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

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

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

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

\textsuperscript{3} Cable television dates back to the 1950's when community antenna systems (CATV)
simply provided better reception and carried more distant broadcast signals into the home. By
the end of the decade there were roughly 640 cable systems serving approximately 650,000
subscribers. See Besen \& Crandall, \textit{The Deregulation of Cable Television}, 44 \textit{Law \& Con-
temp. Probs.} 77, 79-81 (1981). Six percent of the nation's households were cable subscribers
by 1969 and the numbers continued to grow throughout the 1970's to more than 14 million
subscribers—nearly 20% of all television households. \textit{Id.} at 79. In the mid-1970's the technol-
ogical development of cable systems and satellite service spurred the expansion of cable televi-
sion systems. Cable companies began to offer nonbroadcast channels featuring movies,
sporting events, religious programs, and special shows for children. \textit{Id.} at 81.
operators seeking first amendment protection of their activities frequently have attacked two separate areas of governmental regulation: the establishment of channel and programming requirements and the licensing process itself.

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

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


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


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

10. Compare Community Communications, 660 F.2d at 1379, and Berkshire, 571 F. Supp. at 984-85 (courts reject comparison between newspapers and cable), with Midwest Video, 571 F.2d at 1056 (analogizes newspapers and cablecasting).
In Preferred Communications, Inc. v. City of Los Angeles, the United States Court of Appeals for the Ninth Circuit held that a city’s franchising procedure could be an unconstitutional infringement upon the first amendment rights of cable operators. The Ninth Circuit first engaged in a traditional first amendment analysis focusing on the nature of the medium being regulated. The court then shifted its focus away from the characteristics of the medium to examine the type of public property to which access was being sought. Here, the court applied the public forum doctrine and found the city’s refusal to provide a cable franchise unconstitutional, at least where the available facilities were potentially capable of accommodating additional systems.

Preferred Communications, Inc. (PCI), in an effort to set up a cable television system in Los Angeles, approached two utility companies to negotiate an agreement for use of their poles and conduit space. Both utilities required that PCI first obtain a city franchise to provide cable service. Los Angeles refused PCI’s franchise request because it had not participated in an auction where the city awarded one franchise to each region. PCI then brought suit against the city alleging that the refusal to award it a franchise was a deprivation of first and fourteenth amendment rights, as well as a violation of federal antitrust laws and various other state laws. The trial court granted the city’s motion to dismiss for failure to state a claim upon which relief could be granted finding that the city’s franchising process did not violate the first and fourteenth amendment rights of a

11. 754 F.2d 1396 (9th Cir.), cert. granted, 106 S. Ct. 380 (1985).
12. Preferred, 754 F.2d at 1411.
13. Id. at 1403-07.
14. Id. at 1405-09.
15. Id. at 1407-09.
16. Id. at 1411.
17. Id. at 1400.
18. Id.
19. Id. at 1401. The California Government Code authorizes the licensing of a cable television system by a local municipality. See CAL. CODE § 53066 (West Supp. 1984). Los Angeles allocates cable franchises through an auction process. A company wishing to participate in the auction must pay or promise to pay a number of fees and must submit a detailed proposal outlining its proposed operations for a nine-year period. Preferred, 754 F.2d at 1400. Furthermore, the company must demonstrate that it has a strong financial base and “good character,” that its operations constitute “sound business plans,” and that it has “demonstrated business experience.” Id. Bidders also must agree to share a percentage of future annual gross revenues with the city, to provide certain customer services, and to provide various mandatory access and leased channels. Id.
20. Preferred, 754 F.2d at 1399. The court dismissed without prejudice the two alleged state law violations for refiling in state court. Id. at 1399 n.1.
21. Id. at 1399 (complaint dismissed without leave to amend pursuant to FED. R. CIV. P. 12(b)(6)).
prospective cable operator and that the city was immune from antitrust liability.  

On appeal, a three-judge panel of the Ninth Circuit unanimously reversed the lower court’s dismissal of the first amendment claim and affirmed its dismissal of the antitrust claims.  

The case was remanded to the district court for resolution of the factual issue of whether the city had violated PCI’s first amendment rights by refusing it access to public facilities.

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

I. THE CABLE COMMUNICATIONS POLICY ACT OF 1984

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

Through its enactment of the Cable Communications Policy Act of

22. Id.
23. Id. A dismissal is upheld if it “appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In conducting the review, the court presumes that all allegations in the complaint are true, and all doubts are resolved in the plaintiff’s favor. Id. See infra note 162 for discussion of the antitrust claim and the grounds for its dismissal.
24. Preferred, 754 F.2d at 1415.
25. See Note, Cable Franchising, supra note 2, at 323-24.
26. Id.
27. A recent survey showed that of the 4200 cities with cable television systems, 99.7% have only one franchisee. See Noam, Towards an Integrated Communications Market—Overcoming the Local Monopoly of Cable Television, 34 FED. COMM. L.J. 209, 242 n.148 (1982).
1984, Congress specifically required that cable operators be franchised if they are to provide service. The Cable Act set out a national cable communications policy that was intended to "establish guidelines for . . . Federal, State, and local authorities with respect to the regulation of cable systems." The national standards for cable franchising were an attempt to provide "the cable industry with the stability and certainty that are essential to its growth and development."

Section 621 of the Cable Act authorizes the franchising authority to award "1 or more franchises within its jurisdiction." The term "franchising authority" includes "any governmental entity empowered by Federal, State, or local law to grant a franchise." This provision is designed to permit the franchising authority to determine the number of cable operators that will serve its jurisdiction. Once a cable company is granted a franchise, it is authorized to construct a cable system over public rights of way and easements dedicated for compatible uses. The cable operator must pay the installation and operation cost, ensure the continued safety and appearance of public rights of way and easements.
of the property being used, and provide just compensation to any property owner who incurs damages in the course of installation and operation.\textsuperscript{36}

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

\section*{II. The First Amendment as Applied to Various Media: Is the Past Prologue?}

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

\begin{footnotesize}
\begin{itemize}
  \item[36.] Id. § 621(a)(2)(A)-(C) (codified at 47 U.S.C.A § 541(a)(2)(A)-(C) (West Supp. 1985)).
  \item[37.] Id. § 612 (codified at 47 U.S.C.A. § 532 (West Supp. 1985)).
  \item[38.] Id. § 612(b)(1) (codified at 47 U.S.C.A. § 532(b)(1) (West Supp. 1985)).
  \item[39.] Id. § 612(c)(2) (codified at 47 U.S.C.A. § 532(c)(2) (West Supp. 1985)). This section states:

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

  \item[40.] See H.R. REP. No. 934, supra note 31, at 32, reprinted in U.S. CODE CONG. & AD. NEWS at 4669 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
  \item[41.] See, e.g., Red Lion, 395 U.S. at 390 ("the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas"); Associated Press, 326 U.S. at 20 (The goal of the first amendment is to promote "the widest possible dissemination of information.").
\end{itemize}
\end{footnotesize}
Access Rights of Cable Television Companies

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

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

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

46. See, e.g., Omega Satellite, 694 F.2d at 127-29; Community Communications, 660 F.2d at 1376; Midwest Video, 571 F.2d at 1052-57; Home Box Office, 567 F.2d at 43-51.
47. See infra text accompanying notes 57-77.
48. See infra text accompanying notes 78-101.
49. See infra text accompanying notes 102-22.
54. Compare National Broadcasting Co., 319 U.S. 190 (1943) (discussing physical scarcity
government regulation, cable's interference with the public domain, arises from cable's unique characteristics. Numerous courts have maintained that the disruption caused by cable wiring to public streets and thoroughfares justifies increased regulation of the industry.

A. Physical Scarcity Theory as a Justification for Government Regulation

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

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

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

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

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

58. See supra note 51.

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

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


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


63. Id. at 218-19; see also Red Lion, 395 U.S. at 385-86.
The Supreme Court elaborated on the scarcity principle in *Red Lion Broadcasting Co. v. FCC*. In *Red Lion*, the Court upheld the constitutionality of the FCC fairness doctrine that requires broadcasters to air both sides of controversial public issues. The broadcaster unsuccessfully argued that this doctrine interfered with editorial control of content in violation of the first amendment. The Court rejected this claim, reasoning that scarcity permitted the government to impose restraints "on licensees in favor of others whose views should be expressed on this unique medium." Justice White, writing for the majority, stated that the goal of the first amendment is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." He therefore concluded that "[i]t is the right of the viewers and listeners, not the right of

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


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

Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete . . . . We are not prepared, however, to reconsider our long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required. *League of Women Voters*, 104 S. Ct. at 3116 n.11 (1984).

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

68. 395 U.S. at 390.
the broadcasters which is paramount.\textsuperscript{69}

The only court to approve physical scarcity as a justification for cable regulation was the United States Court of Appeals for the Eighth Circuit in \textit{Black Hills Video Corp. v. FCC}.\textsuperscript{70} Embracing the physical scarcity theory, the court upheld the FCC's power to regulate community antenna television systems that retransmit signals received from broadcasting stations.\textsuperscript{71} Significantly, however, many courts have rejected the \textit{Black Hills Video} reasoning because of the technological advances of the cable industry since 1968.\textsuperscript{72} Cable television systems no longer serve solely as passive retransmitters of broadcast signals, but now originate programming and select which other stations' broadcasts they will carry.\textsuperscript{73} Furthermore, the Eighth Circuit's later opinion in \textit{Midwest Video Corp. v. FCC}\textsuperscript{74} seriously weakened the acceptance of the physical scarcity rationale in \textit{Black Hills Video}.

Still, courts have noted that there are some physical limitations imposed by the number of cables that can be strung from utility poles or buried underground.\textsuperscript{75} While the need to regulate broadcast frequencies because of speaker interference is not an applicable concern for cable broadcasting, courts have recognized another type of scarcity justification\textsuperscript{76} and another type of interference\textsuperscript{77} that may justify a degree of government regulation of cable service.

\section*{B. The Economic Scarcity Rationale as a Justification of Government Regulation}

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

\begin{itemize}
\item \textsuperscript{69} \textit{Id.} See also \textit{National Broadcasting Co.}, 319 U.S. at 218-19.
\item \textsuperscript{70} \textit{399 F.2d 65 (8th Cir. 1968)}.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} See, e.g., \textit{Omega Satellite}, 694 F.2d at 127 ("frequency interference [is] a problem that does not arise with cable television"); \textit{Home Box Office}, 567 F.2d at 45 n.80.
\item \textsuperscript{73} See, e.g., \textit{Midwest Video}, 571 F.2d at 1054-55; see also Note, \textit{Cable Franchising}, supra note 2, at 319.
\item \textsuperscript{74} \textit{571 F.2d 1025 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979)}.
\item \textsuperscript{75} See, e.g., \textit{Omega Satellite}, 694 F.2d at 126; \textit{Century Fed.}, 479 F. Supp. at 1563.
\item \textsuperscript{76} See infra text accompanying notes 78-101.
\item \textsuperscript{77} See infra text accompanying notes 102-22.
\item \textsuperscript{78} Compare \textit{Home Box Office}, 567 F.2d 9 (1977) (rejecting the economic scarcity rationale as a justification for regulating the cable industry), with \textit{Community Communications}, 660 F.2d 1370 (1981) (accepting the economic scarcity rationale as a justification for regulating the cable industry).  
\end{itemize}
than one cable company to operate in a particular geographic area. In response, courts have been forced to decide whether the industry's natural monopolistic qualities were an adequate justification for the proposed government restraint.

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

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

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

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79. See Community Communications, 660 F.2d at 1374.
81. Id. at 244.
82. Id. at 249-51.
83. Id. at 258.
84. See Midwest Video, 571 F.2d at 1055-56; Home Box Office, 567 F.2d at 46; see also Quincy Cable, 768 F.2d at 1450-51. But see Berkshire, 571 F. Supp. at 985.
85. Midwest Video Corp. v. FCC, 571 F.2d 1025, 1032 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979). The court here reviewed the FCC's 1976 Report that had altered the 1972 mandatory access rules in three major ways: it eliminated the top 100 market criteria thereby applying them to all cable systems with more than 3499 subscribers; it extended the compliance deadline for the 20-channel construction requirement to June 21, 1986, for most, but not all of the existing systems; and it required four access channels of large systems and required other systems to conglomerate access on one or more channels. Id. at 1033-34.
86. Id. at 1035.
87. Id. at 1052-57.
ation decisions over the four required public access channels. In rejecting the government's power to compel public access, the court compared cablecasting to newspapers. It referred to cable operators as the creators of a "private electronic 'publication'" and criticized the Commission for ignoring the Supreme Court's holding in Miami Herald. The court indicated that the rights of the public to engage in free speech should have been balanced against freedom of the press. The court maintained that the Commission had improperly disregarded the latter consideration.

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

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

88. Id. at 1055-56.
89. Id. at 1056. See generally Note, Cable Television and Content Regulation: The FCC, The First Amendment and the Electronic Newspaper, 51 N.Y.U. L. REV. 133 (1976).
90. Midwest Video, 571 F.2d at 1053.
91. Id.
93. Id. at 46.
94. Id.
95. Id. But cf. Quincy Cable, 768 F.2d 1434 at 1450 (stating that "the tendency toward monopoly, if present at all, may be attributable more to governmental action—particularly the municipal franchise process—than to any 'natural' economic phenomenon").
96. Home Box Office, 567 F.2d at 46.
97. Id.
98. See, e.g., Omega Satellite, 694 F.2d at 127-28; Community Communications, 660 F.2d at 1378-79; Berkshire, 571 F. Supp. at 985; Hopkinsville Cable TV, 562 F. Supp. at 547.
99. Community Communications, 660 F.2d at 1379; Berkshire, 571 F. Supp. at 985.
facilities,\textsuperscript{100} and thus provided the local municipality with a legitimate interest in limiting access to these facilities.\textsuperscript{101}

\section*{III. Disruption of the Public Domain as a Justification for Government Regulation}

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

The issue in \textit{Community Communications} was whether the city's geographic districting plan violated the first amendment rights of cable operators.\textsuperscript{104} The case arose following the issuance of a preliminary injunction against the City of Boulder\textsuperscript{105} preventing Community Communications Company (CCC) from expanding its cable television services into the city.\textsuperscript{106} Overruling the district court, the Tenth Circuit examined the degree of government regulation over cable operators permitted by the first amendment.\textsuperscript{107} The court offered two justifications for the city's regulations: cable's disruption of municipal resources\textsuperscript{108} and economic scarcity.\textsuperscript{109}

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

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\textsuperscript{100} Omega Satellite, 694 F.2d at 127; Community Communications, 660 F.2d at 1378-79; Berkshire, 571 F. Supp. at 985.
\textsuperscript{101} Omega Satellite, 694 F.2d at 127; Community Communications, 660 F.2d at 1378; Berkshire, 571 F. Supp. at 985.
\textsuperscript{102} 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982).
\textsuperscript{103} Id. at 1377-78.
\textsuperscript{104} Id. at 1373. In 1966, Boulder granted the plaintiff a 20-year revocable license, permitting the company to provide cable services to all residents of Boulder. Community Communications Co. (CCC) chose to serve only one area of Boulder until 1979 when it informed the city of its expansion plans. The city had also received a request from another company for a permit. Boulder conducted a study of the industry's technology and concluded that cable systems were natural monopolies. As a result of the study's findings, the city placed a moratorium on CCC's expansion efforts. This provided other companies the opportunity to bid on service to the other areas before CCC could monopolize the cable industry in Boulder. Shortly afterward, CCC filed a complaint against the city alleging its actions violated the Sherman Act and the first amendment. Id.
\textsuperscript{105} Id. at 1372.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 1375-80.
\textsuperscript{108} Id. at 1377-78.
\textsuperscript{109} Id. at 1378-79.
\end{flushleft}
they must interfere with municipal facilities by stringing cable across poles or through underground conduits.\textsuperscript{110} In this respect, the court distinguished cable broadcasting from the printed press, which reaches its intended audience without any disruptive effect on public property.\textsuperscript{111} Focusing on cable's disruptive effect on the public domain, the court concluded that cable broadcasters, in order to engage in first amendment activities, must necessarily obtain a license.\textsuperscript{112} It reasoned that governmental interference with a cable operator's first amendment rights is justified to limit public inconvenience and to promote public safety.\textsuperscript{113}

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

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

\textsuperscript{110} Id. at 1377.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 1377-78.
\textsuperscript{113} Id. at 1378.
\textsuperscript{114} This argument was advanced by the City and rejected by the lower court. Id. at 1378-79.
\textsuperscript{115} Id. at 1379. See also Berkshire, 571 F. Supp. at 976 (distinguishing cable from newspapers because the print media historically has been free from governmental control over content).
\textsuperscript{116} Community Communications, 660 F.2d at 1379.
\textsuperscript{117} Id. ("[The city] must be permitted to deal with the effects of the scarcity that may attend the use of the license it is about to issue.").
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
gree of regulation. The court maintained that while the general rationale for allowing government regulation may be the same for cable as for broadcasting, the criteria upon which licensing decisions are based may be different for the two industries. Community Communications suggested three factors that may justify differences in the regulations applied to the cable medium: first, the degree of the medium's natural monopolistic tendencies; second, the potential for technological developments; and finally, the possible uses of cable as a form of two-way communication.

IV. The Treatment of Cable Regulations as an Incidental Burden on Speech

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

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

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

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


124. Id. at 49. The Commission feared pay cable television would have adverse affects on conventional broadcasting by "siphoning" its programs. Siphoning occurs when a program aired on free television is purchased by a subscription cable channel. The Commission argued that the program purchased by the cable company no longer would be available to television networks or that its showing would be delayed. In either event, the Commission argued this phenomenon would prevent or delay viewing access to a segment of the American public. Id. at 24-25.
cided on statutory grounds,\textsuperscript{125} the court also discussed the constitutional propriety of the FCC pay cable rules. In evaluating the first amendment issues, the court rejected both the physical and economic scarcity rationales for government regulation.\textsuperscript{126} The court, acknowledging that the first amendment permits the regulation of "collateral aspects" of speech,\textsuperscript{127} treated the FCC regulations as an incidental burden on the cable operator's free speech rights.\textsuperscript{128} The \textit{Home Box Office} court concluded that the regulations affected "a government interest . . . unrelated to the suppression of free expression."\textsuperscript{129} stating that the proper test for the constitutionality of such regulations was outlined by the Supreme Court in \textit{United States v. O'Brien}.\textsuperscript{130}

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

\textsuperscript{125} The court held that the FCC lacked authority to promulgate the pay cable rules. \textit{Id.} at 43-51.

\textsuperscript{126} \textit{Id.} at 43-46.

\textsuperscript{127} \textit{Id.} at 47. \textit{See generally} Brennan, \textit{The Supreme Court and the Meiklojohn Interpretation of the First Amendment}, 79 \textit{Harv. L. Rev.} 1, 5 (1965).

\textsuperscript{128} \textit{Home Box Office}, 567 F.2d at 47.

\textsuperscript{129} \textit{Id.} at 48 (quoting \textit{United States v. O'Brien}, 391 U.S. 367, 377 (1968)).

\textsuperscript{130} \textit{Id.} at 376.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.} at 377. The four-part \textit{O'Brien} test, in full, is as follows:

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

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

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

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

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

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

138. *Id.* at 49-50.

139. *Id.* at 50.

140. *Id.*

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

142. *Id.* at 978.

143. *Id.* at 979.

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

145. *Id.* at 986.
build and operate a successful cable system in an area already being served.\textsuperscript{146} While acknowledging that the Supreme Court had rejected the economic scarcity rationale as a justification for mandatory access requirements imposed on newspapers, the court nonetheless claimed that significantly different effects resulted from denying public access to the respective media.\textsuperscript{147} It noted that a person who is denied access to the printed press is not effectively barred from expressing his views in that same print media because there are relatively inexpensive alternative ways to convey a printed message.\textsuperscript{148} The court contrasted this situation to that where one is barred access to a cable station because he lacks any economically feasible alternative method of conveying his message within that same medium.\textsuperscript{149} The court concluded that "scarcity is scarcity—its particular source, whether 'physical' or 'economic,' does not matter if its effect is to remove from all but a small group an important means of expressing ideas."\textsuperscript{150} Accordingly, the district court in \textit{Berkshire} recognized that the goal of the scarcity rationale, previously applied to the broadcast media in \textit{Red Lion}, was the appropriate model for cable television.\textsuperscript{151}

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

\textsuperscript{146}. \textit{Id.}
\textsuperscript{147}. \textit{Id.} at 984-85.
\textsuperscript{148}. \textit{Id.} at 986 (noting that a person could distribute "a leaflet, pamphlet, or other relatively inexpensive form of 'publication' ").
\textsuperscript{149}. \textit{Id.} But cf \textit{Miami Herald}, 418 U.S. at 256-58; \textit{Home Box Office}, 567 F.2d at 48. Both courts observed that although not everyone can speak through a given medium because an individual cannot afford to do so, this does not justify government intervention. \textit{Id.}
\textsuperscript{150}. \textit{Berkshire}, 571 F. Supp. at 986-87.
\textsuperscript{151}. \textit{Id.} at 986. The goal stated by the court was "to promote the First Amendment by making a powerful communications medium available to as many . . . citizens as is reasonably possible." \textit{Id.} (emphasis in original).
\textsuperscript{152}. \textit{Id.} at 987-88. With regard to the \textit{O'Brien} test used in \textit{Home Box Office}, see \textit{supra} text accompanying note 137.
\textsuperscript{153}. \textit{Berkshire}, 571 F. Supp. at 987.
"'unfettered flow of information'" and a well-informed public by opening up cable television to all. Ultimately, the Berkshire court found that the rules imposed no excessive restraint because cable operators were required to turn over only seven of their fifty channels and retained complete control over those remaining.

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

V. THE PREFERRED ANALYSIS

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

154. Id. (quoting CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 19 (1974)).
155. Id. at 988.
156. 754 F.2d 1396 (9th Cir.), cert. granted, 106 S. Ct. 380 (1985).
157. Preferred, 754 F.2d at 1400.
158. Id.
159. Id. at 1401.
160. Id.
161. Id. at 1399. See supra note 23.
162. 754 F.2d at 1399. The court dismissed the antitrust claim based on the municipality's immunity from antitrust liability. Id. at 1415. Under the Sherman Act, states are immune from liability. Id. at 1415 (citing Parker v. Brown, 317 U.S. 341, 351 (1943)). Municipalities, however, are not automatically immune from liability. The court answered two questions in evaluating the city's immunity. The first was whether the city acted in response to a "clearly
Preferred was the first decision to hold cable licensing regulations unconstitutional.\(^6\) The court's analysis appropriately may be divided into two distinct first amendment approaches. First, the court examined cable's first amendment rights, as earlier courts had done, by focusing on the medium being regulated.\(^3\) Under this approach, the court distinguished government regulation of broadcasting from government regulation of cable.\(^4\) The court concluded that the physical and economic scarcity rationales were insufficient to justify the franchising process at issue.\(^5\)

Moving away from the traditional media analysis, the court then evaluated both the type of property to which access was being sought\(^6\) and whether the intended use was destructive to that property.\(^7\) While conceding that some degree of regulation over the use of public facilities would be permissible, the court concluded that restricting access to only one company might overstep the bounds of permissible regulation if it could not be shown that the facilities would support only one system.\(^8\) Further, the court focused solely on the property in question, employing the public forum doctrine,\(^9\) to reinforce its conclusion that the limitations imposed by the city were potentially unconstitutional.\(^10\)

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

In Preferred, the Ninth Circuit flatly rejected earlier judicial attempts to apply broadcasting standards to the cable industry.\(^11\) The court observed that the similarities between the two media were "superficial," concluding articulated and affirmatively expressed" state policy that displaced competition with regulation. Id. at 1412. The court in Preferred held that the city's authority to issue franchises under § 53066 of the California Code constituted a "clearly articulated and affirmatively expressed' state policy to displace competition with regulation." Id. at 1415 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

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

163. Id. at 1396.
164. Id. at 1403-07.
165. Id. at 1403-04.
166. Id. at 1404-05. For a critique of the comparative media analysis approach, see Lively, Fear and the Media: A First Amendment Horror Show, 69 MINN. L. REV. 1071, 1091-95 (1985).
167. Preferred, 754 F.2d at 1405-07.
168. Id.
169. Id.
170. Id. at 1407-09.
171. Id.
172. Id. at 1403.
that the differences between cable and over-the-air broadcasting mandate dissimilar first amendment standards. The court rejected the city's contention that because pole and conduit space are to some "undetermined extent physically limited," it should be permitted to limit access to only one cable operator. At the same time, however, the court did not rule out the possibility that physical scarcity might justify increased cable regulation where the structures are physically incapable of accommodating all those who seek access. Thus, the Preferred court concluded that, based on PCI's allegations of available space on poles and in conduits, the city could not justify its denial by relying on the physical scarcity rationale unless it demonstrated that the required space could not be made available.

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

B. The O'Brien Test as Applied in Preferred

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

173. Id.
174. Id. at 1404.
175. The court stated: "We express no opinion on the issue of the manner in which the City should allocate access to poles and conduits to competing cable systems when these structures are incapable of accommodating all those seeking access." Id.
176. Id.
177. Id.
178. Id. at 1405.
179. Id. See supra text accompanying notes 114-19.
180. 754 F.2d at 1405.
181. Id.
182. Id. at 1406.
183. Id. at 1405.
Preferred established that the city had legitimate interests in minimizing interference with the public domain. Furthermore, the court conceded that this interest was "unrelated to the suppression of free expression." Nevertheless, the court held that the city failed to meet the fourth prong of the O'Brien test because there were less restrictive means available to protect the city's interest. The means that the city adopted to effectuate its interest allowed only one cable company to operate a franchise. The court reasoned that such a system created an unnecessary risk that city officials would discriminate in their choice of cable operators based on the content or views in their proposed programs. Preferred held that this risk could be substantially lessened by means less restrictive of the first amendment rights of cable operators.

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

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

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

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184. Id. See supra notes 134-35 and accompanying text.
185. Preferred, 754 F.2d at 1406. The court also recognized the city's legitimate interests in public safety and in the maintainance of public thoroughfares. Id.
186. Id. at 1405 (quoting O'Brien, 391 U.S. at 377).
187. Id. at 1406. The court stated:
   "It has not been alleged that public utility facilities owned or controlled by the City can only support the use of a single or a few cables. Indeed, PCI has alleged precisely the contrary. A different and more sharply focused response by the City could protect the legitimate interests of the City and its citizens."
   Id.

Nevertheless, the court did not identify the "more sharply focused response" it maintained the city should take.
188. Id.
189. Id.
190. Id.
191. Id.
192. Id. at 1406-07.
193. Id.
194. 453 U.S. 490 (1981); see Preferred, 754 F.2d at 1405.
the Supreme Court recognized a legitimate government interest in controlling the noncommunicative aspects of speech. Yet it cannot be said that Metromedia offers any support of the Preferred court's reliance on O'Brien. In Metromedia, the Court did not apply the O'Brien test. Rather, it held that a balancing test was required where regulation of a noncommunicative aspect of speech infringed on the communicative aspects. The Court concluded that "the First Amendment interest at stake" must be weighed against "the public interest allegedly served by the regulation." Assessing these interests required a "particularized inquiry into the nature of the conflicting interests at stake." Preferred, without referring to the Metromedia inquiry, performed a cursory balancing test under the fourth part of its O'Brien analysis.

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

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

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195. Metromedia, 453 U.S. at 502. As the Court stated, "the government has legitimate interests in controlling the noncommunicative aspects of the medium, . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects." Id.
196. Id.
198. Id. at 503.
199. Preferred, 754 F.2d at 1406-07.
201. Id. at 376-77. See also Ely, supra note 135, at 1494-95 (discussing the speech/non-speech distinction).
202. Id. at 377-82.
203. Preferred, 754 F.2d at 1406.
the inevitable effect of the operator's attempt to engage in protected first amendment activities.

D. Preferred's Application of the Public Forum Doctrine

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

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

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


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

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

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


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

211. Id. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981) (school classrooms opened for
parks apply.\textsuperscript{212} The third type of forum is government property that is not open to the public for use as a forum for speech either by tradition or by designation.\textsuperscript{213} Restrictions pertaining to nonpublic forums are permissible as long as they are "reasonable" and viewpoint neutral.\textsuperscript{214}

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

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

\begin{itemize}
\item 212. Perry Educ. Ass'n, 460 U.S. at 46.
\item 213. Id. (intra-school mailboxes); see also Greer v. Spock, 424 U.S. 828 (1981) (military bases).
\item 214. Perry Educ. Ass'n, 460 U.S. at 46. The Court found that "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Id.
\item 215. Preferred, 754 F.2d at 1408.
\item 216. 104 S. Ct. 2118 (1984).
\item 217. Id. at 2124-36. In support of Roland Vincent, a candidate for the Los Angeles City Council, a group of his supporters attached campaign signs to utility poles. As required by the city's Municipal Code, these signs were removed from the poles. Id. at 2122-23.
\item 218. Id. at 2128-30. The Court stated, "[t]he problem addressed by this ordinance—the visual assault on the citizens of Los Angeles . . . —constitutes a significant substantive evil within the City's power to prohibit." Id. at 2130 (emphasis added).
\item 219. Id. at 2129.
\item 220. Id. at 2129-32.
\item 221. Id. at 2130-32.
\item 222. Id. at 2130. Cf. Young v. American Mini Theatres, 427 U.S. 50, 71 (1976) (plurality opinion) ("[T]he city's interest in . . . the quality of urban life is one that must be accorded high respect.").
\end{itemize}
dressed the taxpayers' argument that because utility poles are located on streets and thoroughfares, the poles should be treated as a public forum. The Vincent court concluded that telephone poles and lampposts were neither traditional nor limited public forums. Instead, it found the property to be a nonpublic forum. Based upon the nonpublic forum test, the Court concluded that the ordinance passed constitutional scrutiny because it served a legitimate interest, was viewpoint neutral, and alternative channels of communication were available. The Court found the taxpayers' reliance on the public forum doctrine to be "misplaced." Although the Court addressed the public forum issue, it questioned whether the public forum doctrine was the appropriate analytical tool for the case. In a footnote, the Vincent court stated that it is "of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum."

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

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

223. Vincent, 104 S. Ct. at 2133-34.
224. Id. at 2134.
225. Id.
226. Id.
227. Id. at 2134.
228. Id. at 2134 n.32.
229. Id.
230. Preferred, 754 F.2d at 1408.
231. Id.
232. Id.
233. Id. at 1409.
234. Id. See CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1984).
235. Preferred, 754 F.2d at 1409.
236. Id.
were limited public forums.\footnote{Access Rights of Cable Television Companies} Treating these facilities as limited public forums, the court concluded that the City’s licensing process was not a reasonable time, place, and manner regulation.\footnote{Preferred} The court found that both the city’s solicitation of “bids” from prospective operators and its denial of access to all except the “highest bidder” were an unconstitutional exercise of the city's licensing authority.\footnote{Preferred}

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

\section*{E. Preferred’s Public Forum Analysis in Light of Cornelius}

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

\begin{itemize}
\item \footnote{237. “PCI’s complaint sufficiently alleges that the utility facilities at issue do constitute a kind of public forum, either by tradition or by designation.” Id. (emphasis in the original).}
\item \footnote{238. Id. at 1409.}
\item \footnote{239. Id.}
\item \footnote{240. Id.}
\item \footnote{241. See Cornelius, 105 S. Ct. 3439, 3451-54 (1985).}
\item \footnote{242. Preferred, 754 F.2d at 1409.}
\item \footnote{243. Id.}
\item \footnote{244. Id. (emphasis added).}
\item \footnote{245. Id.}
\item \footnote{246. 105 S. Ct. 3439 (1985).}
\item \footnote{247. Id. at 3446. CFC is an annual fundraising drive among federal employees conducted during working hours at the federal workplace. Id. at 3443. Participating organizations submit 30-word statements included in the campaign literature which then is distributed to federal employees. The only organizations permitted to participate in the CFC were tax-exempt, non-}
\end{itemize}
Applying the public forum doctrine, the Supreme Court in *Cornelius* began its analysis by defining the relevant forum. The Court stated that in defining the forum, the correct analysis extended beyond simply identifying the government property at issue. Instead, the Court observed that the access sought by the speaker was the more appropriate focal point. Accordingly, the relevant forum in *Cornelius* was the CFC and not the federal workplace. As applied to *Preferred*, the property at issue was the poles and conduit space, and the cable operator sought access to the place on these facilities where the cable wires attach.

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

Applying the *Cornelius* analysis to the facts in *Preferred*, the city’s practice and policy did not evidence an intent to designate its facilities as a public forum open to all cable companies seeking access. Los Angeles always profit charitable organizations that were both supported by public contributions and provided direct health and welfare services. The legal defense and political advocacy organizations that challenged the regulations were specifically excluded. The Court first recognized that charitable solicitation of funds is a form of protected speech and, therefore, implicates first amendment interests. See generally Note, *Forum over Substance*: *Cornelius* v. NAACP Legal Defense & Educational Fund, 35 CATH. U.L. REV. 307 (1986).

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

249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 3449-50.
253. *Id.*
254. *Id.*
255. *Id.* at 3450-51. In determining that the CFC was a nonpublic forum, the Court concluded that “[t]he Government did not create the CFC for purposes of providing a forum for expressive activity.” *Id.* at 3451.
256. *Id.*
257. See *Preferred*, 754 F.2d at 1402 (city argues that it may limit access to one cable company); *Cornelius*, 105 S. Ct. at 3450. Here, the Supreme Court discussed Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). The Court noted as significant, the city’s *intent* to limit access to advertising spaces on municipal buses. *Cornelius*, 105 S. Ct. at 3450 (emphasis added).
had limited pole access to one franchise and the relevant state statute permitted this limitation.\textsuperscript{258} The disruption to the public domain that results from allowing additional companies access to poles further supports the conclusion that the city did not intend to designate the facilities as a public forum and significantly undercuts PCI's argument that the facilities were limited public forums.\textsuperscript{259}

The Preferred court noted that even if the poles and conduits were appropriately characterized as a nonpublic forum, the city's auction process would still be unconstitutional under the applicable test.\textsuperscript{260} With regard to nonpublic forums, Cornelius held that a regulation must be viewpoint neutral, there must be reasonable alternative means available for communication, and the regulation must be reasonable in light of the forum's purpose.\textsuperscript{261} Preferred maintained that the city's practice was not viewpoint neutral\textsuperscript{262} because it "create[d] an impermissible risk of covert discrimination based on the content or the views expressed in the operator's proposed programming."\textsuperscript{263} The legitimacy of this argument, after Cornelius, turns on whether the Supreme Court would accept the Ninth Circuit's conclusion that the risk of discrimination arising from the city's single franchise system warrants the finding of viewpoint nonneutrality.

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

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

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

\[\text{\textsuperscript{260} Preferred, 754 F.2d at 1409.}

\[\text{\textsuperscript{261} Cornelius, 105 S. Ct. at 3451-54.}

\[\text{\textsuperscript{262} Preferred, 754 F.2d at 1409.}

\[\text{\textsuperscript{263} Id. (emphasis added).}

\[\text{\textsuperscript{264} Id. at 1409-10.}

\[\text{\textsuperscript{265} See Cornelius, 105 S. Ct. at 3453. The Court stated, "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." Id.}
need not be the most reasonable or the only reasonable limitation." 266

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

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

Congress passed the Cable Communications Policy Act of 1984 to implement a uniform regulatory scheme for cable television. 268 The Act empowers local authorities to "award . . . 1 or more franchises within its jurisdiction." 269 The Act's franchising model is similar to the Los Angeles franchising procedure. 270 Despite this fact, the court in Preferred relegated its discussion of the Act to a footnote, 271 acknowledging a municipality's interest in "regulating disruption of public resources through a system of permits or franchises." 272 Yet Preferred directly attacked the Act's legislative history, which stated that the provision "'grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area.'" 273 The court in Preferred observed that while a city may issue franchises in order to prevent disruption, it has no authority to decide how many franchises will be issued as long as there is space available on the poles for additional systems. The holding in Preferred must be seriously questioned because the Act plainly states that a city may grant one franchise in a single region if it so chooses. 274 According to the Cable Act, it would seem that Los Angeles would not be required to grant PCI a franchise nor would PCI be permitted

266. Id. (emphasis added).
268. See supra note 31.
270. Preferred, 754 F.2d at 1400 n.3.
271. Id. at 1411 n.11.
272. Id.
to provide cable services without one.\textsuperscript{275} In Preferred, the court did not adequately address the applicability of the Cable Act to the matter before it. Incomprehensibly, it avoided any thoughtful discussion of its decision to dismiss this provision of the Cable Act out of hand. Regardless of whether the court thought the Act did or did not have bearing on the issues in Preferred, sound jurisprudence would dictate that the court address the matter in a straightforward manner. Preferred may be rightly criticized for abdicating its responsibility in this regard.

VI. CONCLUSION

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

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

\textsuperscript{275} See supra note 29.
ketplace or local governments should exercise control over the number of franchises that will be granted to a particular region.

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