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First Amendment: Awarding Exclusive Cable Franchises through Auction Process Violates the First Amendment Rights of Private Cable Companies

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FIRST AMENDMENT: AWARDING EXCLUSIVE CABLE FRANCHISES THROUGH AUCTION PROCESS VIOLATES THE FIRST AMENDMENT RIGHTS OF PRIVATE CABLE COMPANIES—*Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985).

I. INTRODUCTION

During the past two decades, a new form of telecasting has emerged in the United States in the form of cable television[1]. While cable television has undoubtedly increased the quantity of information and entertainment available to the viewing public, the advent of cable television has also spawned a variety of related legal problems and issues.[2] Among these problems and issues is the proper method for granting cable television companies, in a nondiscriminatory manner, the right to telecast in a given area.[3] In the past, cable television companies obtained a license from a political subdivision of the state in order to provide cable television service to a particular locale.[4] New cable companies must now have a franchise in order to provide cable service within the United States.[5] In most localities, the city governments, acting as franchising authorities,[6] grant exclusive franchises to cable tele-

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1. Cable television refers to systems capable of re-transmitting television broadcast signals and also "transmitting a variety of programming from non-broadcast sources made possible by satellite delivery systems as well as programming originated in their own studios." Berkshire Cablevision v. Burke, 571 F. Supp. 976, 979 n.1 (D.R.I. 1983). In comparison to cable television, " 'CATV', or 'community antenna television', refers to systems that receive television broadcast signals and transmit them by wire to subscribers." *Id.*

2. *See, e.g.*, Fornightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (cable companies that rebroadcast a local television station's programs may infringe on copyright laws); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982) (state law makes distribution of pornographic material over cable a misdemeanor).

3. *See, e.g.*, Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985). In *Tele-Communications*, the U.S. Air Force requested bids for cable television service to Homestead Air Force Base in Florida. *Id.* at 1332.

4. *See* Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543, 545 (W.D. Ky. 1982).

5. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (currently codified at 47 U.S.C.A. §§ 521–559 (West Supp. 1984)). Section 541(b)(1) of the Act provides: "Except to the extent provided in paragraph (2), a cable operator may not provide cable service without a franchise." 47 U.S.C.A. § 541(b)(1) (West Supp. 1985). Paragraph 2 provides: "Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires." *Id.* § 541(b)(2).

6. 47 U.S.C.A. § 522(9) (West Supp. 1985). "Franchising authority" is broadly defined as "any governmental entity empowered by Federal, State or local law to grant a franchise." *Id.*

vision companies through a bidding process.[7] For example, the city of Los Angeles, California, adheres to an auction process which requires a participant to pay a ten thousand dollar filing fee and demonstrate that its business is on a sound financial basis.[8] This auction process was challenged in *Preferred Communications, Inc. v. City of Los Angeles*,[9] wherein the United State Court of Appeals for the Ninth Circuit confronted the issue of whether the city of Los Angeles, consistent with the first amendment to the United States Constitution, could limit access to public utility facilities[10] to one cable television company when the facilities were capable of accommodating more than one company's cable attachments.[11] The court held that Los Angeles could not limit access to an exclusive franchise because to do so would be violative of the first amendment's freedom of expression protections.[12] The court also ruled, however, that the city enjoyed antitrust immunity with respect to the regulation of cable television, and therefore could not be held liable for damages arising from the anticompetitive effects of the city's first amendment violation.[13] As a result, the Ninth Circuit did not require Los Angeles to pay Preferred Communications any damages. Instead, Los Angeles was only required to remedy its first amendment violation by structuring a new auction process that would award cable franchises without violating a participant's right to freedom of expression.[14]

This casenote will initially analyze the rationale used by the Ninth Circuit in determining that the award of an exclusive cable television franchise violated the first amendment. The analysis will then specifically focus on the court's determination that a cable franchising auction process is not content neutral[15] and consequently violates an applicant's freedom of expression. Finally, this note will examine the court's treatment of the antitrust issue and whether its recognition of state action immunity was proper in this instance.

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7. Middleton, *Cable TV Franchise Violates First Amendment*, Nat'l L.J., Mar. 18, 1985, at 8, col. 1.

8. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1400 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985).

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

10. Public utility facilities specifically refer to poles and conduits owned by utility companies. *Id.* at 1400.

11. *Id.* at 1411.

12. *Id.* at 1410–11.

13. *Id.* at 1415.

14. *See id.* at 1411.

15. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). A regulation is non-content neutral if it restricts expression because of its message, its ideas, its subject matter, or its content. *Id.* at 95.

II. FACTS AND HOLDING

Preferred Communications was organized for the purpose of operating cable television systems in the southern half of the city of Los Angeles.[16] Needing a method to supply customers with cable services, Preferred Communications approached two utility companies and attempted to negotiate a lease that would give it the right to attach its cables to the utility companies' poles and conduits.[17] Both utility companies denied Preferred Communications' request, informing the cable company that Los Angeles required all cable companies to obtain a franchise from the city before the cable companies would be permitted to attach cables to public utility facilities located within the city.[18] Subsequently, Preferred Communications petitioned the city of Los Angeles for a franchise.[19]

The city of Los Angeles refused to grant Preferred Communications a franchise because the company had not participated in the city's auction process.[20] Preferred Communications subsequently brought an action in the United States District Court for the Central District of California, challenging the city's policies governing the auctioning of a solitary right to provide cable services in different regions of Los Angeles.[21] The district court dismissed Preferred Communications' constitutional claim because, as a matter of law, the city's auction process did not violate the first amendment rights of a prospective cable television operator.[22] In addition, the court held that the city was immune from antitrust liability.[23] The cable company appealed this decision to the United States Court of Appeals for the Ninth Circuit, arguing that Los Angeles' procedure for awarding cable franchises violated the first amendment,[24] and that Los Angeles was not immune from Sherman

16. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1399–1400 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985).

17. *Id.* at 1400.

18. *Id.* The city of Los Angeles is statutorily authorized to enfranchise cable television companies. *See* CAL. GOV'T CODE § 53066 (West Supp. 1984). *See also* 47 U.S.C.A § 541(b),(e) (West Supp. 1985). The United States Code requires cable operators to have franchises before they can provide cable television service to the general public. *See id.* § 541(b)(1).

19. *Preferred Communications*, 754 F.2d at 1400.

20. *Id.* In order to participate in Los Angeles' auction process, a cable operator must submit to numerous conditions. First, the operator must agree to pay Los Angeles a percentage of future annual gross revenues. *Id.* Second, the operator must provide various channels for the city's use. *Id.* Third, the bidder must allow city officials to set prices and handle customer relations. *Id.* at 1401. These three requirements, in addition to several other requirements, aid the city in deciding which operator is best qualified for each region of the city. *Id.*

21. *Id.* at 1399.

22. *Id.*

23. *Id.*

24. *Id.* at 1401.

Act antitrust liability under the state action exemption.[25]

In the original opinion of March 1, 1985, the Ninth Circuit held that the first amendment prohibited the city from limiting access to public utility poles and conduits to a single cable television company, particularly when the utilities' facilities were capable of accommodating more than one cable television system.[26] In its amended opinion of May 20, 1985, the court added that Los Angeles' method of awarding franchises violated the first amendment because the method created a risk that city officials might discriminate among bidders on the basis of their proposed programming content.[27] The city, however, was not liable for damages as a consequence of the anticompetitive effects of its first amendment violation because the court also held that Los Angeles enjoyed antitrust immunity.[28]

III. BACKGROUND

Before the advent of television, the Federal Communications Commission (FCC) committed most of its efforts to regulating radio broadcasting.[29] In 1934, Congress passed the Communications Act of 1934,[30] giving the FCC the authority to regulate broadcast television. The Communications Act of 1934 was promulgated because of the finite size of the electromagnetic spectrum;[31] regulation of broadcast television has continued for this reason.[32] Although the FCC kept a watchful

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25. *Id.* at 1399 (the Ninth Circuit affirmed the district court's decision as it pertained to Preferred Communications' antitrust claims but reversed the district court's dismissal of Preferred Communications' first amendment claim). *See* Parker v. Brown, 317 U.S. 341, 350–51 (1943) ("nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature"). This immunity from liability under the Sherman Act is called the state action exemption.

26. *Preferred Communications*, 754 F.2d at 1411. As indicated, the Ninth Circuit set forth an opinion that was subsequently amended by two orders. *See Preferred Communications*, No. 84-5541 (9th Cir. June 26, 1985) (order amending opinion) (on file with University of Dayton Law Review); *Preferred Communications*, No. 84-5541 (9th Cir. June 13, 1985) (order amending opinion) (on file with University of Dayton Law Review). *See also Preferred Communications*, 754 F.2d 1396 (9th Cir. 1985) (original opinion) (on file with University of Dayton Law Review).

27. *Preferred Communications*, 754 F.2d at 1406.

28. *Id.* at 1396.

29. *See* Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (codified at 47 U.S.C. §§ 81–115 (1982)), *repealed by* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151–609 (1982)).

30. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151–609 (1982)).

31. "[The] electromagnetic spectrum [is] the entire range of wavelengths or frequencies of electromagnetic radiation from the shortest gamma rays to the longest radio waves, visible light comprising only a small part of the range." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 732 (17th ed. 1976).

32. *See* Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) (the rationale regarding the physical scarcity of the electromagnetic spectrum is recognized as the "physical scarcity rationale").

eye on broadcast television because of the scarcity of broadcast channels, cable television was not subject to direct regulation until 1962.[33] Due to the competitive impact of cable television, the FCC abandoned its "hands-off" policy[34] by imposing two requirements: First, it required cable operators to carry the signals of local broadcasters in service areas where the cable operators brought competing signals; second, the cable operators were forbidden to duplicate programming of local stations for periods of fifteen days before and after a local broadcast.[35]

In 1968, the FCC further expanded its regulation of cable television by proposing additional rules that required cable companies to affirmatively advance statutory policies.[36] The reason for this expansion in the scope of regulation was twofold: (1) cable television was having an adverse impact on broadcast television,[37] and (2) there was a sub-

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33. *See* Berkshire Cablevision v. Burke, 571 F. Supp. 976 (D.R.I. 1983). The *Berkshire Cablevision* court gave a lengthy discourse on the history of cable television regulation:

> Until the early 1960's, the Commission had concluded that it lacked authority to regulate cable television. It had reasoned that cable operators were neither "broadcasters" nor "common carriers" within the meaning of the [Communications] Act [of 1934]. . . .
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> [However, in 1962, the FCC] found that some regulation was necessary to ameliorate the competitive impact of cable television on local broadcast television. The [FCC] imposed two separate requirements on cable television operators. First, they were required to carry the signals of local broadcast stations in service areas in which they bought competing signals. . . . Second, cable operators were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast.

Id. at 983 n.5 (citations omitted).

34. *Id.* at 983 n.5. *See also* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), where the court noted that the United States Supreme Court had recognized the FCC's authority to regulate cable television. *Id.* at 13 (citing United States v. Midwest Video Corp., 406 U.S. 649, 667–68 (1972); United States v. Southwestern Cable Co., 392 U.S. 157, 173–76 (1968)).

35. *See* First Report and Order, 38 F.C.C. 683, 716–30 (1965). *See generally Berkshire Cablevision*, 571 F. Supp. at 983 n.5.

36. *See* Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 422 (1968) (FCC's general position of regulation in order to prevent cable television companies from harming local broadcasters). In providing for the allocation of communication facilities, the FCC is required to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C.A. § 307(b) (West 1982).

The Commission also promulgated local origination rules requiring cable companies to make available facilities for local production. *See Berkshire Cablevision*, 571 F. Supp. at 983 n.5.

37. *See* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). The court in *Black Hills Video Corp.* observed:

> [M]ultiple channel CATV service would impair the existence and development of local television stations by splintering the audience of such stations . . . . Without . . . local stations, many viewers who could not afford CATV charges . . . would be deprived of television service. Such a result would be contrary to the public interest. Protection of public interest in the television field is clearly a responsibility of the Commission under the Federal Communications Act.

Id. at 71.

stantial public interest to consider.[38] The regulations expanded the FCC's regulatory power beyond that which it had previously enjoyed. To be valid, however, the regulations had to meet one of two tests.[39] The ends to be achieved by the regulations had to be (1) "well understood and consistently held ends for which broadcast television could be regulated,"[40] or (2) Congress must have approved of the FCC regulations.[41]

Because the aforementioned requirements apply to all forms of television, it follows that the FCC regulates cable television for some of the same reasons that it regulates broadcast television.[42] For example, the Supreme Court has recognized that the FCC can regulate broadcast television because of the physical scarcity of the electromagnetic spectrum.[43] The FCC has also claimed that cable television regulations are valid because of the physical scarcity of cable attachments on public utility facilities,[44] a position that has been accepted by the United States Court of Appeals for the Eighth Circuit.[45] Thus, one of the rationales used to support the regulation of broadcast television has also been used to support the regulation of cable television.

When courts uphold cable regulations, they not only accept rationales that support the regulation of broadcast television, but they also rely on new theories of justification.[46] For instance, governmental regulation of cable television has been justified using an economic approach. Some courts have recognized that cable television is a natural monopoly[47] and have held that competition for cable services is not economically feasible.[48] Although the United States Supreme Court has re-

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38. *See supra* note 33. It is in the public's interest to have the FCC develop an adequate system of local television. *See Berkshire Cablevision*, 571 F. Supp. at 983 n.5.

39. *Home Box Office, Inc.*, 567 F.2d at 26–28.

40. *Id.* at 28.

41. *See* United States v. Midwest Video Corp., 406 U.S. 649, 667–68 (1972).

42. *See, e.g.*, Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981) (regulation promotes diverse state-of-the-art communication services); *Black Hills Video Corp.*, 399 F.2d 65 (8th Cir. 1968) (regulation protects interstate commerce); *Berkshire Cablevision*, 571 F. Supp. 976 (D.R.I. 1983) (time, place, and manner regulation of expression).

43. *See National Broadcasting Co.*, 319 U.S. at 190.

44. *See, e.g., Century Fed.*, 579 F. Supp. 1553 (N.D. Cal. 1984).

45. *Black Hills Video Corp.*, 399 F.2d at 69. *See also* Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1404 (9th Cir.) (citing *Black Hills Video Corp*, 399 F.2d at 69), *cert. granted*, 106 S. Ct. 380 (1985).

46. Public disruption is another theory relied on by courts to regulate cable television. *See Preferred Communication*, 754 F.2d at 1405.

47. *See, e.g.*, Lamb v. Toledo Blade, 461 F.2d 506, 513 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972) ("[The parties] were competing in a natural monopoly situation in which two or more [cable television] operators could not survive in direct house-to-house competition.").

48. *See Community Communications Co.*, 660 F.2d at 1379 ("The conclusion that [CATV systems are] natural monopol[ies] is a justification for some degree of regulation of cable operators . . . ."). *See also Berkshire Cablevision*, 571 F. Supp. at 986 (because most cable companies

jected this theory as a justification for the regulation of other media, such as newspapers,[49] several lower federal courts have held that the inherent monopolistic character of cable companies allows for governmental regulation.[50]

Interestingly, however, the United States Court of Appeals for the Ninth Circuit apparently abandoned the use of the inherent monopoly theory in adjudicating Preferred Communications' complaint. Instead, the court relied on the first amendment to abrogate Los Angeles' regulatory auction process in *Preferred Communications, Inc. v. City of Los Angeles*.[51]

IV. ANALYSIS

A. Application of the First Amendment to Cable Franchising

1. Los Angeles' Auction Process for Awarding Exclusive Cable Franchises is Unconstitutional

In analyzing the first amendment issues surrounding the franchising process, the United States Court of Appeals for the Ninth Circuit, in *Preferred Communications, Inc. v. City of Los Angeles*,[52] initially observed that the standards of review for regulation of cable and broadcast television are different.[53] Following the lead of the United States Supreme Court,[54] the Ninth Circuit recognized that because of the physical scarcity of the electromagnetic spectrum, regulation of broadcasting frequencies does not violate the first amendment right of free expression when balanced against the public's interest in the airways.[55] The court, however, rejected the idea that the physical scarcity

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have natural monopolies, start-up costs and economic conditions make entry into the cable television market difficult). The rationale used by the courts is referred to as the economic scarcity theory.

49. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

50. *See, e.g., Omega Satellite Prods. Co.*, 694 F.2d at 127–28; *Community Communications Co.*, 660 F.2d at 1379; *Berkshire Cablevision*, 571 F. Supp. at 985–86.

51. 754 F.2d 1396 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985).

52. 754 F.2d 1396 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985).

53. *Id.* at 1403. *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1964) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.").

54. In *Red Lion Broadcasting Co.*, the Court stated: In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the [governmental] regulations . . . are . . . authorized by statute and [are therefore] constitutional." 395 U.S. at 400–01. *See also* National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

55. *Preferred Communications*, 754 F.2d at 1404 ("Without licensing, the broadcast spectrum would be rendered virtually useless to all."). *See also* Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) (recognizing that the electromagnetic spectrum

rationale also applied to cable television in this case because space on the utilities' poles was not limited.[56] Therefore, because adequate facilities were available to support more than one cable company's equipment,[57] Los Angeles was not allowed to restrict the operation of a cable system in a particular region of the city to an exclusive cable company.[58]

Although the Ninth Circuit refused to give effect to Los Angeles' regulatory auction process, the court did recognize that the city had an interest in regulating cable television.[59] The court noted that when cable companies attach cables to utility poles, sections of public streets are closed to the general public.[60] This activity causes public disruption that the city has a responsibility and a right to minimize in order to protect public resources.[61] However, the court held that the city's interest in minimizing public disruption was not important enough to regulate expression.[62] The auction process simply did not further a substantial interest that justified the resulting limitation on cable companies'

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is a finite medium incapable of carrying the messages of all who wish to use it).

56. *Preferred Communications*, 754 F.2d at 1404. The Ninth Circuit stated:

> We cannot accept the City's contention that, because the available space on such facilities is to an undetermined extent physically limited, the First Amendment standards applicable to the regulation of broadcasting permit it to restrict access and allow only a single cable provider to install and operate a cable television system.

Id. See also Home Box Office, Inc. v. FCC, 567 F.2d 9, 45 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("[A]n essential precondition of [broadcast regulation] theory—physical interference and scarcity requiring an umpiring role for government—is absent [with cable television].").

57. *Preferred Communications*, 754 F.2d at 1404 ("[T]he physical scarcity that could justify increased regulation of cable operations does not exist in this case.").

58. *Id.* at 1411. In considering the court's holding, it is noteworthy that all cable companies are allowed access to public utility facilities according to California law. *See* CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1986). Section 767.5(b) of the California Public Utility Code states:

> The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.
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> The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

Id.

59. *See Preferred Communications*, 754 F.2d at 1406.

60. *See id.* (citing Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377 (10th Cir. 1981) ("[A] cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways.")).

61. *See Preferred Communications*, 754 F.2d at 1406.

62. *Id.* at 1406–07.

exercise of editorial control and judgment.[63] Because the auction process did not promote a substantial interest that complied with the Supreme Court's standard[64] for upholding governmental regulations,[65] Los Angeles could not intrude on Preferred Communications' first amendment right to freedom of expression.[66]

2. The Ninth Circuit Failed to Precisely Confront the Facts Presented in *Preferred Communications*

When the Ninth Circuit amended its *Preferred Communications* opinion, it added two extremely significant sentences to its original opinion:[67]

> But the means chosen by the City to serve its interests—allowing only the single company selected through the franchise auction process to erect and operate a cable system in each region—creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or the views expressed in, their proposed programs. This risk can be reduced, if not eliminated, by means less destructive of First Amendment rights.[68]

The addition of these sentences is very troubling. The court implied that the regulations governing the franchise selection process were not content neutral or at least they would not be applied in a content-neutral fashion. This implication indicates that the Ninth Circuit believed it was confronted with a regulation that specifically infringed on the editorial viewpoints[69] of Preferred Communications. The Ninth Circuit, however, claimed that the issue in *Preferred Communications* focused on whether limited access to utility poles for cable attachments ex-

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63. *Id.*

64. In United States v. O'Brien, 391 U.S. 367 (1968), the Supreme Court articulated the following standard for analyzing regulations affecting first amendment expression:

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

Id. at 377.

65. *Preferred Communications*, 754 F.2d at 1404–05.

66. *Id.* at 1411.

67. Before the first amended opinion of *Preferred Communications* was finished, at least one court had already commented on the *Preferred Communications* pre-amended decision. *See* Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1338 n.3 (D.C. Cir. 1985) ("The precise basis for the Ninth Circuit's opinion [in *Preferred Communications*] is unclear . . . ."). *See also supra* note 26.

68. *Preferred Communications*, 754 F.2d at 1406.

69. A broadcasted editorial viewpoint of an entity like Preferred Communications would appear to be analogous to a spoken message of an individual for purposes of the right to freedom of expression under the first amendment to the United States Constitution.

isted—that is, whether there was a scarcity in utility facilities that justified Los Angeles' discriminatory auction process.[70] As the court noted in its subheading, this issue involves the cable television medium.[71] Thus, the issue presented emphasizes the means or medium of transporting the communication, not the message or views of the cable company. The court, for some reason, felt compelled to address the latter issue.

Despite the differences between *medium* and *views*, the Ninth Circuit did not adequately distinguish between the regulation of access to utility poles—medium—and the regulation of expression—views. The court rather carelessly categorized medium and views as one-in-the-same. The Ninth Circuit may have rationalized this categorization because nearly all regulations that are non-content neutral are per se violations of the first amendment right of free expression.[72] The court's rationalization, however, ignores the fact that lower federal courts need unambiguous precedent when confronted with complicated issues that are similar to those the Ninth Circuit confronted in *Preferred Communications*.[73]

The Ninth Circuit should have noted that the propriety of access regulations and the legitimacy of viewpoint regulations are analyzed under differing standards. Government regulation of the dissemination of an individual's *viewpoints* must withstand strict scrutiny; the regulation must be narrowly drawn to further a compelling state interest.[74] To the contrary, when a local government regulates *access* to communicative mediums, it need only prove that it has an important interest in regulating such access and that the incidental restriction on alleged first amendment rights is not greater than that which is essential to the

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70. *See Preferred Communications*, 754 F.2d at 1401. The court stated:

We believe such an issue is as follows:

> 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?

Id.

71. *Id.* at 1403 ("B. *The Cable Television Medium and the First Amendment*").

72. *See* Widmar v. Vincent, 454 U.S. 263, 276 (1981) ("Our cases have required the most exacting scrutiny in cases in which a state undertakes to regulate speech on the basis of its content."). *See also* Cohen v. California, 403 U.S. 15, 19 (1971) ("[T]he State certainly lacks power to punish [citizens] for the underlying content of the[ir] message[s] . . . .").

73. For example, the United States District Court for the Central District of California would not know which provisions of the auction process were invalid because the Ninth Circuit did "not decide the validity of any specific requirements called for by the City's franchising process." *Preferred Communications*, 754 F.2d at 1401

74. *See Widmar*, 454 U.S. at 270.

furtherance of the important governmental interest.[75] If the proffered governmental interests, such as avoiding public disruption and preventing physical scarcity of public utility pole space, are of the requisite "importance," then the "regulation of access" is allowed to be more intrusive upon first amendment rights than "regulation of views," and a city may be warranted in restricting access of a cable system.[76] Consequently, the courts must explicitly distinguish between cases where a local goverment engages in the regulation of viewpoints from those situations where the government regulation is merely restricting access to a particular type of medium. The Ninth Circuit's analysis in *Preferred Communications* failed to make this important distinction.

B. Antitrust Liability

1. Los Angeles is Immune from Antitrust Liability

The second issue raised in *Preferred Communications* was the liability of Los Angeles for an alleged antitrust violation.[77] The Los Angeles auction process was found to grant the city monopolistic power over cable systems.[78] When incorporated government entities, such as the city of Los Angeles,[79] attempt to monopolize, they are literally subject to the antitrust proscriptions of the Sherman Act.[80] Nevertheless, immunity from the Sherman Act has been accorded government entities in certain circumstances.[81] For instance, states acting in their sovereign capacity[82] are immune from liability under the Sherman Act.[83] This immunity, however, is restricted when applied to local government entities;[84] political subdivisions of the state do not automatically share the

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75. *See O'Brien*, 391 U.S. at 376–77.

76. *See Preferred Communications*, 754 F.2d at 1404–06.

77. *Id.* at 1401.

78. *See id.* at 1405, 1412.

79. The city of Los Angeles is a municipal corporation. *Id.* at 1396.

80. *See* 15 U.S.C. § 2 (West Supp. 1985). Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, . . . shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars . . . ." *Id. See also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 397 n.14 (1978) (cities are, with some exceptions, subject to antitrust laws).

81. *See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943) (state regulation of raisin crop nonviolative of Sherman Act).

82. "The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers." *Id.* at 359–60.

83. *Id.* at 350–51. *See Preferred Communications*, 754 F.2d at 1411 ("States, acting 'as sovereigns,' are immune from liability under the Sherman Act.").

84. *Preferred Communications*, 754 F.2d at 1411.

state's immunity.[85] Instead, a city like Los Angeles must act, when displacing competition, pursuant to a "clearly articulated and affirmatively expressed state policy."[86] Moreover, the state must actively supervise the municipality's anticompetitive conduct when the municipality delegates the state-authorized power to private parties.[87]

In determining whether Los Angeles' actions were pursuant to a "clearly articulated and affirmatively expressed state policy," the Ninth Circuit scrutinized the city's actions under a two-part test. First, because the city's actions were allegedly displacing competition in the provision of cable services, the court had to determine whether the state policy allowed such displacement of competition with regulation or monopolization of public cable television services.[88] Second, the court had to analyze whether the state legislature contemplated the kinds of actions alleged to be anticompetitive.[89] The Ninth Circuit determined that the first part of the test was sufficiently met because the legislature had, by statute, granted Los Angeles the authority to regulate cable systems by allowing cities to grant licenses or franchises.[90] The second part of the antitrust immunity test was also satisfied because in the court's opinion the legislature had to have foreseen the specific anticompetive action taken by Los Angeles—"a reasonable consequence of [the city's] engaging in the authorized regulatory activity."[91] Because the two parts of the test were satisfied, the court recognized that the city correctly acted under a "clearly articulated and affirmatively expressed state policy" which, consequently, resulted in antitrust immunity.[92]

The conclusion of the court is substantively correct; a governmental agent of the state should not be restrained by the Sherman Act's

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85. *Id.* "[F]or purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *City of Lafayette*, 435 U.S. at 410 (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975)). The Supreme Court confirmed the validity of the reasoning of *City of Lafayette* in Community Communications Co. v. City of Boulder, 455 U.S. 40, 51 n.14 (1982).

86. *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). "[T]wo standards [must be met] for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Id.* at 105 (quoting *City of Lafayette*, 435 U.S. at 410). *See also Preferred Communications*, 754 F.2d at 1411 (quoting *City of Lafayette*, 435 U.S. at 410).

87. *California Retail Liquor Dealers Ass'n*, 455 U.S. at 105–06. *But see* Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713, 1720–21 (1985) (active state supervision component need not be met when municipality is the actor). *See infra* text accompanying note 109.

88. *Preferred Communications*, 754 F.2d at 1412.

89. *Id.*

90. *Id.* at 1412–14. *See also* CAL. GOV'T CODE § 53066 (West Supp. 1986) (reproduced at *infra* note 104).

91. *Preferred Communications*, 754 F.2d at 1414–15.

92. *Id.* at 1415.

antitrust prohibitions when the agent's activities are directed by the legislature.[93] The Ninth Circuit, however, did not need to meticulously proceed through its two-part test to determine that Los Angeles acted under a "clearly articulated and affirmatively expressed state policy." Instead, the court should have invoked the one-step test as presented by the United States Supreme Court in *Town of Hallie v. City of Eau Claire*.[94]

2. The *Town of Hallie* test

After the original opinion of *Preferred Communications* was issued by the Ninth Circuit, the United States Supreme Court decided *Town of Hallie*.[95] In *Town of Hallie*, the city of Eau Claire, Wisconsin, acquired a monopoly over sewage treatment services[96] and refused to provide service to four neighboring townships.[97] Instead, Eau Claire supplied services to individual landowners in a given area after a majority of the landowners voted to have their homes annexed by the city.[98] The plaintiffs claimed that Eau Claire used its authorized monopoly to gain an unlawful monopoly over sewage collection and transportation services.[99]

The plaintiffs' contention forced the Supreme Court to confront an important question: How clearly must a state policy be articulated for a municipality to establish that its anticompetitive activity is pursuant to a state mandate, thus giving rise to antitrust immunity?[100] The Supreme Court held that the Wisconsin legislature was not required to assert explicitly that it expected Eau Claire's conduct to have anticompetitive effects in order for the city's activities to be protected under the umbrella of state action.[101] Instead, it was sufficient that Eau Claire had been given a grant of regulatory authority and that the anticompetitive effects logically resulted from this broad regulatory authorization.[102] Because the legislative grant of a monopoly over construction of a sewage system and the provision of such services in designated areas

93. *See Parker*, 317 U.S. at 350–51.

94. 105 S. Ct. 1713 (1985).

95. The original *Preferred Communications* opinion was published on March 1, 1985. *See supra* note 26 and accompanying text. The Supreme Court decided *Town of Hallie* on March 27, 1985. *Town of Hallie*, 105 S. Ct. at 1713.

96. *Id.* at 1715. The city had previously obtained federal funds to build a sewage treatment facility within the area including the petitioning towns of Hallie, Seymour, Union, and Washington. *Id.*

97. *Id.*

98. *Id.* at 1715–16. *See* WIS. STAT. ANN. § 144.07(1) (West 1974).

99. *Town of Hallie*, 105 S. Ct. at 1716.

100. *Id.* at 1717.

101. *Id.* at 1718.

102. *Id.*

satisfied the clear articulation test, the city's attempts to monopolize sewage collection and transportation were immune from antitrust action as they were the logical anticompetitive consequence of the state's grant of authority. Accordingly, Eau Claire's conduct met the requirements of the state action test and, therefore, immunized the city from antitrust liability.[103]

The facts in *Preferred Communications* are analogous to those in *Town of Hallie*. Just as Eau Claire was given legislative authorization to construct sewage systems and provide the related services, Los Angeles was given broad authority to control the construction of cable systems and the provision of cable services.[104] Acting pursuant to the statute, Los Angeles formed an auction process to choose cable companies for exclusive cable franchises.[105] As noted, the Ninth Circuit recognized that the Los Angeles auction process created a monopoly.[106] The court should also have recognized that the monopoly was a logical anticompetitive effect of Los Angeles' broad regulatory authorization.[107] Therefore, the Ninth Circuit should have carefully compared the facts of the two cases and followed *Town of Hallie* to hold that Los Angeles enjoyed antitrust immunity.

Ironically, the Ninth Circuit cited *Town of Hallie* in its amended opinion.[108] The court recognized that the Supreme Court does not require states to "actively supervise" policies authorizing anticompetitive conduct by its municipalities when a municipality, rather than a private party, is the actor.[109] The Ninth Circuit, however, failed to properly utilize *Town of Hallie* as a one-step test to determine that Los Angeles acted under a "clearly articulated and affirmatively expressed state policy." Instead, the court adhered to its two-step test and set a cumbersome precedent for future cases.

It will be particularly burdensome for a court to apply the first part of the Ninth Circuit's test. Normally, courts do not specifically

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103. *Id.* at 1718–19.

104. *See* CAL. GOV'T CODE § 53066 (West 1983). Section 53066 provides:

> Any city . . . in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system.

Id.

105. *Preferred Communications*, 754 F.2d at 1400–01.

106. *Id.* at 1405, 1412.

107. *See Town of Hallie* 105 S. Ct. at 1718. *See also supra* text accompanying notes 102–03.

108. *Preferred Communications*, 754 F.2d at 1414 (citing *Town of Hallie*, 105 S. Ct. at 1718–19).

109. *Id.* at 1412. *See supra* note 87 and accompanying text.

determine the ambit of a legislative policy if the boundaries of the policy's reach are not defined.[110] Under the first part of the test, however, the court examines a state policy and determines if the legislature desired the displacement of competition even though this intention was not specifically mentioned. To make this determination, the court will have to delve unnecessarily into legislative history and hypothesize about the ramifications of state legislative policy.

The second part of the test will burden the political subdivision rather than the courts. The political subdivision must prove to the court that the legislature contemplated the anticompetitive effects of the legislature's grant of rule-making authority. Part of the political subdivision's proof will include showing that the effects of its actions are a reasonable consequence of the political subdivision's involvement in the authorized regulatory activity.[111] Thus, the political subdivision must show the existence of a substantial reason for limiting competition; the complaining party is not required to prove that the alleged anticompetitive effects of the political subdivision's actions are an unreasonable consequence of the subdivision's involvement in the authorized regulatory activity. For example, a substantial reason for Los Angeles to limit access to utility resources would be "to minimize disruption of public resources."[112] This puts a significant evidentiary burden on the state's political subdivision and ignores the existence of an adequate one-step test developed by the Supreme Court in *Town of Hallie* which merely requires that there be a grant of legislative authority that logically results in the subsequent anticompetitive effects.[113]

V. CONCLUSION

In *Preferred Communications, Inc. v. City of Los Angeles*,[114] the United States Court of Appeals for the Ninth Circuit refused to allow a franchising authority to limit access to public utility facilities to an exclusive cable television company when the facilities were capable of accommodating more than one company's cable attachments.[115] The

110. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978) ("A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the [specified] reach of the statute . . . .").

111. *See, e.g., Preferred Communications*, 754 F.2d at 1415 ("That some cities, to minimize the disruption of public resources, might limit the number of cable providers seems to us to constitute at least a reasonable consequence of their engaging in the authorized regulatory activity.").

112. *Id.*

113. *See supra* notes 100–03 and accompanying text.

114. 754 F.2d 1396 (1985).

115. *Id.* at 1411. *See supra* note 26 and accompanying text.

court concluded that the franchising authority's scheme of exclusivity—an auction process awarding the franchise to one applicant—violated the applicant cable company's freedom of expression as guaranteed by the first amendment.[116] The ramifications of this holding, however, should not be far reaching as the court did not indicate what parts of the auction process were unconstitutional. Specifically, the court did not state whether the process was meant to regulate the content of the broadcasting or merely the medium by which the broadcast was conveyed. Because the Ninth Circuit was not specific in its application of first amendment principles to the facts in this case, courts that confront similar issues with cable television regulation in the future will be unable to use the Ninth Circuit's opinion for guidance or as supportive precedent.[117]

The Ninth Circuit also failed to provide a promising precedent in deciding the antitrust issue. First, the court invoked a cumbersome two-part test which (a) directs courts to speculate about the legislature's intent behind state policies, and (b) requires political subdivisions to prove that the means used to implement the grant of regulatory authority were contemplated by the state legislature. Second, the court failed to utilize properly Supreme Court guidance in analyzing the antitrust issue; the Ninth Circuit did not draw upon the test expressed in, *Town of Hallie v. City of Eau Claire*,[118] whereby a court need only determine that the anticompetitive means chosen logically proceed from a legislative grant of authority. Therefore, it is highly unlikely that *Preferred Communications* will stand as convincing precedent in this evolving area of communications law.

Michael A. Metz

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116. *Id.*

117. The usefulness of the Ninth Circuit's opinion may soon become a moot topic. On November 12, 1985, the United States Supreme Court granted review of defendant Los Angeles' petition for certiorari. *Preferred Communications*, 106 S. Ct. 380 (1985). Although the Ninth Circuit addressed two issues in *Preferred Communications*, Los Angeles has only sought review of the Ninth Circuit's decision on the first amendment issue. Telephone interview with Siegfreid Hesse, of Farrow, Schildhouse & Rains, Oakland, Cal., Preferred Communications' attorney (Feb. 18, 1986).

It is impossible to accurately predict the direction the Court will take when it addresses the first amendment issue. Because the decision by the Ninth Circuit was decided on the parties' pleadings, the Court lacks a record on which it may base its decision. *Id.* Furthermore, the Supreme Court has received numerous amicus curiae briefs, which have adversely impacted the clarity of the issue. *Id.*

118. 105 S. Ct. 1713 (1985).