754 F.2d at 1405; *see also infra* notes 153-163 and accompanying text discussing disruption to the public domain as justification for stringent governmental regulation of CATV.

106. 418 U.S. 241 (1974).

> fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[107]

Application of the standard set out in *Miami Herald* to CATV litigation is based on the similarities between the first amendment activities of newspaper publishers and cable operators.[108] Although newspapers are not public forums, and newspaper publishers are not licensees,[109] both newspaper and cable operators exercise private editorial discretion in publication and programming operations.[110]

In *Quincy Cable TV, Inc. v. FCC*,[111] the United States Court of Appeals for the District of Columbia cited *Miami Herald* in support of its finding that first amendment principles governing regulation of the broadcast media should not apply to the regulation of CATV.[112] At issue in *Quincy*, were FCC must-carry regulations which required CATV operators, upon request and without compensation, to transmit to their subscribers any over-the-air broadcast signals " 'significantly viewed in the community . . . .' "[113] The FCC alleged that the must-carry rules were necessary in order "to assure that the advent of cable technology [did] not undermine the financial viability of free, community-oriented television."[114] Quincy Cable, on the other hand, asserted that the FCC's must-carry rules violated its first amendment right to exercise editorial

107. *Id.* at 258. In *Miami Herald*, the United States Supreme Court struck down a Florida "right of reply" statute that required newspapers to print the reply of a political candidate to charges made by a newspaper regarding the candidate's personal character and official record. *Id.* at 244. The newspaper publishing company sought a declaration that the "right of reply" statute was unconstitutional because it regulated the content of a newspaper in violation of the publisher's first amendment right to exercise editorial discretion in publication considerations. *Id.* at 247; *see also* U.S. CONST. amend. I. ("Congress shall make no law . . . ."). In opposition, others advocated an enforceable right of access to the press, not unlike the fairness doctrine approved by the United States Supreme Court in *Red Lion*. The rationale for a right of access to the press was allegedly to ensure that the widest possible diversity of information sources and services would reach the public. *Miami Herald*, 418 U.S. at 247-48; *see also* FLA. STAT. § 104.38 (1973).

108. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1405-06 (9th Cir. 1985).

109. *See* SHAPIRO, *supra* note 1, at 77-81 (discussing the similarities and differences of the cable and print medias in the context of mandatory access requirements).

110. *Id.* at 120-22. Broadcast operators exercise editorial control; however, broadcasters are limited in their ability to broadcast anything by the fairness doctrine and other FCC regulations that do not affect cable or print.

111. 768 F.2d 1434, 1450 (D.C. Cir. 1985).

112. *Id.*

113. *Id.* at 1437 (citing 47 C.F.R. §§ 76.57-76.61 (1984)).

114. *Id.* at 1440. The underlying concern of the FCC centered on the rapidly developing technology of CATV sytems, and the possibility of the CATV industry driving the broadcast television services out of business. *Id.*

discretion in selecting programming and services to offer its subscribers.[115]

In response to arguments presented, the court in *Quincy* refused to accept the FCC's argument that application of broadcast principles to CATV was justified, because the " 'natural monopoly characteristics' of cable create economic constraints on competition comparable to the physical constraints imposed by the limited size of the electromagnetic spectrum."[116] Although the court recognized that the installation and maintenance of CATV disrupts the public domain, justifying some governmental regulation, it stated that "purely economic constraints on the number of voices available in a given community" do not justify unwarranted intrusions into first amendment rights.[117] In addition, the court in *Quincy* pointed out that "[u]nlike ordinary broadcast television, which transmits the video image over airwaves capable of bearing only a limited number of signals, cable reaches the home over a coaxial cable with the technological capacity to carry 200 or more channels."[118] Based on these distinctions, the court held that CATV was not subject to regulation under broadcast principles.[119]

Next, the court in *Quincy* analyzed the propriety of treating must-carry rules as incidental burdens on speech.[120] The court applied the standard set out in *United States v. O'Brien*[121] and determined that the FCC's must-carry regulations, as applied to CATV, coerced speech.[122] The court found coercion because the rules demanded that a CATV operator carry the signals of local broadcasters regardless of content and irrespective of whether such programming best suited the operator's sub-

115. *Id.* at 1447.

116. *Id.* at 1449-50. The problem with the city's contention that cable television has cornered the market by operating as a natural monopoly is the fact that many alternative methods of distributing television signals already exist.

117. *Id.* at 1450 (citing *Miami Herald*, 418 U.S. at 247-56). The idea that economic forces of the market place alone could justify imposition of prior restraints and content-based discrimination is foreign to the first amendment.

118. *Id.* at 1448. The ability of cable to reach a larger number of subscribers than broadcast is the significant difference between the two medias. Although cable may never dominate the market as does national broadcast television, the fact that cable systems are competitors in the market place justifies some governmental regulation.

119. *Id.* at 1449. When the court in *Quincy Cable* rejected the FCC's physical interference and scarcity arguments, it was *not* referring to the physical interference caused by the installation and maintenance of CATV. Instead, the court rejected the application of broadcast principles to CATV because broadcast was subject to limited spectrum availability, whereas CATV was not. The court's failure to discuss in greater depth CATV's disruption to the public domain was apparently because the issue was one of access to CATV channels rather than access to CATV in general.

120. *Id.* at 1451.

121. 391 U.S. 367, 377 (1968).

122. *Quincy Cable*, 768 F.2d at 1452.

scriber-public.[123] Using the reasoning that a CATV operator's programming decisions are protected by the first amendment,[124] the court in *Quincy* held that the FCC's must-carry rules were not narrowly tailored to meet substantial interests and were unconstitutional as applied to CATV.[125] *Quincy* illustrates that economic factors in CATV operations, making it difficult for some broadcasters to compete in community-oriented television programming, do not justify application of broadcast regulations to CATV.

Miami Herald is difficult to apply to CATV exclusively, because both cable and broadcast operators exercise some degree of editorial discretion. Yet, when examined in terms of economic scarcity, *Miami Herald* suggests that market-place constraints on competition alone do not justify governmental regulation of access to communication mediums.[126] Theoretically, access to either cable or print is inherently available to all. In actuality, access to both is limited, but perhaps more so to broadcast than to cable because, in addition to monetary impediments, broadcast is also affected by the physical limitations of the electromagnetic spectrum.[127] In the case of broadcast, where the government has a demonstrable interest in regulating access to a medium of communication, it may do so using narrowly-tailored regulations; however, reliance upon economic scarcity alone does not state the requisite significant interest.[128]

The court of appeals in *Preferred* did not discuss *Miami Herald* in detail.[129] It did, however, note that the United States Court of Appeals for the Tenth Circuit, in *Community Communications Co. v. City of Boulder*,[130] distinguished *Miami Herald* in the context of CATV, stating that exclusive franchise practices were justified because of: (1) the natural monopoly characteristics of CATV; and (2) because of disruption to the public domain caused by the installation and maintenance of CATV.[131] Additionally, the court in *Preferred*, citing *Boulder*, noted that newspaper operations have no significant impact on the public domain.[132] However, unlike the Tenth Circuit Court, the court in *Preferred*

123. *Id.*
124. *Id.*
125. *Id.* at 1462-63.
126. *See, e.g., Miami Herald*, 418 U.S. at 248-58.
127. *See* Shapiro, *supra* note 1, at 188-89.
128. *See, e.g., Preferred*, 754 F.2d at 1404-05.
129. *Id.* at 1404. Once again the court was bound to take as true PCI's allegation that competition for cable services was economically feasible in the Los Angeles area. *Id.*
130. 660 F.2d 1370 (10th Cir. 1981).
131. *Preferred*, 754 F.2d at 1405.
132. *Id.* at 1406 (citing *Boulder*, 660 F.2d at 1378).

refused to sanction the city's exclusive franchising process or to acknowledge the alleged natural monopoly characteristics of CATV.[133]

C. *Cable Distinguished from Broadcast*

Cable television is mistakenly categorized, for purposes of regulation with the television broadcast media because both are electrical communication systems requiring the use of a television set for reception, and because broadcast and cable operators are both licensees who exercise varying degrees of editorial control for programming purposes. However, the comparison ends there. CATV is not subject to the phenomenon of physical interference which impedes broadcast operations, nor to the physical scarcity of spectrum frequencies inherent in broadcast operations.[134] Further, CATV operations do not disrupt the public domain to the extent that a franchising authority should be permitted to create a natural monopoly through use of exclusive franchising practices.[135]

On the other hand, CATV is much like a newspaper because it "is limited in channel capacity only by the investment made by the system's owner and by the sophistication of the technology employed in its development."[136] Therefore, anyone with financial backing and a subscriber base can set up a CATV operation of any size.[137] An operator may solicit the public to lease channel space on the cable much like a publisher solicits advertisers for its newpaper.[138] Because of these similarities, CATV should be subject only to the same regulations as the press.

1. Physical Interference

With broadcast operations, the use of radio and television frequencies must be regulated. If two or more broadcasters in the same area attempt to use the same frequency, their broadcasts will interfere with each other, and neither operator will be able to transmit programming.[139] As a result, "[t]he government therefore must determine who may broadcast over which frequencies and must tell some applicants that they

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

134. *See Home Box Office*, 567 F.2d at 45 (wherein the court held that pay programming rules designed by the FCC did not apply to cable television because "an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent" *Id.*).

135. *See infra* notes 153-62 and accompanying text.

136. Note, *Cable Television and Content Regulation: The FCC, The First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 146 (1976); *see* SHAPIRO, *supra* note 1, at 4.

137. *See id.* at 146.

138. *Id.*

139. *See* SHAPIRO, *supra* note 1, at 194.

'[cannot] broadcast at all.' "[140] CATV, however, is not subject to physical interference. CATV technology allows cable operators to insulate cables and forego use of the airwaves in order to avoid interfering with the "cablecasts" of another CATV operator.[141] Physical interference is nonexistent in cable operations, therefore, the government is not justified in telling any CATV operator that it may not engage in cable communications unless a substantial or compelling interest is shown.

2. Physical Scarcity

The notion that spectrum frequencies are scarce in broadcast operations does not apply to the CATV media. The United States Supreme Court first applied the physical scarcity rationale to broadcast operations in *Red Lion*, stating that "[b]ecause [of] the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[142] However, unlike broadcast, CATV operations are not bound by any specific channel capacity level.[143] Technological innovations permit CATV operators to double channel capacity merely by splitting the strands of each cable into separate channels, increasing the cable operator's ability to meet the public's demands. Broadcast operators are generally issued one license covering one channel and are therefore inherently limited in their programming capacity. CATV, however, does not use the airwaves; instead, its signals are transmitted from underground cables or cables strung on utililty poles into the homes of subscribers.[144]

Additionally, there is a facet of the physical scarcity argument which is concerned not only with the *availability* of space for cables, but with the *need* for cable operators in the market place as well. This argument addresses the fact that a cable operator's abililty to provide a multitude of channels is of minimal value in an area where there is not room

140. *Id.* at 195 (citing *Red Lion*, 395 U.S. at 388).

141. *See* Note, supra note 136, at 134-35.

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

143. *See Quincy Cable*, 768 F.2d at 1448 (wherein the court noted that a single CATV system has the potential to offer up to 200 channels); Omega Satellite Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) (wherein the court stated that frequency interference [is] a problem that does not arise with [CATV]).

144. Only one circuit has directly applied the concept of physical scarcity to CATV operations. In *Black Hills*, the Eighth Circuit Court of Appeals analogized cable to broadcast and held that cable did not differ from broadcast because cable merely retransmitted the signals of broadcasting stations over the airwaves. Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). The *Black Hills* analogy is erroneous because today's cable operators originate their own programming in addition to retransmitting broadcast signals.

for additional cables or where the local market does not warrant additional cable companies. In these instances, true economic forces should operate to preclude additional CATV stations from operating, rather than a forced monopoly situation created by the exclusive franchising practices of local authorities. If no public facilities are available for cable or no demand exists, then physical scarcity factors will operate to limit the ability of cable operators to provide information to the public. Consequently, physical scarcity, in this sense, justifies some degree of governmental regulation.[145]

3. Natural Monopoly

It has been stated that "[t]he primary rationale for government regulation of [CATV] rates rests upon a premise that [CATV] systems are 'natural monopolies' and will therefore, in the absence of governmental restraint, exact monopolistic charges from their subscribers."[146] However, it appears that CATV operations are not inherently "natural monopolies," rather, it would seem that the belief of franchising authorities that a city or town can only successfully support one CATV system has artificially created a natural monopoly for whomever is granted the CATV franchise in a particular city or town. Regardless of how these monopolies originate, there are two flaws associated with the "natural monopoly" theory of regulation. First, although CATV operators constitute powerful opposition to other forms of telecommunications, CATV operators are not immune from competiton, and therefore, must offer competitive subscriber packages.[147] Examples of alternative services are subscription television (STV), multi-point distribution service (MDS), over-the-air broadcasting (radio and television), satellite master antenna television systems (SMATV), microwave master antenna systems, and each such alternative service competes in the telecommunications market.[148] Second, the argument that economic forces of the market place preclude the operation of more than one CATV operator in a given area is flawed.[149] This argument rests on the assumption that the costs of organization and installation of a CATV system outweigh the costs of serving cable subscribers, thereby dictating the use of exclusive franchis-

145. *See Preferred*, 754 F.2d at 1404 (the city of Los Angeles argued that physical scarcity applied to CATV because space on public utility poles was not inherently available to all).

146. SHAPIRO, *supra* note 1, at 154.

147. *Id.*

148. *See* S. Rep. No. 98-67, 98th Cong., 1st Sess. 20 (1983).

149. SHAPIRO, *supra* note 1, at 188-89.

ing to reduce subscriber costs.[150] As mentioned earlier, the United States Supreme Court, in *Miami Herald*,[151] rejected the argument "that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights."[152] Arguably, the economic forces of the market place alone do not justify exclusive franchising practices or intrusion into the editorial discretion of those engaged in cable communications.

4. Disruption to the Public Domain

Installation of CATV systems necessarily involves disruption of public streets and utility structures.[153] Accordingly, the rights of CATV operators to use public rights-of-way, like streets and utility structures, may be subject to reasonable regulations designed to protect the public domain from overuse and to protect its aesthetic qualities.[154] Albeit, these regulations must be directed at the noncommunicative aspects of speech.[155] The basic test for determining whether government regulations are reasonable, that is, directed at noncommunicative aspects of speech is found in *Grayned v. City of Rockford*.[156] In *Grayned*, the Court stated: "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' "[157] According to the Court, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[158] In the context of CATV, "the question is whether the presence of wires the cable operator seeks to install on public rights of way would be 'basically incompatible with the

150. *Id.* at 188.

151. *See generally, Miami Herald*, 418 U.S. at 247-56.

152. *Quincy Cable*, 768 F.2d at 1450 (construing *Miami Herald*, 418 U.S. 241, 247-56 (1974)). The fact that *Miami Herald* concerned newspaper operations is irrelevant here because courts have stated that "there is no meaningful 'distinction between cable television and newspapers on this point.' " *Id.* at 1450 (citing *Home Box Office*, 567 F.2d at 46). If natural monopolies exist in the CATV industry, they are the direct result of exclusive franchising practices. State and local authorities are empowered to ensure that CATV operators obtain a franchise *prior to* serving the community. *See* 47 U.S.C. § 541 (1982). Because of their power to franchise, state and local authorities seldom award more than one CATV franchise in any given jurisdiction. *See* SHAPIRO, *supra* note 1, at 11. Clearly the cable operator awarded the single franchise enjoys a monopoly that is not created by economic factors, but fabricated by franchising authorites themselves.

153. *Preferred*, 754 F.2d at 1405-06. Cable operators must use the streets and alleys in order to string and lay their cables.

154. *See* SHAPIRO, *supra* note 1, at 180-81.

155. *Id.*

156. 408 U.S. 104 (1972).

157. *Id.* at 116.

158. *Id.*

normal activity' of the streets, alleys or conduits which the cable operator proposes to use."[159]

By way of answering this question, CATV operators must have access to public streets and utility structures in order to install cable communications equipment.[160] Cities commonly designate "surplus space" on public utility structures for stringing cables.[161] Thus, it follows that use of public utility structures by CATV operators for the installation and maintenance of CATV services is compatible with the normal activity of such places.

The presence of use compatibility in these circumstances limits the power of franchising authorities to regulate access to these facilities to reasonable time, place, and manner restrictions. In essence, "[o]nce the local government has taken the least restrictive measures reasonably necessary to prevent cable television wires from interfering with the normal usage of public property, its regulatory power arising by virtue of a cable operator's use of property is exhausted."[162]

D. *The* O'Brien *Standard*

The standard articulated by the United States Supreme Court in *United States v. O'Brien*[163] applies to regulation of cable communications because aspects of speech are involved. In applying the *O'Brien* standard the court in *Preferred* found that,

> [a] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[164]

Although the standard articulated in *O'Brien* suggests that a city might have an important or substantial interest in preventing disruption to the public domain when its public utility structures can accommodate only one cable system, *O'Brien* does not support this contention when there is room for more than one cable operator. In essence, a city's exclusive franchising practices fail to meet the *O'Brien* standard when there is surplus cable space available within a city's jurisdiction.

159. SHAPIRO, *supra* note 1, at 181.
160. *See Preferred*, 754 F.2d at 1406.
161. *Id.* at 1404.
162. *See* Shapiro, *supra* note 1, at 184.
163. United States v. O'Brien, 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968).
164. *Preferred*, 754 F.2d at 1405-06 (citing *O'Brien*, 391 U.S. at 377).

IV. ANALYSIS OF THE *PREFERRED* DECISION

The decision reached by the Ninth Circuit Court of Appeals, that a city may not employ an auction process to limit access when utility structures are physically capable of accommodating more than one operator,[165] illustrates an undesirable means of reaching an appropriate end. The major weakness of the court's opinion in *Preferred* is the court's failure to adequately support its conclusion that CATV is distinct in nature and operation from broadcast. Similarly, the court in *Preferred* slighted its discussion of physical scarcity and natural monopoly.[166] On the other hand, the court's discussion of the *O'Brien* standard and the public forum doctrine was complete[167] and helpful in visualizing the cable operator as a first amendment speaker. In any event, the court in *Preferred* made an important decision in the context of CATV regulation.

A. *Cable Distinguished from Broadcast*

Application of broadcast standards to CATV was properly refused by the court in *Preferred*.[168] However, the court failed to point out the concrete distinctions between cable and broadcast. For example, CATV does not require the use of airwaves, and therefore, should not be regulated as a unique or scarce medium.[169] Also, CATV is subscriber-oriented, and cable operators are in business to serve subscriber interests. Obversely, broadcast operations use airwaves which are inherently limited in the number of broadcasters they can support at one time. Moreover, broadcast is advertiser-oriented and not dependent on a subscriber base to stay in business. These omissions were pointed out by the concurring Justices in the United States Supreme Court's review of the constitutional issues in *Preferred*.[170] Justice Blackmun, in his concurring opinion, stated that the Court lacked factual information to determine "whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard [of regulation] or whether those characteristics require a new analysis."[171]

165. *Id.* at 1404-05.
166. *Id.*
167. *Id.* at 1405-06.
168. *Id.* at 1403.
169. *Id.*
170. City of Los Angeles v. Preferred Communications, Inc., 106 S.Ct. 2034, 2038 (1986).
171. *Id.* (Blackmun, H., concurring).

B. *Physical and Ecomonic Scarcity*

The *Preferred* court's discussion of physical and economic principles does not provide a true distinction between these two medias. Despite the court's recognition that CATV is not restricted by the physical properties which limit broadcast,[172] the court failed to discuss the fact that CATV operations are not subject to the physical interference that is inherent in broadcast operations. The court in *Preferred* should have developed a discussion of the technological advances in CATV, such as the technology that permits cable operators to offer potentially infinite channel capacity.[173] Moreover, the court should have given some attention to the other side of the physical scarcity argument, that public utility facilities and the demand for CATV in the market place may be physically scarce. Similarily, the court should have developed its discussion of the natural monopoly argument by pointing out the competition cable operators are faced with in today's communications market. Also, the court merely alluded to the idea that the city actually creates the monopoly of which it complains.[174] Notably, however, the court discussed CATV's disruption to the public domain and the city's contention that an auction process was a permissible governmental response to the burden imposed by CATV operations on the public domain.[175]

In *Preferred*, the court balanced PCI's interest in gaining access to public utility structures against the city's interest in preserving public resources.[176] The court stated that it was important to evaluate the nature and character of the public property at issue and let the property fix the conditions under which PCI may have access and the city may regulate.[177] Applying this balancing test, the court determined that because the city represented to cable operators that surplus space on public utility poles could be used to string cable for CATV communications,[178] PCI's intended use of the surplus space was consistent with its normal use.[179] Next, the court noted that PCI sufficiently alleged facts supporting its contention that utility facilities constitute a kind of public forum, the city was not justified in imposing more than reasonable time, place, and man-

172. *Preferred*, 754 F.2d at 1403-04.
173. *Id.* at 1404.
174. Id. at 1405.
175. *Id.* at 1405-06.
176. *Id.* at 1406-07.
177. *Id.* at 1407.
178. *Id.* at 1409.
179. *Id.* at 1407-09 (citing Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

ner restrictions to access public facilities.[180]

In the end, the court in *Preferred* struck the balance in favor of PCI.[181] The court held that unless the city could demonstrate a compelling government interest in issuing a single cable franchise, the city could only promulgate reasonable time, place, and manner restrictions to preserve its public resources.[182]

The *Preferred* court's rationale for limiting the city's ability to exclude CATV operators from public forums was its concern that an auction process presented an "impermissible risk of covert discrimination based on the content of or the views expressed in the operator's proposed programming."[183] The court mandated that the city uniformly apply franchise regulations to potential franchisees, and that such regulations be narrowly tailored to minimize the burden on the public domain.[184] The court held that the city must grant franchises to all those willing to satisfy the city's reasonable conditions.[185]

C. *The Public Forum Doctrine and* O'Brien

The court in *Preferred* correctly applied the *O'Brien* standard to the city's auction process, and determined that the auction was not a constitutionally permissible means of regulating the communicative aspects of speech.[186] By balancing the interests of the city in protecting the public domain with those of PCI in exercising its editorial rights,[187] the court determined that the city may not choose the cable providers that it will permit to use the medium via an auction process that reeks of outright discrimination.[188]

In *Preferred*, the court did not dispute the city's contention that it

180. PCI contended that both the city and the public utility departments held themselves out as providers of access to public rights-of-way. PCI justified its position by citing CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1984) which specifically designates surplus space for cable use and by pointing out that the city's franchise process itself illustrates the city's effort to grant "at least some access to its facilities." *Id.* at 1409. The Supreme Court, in its review of *Preferred Communications*, noted that it needed more information regarding the "surplus space" allegedly existing on the city's public facilities. *Preferred*, 106 S.Ct. at 2038. Presumably, if surplus space does exist such that PCI can operate without causing substantial interference with existing use of the facilities, the city must grant the franchise and will be limited to imposing time, place, and manner restrictions on the installation and maintenance of PCI operations.

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

182. *Id.* at 1409-10.

183. *Id.* at 1409.

184. *Id.*

185. *Id.*

186. *Id.* at 1405-06.

187. *Id.* at 1406-07.

188. *Id.* at 1406.

could exercise its police powers to enforce regulations designed to promote public safety and minimize disruption to the public domain.[189] The problem with the city's regulations, however, was not that they told a CATV operator when, where, and how cable operations could be installed; rather, the city's regulations violated the constitution because they precluded installation of cable operations altogether to all but a single cable operator. The court in *Preferred* determined that the city's interest in preventing disruption to the public domain did not rise to the level of an important or substantial governmental interest. In its analysis of this point the court noted that though the city is deemed to have a substantial interest in maintaining the integrity of the public domain, the right of free expression outweighs this interest. In this case, the city's exclusive franchising practices were related to the suppression of free expression because, potentially, they might allow the city to discriminate against cable operators who held views with which the city did not agree.[190]

V. CONCLUSION

Each medium of expression must be "assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[191] The major obstacle courts must overcome concerning the regulation of CATV is determining what standards—broadcast, print, or otherwise—should be applied to cable. The absence in CATV of physical limitations that plague broadcast operations, such as scarcity of the electromagnetic spectrum and programming capacity, does not mean that no regulation of CATV is permissible under the first amendment. Nor does it mean that CATV is more appropriately regulated like the print media or like the broadcast media.

Government infringes on the free speech rights of cable operators when it seeks to regulate cable like broadcast. Neither physical nor economic scarcity arguments justify a compromise of the constitutional values associated with free speech. Furthermore, disruption to the public domain, generated by the installation and maintenance of CATV does not rise to the level of a significant or compelling government interest sufficient to justify subjecting CATV to stringent broadcast type regulation. The courts must carefully weigh the first amendment interests of

189. *Id.*
190. *Id.* at 1409.
191. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

cable operators against the public's interests before upholding regulations which treat CATV like over-the-air broadcast operations.

It is the cable franchising process itself that intrudes on the first amendment freedoms of CATV operators. While a government's attempt to regulate the time, place, and manner of cable installation and maintenance is clearly reasonable, actions taken to restrict access to the CATV communications medium are blatantly unconstitutional. The power to grant or deny a CATV franchise based on undefinable criteria reeks of discrimination, paving the way for a franchisor to substitute its views for those of the CATV operator.

The model for regulating CATV like the print media is substantially different than the model for regulating CATV like the broadcast media. To regulate CATV like broadcast would be akin to forcing CATV to take on the limitations of the broadcast industry, while regulating CATV like a newspaper would be analogous to the laissez-faire attitude embedded in the political values of our society. However, such an attitude compromises the public's interest in determining who provides CATV communications. Essentially, CATV must be regulated by standards just short of the principles governing the print media.

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