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I. Introduction

With the enactment of the Cable Communications Policy Act of 1984,[1] Congress specified comprehensive national objectives for cable television for the first time. These objectives are consistent with those advanced by the Federal Communications Commission (FCC) and substantially upheld by the courts with respect to broadcast television and cable television. The statute further established a regulatory framework within which local governmental, i.e. state and municipal, franchising is essential to the fulfillment of national communications policy.

Despite congressional action, the extent of local governmental authority to regulate cable television by means of a franchising process remains uncertain. The focus of the current debate is the first amendment. The issue concerns the proper balancing of governmental interests in cable television and the interests of the individuals and companies involved in cable construction, operation and programming.

Part II of this Article will review the fundamental principles underlying the regulation of broadcasting by the FCC and the application of such principles to cable television through 1975. Part II will also discuss the basis for and the extent of local governmental regulation of cable television under both FCC policy and the Cable Communications Policy Act. Part III discusses the current debate over the first amendment rights of cable television, including in particular, efforts to distinguish cable television from broadcast television for the purpose of establishing a

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1. 47 U.S.C. § 521 (Supp. III 1985). *See infra* text accompanying notes 69-106.

separate first amendment standard of review. The Article concludes in Part IV by affirming an important regulatory role for local government.

II. Background

A. *Early Regulation of Television Broadcasting*

From its inception, television broadcasting was subject to the jurisdiction of the Federal Communications Commission (FCC) in accordance with the Communications Act of 1934.[2] The Communications Act was enacted by Congress "under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field . . . [and in order] to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[3] The statute applied to "all interstate and foreign communication by wire or radio . . . to all persons engaged within the United States in such communication . . . and to the licensing and regulating of all radio stations."[4] The FCC was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[5]

Under the Communications Act, no person can engage in broadcasting without a license and no license can be obtained unless the "public convenience, interest, or necessity . . . [would] be served thereby."[6] Licenses are limited in duration to a term of years[7] and cannot "be construed to create any right, beyond the terms, conditions, and periods . . . [thereof]."[8] The FCC is directed to distribute licenses "among the several States and communities so as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[9] Section 303 of

2. 47 U.S.C. §§ 151-559 (1982).
3. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940).
4. 47 U.S.C. § 152(a) (1982).
5. *Id.* § 151.
6. *Id.* § 307(a).
7. *Id.* § 307(d).
8. *Id.* § 301.
9. *Id.* § 307(b).

the statute confers additional, specific powers on the FCC also to be exercised as the "public convenience, interest, or necessity requires."[10]

The Communications Act contains two significant limitations on the FCC's authority over broadcasting. Section 153(h) provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."[11] Section 326 explicitly denies the FCC the power to censor or to "interfere with the right of free speech by means of radio communication."[12]

From the beginning, the prevailing rationale for governmental licensing has been the limited number of frequencies available for broadcasting, and thus for broadcasters. This so-called "scarcity rationale" has two dimensions. First, the interference caused by conflicting use of the same frequency results in confusion and chaos. Second, the limitation on the number of separate frequencies requires consideration of the appropriate use of frequencies that are available. The first dimension requires allocation; the second requires standards for utilization of a limited resource.

By the end of World War II, it was well established that the FCC possessed broad authority under the public interest standard in the Communications Act to promote diversity of information and information sources in broadcasting.[13] Specifically,

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10. *Id.* § 303. The FCC has the additional power to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;" *id.* § 303(g); and the specific power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . ." *Id.* § 303(r).

11. *Id.* § 153(h). "Common carrier" or "carrier" is defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or [in] interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." *Id.*

12. *Id.* § 326.

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio transmission.

Id.

13. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); FCC v. Potts-

Supreme Court decisions in the 1940's emphasized 1) the discretion of the FCC to determine the public interest with respect to licensing matters and 2) the responsibility of the FCC to promote and enhance the public benefit to be derived from broadcasting by subordinating the interests of the licensee to the interests of the listeners and viewers.[14] The Communications Act as it had then been applied by the FCC and upheld by the Supreme Court was not designed merely to encourage broadcasting by the orderly allocation of frequencies but to promote the "best practicable [broadcasting] service to the community."[15]

Perhaps the most significant of the early cases was *National Broadcasting Co. v. United States*,[16] where the Court sustained the authority of the FCC to promulgate chain broadcasting regulations.[17] The Court referred to an FCC report on the status of the radio broadcasting industry in 1938 which found that more than one-half of the commercial stations were affiliated with one of three major radio broadcasting networks and that such stations "utilized more than 97% of the total night-time broadcasting power of all the stations in the country . . . [and that the two largest networks] controlled more than 85% of the total night-time wattage."[18] The Court found that "[t]he 'public interest' to be served under the Communications Act is . . . the interest of

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ville Broadcasting Co., 309 U.S. 134 (1940); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

14. In *Pottsville Broadcasting*, the Supreme Court denied a license applicant's claim to rights of priority in a license. The Court sustained an FCC decision which required the applicant to participate in a competitive licensing proceeding even where the same applicant's initial effort to obtain a license was denied because of an erroneous application of state law by the FCC. The applicant's participation in the competitive proceeding was required notwithstanding the fact that its competitors for the license first emerged after the applicant was denied the license. In *Sanders Bros.*, the Court upheld an FCC decision to grant a second license in the same community over objection of the existing licensee that he would suffer economic injury. The FCC had found that both applicants were qualified and that there was a need in the community for the license for both broadcast services. The Court ruled that "no person is to have anything in the nature of a property right as a result of the granting of a license. . . . [I]t is not the purpose of the Act to protect a licensee against competition. . . ." *Id.* at 475.

15. *Sanders Bros.*, 309 U.S. at 475.

16. 319 U.S. 190 (1943).

17. *Id.* The regulations applied to a variety of matters including exclusive affiliation agreements, territorial exclusivity, rights to reject programs and network ownership of stations. *Id.* at 198-209.

18. *Id.* at 197-98.

the listening public in 'the larger and more effective use of radio.' "[19]

The Court rejected the contention that the regulations violated appellants' right of free speech under the first amendment. After finding that "radio inherently is not available to all"[20] and is, therefore, subject to governmental regulation, the Court concluded that "[t]he right of free speech does not include . . . the right to use the facilities of radio without a license" and that "[d]enial of a station license on . . . [the ground of public interest, convenience or necessity] if valid under the Act, is not a denial of free speech."[21]

B. *The Advent of Cable Television*

Cable television systems (CATVs) were first constructed in the United States around 1950. The purpose of the early CATVs was to bring the signals of broadcast television to predominantly rural, usually low-lying, areas where "off air" reception by ordinary roof-top antennaes was inadequate. An antenna was installed at an elevated site to receive and amplify the signals of nearby stations which were then distributed by coaxial cable to television receivers in homes throughout the community. Generally, the transmission facilities and equipment of the system were located in and along the public right-of-way entirely within the boundaries of a single state. At the very beginning, only the signals of local stations were carried. With the development of microwave relay service, systems soon began to receive and distribute broadcast signals from distant stations.[22] In both instances, the programming available on the systems was essentially, if not exclusively, the same programming provided on broadcast frequencies licensed by the FCC.

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19. *Id.* at 216.

20. *Id.* at 226.

21. *Id.* at 227.

22. United States v. Southwestern Cable Co., 392 U.S. 157, 163 (1968). For an exposition on the growth of cable television, see *infra* note 26.

1. *The Beginning of Federal Regulation: An Emerging Policy of Diversity*

In the 1950's, the FCC determined that it lacked the necessary statutory authority to regulate cable television.[23] By 1962, the Commission reversed itself and asserted jurisdiction over systems utilizing microwave facilities.[24] Later, in 1966, it asserted jurisdiction over all cable television systems by adopting rules essentially designed to protect broadcasting from the potential economic harm posed by cable.[25]

In 1968, in *United States v. Southwestern Cable Co.*,[26] the Supreme Court upheld FCC jurisdiction over cable television based upon section 152(a) of the Communications Act. Although section 152(a) pertained to communications by both wire and radio,[27] the Court determined that the essential feature of cable television was the retransmission of broadcast television signals — an interstate service — and limited its review of the

23. Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958); *recon. denied* in conjunction with *Report and Order*, 26 F.C.C. 403, 428-29 (1959).

24. Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). *See also Rules re Microwave - Served CATV*, 38 F.C.C. 683 (1965).

25. *Second Report and Order*, 2 F.C.C.2d 725 (1966), *aff'd*, Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968).

26. 392 U.S. 157 (1968). After reviewing the rapid growth of the CATV industry and the technical potential for program production, the Court observed that "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations . . . and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.* at 163. Since television broadcasting is interstate and because CATV systems served as an extension of broadcasting, the Court concluded that "[t]o categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities.' " *Id.* at 169 (quoting Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 279 (1933)). In the same year, the Court also determined that CATV carriage of broadcast signals did not constitute a performance of the programs causing liability for copyright payments. Fortnightly Corp. v. United Artists Television Inc., 392 U.S. 390 (1968). In this context the Court stated "[t]he function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive." *Id.* at 400. The Court adhered to its holding in *Fortnightly* in Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974). In 1976, Congress did impose copyright liability on cable television operators. Pub. L. No. 94-553, 90 Stat. 2553 (1976) (codified at 17 U.S.C. § 111 (1982)).

27. *Southwestern Cable*, 392 U.S. at 172-78.

FCC's authority over cable television to that "reasonably ancillary to the effective performance of . . . [its] various responsbilities for the regulation of television broadcasting."[28]

After *Southwestern,* the FCC acted early and often to formulate federal policy for cable television. The emphasis of each action was on the potential of cable television — as an emerging part of the national communications network — to contribute to the diversity of communication services, particularly the diversity of programming available on television.[29] Significantly, the first rules adopted by the FCC charged cable television operators with the duty to act substantially as broadcasters.[30] For example, the FCC ruled that cable systems with 3500 or more subscribers must operate to a significant extent as a local outlet for community expression and, in the process, comply with the equal-time provisions of section 315 of the Communications Act,[31] the sponsorship identification provisions of section 317 of

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28. *Id.* at 178. "The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' . . . We express no views as to the Commission's authority, if any, to regulate CATV under any circumstances or for any other purposes." *Id.* (citation omitted).

29. The FCC was, no doubt, encouraged by the unanimous decision of the Supreme Court upholding the fairness doctrine applicable to broadcast licensees in Red Lion Broadcasting, Co. v. FCC, 395 U.S. 367 (1969). Although the Court refused to decide whether diversity as an end in itself — separate and distinct from the issue of scarcity — might justify congressional regulation of broadcasting, its ruling was decidedly pro-diversity. *Id.* at 401 n.28. The Court emphasized that broadcasting uses public airwaves, requires government allocation of frequencies to make speech intelligible and that the rights of licensees cannot be superior to the rights of the public. Indeed, the decision of the government to issue licenses to private parties has its basis in the first amendment. Thus, there is a "First Amendment goal of producing an informed public capable of conducting its own affairs" *id.* at 392; and "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here." *Id.* at 390.

30. *First Report and Order,* 20 F.C.C.2d 201 (1969).

31. 47 U.S.C. § 315(a) provides in part that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." In 1974, the section was amended expressly to include the use of cable television systems.

the Act[32] and the "fairness doctrine."[33] The imposition of an affirmative obligation to originate programming of interest to the local community was a clear statement by the FCC that cable television technology should not be used solely as a conduit for broadcast programming.[34] The origination rules permitted an operator to cablecast CATV network programming, but the main purpose of the rules was to provide an additional outlet for local expression.[35]

At the same time, the FCC expressed the opinion that common carrier status should be imposed on some cable television channels.[36] Such status would be consistent with the potential to provide diverse programming sources and also with the FCC's view that "one entity should not control the content of the program materials on all cable channels not used for carriage of broadcast signals."[37] Since it lacked the authority to impose common carrier status on broadcasters, the FCC's tentative determination to impose carrier status on cable television suggested an expansive interpretation of the *Southwestern* decision. In addition, the FCC specifically rejected the claim that the origination rules abridged first amendment rights of cable televi-

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32. 47 U.S.C. § 317(a)(1) provides in part:

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

33. The fairness doctrine imposes a two-fold duty upon broadcasters. First, a licensee is required to devote a reasonable amount of time to the coverage of controversial issues of public importance. Second, a licensee must provide a reasonable opportunity for the presentation of contrasting points of view. It should be noted that the FCC no longer supports the fairness doctrine. *Report and Order*, 102 F.C.C.2d 143 (1985).

34. "[W]e do not think, given the present broadcast mode of operations, that significant additional program choice can be obtained by simply adding more broadcast signals to provide 20-40 channels of programming to subscribers." *First Report and Order*, 20 F.C.C.2d at 206.

35. *Memorandum Opinion and Order*, 23 F.C.C.2d 825, 827 (1970). The FCC subsequently amended the rules to prevent a cable operator from entering into "any arrangement which inhibits or prevents the substantial use of the cable facilities for local programming designed to inform the public on issues of public importance." *Id.*

36. 20 F.C.C.2d at 206-07. "There is . . . in our opinion, a need for additional means by which various entities can communicate with the public via television at low cost. . . . [I]t is our opinion that the public interest would be served by encouraging CATV systems to operate as common carriers on some channels."

37. *Id.* at 206.

sion operators. Quoting liberally from *Southwestern* and early broadcast cases, the FCC stated that "[s]ince CATV systems use broadcast signals as the backbone of the service they provide, they come within the regulation of this agency, if reasonably related to the public interest. If the regulation is so related, it is not barred by the first amendment."[38] The FCC went on to state that "[i]t is thus immaterial that the scarcity of frequencies rationale underlying first amendment rulings in the broadcast field does not apply directly to the cable technology."[39]

With program origination rules firmly in place, the FCC acted promptly to ensure the development of an independent cable television industry separate from the telephone and broadcasting industries. In January, 1970, rules were adopted which precluded a telephone company, either directly or through affiliates, from selling cable television service to the viewing public in its own service territory.[40] The rules also required telephone companies to discontinue cable television service in their service areas within a period of four years.[41] In support of its rules, the FCC expressed concern about the extension of telephone company monopolies and about the anti-competitive consequences of telephone company ownership of cable, including the deterrent effect on other potential entrants into the cable television business.[42] In this context, the FCC assumed that all cable televison systems would be constructed on existing utility prop-

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38. *Id.* at 222 (citations omitted).

39. *Id.* at 222 n.27.

40. *Final Report and Order*, 21 F.C.C.2d 307, *recon. in part*, 22 F.C.C.2d 746 (1970), *aff'd sub. nom.*, General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).

41. *Id.* at 326. Telephone companies are now prevented by statute from selling cable service in their service areas, except upon special waivers granted by the FCC for the provision of cable service in rural areas. 47 U.S.C. § 533(b) (1982 & Supp. III 1985).

42. However, the FCC did not fully explain how the provision of cable television service by a telephone company would interfere with national objectives underlying the broadcast signal carriage rules and common carrier status promised although not then imposed. In fact, the rationale for the FCC's decision was the potential for competition in the development of non-video broadband communication services by independently owned cable television companies.

> We believe that the public interest in modern and efficient means of communications will be best served, at this time, by preserving, to the extent practicable, a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities.

Final Report and Order, 21 F.C.C.2d at 325.

erty and that local governments could deny cable television operators permission to erect their own poles and conduits.[43]

In June, 1970, the FCC adopted rules prohibiting "cross ownership" of cable television systems and television broadcast stations in the same market.[44] The FCC noted CATV's developing role as an "opinion molder"[45] and concluded that the rule "would further the Commission's policy favoring diversity of control over local mass communications media."[46] The FCC also recognized that there was a separate CATV subscribing portion of the public which was entitled to diversity of control and programming.[47] Finally, the Commission expressed the opinion that it had "authority to adopt ownership rules governing CATV systems directly, including the matter of cross-ownership interest with newspapers over whom the Commission has no independent licensing authority."[48]

In early 1972, the FCC adopted comprehensive regulations for cable television including: 1) access channel requirements, 2) detailed broadcast signal carriage and program exclusivity rules, 3) technical standards, and 4) local franchising and federal certification requirements.[49] The regulations were "designed to allow

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43. *Id.* at n.6. "The CATV system would normally have to use the same set of poles or conduits as the telephone company, because the communities generally will not permit the construction of duplicate sets of poles or conduits." *See infra* note 54.

44. *Second Report and Order*, 23 F.C.C.2d 816 (1970), *recon. denied in part*, 39 F.C.C.2d 377 (1973); *see also Second Report and Order*, 55 F.C.C.2d 540 (1975), *recon. denied*, 58 F.C.C.2d 596 (1976) codified at 47 C.F.R. § 76.501 (1985); *Third Report and Order*, 97 F.C.C.2d 65 (1984) *recon. denied*, FCC Docket No. MM 85-232 (5/3/85). A similar restriction is now contained in 47 U.S.C. § 533(a) (1982 & Supp. III 1985).

45. 23 F.C.C.2d at 817.

46. *Id.* at 820.

47. *Id.* at 820-21.

48. *Id.* at 822. In 1975, the FCC adopted rules limiting common ownership of a radio or television broadcast station and a daily newspaper located in the same community. *Second Report and Order*, 50 F.C.C.2d 1046 (1975). The rules were upheld by the Supreme Court in FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978). The Court rejected the contention by newspaper owners that the cross-ownership restrictions violated their first amendment rights. "We cannot agree, for this argument ignores the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.' " *Id.* at 799 (quoting Red Lion Broadcasting, Co. v. FCC, 395 U.S. 367, 388 (1969)).

49. *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972). In June, 1972, the Supreme Court upheld the FCC's mandatory origination rules for cable systems by a narrow margin in United States v. Midwest Video Corp., 406 U.S. 649 (1972). The Court noted that the "regulatory authority . . . generally sustained . . . in *Southwestern* was

for fulfillment of the technological promise of cable and, at the same time, to maintain the existing structure of broadcast television."[50] In adopting regulations requiring the designation of certain channels for public, governmental and educational access, the FCC identified a specific role for cable television as follows:

> Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable — the opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments.[51]

The regulatory program was implemented by standards that applied directly to cable television systems and by additional minimum standards that governed the award and content of cable television franchises. Since a local franchise was generally a condition to a certificate of compliance — the equivalent of a federal license[52] — the FCC was able to enforce rules against both cable operators and local governments. It should also be noted that many substantive federal rules were preemptive of local authority. For example, a local franchise could not impose access requirements in excess of those expressly permitted by FCC rules. These limitations on local authority applied even in areas outside the top 100 television markets, where FCC access rules generally did not apply.

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authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting;" *Id.* at 667; and approved of regulatory efforts aimed at increasing "the number of local outlets for community self-expression and [augmenting] the public's choice of programs and types of service[s]." *Id* at 651 (citation omitted). "The effect of the regulation after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming — the same objective underlying regulations sustained in *National Broadcasting Co. v. United States* . . . as well as the local-carriage rule reviewed in *Southwestern* and subsequently upheld." *Id.* at 669.

50. *Cable Television Report and Order*, 36 F.C.C.2d at 147.

51. *Id.* at 190. FCC access rules were invalidated by the Supreme Court in FCC v. Midwest Video Corp., 440 U.S. 689 (1979). The Court concluded that the rules exceeded the FCC's authority because they imposed common carrier status on cable television operators — a status that could not be imposed on broadcasters under the Communications Act. The Court did not reach the first amendment issue.

52. 47 C.F.R. § 76.11 (1985).

2. *Local Regulation*

Cable television, by its very nature, creates a tension between the respective interests of federal and non-federal levels of government. The transmission of video signals by wires attached to poles on public property invokes the historic power — indeed the responsibility — of state and local governments to ensure that public streets are used for public purposes.[53] On the other hand, cable television began as a business engaged in the retail sale of retransmitted interstate broadcast television signals. Some regulatory role was proper and necessary for federal, state and local governments. The determination of the FCC to specifically and actively regulate the growth and development of a separate cable televison industry through preemptive federal standards contributed to the tension.

The division of regulatory responsibility between the FCC and state governments or their political subdivisions was a critical issue in the formation of federal policy. Both the courts and the FCC had previously conceded the local aspects of cable television.[54] The FCC proposed three approaches: 1) federal licensing of all cable systems; 2) maintenance of the current federal regulatory program enforced by section 312(b) proceedings; and 3) federal regulation of some aspects, with local regulation of others under federal prescription of standards for local jurisdictions.[55] The consideration of the first two enumerated approaches implied the authority to regulate cable television exclusively at the federal level, i.e., that local governmental consent in

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53. City of New York v. Rice, 198 N.Y. 124, 91 N.E. 283 (1910); American Rapid Tel. Co. v. Hess, 125 N.Y. 641, 26 N.E. 919 (1891).

54. The local aspects of cable television were early described in TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968) as follows:

> The apparatus of the community antenna system is an appendage to the primary interstate broadcasting facilities with incidents much more local than national, involving cable equipment through the public streets and ways, local franchises, local intra-state advertising and selling of services and local intra-state collections. In this perspective, a community antenna system is essentially a local business . . . [and] these are subjects which lend themselves naturally to local control and supervision.

Id. at 463.

55. *Notice of Proposed Rulemaking*, 25 F.C.C.2d 50 (1970). Section 312(b) authorizes the FCC to enforce the statute, its regulations and the condition of the license by the issuance of cease and desist orders. 47 U.S.C. § 312(b) (1982).

the form of a "street franchise" was not necessary for the lawful construction of a cable television system. Adoption of the third approach appeared to constitute a determination that some local governmental action was essential.[56]

In its *Cable Television Report and Order*, the FCC codified dual jurisdiction over cable, stating that:

> Conventional licensing would place an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts. . . . Under the circumstances, a deliberately structured dualism is indicated; the industry seems uniquely suited to this kind of creative federalism.[57]

For local government, this "dualism" — subject to FCC minimum standards — included the authority to: 1) select the franchisee in a public proceeding; 2) determine the duration of the franchise; 3) approve initial rates and any subsequent changes for regular subscriber service; and 4) review and approve the franchisee's subscriber complaint procedures.[58] The local government was also responsible for determining the service area and the precise timetable for construction. In part, this local role was consistent with the long-standing emphasis upon localism and the fulfillment of community needs in broadcasting. Ironically, such fundamentally local issues as program origination and access channels were reserved by the FCC for its own determination. Even local franchise fees were subject to a federally imposed ceiling.

In 1975, the FCC reported on an inquiry concerning duplicative and excessive over-regulation of cable television.[59] The Commission expressed concern over allegations of duplicative regulation but refused to insist upon an exclusive "two-tier" approach. "The decision on the allocation of existing powers within a state must be left to that state. While we strongly urge all states to refrain from adopting unnecessarily duplicative regula-

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56. *See supra* note 54 and accompanying text.
57. *Cable Television Report and Order*, 36 F.C.C.2d 143, 207 (1972).
58. *Id.* at 207-09.
59. *Report and Order*, 54 F.C.C.2d 855 (1975).

tions, we believe it *imprudent* for us to attempt to impose a strict, inflexible, 'two-tier' approach to cable regulation."[60]

> We have concluded that while nonduplicative regulation is a worthy objective, the jurisdictional impediments, particularly for an agency such as this one, without clear Congressional guidance on the subject, would present major, although not necessarily insurmountable, difficulties. . . . In an effort to clarify and delineate the role of this Commission as well as non-federal regulators in the development of cable communications, we have concluded that the most appropriate course would be to secure legislation from Congress.[61]

The FCC recited its view on the federal/state issue:

> The ultimate dividing line, as we see it, rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission. This is so because of the inter-state nature of the medium as enunciated by the Supreme Court.[62]

As noted, FCC rules adopted before 1972 required a cable system to obtain a certificate of compliance from the Commission as a condition of carriage of broadcast signals. The application for such a certificate required a copy of the franchise agreement and a detailed statement showing that the franchising authority had considered the system operator's qualifications.[63] However, the FCC never conceded that a franchise was a prerequisite for use of streets. For example, neither the definition of cable television system in section 76.5(a) of the FCC rules,[64] nor the exemption conferred upon master antenna television systems (MATV), referred to the use of public streets or rights-of-way. Indeed, the FCC anticipated the existence of areas where local governments would not assert the authority to grant a

60. *Id.* at 863 (emphasis added).

61. *Id.* at 866.

62. *Id.* at 861 (citing United States v. Southwestern Cable, 392 U.S. 157 (1968) and United States v. Midwest Video Corp., 406 U.S. 649 (1972)).

63. *Cable Television Report and Order*, 36 F.C.C.2d 143, 207 (1972).

64. 47 C.F.R. § 76.5(a) (1985).

cable television franchise, and it espoused a policy whereby a cable operator would nonetheless be authorized to carry broadcast signals in such an area upon submission of an "alternate proposal" for fulfillment of Commission regulatory policy.

In retrospect, the statement that "local governments are inescapably involved in the process because cable makes use of streets"[65] seems more a practical accommodation to local interests than a commitment to the principle that the construction of a cable system in the public right-of-way requires a local franchise. In 1980, the FCC referred to the "1972 Cable Television Report and Order wherein . . . [it] *relinquished* franchising jurisdiction to non-federal agencies."[66] In the same decision, the Commission noted that *its* "decision *to share* regulatory responsibility over cable television with non-federal authorities . . . [did] not in any way qualify . . . [its] jurisdiction over other forms of interstate communications."[67] In 1983, with respect to the issue of local regulation of Satellite Master Antenna Television systems (SMATV), the FCC stated:

> [w]e agree with the petitioner that the Commission established this duality *as a policy decision, rather than as a matter of law,* based on franchised cable's use of the public streets and rights of way and the particular local interests considered applicable to a cable operator, generally chosen to serve the community as a whole.[68]

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65. 36 F.C.C.2d at 207. *See supra* text accompanying note 57.

66. *Orth-O-Vision, Inc.*, 82 F.C.C.2d 178, 183 (1980) (emphasis added), *aff'd*, New York State Comm'n on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982). The FCC preempted local regulation of MATV systems to the extent necessary to promote the growth of interstate Multi-Distribution Services (MDS).

67. *Id.* (emphasis added).

68. *Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1234 (1983) (emphasis added), *aff'd*, New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C.Cir. 1984). The FCC preempted entry regulation by local government of Satellite Master Antenna Television systems (SMATV) to promote the development of interstate transmission of satellite signals (Direct Broadcast Services). *See also* Satellite Television of New York Assocs. v. Finneran, 579 F. Supp. 1546 (S.D.N.Y. 1984).

C. *The Cable Communications Policy Act of 1984*

1. *Purpose of the Act*

The principal focus of the Cable Communications Policy Act[69] is *cable television as television.* Section 521(3) of the statute provides that "the purposes of this title are to establish guidelines for the exercise of federal, state, and local authority with respect to the regulation of cable systems."[70] "Cable system" is defined generally to mean "a facility . . . that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community."[71] "Cable service" is the "one-way transmission to subscribers of (i) video programming or (ii) other programming service;"[72] "video programming" is "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[73] Although various purposes of the statute are expressed in terms of cable communications, it is apparent that Congress did not intend to alter the existing authority over any communications service other than cable service.[74] Rather, it is the intent of Congress to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[75] Thus, the underlying goal of the Cable Communications Policy Act is to promote diversity in television — the same goal that has defined federal policy and sustained FCC regulatory efforts in broadcast television for fifty years.

2. *Local Regulation*

Under the Cable Communications Policy Act, it is unclear whether the regulatory responsibilities of local governments are based upon the sovereign power of each state to regulate the use of its public streets or upon a delegation of power by Congress.

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69. 47 U.S.C. § 521 (Supp. III 1985).
70. *Id* § 521(3).
71. *Id.* § 522(6).
72. *Id.* § 522(5).
73. *Id.* § 522(16).
74. H.R. REP. No. 934, 98th Cong., 2d Sess. 29, 60, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4666, 4697.
75. 47 U.S.C. § 521(4) (1982 & Supp. III 1985).

For example, the statute provides that a "franchise shall be construed to authorize the construction of a cable system over public rights-of-way"[76] and that a "franchising authority" includes "any governmental entity empowered by Federal, *State* or *local* law to grant a franchise."[77] On the other hand, the statute also suggests that Congress may be the source of the cable television franchising power, and furthermore that Congress has specifically delegated such power to the states.[78] Whether the jurisdictional basis is traditional or founded upon federal action or some combination thereof, Congress has clearly expressed its determination in the Act to rely "on the local franchising process as the primary means of cable television regulation"[79] and, therefore, the local franchising process is an important vehicle for furthering diversity.

Section 541(b) of the statute provides that "a cable operator may not provide cable service without a franchise."[80] Section 522(8) defines a "franchise" as "an initial authorization or renewal thereof . . . which authorizes the construction or operation of a cable system."[81] There are distinctive aspects of a "cable system" as defined in the statute. First, Congress has specifically exempted a "facility that serves only to retransmit the television signals of 1 or more television broadcast stations."[82] Thus, systems which do not produce their own programming and simply carry, without editing, whatever broadcast programs they receive are *not* cable systems under the Act and are not encompassed within the uniform national policy set forth in the statute.[83] If,

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76. *Id.* § 541(a)(2).

77. *Id.* § 521(9)(emphasis added).

78. *Id.* § 541(a)(1) ("A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction.").

79. H.R. REP. No. 934, 98th Cong. 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4656.

80. 47 U.S.C. § 541(b)(1) (Supp. III 1985).

81. *Id.* § 522(8).

82. *Id.* § 522(6).

83. Those who would argue that the authority to franchise a communications entity engaged in interstate commerce emanates from Congress might also argue that these so-called "non-cable systems" are free from all state and local regulation. If sustained, this position would lend support to the contention that the determination of Congress to vest state and local governments with regulatory responsibilites in the franchising process was not based simply upon "street use" considerations. *But see* City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034 (1986) in which the Supreme Court stated

as it appears, state and local governments are not preempted from requiring a franchise from (and otherwise regulating) such systems, then it must be concluded that Congress has determined that the interstate nature of broadcasting alone requires neither uniformity for such systems nor an explicit limitation of the authority of state and local government to regulate such systems. Moreover, the interstate nature of broadcasting can no longer be said to constitute the jurisdictional basis for national policy over cable television. For example, if a system transmits only local broadcast signals, it is not a cable system. If it subsequently adds a local, governmental or educational channel, it becomes a cable system. If a system does not transmit any broadcast signals, it is also a cable system. This policy is in direct contrast with the former policy of the FCC. The FCC's jurisdiction over cable television was based upon its statutory jurisdiction over broadcasting and, consequently, the FCC definition of a "cable television system" required the transmission of one or more television broadcast signals.

A second distinctive aspect of the definition of "cable system" in the Cable Communications Policy Act is that the existence of the cable system does not depend upon whether the facility uses or occupies public streets or rights-of-way except in the case of an MATV system.[84] Rather, a critical element of the definition is the provision of some non-broadcast *television* to "multiple subscribers." Under the Act, any facility which satisfies the definition of a "cable system" must obtain a franchise from a franchising authority. Thus, the authority of state and local government to regulate cable television is not necessarily coincidental with — or, indeed, limited to — the powers and purposes traditionally associated with the regulation of the use of streets. Under the Act, the authority conferred upon state and local governments creates an affirmative duty to "assure that cable systems are responsive to the needs and interests of the local community"[85] and to encourage or require diversity in certain areas.

With respect to both objectives, Congress has detailed the

Congress has endorsed the franchising process. *Id.* at 2035 n.1.

84. 47 U.S.C. § 522(6)(B) (Supp. III 1985).

85. *Id.* § 521(2).

nature and scope of the issues subject to regulation. The critical, unifying objective of the regulatory scheme for cable television is "to assure that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas — an environment of 'many tongues speaking many voices.' "[86] The road to "localism" and "diversity" chosen by Congress includes deregulation of certain areas and the articulation of specific statutory objectives to be served by local governmental regulation.

First, a franchising authority may require that the franchisee designate channel capacity for public, educational and governmental use and channel capacity on institutional networks for educational and governmental use.[87] Second, the franchising authority may establish regulations for facilities and equipment which include the authority to regulate channel capacity.[88] Third, a franchising authority may require an upgrade of an existing system, including an expansion of channel capacity, in the context of a franchise renewal.[89]

Perhaps the clearest expression of congressional intent concerning diversity in cable television is found in section 532 — Cable channels for commercial use. This section requires cable operators to make channels available for commercial use "by persons unaffiliated with the operator,"[90] precludes the exercise by the operator of "any editorial control over any video programming provided [on such channels]"[91] and provides specific

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86. H.R. REP. No. 934, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4656.

87. 47 U.S.C. § 531 (b)(Supp. III 1985). "Local governments, school systems, and community groups, for instance, will have ample opportunity to reach the public under . . . [the Cable Communications Policy Act] . . . ." H.R. REP. No. 934, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4656.

88. 47 U.S.C. § 544(b). "Facility and equipment requirements may include requirements which relate to channel capacity; system configuration and capacity, including institutional and subscriber networks; headends and hubs; two-way capability; addressability; trunk and feeder cable; and any other facility or equipment requirement, which is related to the establishment and operation of a cable system . . . . " H.R. REP. No. 934, 98th Cong., 2d Sess. 68, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4705.

89. 47 U.S.C. § 546(b).

90. *Id.* at § 532(b)(1).

91. *Id.* at § 532(c)(2).

remedies to persons denied commercial access.[92] The legislative history of this section reveals that Congress recognized that

> cable operators do not necessarily have the incentive to provide a diversity of programming sources . . . [and that] [t]he Committee's overriding goal in adopting this section is divorcing cable operator editorial control over a limited number of channels. In doing so, the Committee does not intend to adversely affect the cable operator's economic position, since it is not the cable operator's exercise of any economic power, but his exercise of editorial control, which is of concern to the Committee. . . . *[T]he marketplace cannot be relied upon to assure a diversity of viewpoints.*[93]

The provisions governing commercial access are mandatory and pre-emptive. At this time, neither the FCC nor state or local governments can impose additional requirements. However, the statutory obligation to make channels available for leased use does not apply unless the channel capacity of a particular system is at least thirty-six. The potential for a critical local governmental role even in the area of leased access is apparent. The requirements for channel capacity in a franchise may well be the determining factor in whether a particular system is subject to mandatory leased access under section 532.[94]

3. *Cable Television Regulation and Use of the Public Right-of-Way*

Although local regulation of cable television may not depend upon street use, the use of public property by cable television facilities and equipment is not incidental. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[95] the Supreme Court held

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92. *Id.* at §§ 532(d)-(f).

93. H.R. REP. No. 934, 98th Cong., 2d Sess. 48, 50, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4685 & 4687 (emphasis added).

94. 47 U.S.C. § 532 (Supp. III 1985). Of course, the cable operator may unilaterally determine to provide a system with 36 or more channels either in a franchise or by the unilateral act of upgrading during the term of the franchise. But, if an operator lacks the incentive to provide a diversity of sources and, if the marketplace is unreliable, regulation by the franchising authority may be the only method for insuring diversity. Moreover, given the local governmental authority to regulate channel capacity, the capacity, the size of the system, and, therefore, the existence of mandatory leased access partakes of governmental action and a franchising authority may be accountable to a would-be commercial lessee on first amendment grounds.

95. 458 U.S. 419 (1982).

that a state statute which conferred upon cable television franchisees a right of access to private property for the purpose of providing cable television service to tenants constituted a "taking" of property requiring just compensation. In describing the nature of the taking involved, the Court quoted at length from *St. Louis v. Western Union Telegraph Co.*[96] as follows:

> The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. . . . Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of highway and personal travel, wholly lost to the public. . . . It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.[97]

As noted, streets, rights-of-way and other public property are held in trust for the benefit of the public at large.[98] In New York, highways are intended principally for use by pedestrians and travelers; other uses are permitted but are subordinate.[99] The right to use the public highway for purposes other than travel is a special privilege which cannot be acquired by purchase or condemnation but only by grant from the proper public authorities. Perhaps, most significantly, a privilege or right can be granted for highway use only where the use has a public purpose.[100]

The historical vehicle for regulating street use is the street

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96. 148 U.S. 92 (1893).

97. *Id.* at 98, 99, 101-02.

98. Schneider v. New Jersey, 308 U.S. 147 (1939); Werlein v. New Orleans, 177 U.S. 390 (1900).

> Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one *rightfully upon the street* to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the street.

Schneider, 308 U.S. at 160 (emphasis added).

99. People v. Squire, 107 N.Y. 593, 14 N.E. 820 (1888) *aff'd*, 145 U.S. 175 (1892).

100. City of New York v. Rice, 198 N.Y. 124, 91 N.E. 283 (1910); American Rapid Tel. Co. v. Hess, 125 N.Y. 641, 26 N.E. 919 (1891).

franchise. Although the differences between broadcasting and cable television may not be substantial in a way that justifies significantly different regulatory principles, there is a fundamental distinction between the authorization to use the airwaves and authorization to use the streets. The permission necessary to broadcast is manifest in a license issued by the FCC pursuant to statute. The special privilege by which a person is authorized to physically occupy and use public streets and rights-of-way is the franchise. "No person is to have anything in the nature of a property right . . . [in] a license."[101] A franchise, once accepted, is a property right[102] which cannot be defeated without cause except through the power of eminent domain[103] and which is subject to the constitutional restriction on the impairment of contracts.[104]

Congress has affirmed the concept of franchise as contract.[105] Because the franchisee possesses a valuable property right and because the franchising authority holds title to public streets and rights-of-way as trustee for the benefit of the public, the grant and award of a franchise is subject to state constitutional provisions requiring just and fair compensation for the right. In New York, for example, Article VIII Section 1 of the

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101. FCC v. Sanders Bros. Radio Station, 309 U.S. at 470, 475 (1940).

102. *See* City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58 (1913) holding that the grant of franchise is the grant of a property right that may be 'perpetual'.

> "That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases. . . . As a property right it was assignable, taxable and alienable. Generally, it is an asset of great value . . . and a principal basis for credit."

Id. at 65 (cases omitted).

"The original source of power over both streets and highways is the State." *Id.* at 67.

103. Delaware, L. & WR.R. v. Town of Morristown, 276 U.S. 182 (1928); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); City of Los Angeles v. Los Angeles Gas & Electric Corp., 251 U.S. 32 (1919).

104. Ohio Pub. Serv. Co. v. Ohio, 274 U.S. 12 (1927).

105. The term franchise is defined broadly and includes a "contract . . . [or] agreement . . . which authorizes the construction or operation of a cable system. . . ." 47 U.S.C. § 522(8) (Supp. III 1985). The Cable Act anticipates "a request for proposals" (47 U.S.C. §§ 531, 544), permits agreement by the parties (47 U.S.C. § 542) and generally, if not exclusively, provides for the enforcement of requirements in a franchise (47 U.S.C. §§ 531, 544, 552). Moreover, the statute contains provisions relative to "grandfathering" (47 U.S.C. § 557), franchise modification (47 U.S.C. § 545) and the valuation of a cable system upon termination of a franchise (47 U.S.C. § 547) which are based specifically upon contract and property-right principles.

State Constitution provides that "[N]o county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking."[106]

III. Communications Regulations and the First Amendment

A. *The Standard of Review for Broadcasting Regulation*

In *FCC v. League of Women Voters of California*,[107] the Supreme Court recently reaffirmed the "unique considerations" of broadcast regulation while striking down a federal statutory ban on editorializing by noncommercial educational broadcasting stations. In reviewing the "fundamental principles that guide . . . [its] evaluation of broadcast regulation,"[108] the Court noted that: 1) broadcasting is still "a new medium;"[109] 2) broadcast frequencies remain a "scarce and valuable national resource"[110] that Congress may regulate pursuant to the commerce clause through a licensing process; and 3) Congress "may . . . seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations."[111] Quoting from *Red Lion Broadcasting Co. v. FCC*[112] and *CBS, Inc. v. Democratic National Committee*,[113] the Court endorsed the notion that broadcast licensees act, in part, as fiduciaries for the public.[114] The Court also endorsed its holding in *Columbia Broadcasting Systems v. FCC*[115] "that broadcasters are engaged in a vital and independent form of communicative activity . . . [and are] entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with their

106. N.Y. CONST. art. VIII, § 1.
107. 468 U.S. 364 (1984).
108. *Id.* at 376.
109. *Id.* at 377.
110. *Id. at 376.*
111. *Id.* at 377.
112. 395 U.S. 367 (1969).
113. 412 U.S. 94 (1973).
114. *League of Women Voters*, 468 U.S. at 377.
115. 453 U.S. 367 (1981).

public [duties].' "[116] Thus, restrictions on broadcasting that would not obtain for certain other media "have been upheld only when . . . [the Court was] satisfied that the restriction is narrowly tailored to further a substantial government interest, such as insuring adequate and balanced coverage of public issues."[117]

The issue before the Court in *League of Women Voters* was the constitutionality of section 399 of the Public Broadcasting Act of 1967,[118] a restriction "directed at a form of speech . . . that lies at the heart of First Amendment protection."[119] The scope of the restriction was "defined solely on the basis of the content of the suppressed speech."[120] The Court affirmed the decision of the district court ruling the statute unconstitutional under the first amendment. However, noting that it had never gone as far as requiring a compelling government interest in the evaluation of broadcast regulation,[121] the Court did not apply the most exacting standard of review for first amendment issues. Rather, the Court found that the statute was not "narrowly tailored to serve a substantial governmental interest."[122]

B. *Cable Television Regulation*

The Supreme Court has not yet determined whether government regulation of cable television is subject to the same standard of review applicable to broadcast regulation, i.e., whether essential characteristics of cable television are similar to the distinctive characteristics of broadcasting or whether cable television may itself have distinctive characteristics requiring a special standard of review for government regulation. In particular, the Court has not had occasion to determine whether the scarcity characteristic of broadcasting finds an analog in cable television.

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116. *League of Women Voters*, 468 U.S. at 378 (quoting Columbia Broadcasting Sys. v. FCC, 453 U.S. at 395 and Columbia Broadcasting Sys. v. Democratic Nat'l Comm. 412 U.S. at 110).

117. *Id.* at 380.

118. 47 U.S.C. § 390 (1982 & Supp. III 1985).

119. 468 U.S. at 381.

120. *Id.* at 383.

121. *Id.* at 376.

122. *Id.* at 380.

In *City of Los Angeles v. Preferred Communications, Inc.*,[123] the Supreme Court intimated that the "scarcity" issue might be relevant to cable television. The Court noted that "[t]he well-pleaded facts in the complaint include allegations of sufficient excess physical capacity and economic demand for cable television operators in the area which respondent sought to serve."[124] Final judgment on the proper first amendment analysis was deferred pending the receipt of more information about the "present uses of the public utility poles *and* rights-of-way and how respondent proposes to install and maintain its facilities on them."[125] However, the Court also suggested that scarcity may not be dispositive. Quoting from recent public forum cases, the Court noted that "[e]ven protected speech is not equally permissible in all places and at all times"[126] and that "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests."[127] Whether or not scarcity is critical to the standard of review applicable to cable television regulation, the issue has not always received a comprehensive, in-depth analysis.

C. *Broadcasting and Cablecasting — Is There a Difference?*

In an often cited phrase, the Supreme Court has observed that "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[128]

In *Home Box Office, Inc. v. FCC*,[129] the Court of Appeals for the District of Columbia found that "an essential precondition of . . . [the regulation of broadcasting] theory — physical interference and scarcity requiring an umpiring role for government — is absent"[130] in cable television. The court found no "apparent physical scarcity of channels relative to the number of

123. 106 S. Ct. 2034 (1986).
124. *Id.* at 2036.
125. *Id.* at 2038 (emphasis added).
126. *Id.* at 2037 (citation omitted).
127. *Id.* at 2038.
128. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).
129. 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).
130. *Id.* at 45.

persons who may seek access to the cable system [and observed that] cable systems have the capacity to convey over thirty-five channels of programming."[131]

In *Quincy Cable TV v. FCC*,[132] the same court again distinguished cable television technology from broadcasting and noted that "the inescapable physical limitations on the *number of voices* that can simultaneously be carried over the electromagnetic spectrum . . . [were] limitations . . . [which] engendered a peculiar irony of the broadcast medium: limited regulation, by converting aural and visual chaos into channels of effective communication . . . ."[133] The irony of the *Quincy* case is that the court distinguishes cable television on the basis of its "virtually unlimited channel capacity"[134] when, in fact, the petitioner's system was a twelve-channel system at the commencement of the proceeding, and all twelve channels were in use.[135] The number of voices that could speak by cable was limited.[136] The demand was greater than the capacity which, in fact, was no greater than the number of local VHF broadcast signals available for viewing on any television set.[137] Based on the facts, it is perhaps not surprising that the primary constitutional objection to the FCC's "must-carry" signal carriage rules[138] was not the intrusive effect upon the cable operator, but the adverse impact on the would-be cable programmer. The court found "most importantly, [that] if a system's channel capacity is substantially or completely occupied by mandatory signals, the rules prevent

131. *Id.*

132. 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub. nom.* National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 106 S. Ct. 2889 (1986).

133. 768 F.2d at 1448-49. Eight years after *Home Box Office*, the court noted 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." *Id.* at 1448.

134. *Id.* at 1450.

135. *Id.* at 1447 n.28.

136. The number of voices based upon the abundant channel capacity of any particular cable system is not the real issue in the current first amendment challenges to the cable television franchising procedure. The Supreme Court has noted the contention of Preferred Communications that the legitimate concerns of the City of Los Angeles are easily satisfied without the need to limit entry to cable television to a single speaker. *Preferred Communications*, 106 S. Ct. at 2037.

137. *Cf. Home Box Office*, 567 F.2d at 45.

138. 47 C.F.R. §§ 76.57-76.61 (1985).

cable programmers from reaching their intended audiences even if that result directly contravenes the preference of cable subscribers."[139]

In both *HBO* and *Quincy*, the regulations under review were FCC rules which either precluded or required carriage of various types of programming by cable operators. In each case, the court refused to characterize the regulations as content regulations. In fact, the rules in each case were designed to protect local broadcasting from cable television.[140] Also, in each case, the court applied the standard of review set forth in *United States v. O'Brien*,[141] finding in *HBO* that the rules were overbroad on the record presented and in *Quincy* that the rules were overinclusive "in their indiscriminate protection of every broadcaster regardless of whether or to what degree the affected cable system poses a threat to its economic well-being."[142]

In *Community Television of Utah, Inc. v. Roy City*,[143] a content-based municipal ordinance concerning cable television was declared unconstitutional. In support of its efforts to prohibit the transmission of indecent material by cable, the City of Roy argued that cable television was similar to broadcasting and that its authority to regulate cable was analogous to the regulatory power of the FCC.[144] The City also argued that its regulatory effort was justified by the uniquely pervasive presence characteristic of television, invoked by the Supreme Court[145] as a basis for government regulation of broadcasting.

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139. *Quincy*, 768 F.2d at 1453 (emphasis added).

140. *Id.* at 1453; *Home Box Office*, 567 F.2d at 50-51.

141. 391 U.S. 367 (1968). Where "speech" and "nonspeech" conduct are joined, a governmental regulation affecting "speech" is sufficiently justified

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the govermental 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.

142. *Quincy*, 768 F.2d at 1461. It should be noted that the court applied the *O'Brien* standard reluctantly. The court did seem to be attracted to the cable television-newspaper analogy, but it did not go so far as to employ a first amendment standard of analysis applicable to the print media.

143. 555 F. Supp. 1164 (D. Utah 1982).

144. *Id.* at 1166.

145. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

The court rejected both contentions and offered a number of essential differences between cable television and broadcast television.[146] The court emphasized that cable television programming is transmitted to a subscribing audience via wire which is privately owned in contrast to broadcast television which is transmitted to non-paying viewers through publicly owned airwaves. In this context, the court did not agree with the City's attempt to analogize cable to broadcasting. The court stated that "[t]here is no such public interest charged to a cable distributor [similar to a broadcaster] and at least in theory, no physical limitation on the number of wires available to carry electronic signals."[147]

In *Preferred Communications, Inc. v. City of Los Angeles,* the Court of Appeals for the Ninth Circuit found only a "superficial similarity between broadcasting and cable television."[148] The court stated that the "electromagnetic spectrum simply is physically incapable of carrying the messages of all who wish to use the medium"[149] and concluded that "[w]ithout licensing, the broadcast spectrum would be rendered virtually useless to all."[150] As in *Quincy,* the court seemed to imply that the mere existence of cable television technology will enable every voice to

146. *Community Television,* 555 F. Supp. 1164 (D. Utah 1982).

147. *Id.* at 1169.

148. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985). In making the distinction between broadcasting and cable television, the court seems to merge the issue of frequency interference inherent in radio broadcasting with the physical scarcity of separate frequency wavelengths. The court noted, referring to *HBO* and Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982), that "[m]ore recent cases have expressly concluded that the physical scarcity rationale does not apply to cable." *Id.* at 1404. The court further stated that "[F]requency interferrence [is] a problem that does not arise with cable television." *Id.* (quoting *Omega,* 694 F.2d at 127).

The issue of interference is distinct from scarcity of frequencies and is not unique to communication by radio wave. Interference among speakers may result in a variety of circumstances including simultaneous street demonstrations, pickets or parades. For example, in *Omega,* the court noted that "cable television involves another type of interference — interference with other users of telephone poles and underground ducts." 694 F.2d at 127.

Surely, it is necessary to license broadcasters to prevent frequency interference. However, regulation of speech and other conduct rests finally upon the limited number of separate frequencies. The court in *Omega* did not compare cable television to broadcasting for this purpose.

149. *Preferred Communications,* 754 F.2d at 1403.

150. *Id.* at 1404.

use television to communicate its message. On the other hand, it is asserted that the proper analogy does not involve lay speakers but licensees.

D. *Cable Television as a Scarce Commodity*

The technical capacity of a single cable television wire to transmit many channels of information simultaneously does not invalidate the "scarcity" rationale. Nor does the possibility of a multitude of cable wires providing an infinite number of cable channels distinguish cable television from broadcast television with respect to licensing matters. Cable television is to broadcast television as: 1) a single cable system is to a single broadcast frequency; 2) the public rights-of-way are to the electromagnetic spectrum; and 3) the cable television franchise is to the broadcast license.

1. *Physical Scarcity*

A cable system, like a single broadcast frequency, permanently and exclusively occupies a portion of a "scarce and valuable" resource. The public right-of-way is limited. The height and available space on existing utility poles is more limited yet. As with the electromagnetic spectrum, public rights-of-way — including poles — must, by necessity, be dedicated by law to other public purposes. The transmission of electronic messages — whether by video or otherwise — is but one of a number of necessary purposes that compete for use of the public rights-of-way. Whereas dozens of broadcast television frequencies are available for licensing in a single community, it is unlikely that existing utility poles could accommodate more than two separate television cables without substantial and costly adjustments.[151] Moreover, the authority of the cable television franchise under the Cable Communications Policy Act, like the authority of the broadcast license, confers upon a single entity

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151. *Cf.* Red Lion Broadcasting, Co. v. FCC, 395 U.S. 367, 390-91 (1969). "Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. *Id.*

the power, subject only to government regulation, to determine the content of the programming. It is tempting to compare a seventy-channel cable system or a fifty-four-channel cable system or even a thirty-six-channel cable system with the number of local television broadcasting stations in the same community and conclude that cable television is a medium of abundance. However, on further examination, and for so long as a cable system — rather than individual channels — is franchised to a single individual or entity, one cable system is tantamount to one additional broadcast licensee in any community.

Whether the "medium" of cable television is in any sense scarce must depend, not on the technological capacity of the single cable wire, but upon either of two circumstances — the availability of space in the right-of-way or the feasibility of competition.[152] In *Preferred Communications,* plaintiff sought access to utility poles — public and private — in the City of Los Angeles for the purpose of constructing a cable television system in a region for which a franchise had been previously awarded by the City. The company's request for access was denied because it did not have a franchise from the City. The company's request for a franchise was denied by the City because it had not participated in the City's competitive bidding (or auction) process by which cable franchises are awarded. The plaintiff then brought suit against the City, in part, upon the grounds that it had been deprived of rights guaranteed by the first amendment.

The issue phrased by the Court of Appeals was:

> Can the City, consistent with the First Amendment, limit access by means of an auction process 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?[153]

The court answered the question in the negative.[154]

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152. *Cf.* Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983). "For this court, at least, scarcity is scarcity — its particular source, whether 'physical' or 'economic', does not matter if its effect is to remove from all but a small group an important means of expressing ideas." *Id.* at 986-87 (footnote omitted).

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

154. *Id.* at 1402.

Under the facts as alleged, the court determined that the use of the franchise auction process to limit the number of franchises to one was not the least restrictive means available to the city to further its interests in protecting public resources.[155] The court stated conclusively that "the physical scarcity that could justify increased regulation of cable operations does not exist in this case."[156]

In *Preferred Communications*, the question of whether the scarcity rationale applies to cable television was raised and discussed in terms of available space on existing utility poles and in existing ducts and conduits rather than in terms of the availability of suitable space within the totality of the public right-of-way.[157] Although cable television franchises encourage the joint use of existing utility facilities (for aesthetic reasons and to minimize disruption of the highways) and Congress has asserted jurisdiction over cable television pole attachment rates,[158] it is doubtful that a cable television franchisee even has a right of access to utility property in many jurisdictions.[159] Under the circumstances, it is not self-evident that first amendment analysis of cable television regulation should be determined upon the basis of poles and ducts most often constructed in another era by private utility companies for different purposes. Since utility property is not always available and because cable television franchises routinely empower the franchisee to erect its own poles and conduits, a comprehensive examination of "physical scarcity" must include the possibility of future construction by the franchisee of separate poles or additional wires. A franchise creates a long-term relationship and a valuable property right. Once a franchise is vested, it is unreasonable to anticipate that expansion or new construction can be readily avoided by summary denial of a permit to place additional poles or to construct

155. *Id.* at 1406.

156. *Id.* at 1404. The court expressed "no opinion on the issue of the manner in which the City should allocate access to poles and conduits to competing cable systems when . . . [those] structures are incapable of accommodating all those seeking access." *Id.*

157. *Id.*

158. 47 U.S.C. § 224(b)(1) (1982).

159. In Los Angeles, some utility poles and ducts were owned and maintained by the city and, as noted, state law required private utilities to make space available for the attachment of television cable. *Preferred Communications*, 754 F.2d at 1400.

new conduits.

In fact, the evaluation of first amendment issues based upon the availability of space on existing utility structures suggests that the medium of cable television has — or should have — a right of access to private utility property which may, itself, be scarce. However, the Supreme Court has determined that utility poles are not public forum property and has denied right of access to them.[160]

Shortly after the decision of the Ninth Circuit in *Preferred Communications*, the Court of Appeals for the District of Columbia in *Tele-Communications of Key West, Inc. v. United States*[161] (TCI of Key West) determined that an incumbent cable television franchisee which had been denied a renewal in favor of an invited competitive bidder had stated a first amendment claim under public forum jurisprudence.[162] Defendant was a U.S. Air Force base. Plaintiff TCI of Key West alleged that the "rights-of-way necessary to conduct cable television services had been dedicated to such use . . . [that] no legal or practical burdens would accrue from two cable television companies competing and [that TCI] in no way indicated that more than two companies might end up competing."[163]

The district court dismissed the complaint on the grounds that the rights-of-way were not traditional public fora and that the Air Force had asserted legitimate military objectives that were content neutral. The court of appeals found that the district court had improperly relied upon factual assumptions other than those set forth in the complaint and reversed. It should be noted that because TCI of Key West alleged "there were no reasons for restricting speech,"[164] the court found that it was not

160. City Council v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984) (upholding a municipal ordinance banning the use of utility poles and other public property for the posting of signs). In *Preferred Communications*, the court of appeals attempted to distinguish *Vincent* on the grounds that the attachment of coaxial cable to utility poles is basically compatible with the normal use of those facilities. The court concluded that for purposes of cable television the utility poles were public forum property, noting the existence of a state statute which apparently dedicates surplus space and utility poles to cable. *Preferred Communications*, 754 F.2d at 1408-09.

161. 757 F.2d 1330 (D.C. Cir. 1985).

162. *Id.* at 1338.

163. *Id.* at 1336.

164. *Id.* at 1338.

actually necessary to determine whether the rights-of-way were public forum or nonforum property.[165]

In *TCI of Key West*, public forum jurisprudence was applied to government-owned property, i.e., a U.S. military base. In *Preferred Communications*, the public forum analysis pertained, in part, to publicly owned utility poles. Of course, poles and conduits are often privately owned. The Ninth Circuit did not attempt to explain how private utility property can be converted to public forum property. It would seem, however, if private property can constitute a public forum under certain circumstances,[166] then a privately owned cable television system would also be subject to public forum analysis, in which event the public, educational and governmental as well as the commercial leased access provisions of the Cable Communications Policy Act would not satisfy the first amendment rights of third party users. Even the poles and conduits owned by cable television systems might acquire the same status as privately owned utility poles. The Supreme Court in *Preferred Communications* did not adopt the analysis of the Ninth Circuit but does anticipate a public forum dimension. The Court quotes from *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*[167] that "[e]ven protected speech is not equally permissible in all places and at all times."[168] The Court also suggests that *City Council v. Taxpayers for Vincent*[169] is relevant to the ultimate determination. "Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests."[170]

The application of public forum analysis to cable television franchising should include a comprehensive evaluation of: 1) the totality of the public right-of-way; 2) other uses for which the right-of-way is dedicated in the public interest; 3) the potential for expansion of the right-of-way by the exercise of eminent do-

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165. *Id.* at 1338-39.

166. *Cf.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), (upholding right of public to use privately owned shopping center for leafletting and soliciting signatures).

167. 105 S. Ct. 3439 (1985).

168. *Preferred Communications*, 106 S. Ct. at 2037 (quoting *Cornelius*, 105 S. Ct. at 3448).

169. 466 U.S. 789 (1984).

170. *Preferred Communications*, 106 S. Ct. at 2038.

main of the franchising authority; and 4) the statutory direction that a franchise shall include the right to use private easements dedicated for compatible uses.[171] In addition, and perhaps most significantly, it is necessary to reconcile an alleged "right of access" to government property for would-be cable operators with an historic and present understanding that a cable television franchise is a valuable and enduring property right for which governments traditionally have been entitled to fair compensation. If it is determined that every decision by local governments to permit the construction of a cable television system by a private entity necessarily converts the public right-of-way into a public forum and thereby inhibits the discretion of local government, then a possible response may be the abandonment of private television franchising in favor of municipally owned cable systems.[172] Under municipal ownership, the cable system itself could constitute a dedicated public forum with channels available to those who would choose to speak only.

In *Preferred Communications*, the City of Los Angeles did not deny the existence of sufficient available space on utility poles for a second cable television system. In other cases, municipal governments have argued that some limit exists.[173] It does not appear, however, that a case exists where it was found that the existing poles could support one and only one cable televi-

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171. Section 521(a)(2) of the Cable Communications Policy Act provides that: "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . . ." 47 U.S.C. § 541(a)(2) (Supp. III 1985).

172. "It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communications possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum." Red Lion Broadcasting v. FCC, 395 U.S. 367, 389 (1969).

173. Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) (The City alleged that there was "a sheer limit on the number of cables that can be strung on existing telephone poles." *Id.* at 1378); Century Federal, Inc. v. City of Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984) ("[T]here may be some practical limit to the number of coaxial cables that may be hung from utility poles or buried underground." *Id.* at 1563); *Cf.* Carlson v. Village of Union City, 601 F. Supp. 801 (W.D. Mich. 1985) ("Defendants do not argue that the facts of this case support a theory of physical scarcity. Although the capacity of the village's utility poles to safely support television cables may at some point be limited, no one has suggested that the poles could support only one such cable." *Id.* at 811 n.9).

sion system.[174]

2. *Economic Scarcity*

A second aspect of the "scarcity" issue is economic scarcity. In *Preferred Communications*, for example, the plaintiff alleged that the region of the city in question could support more than one cable television system. The City argued that cable television was a natural monopoly. The natural monopolistic character of the cable television medium has been alternately assumed by the courts and avoided on the grounds of an insufficient factual record.[175]

In *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*,[176] a jury in federal district court found that cable television in Jefferson City, Missouri, was a natural monopoly. The district court observed that

> [a]ccording to . . . [its] research, this is the first case in which the

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174. "The Court is aware of no case upholding the right of a municipality to deny a CTV franchise or license on the basis of *physical* scarcity." *Century Federal*, 579 F. Supp. at 1563.

175. Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543 (W.D. Ky. 1982) ("A Cable television system, by nature, tends to be a natural monopoly." *Id.* at 547); *Berkshire Cablevision*, 571 F. Supp. at 976.

> Such a [competitive] franchising system recognizes the economic realities of the cable industry, which, as a practical matter, create a "natural monopoly" for the first cable operator to construct a cable system in a given service area. Testimony in this case established that to construct the Newport County cable system would cost approximately seven million dollars. Because of these start-up costs and the nature of the cable television market [citation omitted], the cable systems have operated largely free from competition.

Id. at 986.

In *Community Communications* and *Omega*, the courts assumed some degree of natural monopoly but refused conclusive findings in the absence of a detailed factual record. Only in *Carlson* was there no dispute about the issue.

> Both parties have conceded that the cable television industry in Union City has the characteristics of a natural monopoly. Defendant has indicated that ". . . the size of the municipality (the Village of Union City consists of between 600 and 700 residences) effectively discourages any other cable companies from attempting to compete with a franchise holder.

Carlson, 601 F. Supp. at 810 n.8.

The court further noted that "courts have limited their reliance on a theory of 'economic scarcity' expressly because it was not clear whether, on the facts of that particular case, cable television was indeed functioning as a monopoly. In this case, that fact is not in dispute." *Id.* at 811 n.10.

176. 610 F. Supp. 891 (D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986).

> question of whether a natural monopoly situation exists with respect to a cable television market has been submitted to a jury. . . [and that it] is convinced that treating the natural monopoly issue as a question of fact was proper; in each case, the issue will turn on a variety of particularized factors ranging from the population density of a given community to the age and height of its utility poles.[177]

In *Central Telecommunications*, the City was not a party to the litigation. The plaintiff had applied for a franchise in response to a request for proposals issued by the City in the context of the forthcoming expiration of defendant's franchise. The city council approved the grant of a franchise to plaintiff but the action was vetoed by the Mayor. Subsequently, the City acted to renew the defendant's franchise. The plaintiff brought suit against the incumbent cable television franchisee on antitrust grounds and for interference with its efforts to obtain a franchise. Defendant asserted that it had a right under the first amendment to provide cable television service in the City — with or without a franchise — and also that the City was constrained from refusing to permit any franchise applicant from providing service. In essence, defendant argued that it could not be held accountable for the City's unconstitutional refusal to franchise the plaintiff.

The case was submitted to the jury on three theories: "1) conspiracy to unreasonably restrain trade; 2) actual monopolization; and 3) tortious interference with a business expectancy."[178] On the issue of entry regulation, the court stated that

> in a natural monopoly situation, the First Amendment should tolerate a franchising process whereby a city may periodically award an exclusive franchise to the applicant which offers the best package to the public. On the other hand, if a given cable television market does not have natural monopoly characteristics, the justification for limiting the number of franchisees disappears.[179]

The "determinative factor" of the number of franchises is "whether economic and physical conditions in the relevant mar-

177. *Id.* at 901 n.33.
178. *Id.* at 896.
179. *Id.* at 900.

ket give rise to a 'natural monopoly' situation."[180]

In affirming the district court (including the jury verdict), the Court of Appeals for the Eighth Circuit recognized the "profound first amendment implications inherent in the regulation of cable operators . . . [and made] clear, as did the Supreme Court in *Preferred Communications,* that . . . [it was] unwilling to decide any question which . . . [was] not squarely before . . . [it] and on which there . . . [had] not been a full development of the record."[181] It conceded that both parties had a first amendment interest in being a "cable television 'speaker' " while concluding that "[b]ecause the evidence shows that given the technology offered by the competing companies, there was economic capacity for only one speaker, it seems clear that . . . [Central Telecommunication's] proposal went further in advancing the *First Amendment interests of the viewing public in the greatest variety of programming obtainable.*"[182]

E. *Beyond Scarcity: Additional Governmental Interests*

Since *Preferred Communications*, the Court of Appeals for the Ninth Circuit has affirmed its refusal to grant injunctive relief to a would-be cable television system builder and operator who did not adhere to the requirements of an exclusive procedure for awarding a single cable television franchise.[183] For example, in *Pacific West Cable Co. v. City of Sacramento*,[184] the court explained that the relief sought would "authorize Pacific West to string its cables on Sacramento's utility poles and to lay its cable in utility conduits under Sacramento's streets without regard to the number of others who might seek similar relief or to the ultimate capacity of the poles or conduits."[185] The court held that such an injunction would "infring[e] the legitimate power of Sacramento to prevent disruption of the public domain."[186] "At the very least, Sacramento may regulate the noncommunicative aspects of *cable broadcasting* through rea-

180. *Id.* at 900-01.
181. 800 F.2d at 716.
182. *Id.* at 717 (emphasis added).
183. Pacific West Cable Co. v. City of Sacramento, 798 F.2d 353 (9th Cir. 1986).
184. *Id.*
185. *Id.* at 355.
186. *Id.*

sonable time, place and manner restrictions"[187] through a system "for the allocation of Sacramento's utility resources."[188]

The legitimate power to prevent disruption of the public domain constitutes a substantial governmental interest underlying entry regulation of private cable television systems. This governmental interest supplies a rational basis for a franchising process and anticipates the need to limit the number of cable systems. It does not depend upon "physical scarcity" but it may be fortified by scarcity — physical or economic. It is the context in which every governmental determination to permit the construction of a cable television system must be made.

That no person may construct a cable television system without local governmental action is also consistent with section 541 of the Cable Act.[189] Indeed, under both historic principles of street use and modern federal communications law, no person has a first amendment right to build a cable television system without a franchise. Conversely, there is no constitutional obligation per se to allow any person to use public streets and rights-of-way for the purpose of building a cable system. From this perspective, the public property required for a cable system is not traditional public forum property.[190] Even though cable television "partakes of some of the aspects of speech and the communication of ideas,"[191] the need for a franchise and the implicit power to deny a franchise are consistent with the many holdings of the Supreme Court that there is no first amendment right permitting access to every kind of government property at all times and places.[192]

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187. *Id.* (emphasis added).

188. *Id.*

189. Neither section 541 nor state laws or ordinances requiring franchises or licenses constitute facially invalid prior restraints on speech. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147 (1939) (local ordinances banning or restricting local canvassing and leafletting held unconstitutional as violative of first amendment).

190. Traditional or quintessential public forum property includes streets and parks which have historically been devoted to assembly and debate. The public forum doctrine preceded the advent of cable television technology. *See* Hague v. CIO, 307 U.S. 496 (1939).

191. City of Los Angeles v. Preferred Communications, 106 S. Ct. 2034, 2037 (1986).

192. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981).

Even protected speech is not equally permissible in all places at all times. Noth-

A local governmental franchise is essential for the construction of a cable system by a private entity, but local government is not compelled to grant a franchise. Therefore, the local franchising process may be characterized as a system for selective access to public property for the construction of a cable system. The Supreme Court has recognized the ability of government to create a limited public forum for public communication.[193] In such cases, the Court has indicated that the right of access does not extend to all[194] and that "selective access [granted by government] does not transform government property into a public forum [even a limited one]."[195] In both *Perry* and *Cornelius*, the Court upheld limited access on the basis of reasonable viewpoint-neutral distinctions made in light of the purpose of the forum. Such cases suggest that it is within the constitutional power of government to prescribe the scope of the forum and that local government may decide to dedicate public property sufficient for the erection of a single privately owned television system.

In accord with *Central Telecommunications*, limited access to the public right-of-way is required where economic scarcity exists.[196] The obvious question is whether a local government must prove in every case that cable television will be a natural monopoly in order to support an exclusive franchising procedure.[197] Such a requirement seems too restrictive and overlooks

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> ing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S. Ct. 3439, 3448 (1985). " 'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' " Greer v. Spock, 424 U.S. 828, 836 (1976) (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).

193. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); *Cornelius* 105 S.Ct. at 3449-50.

194. *Perry*, 460 U.S. at 48.

195. *Id.* at 47. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius*, 105 S.Ct. at 3449.

196. Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891, 899-901 (D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986).

197. In this regard, a practical as well as a legal question arises. Specifically, to what extent must a municipality or city be prepared to support a claim of economic scarcity? It seems that a standard which requires a city to conduct a comprehensive, in-depth,

other affirmative governmental interests.

Congress has determined to promote cable television technology consistent with the needs and interests of the local community[198] and to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public . . . ."[199] The statute recognizes the responsibility of local governments to determine cable-related community needs and interests;[200] to assure that the opportunity to subscribe to cable service is not denied on the basis of income[201] or geography;[202] to designate channel capacity;[203] and to require the availability of public, educational and governmental access.[204] In sum, the local governmental interests include the promotion of diversity through the issuance of cable television franchises consistent with the first amendment and the rights of citizens to have access to information distributed by use of public property.

In the context of these affirmative governmental interests, it cannot be assumed that the refusal to grant a second or additional cable systems will impede either diversity or competition in the "marketplace of ideas." The technology of cable television is such that a second system is not needed to expand the channels of information that may be utilized. Congress, of course, has rejected the notion that the cable television franchisee should have the unequivocal right to control either the capacity of the system to be built or the programming to be provided on each and every channel. Nor is competition in the "marketplace of

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expensive study in every instance would be wasteful; instead, a city should be able to rely on findings of other similar communities.

> The First Amendment does not require a city, before enacting [a zoning ordinance prohibiting adult movie theaters near residential property] . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 931 (1986).

198. 47 U.S.C. § 521(2) (Supp. III 1985).

199. *Id.* § 521(4).

200. *Id.* §§ 531(b), 546(a).

201. *Id.* § 541(3).

202. H.R. REP. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4696.

203. 47 U.S.C. § 531.

204. *Id.*

ideas" necessarily served by additional cable systems. Congress has determined that cable television systems in large numbers may be subject to effective competition from alternative delivery systems. The FCC has more recently determined that broadcast television alone suffices to cause competition with cable television.[205] Neither Congress nor the FCC has emphasized that effective competition would be found by overlapping cable systems, most likely because of the rarity with which this occurs. Indeed, the jury determination in *Central Telecommunications* that cable television in Jefferson City was a natural monopoly seems entirely consistent with federal governmental assumptions about the nature of cable television.

The ultimate criterion for determining the constitutionality of a franchising scheme which provides for limited selective access to public property for the construction of a cable television system is whether the reasonable regulation is content-neutral.[206] In *Central Telecommunications,* the court explicitly stated that "there is no question here of content regulation in determining who would be the 'best' applicant."[207] If local governmental action has influenced the content of programming, it is likely to have been attributable, in part, to two aspects of cable television. First, the private cable operator and the government share an interest in the availability of a wide variety of programming and information. Even Congress permits a cable operator to commit to offer broad categories of programming. In such instances, Congress allows a local franchising authority to enforce the programming commitment.[208]

Second, because of the federal ceiling on the amount of

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205. *Report and Order in MM Docket 84-1296*, 55 Rad. Reg. 2d (P & F) 1 (1985).

206. [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

207. Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 714 n.4. (8th Cir. 1986).

208. 47 U.S.C. § 544 (Supp. III 1985).

monetary consideration, i.e. franchise fees,[209] to be paid by the cable operator to the local government, franchising authorities have been precluded from selecting a franchisee solely on the basis of the highest bid. Thus, franchising authorities have been motivated to "quantify" services as part of the selection process and to review programming line-ups. Under the Cable Act, however, local governments may not insist upon requirements for specific programming.[210]

To be sure, the risk that franchising could impinge upon the content of protected speech cannot ever be lightly disregarded. However, this risk is mitigated by the very nature of the technology. With so many separate channels of communication available, the truly "expressive speech" interests of the cable operator are almost indeterminate. Certain programming or channels by themselves might be afforded the highest degree of first amendment protection while other channels and messages standing alone would receive considerably less constitutional protection. A cable system is not uniformly engaged in "the expression of editorial opinions [on public issues] . . . that lies at the heart of first amendment protection."[211] Recently, for example, there has been a proliferation of services available to local cable operators expressly for the direct marketing by video of commercial goods. The fact that cable television operators exercise editorial discretion in some ways similar to that exercised in the print media should not be isolated from the separate traditions which distinguish print from video and newspaper distribution from cable technology.[212]

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209. *Id.* § 542.

210. *Id.* § 544.

211. FCC v. League of Women Voters of California, 468 U.S. 364, 381 (1984).

212. In Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), the court was attracted to similarities between a cable television company and a newspaper insofar as first amendment standards of analysis applied. *Id.* at 1451-54. In City of Los Angeles v. Preferred Communications, Inc., 754 F.2d 1396 (9th Cir. 1985) as well, the Ninth Circuit likened cable television to newspapers in that a cable operator exercises editorial control and judgment over programming. *Id.* at 1406-07. Both courts relied upon Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in which the Supreme Court found that reduced competition in the newspaper business was not cause for permitting governmental action that would impair or interfere with editorial discretion necessary for a free press. But the Supreme Court has never held that first amendment rights of newspapers are unlimited. In FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978), the Court upheld an FCC regulation prohibiting a newspaper from owning a broadcast

Although the courts may "not simply assume that . . .[an] ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity,"[213] a carefully drawn franchising ordinance or regulation that emphasizes channel capacity, state-of-the-art technology and the distinction between the operator's channels and access channels — without regard to the views and specific programming of the cable operator — should satisfy the threshold test of content-neutrality.

If a franchising scheme based upon selective limited access is to withstand first amendment scrutiny, the distinction between conduct and expressive or communicative activity cannot be overemphasized. Denial of the opportunity to build a cable television system does not constitute denial of the right to speak via cable television or, indeed, the right to communicate by video to the home television set. Congress has ensured the ability — subject to franchise commitments for channel capacity — of "cable speakers" to lease channels and the ability of franchising authorities to require adequate channel capacity for public, educational and governmental use.[214] Congress has also expressly prohibited the exercise of editorial control over all such access by cable operators and over all non-governmental channels by franchising authorities. These provisions are based upon historic first amendment considerations. Moreover, if franchising procedures are ultimately to be judged under a standard which requires consideration of the existence of alternative channels of communication for unsuccessful franchise applicants, commercial leased access and access to broadcast licenses and other licensed and unlicensed distribution systems in the community are relevant.

The right to speak by means of cable television does not have to include the right to speak all the time on all the channels to the exclusion of any other use of the media for expressive purposes. In short, the existence in a community of other distribution systems — and perhaps even the opportunity to publish

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television station in the same market.

213. *Preferred Communications*, 106 S. Ct. at 2038 (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984)).

214. 47 U.S.C. §§ 531, 532.

a newspaper — should provide ample alternative channels of communication.

IV. Conclusion

Cable television is a distribution technology. It began as a means of extending the reach of television broadcast signals and has since been promoted, in substantial part, for its ability to provide many channels of communication available for television programming and, to a lesser extent, as an alternative, competitive means of voice and data transmission. Because cable television distributes information and entertainment through use of public property, both its method and purpose are similar to broadcast television. Because its use of public property is permanent, exclusive and tangible, cable television is also similar to telephone and other utility distribution systems. Cable television serves to broaden the electromagnetic spectrum *and* to "widen the sidewalks." In either sense, cable television technology presents the opportunity for the movement of more information, for more purposes by more people.

The distribution of information via cable television is not the same distribution protected by the Supreme Court in the more traditional first amendment cases of the early part of this century.[215] The views expressed on cable television are not offered without charge to casual passersby on the street. Cable television is in the business of using the streets for distributing information. However, it also does more. It is, for example, now used for hawking and peddling wares as in "home shopping." In fact, the potential uses and services of broadband communications transcend protected speech.

The distribution of information via cable also differs from

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215. *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444 (1938) (ordinance forbidding the distribution of literature without prior permission from the City Manager found unconstitutional on its face). *See also* Schneider v. New Jersey, 308 U.S. 147 (1939) (local ordinances banning or restricting local canvassing and leafletting held unconstitutional as violative of first amendment); Hague v. CIO, 307 U.S. 496 (1939) (local ordinances prohibiting distribution of printed matter and prohibiting holding of public meetings in public places without permits held unconstitutional as violative of first amendment); Thornhill v. Alabama, 310 U.S. 88 (1940) (statute forbidding loitering about a place of business for the purpose of inducing individuals not to patronize that place of business, and prohibiting publicizing of facts concerning the involvement of this place of business in a labor dispute, held unconstitutional as violative of first amendment).

newspapers. The newspaper publisher or pamphleteer takes the streets as he finds them. The private cable company may widen the sidewalk but only through the investment of millions of dollars in poles, conduits, cable and electronics on, over or under real estate held in trust for the public. The resulting cable system becomes part of the landscape. The newspaper publisher works on a deadline from one edition to the next and is presumed to know, evaluate and choose in advance each word and image to be distributed. The private cable operator works in a continuum of time and space; even as to programming within his exclusive control — much of it live — he is unlikely to preview every word or image distributed.[216] The editorial function of the cable operator is often passive and general.

Government licensing of broadcasting was necessary to make intelligible distribution possible. It created a new medium which promised to further the goals of the first amendment. Regulation of broadcasting has been sustained to promote diversity and to prevent public property from vesting in private interests solely for private commercial gain. Government franchising of cable television also makes distribution of programming possible.

The decision to grant franchises as well as the decisions to limit the number and choose the franchise holder(s) must all, to a degree, fulfill the purpose of diversity. In a free society, the purpose of the first amendment transcends the whims of the marketplace. As long as the decision on the number of separate wires and the identity of the private owners does not depend upon the content of past or proposed speech on issues of public concern (and at least until we have greater experience with the medium of television), a regulatory scheme for cable television including a competitive franchising process which prevents the appropriation of public property exclusively for private purposes — whether related principally to speech or econom-

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216. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

> [U]nlike local television broadcasting stations that transmit only one signal and receive notification from their networks concerning advertisements, cable operators simultaneously receive and channel to their subscribers a variety of signals from many sources without any advance notice about the timing or content of commercial advertisements carried on those signals."

Id. at 707.

ics — serves the purposes of the first amendment and our federal form of government.