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Preferred Communications, Inc. v. City of Los Angeles: First Amendment Rights and Cable Television Franchising Procedures

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Preferred Communications, Inc. v. City of Los Angeles: First Amendment Rights and Cable Television Franchising Procedures

INTRODUCTION

The United States Court of Appeals for the Ninth Circuit recently held in *Preferred Communications, Inc. v. City of Los Angeles*[1] that a city had violated the first amendment of the U.S. Constitution by limiting cable television franchises in a particular region to a single company.[2] Preferred Communications (PCI), a corporation organized for the purpose of operating a cable television system in the South Central District of Los Angeles, was denied a franchise by the city for failure to participate in the franchise auction process.[3] The city refused to permit PCI to operate a cable television system in the South Central District under any circumstances.[4] PCI alleged the franchise process violated rights of access to a public forum under the first amendment. In addition, PCI claimed the actions of the city were improper under the Sherman Antitrust Act. The district court denied both claims.[5] The Ninth Circuit Court of Appeals affirmed the holding of the district court that the action of the city did not violate antitrust laws.[6] The appellate court reversed on the constitutional issue, however, and held the cable television franchising process used by the city violated the first amendment.[7]

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1. 754 F.2d 1396 (9th Cir. 1985), *cert. granted*, ___ U.S. ___ (U.S. Nov. 12, 1985) (No. 85-390).

2. Preferred Communications, Inc., v. City of Los Angeles, 754 F.2d 1396, 1401-02; *see infra* note 27 and accompanying text.

3. *Preferred Communications*, 754 F.2d at 1401. *See infra* note 17 and accompanying text.

4. *Preferred Communications*, 754 F.2d at 1401.

5. The action was dismissed for failure to state a claim upon which relief could be granted. *Id.* at 1399. *See* Fed. R. Civ. P. 12(b)(6). The standard of review required the appellate court to accept all factual and material allegations of PCI as true and to uphold the dismissal only if no set of facts could support the claim. 754 F.2d at 1399 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

6. The court noted that states are immune from liability under the Sherman Act. *Preferred Communications*, 754 F.2d at 1411 (citing Parker v. Brown, 317 U.S. 341 (1943)).

7. *Id.* at 1401-02.

Part I of this note sets forth the facts of the case and the decision of the court.[8] Part II discusses the legal background of the first amendment issue.[9] Special focus will be placed on the application of the recent ruling of the United States Supreme Court in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*.[10] Part III examines the legal ramifications of the ruling by addressing the extent to which a city may regulate cable television franchises. In addition, the criteria a city should apply in limiting the number of franchises will be examined.[11]

I. THE CASE

A. The Facts

For many years, public utilities throughout California dedicated surplus space on utility poles for cable television use.[12] In 1984, the California Legislature enacted a statute that declared cable television use of public utility support structures was in the public interest.[13] PCI proposed to serve the South Central District of Los Angeles by attaching television cables to existing utility poles and conduits owned by Pacific Telephone and Telegraph Company (Pacific Telephone) and the Los Angeles Department of Water and Power (DWP).[14] Pacific Telephone and DWP refused to negotiate with PCI unless PCI obtained a cable television franchise from the city.[15] Certain formalities were required to obtain a franchise.[16]

The City of Los Angeles required cable television franchise candidates to participate in an auction process. Candidates were required

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8. *See infra* notes 12-59 and accompanying text.
9. *See infra* notes 60-105 and accompanying text.
10. 104 S. Ct. 2118 (1984).
11. *See infra* notes 106-124 and accompanying text.
12. *See infra* note 13 and accompanying text.
13. 1980 Cal. Stat. c. 646, §1, at 1811 (enacting CAL. PUB. UTIL. CODE §767.5(b)).
> The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations. The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

CAL. PUB. UTIL. CODE §767.5(b).
14. *Preferred Communications*, 754 F.2d at 1400.
15. *Id.*
16. *See infra* note 17 and accompanying text.

to submit to a variety of stringent conditions including the payment of specified fees and agreement to certain operating procedures.[17] After submission of bids by competing cable television companies, the city selected the one candidate deemed to be best qualified for each geographical area.[18] PCI refused to participate in the bidding process and was therefore denied permission to operate a cable television system in the South Central District.[19]

B. The Opinion

PCI claimed the city could neither choose which cable providers may use public utility facilities, nor condition that use on requirements imposed by the city.[20] PCI further asserted public utility poles were a public forum by government designation, and access to the poles was therefore protected by the first amendment.[21] PCI also claimed that sufficient space on the utility poles was available to accommodate more than a single cable television system.[22] The city contended that the scarcity of available space on public utility structures,[23] the monopolistic nature of the cable television medium,[24] and the disruption of public property from installation and maintenance of a cable

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17. The franchise of cable television systems has been authorized by the California Legislature. CAL. GOV. CODE §53066. The Ninth Circuit Court of Appeals in *Preferred Communications* outlined the requirements imposed by the City of Los Angeles for cable television franchises. The city requires bidders to pay a $10,000 filing fee, a $500 good faith deposit, and up to $60,000 in reimbursement expenses for the cost of holding the auction. *Preferred Communications*, 754 F.2d at 1400. Bidders must provide the city with a detailed proposal outlining intended operations for the succeeding nine years. *Id.* In addition, bidders must demonstrate a sound financial base, sound business plans, proper character qualifications, and business experience. *Id.* Bidders must also agree to pay the city a percentage of gross annual revenues. *Id.* Bidders must further agree to provide at least fifty-two channels, interactive two-way service, two leased channels, two channels for educational purposes, two channels for use by the city, and two channels for use by the general public. *Id.* Programming staff and facilities must be provided for use by the general public without compensation. *Id.* Bidders must also agree to provide portable production facilities and permit free city use of all poles, towers, ducts and antennas. *Id.* at 1401. Potential cable operators must also agree to relinquish control over pricing and customer relations to the city. *Id.* The operator must form a cable franchise authority board subject to city control. *Id.* Finally, the city reserves the right to inspect cable operations at any time, and requires a waiver of any right to recover damages arising from the franchise or enforcement. *Id.* at 1401-02.

18. *Preferred Communications*, 754 F.2d at 1401. No criteria are stated for determining which of the bidders would best serve each geographical area. *See id.*

19. *Preferred Communications*, 754 F.2d at 1401.

20. *Id.*

21. *See infra* notes 41-44 and accompanying text.

22. *Preferred Communications*, 754 F.2d at 1404.

23. *Id.* at 1402. *See infra* notes 41-44 and accompanying text.

24. *Preferred Communications*, 754 F.2d at 1402. *See infra* notes 41-44 and accompanying text.

system[25] justified restriction of access to a single cable television company.[26]

The appellate court addressed the issue as one of physical space. Specifically, the question was whether the city could allow only one cable television franchise to operate when the system could physically accommodate more.[27] Because the case was dismissed below for failure to state a claim upon which relief could be granted, the court accepted the allegations of PCI as true.[28] PCI alleged that the system could accommodate more than one cable operator.[29] The court therefore concluded that PCI had stated a claim.[30]

The decision of the court was based upon four considerations. First, the court examined the physical scarcity rule applied to the broadcasting industry.[31] Second, government regulation of natural monopolies was addressed.[32] Third, the court examined the disruptive impact of cable television on public resources.[33] Finally, the court discussed the applicability of the public forum doctrine.[34] All four considerations will be addressed, beginning with the physical scarcity doctrine as applied to regulation of television broadcasting.[35]

1. Cable Television and Broadcasting Distinguished

Regulation of the broadcasting medium is justified by the physical scarcity of radio waves.[36] The court in *Preferred Communications*

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25. *Preferred Communications*, 754, F.2d at 1402. *See infra* notes 45-50 and accompanying text.

26. *Preferred Communications*, 754 F.2d at 1402.

27. The court framed the issue as follows:

> Can the City, consistent with the first amendment, limit access by means of an auction to a given region of the City to a single cable television company, when the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system?

Preferred Communications, 754 F.2d at 1401.

28. *Preferred Communications*, 754 F.2d at 1399. *See supra* note 5 and accompanying text.

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

30. *Id.* at 1399. *See supra* note 5 and accompanying text.

31. *Preferred Communications*, 754 F.2d at 1403-04.

32. *Id.* at 1404-05.

33. *Id.* at 1405-07.

34. *Id.* at 1407-09.

35. The court briefly noted that cable television enjoys some first amendment protection. *Id.* at 1403. The problem to be addressed involved the application of that protection to the issues raised in *Preferred Communications*. *Id.*

36. *Id.* at 1403. *See* National Broadcasting Company v. U.S., 319 U.S. 190, 226-27 (1943) (government may impose licensing requirements on television broadcasting companies because the radio medium, by its nature, is not available to all); Century Federal, Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) (government may regulate broadcasting medium

declined to apply the standards of government regulation of broadcasting to regulation of cable television companies.[37] Each medium of expression must be assessed for first amendment purposes by standards suited to that particular medium.[38] Regulation of cable television under the regulatory standards of broadcasting would require a determination of the availability of space on utility support structures in the South Central District of Los Angeles.[39] Because the city failed to assert a physical scarcity or make a determination of the availability of space, the physical scarcity doctrine of regulation of broadcasting was not a valid basis to regulate cable television.[40]

2. *Natural Monopoly*

The court of appeals dismissed the contention of the city that because cable television enjoys a monopoly in geographical areas of distribution, government regulation is justified.[41] The city contended that an absence of business competition with other cable companies allowed the government to regulate access to public utility facilities.[42] The court

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because physical scarcity of radio waves renders electromagnetic spectrum incapable of carrying the messages of all who wish to use the medium).

37. *Preferred Communications*, 754 F.2d at 1403. Several courts have applied the broadcasting regulation standard to governmental regulation of cable television. *See, e.g.*, Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1378-79 (10th Cir. 1981) (inherent limitations of broadcasting medium do not justify government regulation of cable television on the basis of economic scarcity); Black Hills Video Corp. v. FCC 399 F.2d 65, 69 (8th Cir. 1968) (government regulation of microwave antenna systems has same constitutional status as regulation of transmission of radio signals although radio waves are not used); Berkshire Cablevision of Rhode Island v. Burke 571 F. Supp. 976, 983-88 (D.R.I. 1983) (interest in preventing monopolization of cable television time allowed government to require dedication of channels for public access).

38. *Preferred Communications*, 754 F.2d at 1404; Southeastern Promotions v. Conrad, 420 U.S. 546, 557 (1975).

39. *See Preferred Communications*, 754 F.2d at 1404.

40. *Id.* The court assumed that sufficient physical space existed on utility structures to accommodate more than one franchise. *Id. See supra* note 5 and accompanying text. The court therefore expressly reserved judgment regarding how a city might appropriately allocate access among competing cable systems when utility structures are shown to be incapable of accommodating all companies seeking access. *Id.*

41. *Preferred Communications*, 754 F.2d at 1404-05. *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The monopolistic nature of an enterprise that results from a natural absence of competition justifies government regulation of the enterprise. *Preferred Communications*, 754 F.2d at 1404-05. In *Tornillo*, however, the Supreme Court declined to permit government regulation of access to newspaper space although a lack of competition made entry into newspaper markets difficult. *Tornillo*, 418 U.S. at 249-58. The Court held that states could not grant political candidates a right to equal space to reply to criticism in newspapers, even though most newspapers enjoyed monopolies in their geographical areas of distribution. *Id.*

42. *Preferred Communications*, 754 F.2d at 1404. *See supra* note 41 and accompanying text.

assumed the truth of the allegation of PCI, however, that competition for cable services in Los Angeles was economically feasible.[43] Furthermore, the court noted that the auction process of the city limited franchises to a single company and created the very monopoly that the city used to justify regulation of the cable medium. The court concluded, therefore, that the allegation of natural monopoly was not an adequate ground for dismissing the claim of PCI.[44]

3. Disruption of Public Resources

Another asserted purpose of the franchising process was to control disruption of the public domain.[45] The court attacked the argument of the city by applying the test for reasonableness of government regulation of first amendment privileges articulated by the Supreme Court in *United States v. O'Brien*.[46] Government regulation of free speech is reasonable if the restrictions are no greater than necessary to advance an important or substantial government interest, and the regulation is unrelated to the suppression of free expression.[47] Although the city had a valid interest in avoiding disruption of public property, that interest was outweighed by first amendment concerns.[48] Secondly, the franchising process created a serious risk of discrimination on the basis of content or views expressed in programming.[49] The court, therefore, rejected disruption of public resources as a basis for regulation under the facts in *Preferred Communications*.[50]

4. The Public Forum Doctrine

Because the public forum doctrine focuses on the nature and

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43. *Id.* at 1405. *See supra* note 5 and accompanying text.
44. *Preferred Communications*, 754 F.2d at 1404.
45. *Preferred Communications*, 754 F.2d at 1405. Some government regulation is justified because cable television requires the use of public facilities. *Id.* Governmental interest in public safety and maintenance of thoroughfares is a basis for governmental regulation. *Id.*; *Community Communications*, 660 F.2d at 1377-78.
46. *See* United States v. O'Brien, 391 U.S. 367 (1968).

> [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.

Id. at 377.
47. *Id.* at 377.
48. *Preferred Communications*, 754 F.2d at 1406.
49. *Id.*
50. *Id.*

character of public property used for first amendment expression, the doctrine was applicable in this case.[51] The court found that utility poles and conduits do not constitute a traditional public forum.[52] The Ninth Circuit therefore applied the Supreme Court ruling in *Perry Education Association v. Perry Local Educators' Association*.[53] In *Perry*, the Court held that states could reserve nontraditional forums for their intended purpose.[54] In *Preferred Communications*, the issue was narrowed to whether the manner of first amendment expression was fundamentally incompatible with the normal activity of the particular public property involved in the case.[55] The court allowed the use of utility facilities for first amendment expression via the cable medium because the use was compatible with the normal utility company activity of delivering electrical power and telephone service.[56] The suspension of television cables was consistent with the use of public utility poles to support telephone and power lines.[57] Upon concluding that utility structures were a type of nontraditional forum, the court held that the city could promulgate reasonable time, place and manner regulations.[58] The city could not, however, limit access to the forum to a single cable television company under the facts alleged.[59]

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51. *Id.* at 1407 (citing Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 44 (1983)).

52. *Preferred Communications*, 754 F.2d at 1408.

53. 460 U.S. 37, 46 (1983).

54. *See supra* notes 48-55 and accompanying text.

55. *Preferred Communications*, 754 F.2d at 1408-09.

56. *Id.* at 1408. The court distinguished Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984), in which a municipal ordinance prohibiting posting of campaign signs on telephone poles was held not to violate the first amendement right of access to a public forum. *Id.* The court further quoted the Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, (1972). "Public property . . . which is neither a traditional nor a designated public forum, can still serve as a forum for first amendment expression if the expression is appropriate for the property . . . and is not incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, *id.* at 116. The court in *Preferred Communications* held the suspending of cable to be compatible with the normal use of utility structures, although the posting of political campaign signs was incompatible with normal use. *Preferred Communications*, 754 F.2d at 1408. *See infra* notes 72-79 and accompanying text. The court further acknowledged the position of PCI that public utility facilities constitute a kind of forum by designation. The assertion was supported by state legislation declaring that the use of surplus utility pole space for cable television was in the public interest and by the existence of the cable television franchising process. *Preferred Communications*, 754 F.2d at 1409. *See supra* note 13 and accompanying text.

57. *Preferred Communications*, 754 F.2d at 1408.

58. *Id.* at 1409.

59. *Id.* Joint briefs *amici curiae* were filed by the cities of Palo Alto, Menlo Park, and the Town of Atherton in support of Los Angeles. *Id.* at 1399 n.2. *Amici* asserted that the right to shared access to the franchise of another cable company was an adequate substitute for the granting of another franchise. *Id.* at 1410. The court disagreed, however, and found that sharing cable channels with other companies would diminish the first amendment rights of PCI. *Id.* The court analogized the assertion of *amici* to a hypothetical ordinance that would

II. Legal Background

A. Access to Public Forums

The United States Supreme Court held in *United States Postal Service v. Council of Greenburgh Civic Association*[60] that the first amendment does not guarantee access to property merely because that property is owned or controlled by the government.[61] Access is determined by the degree of compatibility of the character of the property with the proposed use for first amendment expression.[62] The Supreme Court, in *Perry Education Association v. Perry Local Educators' Association*,[63] identified three types of public property that may serve as public forums.[64] First, property such as streets and parks that have been devoted to public assembly and debate by long tradition or government designation are public forums.[65] Next, property such as schools and community centers that the government occasionally opens to the public may be used for expressive activity.[66] Finally, property such as mail boxes, rapid transit cars, and jailhouses are public property not designated as public forums by tradition or designation, and may be used for first amendment expression only in limited circumstances.[67] All three categories are subject to content neutral[68] regulations of the time, place and manner of expression that are narrowly tailored to serve a significant government interest.[69] The third category, however, is subject to further regulation.

The government may reserve a nontraditional forum for an originally intended purpose[70] if the regulation is reasonable and does not regulate

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allow free expression in public parks for only a few minutes at six a.m. The permitted access would fail to adequately provide a replacement for free debate in that forum. *Id.* at 1409-10.

60. 453 U.S. 114 (1981).

61. *Id.* at 129.

62. *Perry*, 460 U.S. at 44.

63. 460 U.S. 37 (1983).

64. *Id.* at 45-46.

65. *Id.* at 45; *see* Hague v. CIO, 307 U.S. 486, 515 (1939) (streets and parks have been traditionally used for purposes of assembly, debates, and discussion of public questions).

66. *Perry*, 460 U.S. at 45; *see, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting places opened for use by student groups).

67. *Perry*, 460 U.S. at 46; *United States Postal Service*, 453 U.S. at 131 n.7 (mailboxes). *See* Lehman v. Shaker Heights, 418 U.S. 298, 304 (1974) (rapid transit cars); Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (jailhouses).

68. Government regulation of editorial content of first amendment expression is permissible only if necessary, and narrowly drawn to serve a compelling state interest. *Perry*, 460 U.S. at 45.

69. *Id.* 460 U.S. at 46.

70. For example, mail boxes may be reserved for delivery of mail (*Perry*, 460 U.S. at 46), rapid transit cars for carrying passengers (*see Lehman*, 418 U.S. at 303-04), and jailhouses for security of prisoners (*Adderley*, 385 U.S. at 47-48).

expressive content.[71] In *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*,[72] the Supreme Court held that utility poles and conduits are not public forums by tradition.[73] Because PCI sought first amendment access to utility poles, the court in *Preferred Communications* applied the regulatory standard of the nontraditional forum.[74]

In *Vincent*, the Court found that the posting of political campaign signs was incompatible with the intended use of the poles.[75] The Court recognized a significant government interest in the aesthetic appearance of the public property at issue.[76] Government regulation was permitted because the ordinance in question was narrowly drawn and the objective was not to control expressive content.[77] The court in *Preferred Communications*, however, distinguished *Vincent* on the facts. The attachment of television cables to telephone poles proposed by PCI was not analogous to the posting of political campaign signs in *Vincent*.[78] The suspension of television cables, unlike the posting of political campaign signs, was consistent with the use of public utility poles to support telephone and power lines.[79]

In *Preferred Communications*, the court found that utility structures could be classed as a nontraditional forum under *Vincent*, and further addressed the possibility that utility poles are designated public forums according to local legislation.[80] The California Legislature declared that use of surplus space on utility structures by the cable television industry is in the public interest.[81] In addition, the designation of utility poles as a public forum was evidenced by the franchising process of the City of Los Angeles that recognized the use of utility structures by cable television as appropriate.[82] Classification of utility structures as traditional or designated public forums limits the regulatory scope of the city to reasonable time, place and manner controls only.[83] In *Preferred Communications*, the court applied the

71. *Perry*, 460 U.S. at 46.
72. 104 S. Ct. 2118 (1984).
73. *Vincent*, 104 S. Ct. at 2118.
74. *Preferred Communications*, 754 F.2d at 1408.
75. *Vincent*, 104 S. Ct. at 2118.
76. *Id.* at 2130.
77. *See id.* at 2130-32 (visual assault on citizens by the accumulation of signs posted on public property constituted a substantive evil within the power of the city to prohibit).
78. *Preferred Communications*, 754 F.2d at 1408.
79. *Id.*
80. *Id.* at 1409.
81. *See supra* note 13 and accompanying text.
82. *Preferred Communications*, 754 F.2d at 1409.
83. *See supra* notes 64-68 and accompanying text.

standard of reasonable time, place and manner regulation to the cable franchise process used by the city.

B. Time, Place and Manner Regulation of Free Expression

The first amendment permits governmental regulation of the time, place and manner of speech.[84] The test for assessing the government regulation of time, place and manner of expression is reasonableness.[85] Incidental restrictions on the freedom of expression no greater than essential to the furtherance of a substantial governmental interest are permissible.[86] In *Preferred Communications*, however, the City of Los Angeles advanced only a limited governmental interest. The governmental interest asserted by the city was control of the inherent burden that the cable television medium places on the public domain.[87] The cable television medium causes a significant disruption of streets and utility structures during installation.[88] The franchise process, on the other hand, created a serious risk that city officials would discriminate among cable operators on the basis of content.[89] The court in *Preferred Communications* concluded that the franchise process was unreasonable because the interest in preventing disruption of public property did not outweigh the impact of the franchising process on first amendment freedoms.[90] Beyond an interest in protecting the public domain, the City of Los Angeles argued for regulation of cable television franchises under the same standards used for regulating television broadcasting companies.[91]

C. The Physical Scarcity Doctrine

The government enjoys a greater latitude in regulating the broadcast medium than other media because of the physical scarcity of radio waves.[92] The electromagnetic spectrum used for television broadcasting is incapable of accommodating the messages of all who wish to use the medium.[93] The same standard applied to regulation of the televi-

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84. Home Box Office, Inc. v. FCC, 567 F.2d 9, 47 (D.C. Cir. 1977), *cert denied*, 434 U.S. 829 (1977); *see* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981).
85. *See O'Brien*, 391 U.S. at 377.
86. *Id.*
87. *See Preferred Communications*, 754 F.2d at 1405-07.
88. *Community Communications*, 660 F.2d at 1377.
89. *Preferred Communications*, 754 F.2d at 1406.
90. *Id.*
91. *Id.* at 1403-04.
92. Century Federal, Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984).
93. *Id.*

sion broadcast industry, however, does not apply to all media of communication.[94]

The United States Supreme Court stated in *Southeastern Promotions, Ltd. v. Conrad*[95] that each mode of expression must be assessed for first amendment purposes by standards suited to that medium.[96] Although the physical scarcity doctrine of broadcasting was applied in one case regarding regulation of cable television,[97] the court in *Preferred Communications* distinguished the two media, noting that cable television access is not limited by the electromagnetic spectrum.[98]

In terms of physical scarcity, the limited spectrum of radio waves could be analogized to the scarcity of space on utility poles and conduits. The City of Los Angeles, however, could not use the doctrine to limit access to a single cable operator without asserting a physical scarcity.[99] The city failed to determine the extent of any physical limitation on the use of public utility structures.[100] PCI alleged that enough physical space existed to accommodate more than one cable franchise.[101] Under the facts of *Preferred Communications*, the physical scarcity doctrine, therefore, was not a valid basis for limiting cable franchises to a single company.

The court in *Preferred Communications* found that the applicable legal doctrines did not permit the City of Los Angeles to limit access to public utility structures to a single cable television company.[102] The methods employed by the city to regulate first amendment rights of access to a public forum were found impermissible because the use proposed by PCI was not incompatible with the purpose of utility poles to support cables.[103] Time, place and manner regulations that allowed only a single cable operator were unreasonable because the interest in controlling disruption of public property was outweighed by the risk that the city would discriminate among cable companies on the basis of editorial content.[104] Finally, the physical scarcity doc-

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94. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).
95. 420 U.S. 546 (1975).
96. *Id.* at 557.
97. *See* Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968).
98. *Preferred Communications*, 754 F.2d at 1404, (*quoting* Omega Satellite Products, Co. v. City of Indianapolis, 694 F.2d 119, 127 (1982)) ("[F]requency interference [is] a problem that does not arise with cable television.").
99. *Preferred Communications*, 754 F.2d at 1404.
100. *Id.*
101. *Id. See supra* note 5 and accompanying text.
102. *Preferred Communications*, 754 F.2d at 1411.
103. *Id.* at 1408.
104. *Id.* at 1406.

trine did not justify limitation of franchises to a single company because PCI alleged the availability of utility pole space for more than a single franchise.[105]

III. Legal Ramifications

The holding in *Preferred Communications* suggests the government must allow more than a single cable television franchise to operate in a geographical region when the cables can be physically accommodated.[106] Not all government regulation, however, violates first amendment rights. A question remains regarding the criteria the government might use to limit the number of franchises.

In *Preferred Communications*, the court linked first amendment rights of access to the availability of space on public utility structures. The extent of the relationship between access and availability can be addressed in at least three ways. First, cities can determine the maximum number of cable franchises that would be compatible with the normal activity typical of utility structures.[107] Next, cities can declare and reserve space required for delivery of electrical power and telephone services.[108] Finally, cities may assert substantial government interests that require a limit on the number of cable franchises.[109] An examination of these alternatives will help define the scope of the holding in *Preferred Communications*.

A. Incompatibility With Normal Activity

The court in *Preferred Communications* distinguished *Vincent* on the facts.[110] In *Vincent*, the use of utility structures for posting political campaign signs was incompatible with the normal use of those facilities.[111] In contrast, the use proposed by PCI did reflect the normal use of utility poles as support structures for telephone and power lines.[112] The number of cable television franchises, however, could be limited consistent with the holding in *Preferred Communications*. Cities that determine the maximum number of franchises that can be accommodated by existing utility structures could justify the

105. *Id.* at 1404.
106. *See Preferred Communications*, 754 F.2d at 1411.
107. *See supra* notes 60-79 and accompanying text.
108. *Id.*
109. *See supra* notes 84-91 and accompanying text.
110. *See Preferred Communications*, 754 F.2d at 1408-09.
111. *See id.*
112. *Id.* at 1408. *See supra* note 56 and accompanying text.

exclusion of additional cable companies. The limitation would be justified if additional cables would abnormally burden the structures.

B. Space Required for Electrical and Telephone Services

In addition to the doctrine of abnormal use, a city may limit use of a forum to purposes compatible with the intended use of that forum.[113] The court in *Preferred Communications* relied heavily on the three-part classification of public property set forth by the Supreme Court in *Perry*.[114] If utility structures are a nontraditional forum, the government can reserve the forum for originally intended purposes if the regulation is reasonable and not an attempt to regulate content.[115] A city could reserve space on public utility structures for the intended use as support for electrical power and telephone equipment.[116] The allocation of cable television franchises could, therefore, be limited to the number of franchises that can be accommodated by remaining space. Space remaining after reservation for utility purposes may allow accommodation of only a single cable company.[117]

C. Competing Substantial Interests

Government regulation of the time, place and manner of speech is permissible if the restriction is no greater than necessary to further an important or substantial governmental interest.[118] Under the facts of *Preferred Communications*, limiting cable television franchises to a single company was too great a restriction. Although the delivery of cable television to consumers requires the use of public property,[119] the interest of protecting public property did not outweigh the risk that diversity of editorial expression would be limited.[120] The limitation of cable television franchises to a single company, therefore, was deemed excessive.[121]

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113. *Perry*, 460 U.S. at 46.
114. *Id.* at 45-46.
115. *See supra* notes 62-71 and accompanying text.
116. *Id.*
117. In *Perry*, the Supreme Court held that a state could ban use of a school mail system by a rival teachers' union. *Perry*, 460 U.S. at 37. A state could reserve use of the school mail system for the intended purpose of official school communication. *Id.* The holding in *Perry* would seem to support reserving utility pole space that is necessary for the intended use of utility poles as support for telephone and electrical power lines. *See id.* at 46.
118. *O'Brien*, 391 U.S. at 377.
119. *Id.; see Community Communications*, 660 F.2d at 1377-78 (government may control the time and frequency of street excavations required for laying television cables).
120. *Preferred Communications*, 754 F.2d at 1406.
121. *Preferred Communications*, 754 F.2d at 1406-07.

Following the rationale of the court, a city could impose a franchise limit in the interest of protecting the public property. Limitation to a single cable company, however, remains outside the scope of permissible regulation due to the editorial diversity mandated by the first amendment.[122] A city may, however, advance interests other than protection of public property. Courts have permitted narrowly tailored regulation of free speech activity in public forums in the interest of public safety.[123] If a city demonstrates that an excessive number of cable franchises endangers the public, the interest in public safety would outweigh the first amendment interest in presenting diverse editorial viewpoints.[124] Although the court in *Preferred Communications* struck down an attempt to allow only a single cable company to operate in a designated geographical region, the ruling does not preclude limitation to a single franchise in all circumstances.

CONCLUSION

In *Preferred Communications*, the court held that a city could not limit access of cable television companies to a single franchise if public utility structures could physically accommodate more. A question remains regarding the scope of regulatory power a city can assert to limit the number of franchises. The court in *Preferred Communications* suggested that a city may determine the ability of public utility structures to physically accommodate television cables by considering three factors: (1) Compatibility with normal use of utility poles and conduits; (2) preservation of space for the intended purposes of electrical power and telephone service delivery; and (3) countervailing substantial government interests.

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122. *See id.*

123. Courts have permitted narrowly tailored regulation of public forum access to advance public safety interests. *See, e.g.*, Knolls Action Project v. Knolls Atomic Power Laboratory, 771 F.2d 46 (2nd Cir. 1985) (reasonable safety concerns warranted denial of permission for activists to leaflet government owned nuclear research facility); Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (Mass. Cir. 1981) (safety problems arising from increased pedestrian traffic permitted denial of amusement license); Friedrich v. City of Chicago, ___ F. Supp. ___ (D. Ill. 1985) (safety hazards created by increased pedestrian traffic and gathering of crowds justified banning break dancers); Acorn v. City of Phoenix, 603 F. Supp. 869 (D. Ariz. 1985) (safety and traffic considerations permit prohibition of approaching and soliciting drivers of cars stopped at intersections); International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority, 532 F. Supp. 1088 (D. N.J. 1981) (strong considerations for safety warranted banning solicitation by religious organization at race track due to presence and exposure of cash possessed by large numbers of people).

124. A city might, for example, assert an overriding concern for dangers imposed by installing cables in areas exposed to high winds or other hazardous conditions. *See supra* note 123 and accompanying text.

Disruption of the public domain is not a sufficient government interest to justify limiting access to a single cable television company. The ruling in *Preferred Communications* is sufficiently narrow, however, to permit limitation to a single company in certain circumstances. If more than one franchise would constitute excessive use of utility poles, *Vincent* might allow limitation of access to a single franchise. The ruling of the Supreme Court in *Perry*, giving priority to the originally intended use of a nontraditional public forum, would permit a city to limit access to a single cable television company if necessary to preserve the intended use of utility poles for delivery of electrical power and telephone services. Finally, government concerns for safety might also justify restricting access to a single company if that interest outweighed first amendment concerns.

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