DO CABLE OPERATORS WANT FREE SPEECH OR A FREE MARKET? *PREFERRED COMMUNICATIONS, INC. v. CITY OF LOS ANGELES*

I. INTRODUCTION

The cable television ("CATV") industry has developed with great speed during the past twenty years.[1] In its infancy, cable technology provided rural areas with clear transmission of broadcast signals.[2] Today, there are cable companies operating in every state and in many of the major metropolitan areas.[3] These companies offer the viewer diversity in programming choices.[4] In some areas, one hundred channels transmit sports, entertainment and educational programs.[5] However, the cable industry has not developed without growing pains. The cable industry has always been subject to the regulatory power of the Federal Communications Commission ("FCC") and state and municipal

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[1] *See generally* C. FERRIS, F. LLOYD & T. CASEY, CABLE TELEVISION LAW (1986); SLOAN COMMISSION ON CABLE TELEVISION, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1972); Pilnick & Baer, *Cable Television: A Guide to Technology* in W. BAER, CABLE TELEVISION: FRANCHISING CONSIDERATIONS (1974).

[2] *See* C. FERRIS, F. LLOYD & T. CASEY, *supra* note 1, at ¶ 17B.02[2]. The first "cable case" was Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958). Thirteen broadcast station licensees requested that the Federal Communications Commission ("FCC") regulate the cable industry as a common carrier under the Communication Act of 1934 ("the Act"). *Id.* para. 1, at 251. The FCC refused, finding that cable did not fall under Title II of the Act because the FCC had power to regulate "carriers" and cable technology allowed the cable operators, rather than the subscribers, to select the signals. *Id.* paras. 7-10 at 253-54.

The FCC's regulatory role was finally asserted in 1962 in Carter Mountain Transmission Corp., 32 F.C.C. 459, *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). The FCC denied Carter Mountain the use of microwave relay systems used to transmit distant signals. 32 F.C.C. 459, para. 17 at 465. Cable was used during this period to transmit some "broadcast" signals into rural areas where ordinary television broadcasts were either unavailable or of poor quality due to the surrounding mountains. 32 F.C.C. 459, paras. 9-11 at 463. The role of the FCC was narrowly construed to be one in which a cable system was regulated insofar as regulation was necessary to prevent any deleterious effect on local television station operations. 32 F.C.C. 459, para. 16 at 465.

[3] Cable systems exist in some parts of New York, Philadelphia, and Los Angeles. For a comprehensive list see M. HAMBURG, ALL ABOUT CABLE 22-26 (1979). However, many large cities are not adequately serviced. *See infra* note 159 and accompanying text. Franchises are difficult to obtain. Some believe that regulation thwarted the potential growth of cable. *See infra* notes 158-61. These difficulties, in part, prompted Congress to enact the Cable Communications Policy Act of 1984. *See* H.R. REP. No. 934, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4656.

[4] C. FERRIS, F. LLOYD & T. CASEY, *supra* note 1, at ¶ 17B.02[1].

[5] *See* Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501, 509 (1977).

governments.[6] The FCC regulated cable television through its authority over interstate communication.[7] States and municipalities developed "franchise" schemes to regulate cable operators on the local level.[8]

The constitutional validity of the entire regulatory scheme, especially the franchise scheme, was recently questioned by the Ninth Circuit in *Preferred Communications, Inc. v. City of Los Angeles* ("*Preferred*").[9] While the Supreme Court recently affirmed this Ninth Circuit decision,[10] it was unwilling to decide the central legal question posed by the case,[11] i.e., whether action taken by a municipal corporation infringed the first amendment rights of a cable operator. The Supreme Court's decision was concise and did not analyze any of the arguments advanced by the Ninth Circuit. It thus failed to define the parameters for a pertinent first amendment analysis for the cable industry.[12] Ultimately, the Court remanded the case to the Federal District Court for the Central District of California for further factual development.[13]

This Comment will examine the local municipal regulation of cable operators called into question by the Ninth Circuit's decision in *Preferred*.[14] Part II will present the facts and implications of *Preferred*. Part III will explore the different standards of first amendment protection and thereby determine how the Ninth Circuit reached its decision. This Comment will question whether the Ninth Circuit's analysis was appropriate. Part IV will briefly review the pertinent FCC and state regulatory schemes for the cable industry. Parts V and VI of this Comment will review how the franchise process functions; what policy interest it advances; whether it serves a useful purpose in regulating cable operators; and whether it violates the first amendment. The Ninth Circuit's opinion in *Preferred* provides a useful guidepost to evalu-

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6 *See* 47 U.S.C. §§ 151-152 (1982 & Supp. III 1985); *see also* Albert, *supra* note 5; Barnett, *State, Federal and Local Regulaton of Cable Television*, 47 NOTRE DAME L. REV. 685 (1972); Miller & Beals, *Regulating Cable Television*, 3 COMM/ENT 607 (1981).

7 47 U.S.C. §§ 151-52 (1982 & Supp. III 1985).

8 *See infra* text accompanying notes 153-63.

9 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

10 City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986).

11 *Preferred*, 106 S. Ct. at 2037.

12 The Supreme Court's decision does not provide a detailed, in-depth analysis. *Id.* at 2035-36.

13 *See* Wermiel, *High Court Fails to Set Rules Defining Free Speech Rights of Cable-TV Firms*, Wall St. J., June 3, 1986, at 5, col. 1; *Justices Uphold a Challenge in Cable TV Franchise Suit*, N.Y. Times, June 3, 1986, at D27, col. 1; *see also* Firestone, *Cities' Gamble Pays Off*, CABLE TV AND NEW MEDIA (July 1986); Lloyd, *Supreme Court Affirms "Preferred" Yet Key Issues Remain Open*, CABLE TV AND NEW MEDIA (June 1986); Schooler, *What Cable Owners Won*, CABLE TV AND NEW MEDIA (July 1986).

14 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

ate the cable franchise process and its first amendment implications.

Finally, this Comment will conclude that the Ninth Circuit's first amendment approach is flawed because it combines the technological, editorial, and administrative tasks of the entire cable industry.[15] A more reasoned approach would be to review each of the functional components separately.[16] For instance, a cable construction and operations function is akin to a utility.[17] Hence, a merely rational level of review[18] is appropriate. However, the function of a cable producer and originator is closer to a publisher than to a broadcaster. Therefore, a strict scrutiny[19] standard of review is appropriate for their first amendment claims. Distinguishing between the different components of the cable industry is necessary and ultimately leads to a more sophisticated analysis of cable regulation.

II. *PREFERRED COMMUNICATIONS, INC. V. CITY OF LOS ANGELES*—A CASE STUDY OF MUNICIPAL REGULATION AND A CONSTITUTIONAL CHALLENGE

A. *The Facts*

Preferred Communications, Inc. ("PCI") was organized to establish a cable system to disseminate news, sports, entertainment and other programming to the residents of the southern district of Los Angeles.[20] It proposed to install its cable system by stringing cable along utility poles owned by the Los Angeles Department of Water and Power and by the Pacific Telephone and Telegraph Company.[21] Surplus space was available on these utilities for cable companies and could accommodate more than one company.[22] PCI approached the utility companies in order to negotiate an agreement to lease space, but was told that the utility could not enter into negotiations until PCI had obtained a franchise from the city.[23] PCI was unable to enter the city's auction process as this process had already begun in October 1982, a

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15 *See infra* text accompanying notes 242-58.
16 *See infra* text accompanying notes 259-77.
17 *See infra* text accompanying notes 252-56.
18 *See infra* text accompanying note 64.
19 *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (newspaper cannot be forced to print reply to published personal attack). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 674-77 (1978).
20 Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1400 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).
21 *Preferred*, 754 F.2d at 1400.
22 *Id.* at 1401; *see* CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1984).
23 *Preferred*, 754 F.2d at 1400.

year before PCI was organized as a corporate entity.[24]

The city auction process had required a potential bidder to submit a Request for Proposals ("RFP") with numerous conditions.[25] PCI's request for a franchise was denied because it had failed to participate in the auction.[26] The city barred PCI from operating a cable system in Los Angeles under any circumstances.[27]

PCI brought suit in federal court naming the City of Los Angeles and the two utility companies as defendants.[28] PCI claimed that the city franchise procedure violated its first amendment rights, and further, that the city auction process amounted to an antitrust violation.[29] The district court had found that, as a matter of law, "the City's regulatory scheme did not violate the First Amendment rights of a prospective cable television operator"[30] and dismissed PCI's claim.[31] The Ninth Circuit reversed,[32] finding that a

> [c]ity, consistent with the First Amendment, [cannot] limit access by means of an auction process . . . to a single cable television company, when the public utility facilities and other public property . . . necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system . . . .[33]

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24 Brief for Appellant at 8-9, Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985) (No. 84-5541).

25 *See infra* note 155. The Los Angeles RFP requires that the bidder pay $10,000 as a filing fee and $500 as a good faith deposit. The bidder must also demonstrate a sound financial base and its cable plan must show "sound business plans" as well as "demonstrated business experience." *Preferred*, 754 F.2d at 1400. The bidder must agree to pay the city a percentage of future annual gross revenues. The cable system must include at least 52 channels, including six mandatory access and leased channels, as well as a two-way (interactive) service. *Id.* The company must provide staff and production facilities to aid in programming for the mandatory access channels. Numerous business decisions including pricing and customer relations, were left to city control. *Id.* at 1401. The city also required a waiver of any right to recover for damages or any other injury arising from the cable franchise or its enforcement. *Id.* These requirements do not differ substantially from other RFP's.

26 *Preferred*, 754 F.2d at 1401.

27 *Id.*

28 *Id.*

29 PCI claimed that the city was not immune from antitrust liability. The appellate court sustained the lower court's dismissal of this second cause of action. *Id.* at 1411-15; *see generally* Community Communications v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

30 *Preferred*, 754 F.2d at 1399 (Judge Marshall of the District Court for the Central District of California dismissed Preferred's complaint on a FED. R. CIV. P. 12(b)(6) motion).

31 *Id.*

32 The court reversed the district court's dismissal of PCI's first amendment claim. *Id.*

33 *Id.* at 1411. *Cf.* Tele-Communication of Key West, Inc. v. United States, 757 F.2d

The Supreme Court has affirmed the Ninth Circuit decision but remanded the case for a full factual development indicating that certain issues remain unresolved.[34]

B. *The Implications*

Preferred provides a backdrop for exploring three traditional arguments that have been used to substantiate the current regulatory scheme.[35] Moreover, it provides the basis for a full discussion of the first amendment claims of the cable industry. Finally, the case helps to focus the debate on whether the cable industry will be construed as a "broadcast" or "newspaper" medium for purposes of federal and local regulation.[36] This delineation would require different first amendment standards.[37] Moreover, the Ninth Circuit's decision may also have a compelling impact on the free market economy of the cable industry.[38]

III. The First Amendment

A. *Some Fundamental Concepts*

The first amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[39] Con-

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1330, 1336 (D.C. Cir. 1985) (cable television service operator's complaint arising from termination of its contract with an Air Force base adequately sets forth a first amendment cause of action by alleging that there was no reason why two cable television companies could not simultaneously use cable rights-of-way). *But see* Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 980 (D.R.I. 1983) (city's franchise regulations do not violate first amendment rights as paramount rights are those of viewers and listeners), *appeal denied*, 773 F.2d 382 (1st Cir. 1985).

[34] *Preferred*, 106 S. Ct. at 2038.

[35] Physical scarcity, economic scarcity and the disruption of the public rights-of-way are three arguments that have been used to equate cable television to a broadcaster. *See infra* text accompanying notes 169-210; *see, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969) (physical scarcity justifies federal regulation which limits access to the broadcast medium); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981) (government franchising is virtually indispensable since the municipality has a substantial interest in limiting the number of cable operators who dig up city streets), *cert. dismissed*, 456 U.S. 1001 (1982); *Berkshire*, 571 F. Supp. at 986 (a franchise is a rational way of choosing which cable operator will provide CATV service because the industry is characterized as a natural monopoly).

[36] *See, e.g.*, Omega Satellite Prods. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); *Community Communications*, 660 F.2d at 1378; Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543, 547 (W.D. Ky. 1982) (all characterizing the cable industry as a broadcasting medium). *But see Tele-Communication*, 757 F.2d at 1337; Century Fed. v. City of Palo Alto, 579 F. Supp. 1553, 1554 (N.D. Ca. 1984) (characterizing the cable operation as an electronic publisher and hence entitled to the same first amendment rights as newspapers).

[37] *Cf. infra* text accompanying notes 228-51 for implications of viewing cable as either a broadcaster or a publisher for first amendment analysis.

[38] *See* R. Posner, Cable Television: The Problem of Local Monopoly (1970); Hazlett, *Why Cable TV Needs a Free Market*, N.Y. Times, Nov. 17, 1985, § 3, at 2, col. 1.

[39] U.S. Const. amend. I.

gress, however, has the ability to regulate some speech and abridge this freedom in certain ways.[40] The scope and depth of first amendment protection varies depending upon a number of factors including: the content of speech; the manner, time, and place of speech; and the medium of expression.[41] Furthermore, the first amendment standard of review differs depending on whether the speech is communicative or noncommunicative.[42] The print medium has traditionally been evaluated using strict scrutiny[43] while the broadcast medium has been evaluated on a different level of review.[44] The burgeoning cable industry has not been classified as belonging to either group, and hence, has fallen somewhere between the two standards.[45]

Two broad classes of analysis are used to determine whether government regulation abridges freedom of speech: (1) content or true communication, and (2) content-neutral or noncommunicative speech.[46] Most speech is permitted in a free society, since, in a free marketplace of ideas,[47] the truth is discovered through the competition of all ideas and all speech.[48] True communication is, therefore, evaluated on a rigid "track one"[49] analysis.[50] Any regulation must be narrowly tailored and must further substantial governmental interests.[51] Therefore, whenever a first amendment challenge is analyzed on track one as content-oriented,[52] there is a strong presumption that the regulation is un-

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40 *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM 19-21 (1960); L. TRIBE, *supra* note 19, at 580-682.

41 *See infra* text accompanying notes 59-66.

42 *See* L. TRIBE, *supra* note 19, at 580-82.

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

44 *See generally* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

45 G. SHAPIRO, P. KURLAND & J. MERCURIO, 'CABLESPEECH' THE CASE FOR FIRST AMENDMENT PROTECTION 5-18 (1983).

46 *See* L. TRIBE, *supra* note 19, at 580-88.

47 In this context the "marketplace of ideas" refers to the free flow of information.

48 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (newspapers and other print media are scrutinzied under a very rigid standard).

49 If government regulation is aimed at the speech or communication itself, that regulation is evaluated differently than regulation aimed at the mode of communication. The former is said to be a track one analysis and the latter is a track two analysis. *See* L. TRIBE, *supra* note 19, at 584-88.

50 L. TRIBE, *supra* note 19, at 603; *see, e.g.*, Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980) (the government may not choose the subjects appropriate for speech); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) (content of advertisement including drug prices cannot be regulated); Cohen v. California, 403 U.S. 15 (1971) (profane and offensive language is nonetheless protected speech under the first amendment).

51 *See* L. TRIBE, *supra* note 19, at 582.

52 The crucial point of analysis in any first amendment challenge is the court's initial classification of the regulation, i.e., whether the regulation is content-neutral (track two).

constitutional and the challenge must prevail.[53] A court uses a strict scrutiny standard and places the burden on the regulator to show that the "regulation is necessary to serve a compelling state interest and that [the regulation] is narrowly drawn to achieve that end."[54]

Content-neutral or noncommunicative aspects of speech such as the manner, time, and place of the communication are analyzed on a second track.[55] Symbolic speech is also analyzed as track two speech.[56] In a track two analysis the focus shifts from categories of content to the extent of the government interest in regulating the noncommunicative aspect.[57]

The first level of analysis on track two is whether the noncommunicative aspect involves a public forum.[58] Traditional public forums are those places which by long tradition or by government fiat have been devoted to assembly or debate, such as streets and parks.[59] A court examines the individual's interest in

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This determination bespeaks the court's outcome. Content-based regulations are struck down; however, in a content-neutral analysis, the court's analysis is more complex. *Id.* at 682-88.

Determining whether a regulation should be examined on a track one or track two analysis, a court considers whether the regulation, on its face, is aimed at the content of the speech, and whether the legislature intended to single out certain types of subject matter for suppression. When *either* of the above two criteria is met, a track one analysis is appropriate. *See generally id.* at 584-88; *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); United States v. O'Brien, 391 U.S. 367 (1968).

53 There are, however, established categories of speech deemed not protected by the first amendment. These categories include obscenity, defamation, fraudulent misrepresentations, advocacy of imminent lawless behavior, and "fighting words." *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (speech advocating the use of force or crime can only be proscribed when two conditions are satisfied: (1) the advocacy is "directed to inciting or producing imminent lawless action"; and (2) the advocacy is also "likely to incite or produce such action"); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation); Feiner v. New York, 340 U.S. 315 (1951) (fighting words); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (offensive words).

54 Widmar v. Vincent, 454 U.S. 263, 270 (1981).

55 *See* L. TRIBE, *supra* note 19, at 580-84; *see, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (City ordinance prohibits the use of sound trucks on public streets if they emit loud and raucous noises. The regulation was upheld since it was independent of content.).

56 *See* United States v. O'Brien, 391 U.S. 367 (1968).

57 L. TRIBE, *supra* note 19, at 683-84.

58 *See, e.g., Kovacs*, 336 U.S. at 85-86.

59 Hague v. CIO, 307 U.S. 496, 515-16 (1939). There are three categories of public forums. The first category comprises traditional places of assembly, such as parks, in which the government may only enforce content-neutral regulation of time and place, restricted by the first amendment's limitations on the government's ability to limit expressive activity. *See Hague*, 307 U.S. 496. The second category includes public property opened for the use by the public for expressive behavior, such as universities. Here, the government may only enforce reasonable time and place regulations. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The third category consists of nontraditional forums for public communication, such as teacher's mailboxes in public schools. In these situations, the government may regulate time and place, and may also institute other reasonable regulations, providing that the regulations are not an

free expression and balances that interest against the regulator's interest. The regulator's interest must be significant and the regulation must be narrowly drawn.[60] If the regulator's purpose can be achieved by a less restrictive alternative the regulation will be deemed to violate the speaker's first amendment rights.[61] The burden of proof is on the regulator to show that its interests are substantial.[62]

The second level of track two analysis examines the content-neutral expression which takes place in nonpublic forums such as billboards and utility poles.[63] In these cases, if the infringement of expression is not substantial, the regulator must merely show that the regulation is rational.[64] An alternative means of regulation does not automatically defeat the regulation.[65]

Symbolic speech is also accorded track two protection since courts are wary of sanctioning a generalized first amendment protection to any "act" which purports to convey a message.[66] For example, in *United States v. O'Brien*,[67] O'Brien did not have a first amendment right, couched as symbolic speech, to burn his draft card.[68] The Court found that legislating selective service registration, via a draft card, was within the constitutional power of the government because it furthered an important and substantial governmental interest.[69] That interest, raising an army, was unrelated to the suppression of free expression.[70] The Court held that the "incidental restriction on [O'Brien's] first amend-

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effort to suppress expression based on the government's opposition to the speaker's point of view. *See* United States Postal Serv. v. Council of Greenburgh Civil Ass'n, 453 U.S. 114, 131 n.7 (1981).

60 *Perry Educ. Ass'n*, 460 U.S. at 46.

61 *See* Schneider v. State, 308 U.S. 147 (1939) (antihandbill ordinance invalidated because the State could find other means of achieving its objective of minimizing litter and traffic congestion).

62 *Perry Educ. Ass'n*, 460 U.S. at 45-46; L. TRIBE, *supra* note 19, at 680-90.

63 *Preferred*, 754 F.2d at 1408.

64 *Perry Educ. Ass'n*, 460 U.S. at 46; *see also* L. TRIBE, *supra* note 19, at 684-93.

65 L. TRIBE, *surpa* note 19, at 684-93; *see* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

66 L. TRIBE, *surpa* note 19, at 601.

67 391 U.S. 367 (1968).

68 *Id.* at 376.

69 The Court stated:

> We think it not amiss . . . to comment upon O'Brien's legislative-purpose argument. . . . [B]oth [House and Senate] reports make clear a concern with . . . 'defiant' destruction of . . . 'draft cards' and with 'open' encouragement to others to destroy their cards. . . . [This] would disrupt the smooth functioning of the Selective Service. . . .
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> . . . Accordingly we vacate the judgement of the Court of Appeals . . . .

Id. at 385-86.

70 *Id.* at 377.

ment freedoms is no greater than is essential to the furtherance of [government] interest."[71]

As the above analysis indicates, the track and level used to analyze first amendment rights is crucial. Newspaper and other print media are accorded strict scrutiny under track one; broadcasters, however, are evaluated differently.[72] The cable medium as a whole presents a difficult puzzle for first amendment analysis.[73]

B. *Preferred's First Amendment Challenge*

In discussing PCI's first amendment claim, the Ninth Circuit cited *United States v. O'Brien*[74] and ostensibly used the *O'Brien* test.[75] The Ninth Circuit purported to examine PCI's claims under the content-neutral strand of first amendment analysis.[76] Using the *O'Brien* analysis, the court examined whether the city's franchise regulation furthers an important or substantial govern-

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71 *Id.*

72 *Compare* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) *with* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1979). *See infra* notes 169-70.

73 Cable television presents a novel problem for first amendment analysis since it is neither a true broadcaster nor a true publisher. The following is a small but representative sampling of the scholarly debate. *Compare* Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. CAL. L. REV. 1001 (1981); Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM/ENT 1 (1981); Miller & Beals, *supra* note 6; Nadel, *Cablespeech for Whom?*, 4 CARDOZO ARTS & ENT. L.J. 51 (1985); Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 FORDHAM URB. L.J. 163 (1982) [hereinafter Nadel, *Divorcing the Medium*]; Silbray, *The Cable Communications Policy Act of 1984 v. The First Amendment*, 7 COMM/ENT 381 (1985); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971) [hereinafter Note, *CATV and First Amendment*] *with* G. SHAPIRO, P. KURLAND & J. MERCURIO, *supra* note 45; Goldberg, Ross & Spector, *Cable Television, Government Regulation, and the First Amendment*, 3 COMM/ENT 577 (1981); Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867 (1983); Robinson, *Cable Television and the First Amendment*, 6 COMM. AND THE LAW 47 (1984); Stanzler, *Cable TV Monopoly and the First Amendment*, 4 CARDOZO L. REV. 199 (1983); Note, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment*, 70 CALIF. L. REV. 1393 (1982) [hereinafter Note, *Access to Cable*]; Note, *Cable Television: The Constitutional Limitations of Local Government Control*, 15 SW. U.L. REV. 181 (1984) [hereinafter Note, *Constitutional Limitations*]; *see also infra* text accompanying notes 159-99.

74 391 U.S. 367 (1968); *see supra* text accompanying notes 71-72.

75 *Preferred*, 754 F.2d at 1405-06; *see also* Home Box Office v. FCC, 567 F.2d 9, 15 (D.C. Cir.) (following *O'Brien*), *cert. denied*, 434 U.S. 829 (1977). In *Home Box Office*, FCC restrictions on pay cable programming were struck down. The restrictions were found to be too great a suppression on free expression in light of the governmental interest advanced. However, Home Box Office is involved directly in program production. Its programs are distributed to cable systems for a per-subscriber fee. Home Box Office's function is closely related to that of a publisher because the company is involved in both the creative production of programs and their distribution. This type of participation in the cable market is substantially different from the cable operator in *Communicty Communication*, and hence, using the *O'Brien* test in *Home Box Office* makes sense. *See infra* text accompanying notes 228-31. *But see Community Communication*, 660 F.2d at 1376 (rejecting the *O'Brien* test for cable first amendment claims).

76 *See supra* text accompanying notes 53-59.

ment interest unrelated to the alleged suppression of free expression.[77] The auction and franchise regulations, as restrictions on first amendment freedoms, must not be greater than necessary.[78]

The city's auction process serves the important interest of minimizing disruption to the public domain.[79] Other interests served include preventing " 'cream skimming[,]'[80] . . . ensuring the provision of community access and leased access to cable facilities, and encouraging the development of state-of-the-art cable systems."[81] The court, however, contended that "[r]egulating [the] use and inconvenience, however, is quite different from restricting access, as the City attempts to do here."[82] The Ninth Circuit was not convinced, and hence, ruled that the auction process must be dismantled, since it was found to be unduly burdensome on the cable operator's first amendment rights.[83]

If the court was, in fact, using the *O'Brien* test this would have ended the analysis. However, the court used a hybrid first amendment analysis.[84] Having initially begun its review of a content-neutral regulation,[85] the court switched into a content analysis of PCI's first amendment rights.[86]

> But the means chosen by the City to serve its interests—allowing only the single company selected through the franchise

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

78 The city bears the burden of proving that elements of the *O'Brien* test are met. *Id.* at 1406 n.9.

79 *Id.* at 1406. *Accord* Omega Satellite Prods. v. City of Indianapolis, 694 F.2d 119, 127-29 (7th Cir. 1982); *Community Communications*, 660 F.2d at 1379; Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 985-86 (D.R.I. 1983), *appeal denied*, 773 F.2d 382 (1st Cir. 1985); Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543, 547 (W.D. Ky. 1982).

80 "Cream skimming" denotes a practice among cable operators of serving only affluent areas. *See infra* note 149.

81 *Preferred*, 754 F.2d at 1406 (footnote added). These interests were asserted in the *amicus curiae* brief submitted by the cities of Palo Alto, Menlo Park, and Atherton. The Ninth Circuit asserted that since the city of Los Angeles had not asserted these interests, the court would not presume that these interests exist or are of any significance in the instant case. *Id.* The court should not have dismissed the *amicus curiae*'s interests in such a perfunctory manner. The *Preferred* decision, by according first amendment rights to cable operators, will necessarily have an impact in other cities.

82 *Id.* at 1406. It is important to note that PCI was organized after October 1982, but before September 1983, and did not participate in the city's auction which had begun in October 1982. *See supra* note 24. The city, therefore, cannot be said to have "denied PCI access." Brief for Appellant, *supra* note 24, at 8-10.

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

84 The court shifted from a content-neutral standard to a content standard in the midst of its analysis: "[t]he City's *interest* is not enough to counterbalance the *risk that diversity in editorial judgments* will be limited by the City's determination to choose the cable providers that it will permit to use the medium." *Id.* at 1406-07 (emphasis added).

85 *Id.* at 1409.

86 *Id.* at 1407.

> 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.*[87]

If the Ninth Circuit was concerned with the content of cable programs, then its holding that "the City [cannot] limit access by means of an auction process . . . to a single cable television company."[88] is misplaced.

The *O'Brien* test is inappropriate in the context in which the cable operator's rights to build a cable system are at issue.[89] *O'Brien* involved the "symbolic speech" of burning one's draft card.[90] That act itself was an expressive activity. This is not so in *Preferred* where the prohibited act is the technological task of stringing cable wire on to utility poles.

Perhaps the Ninth Circuit understood the tenuousness of its argument since it couched its language in public forum rhetoric.[91]

> What PCI wants . . . is a right of access to utility poles and conduits . . . controlled by the City. . . . PCI wishes to disseminate its message to the public. . . . [T]he nature and character of the property at issue fix the conditions under which we must evaluate both PCI's claimed right of access and the limitations imposed . . . on that right.[92]

The Ninth Circuit examined the third category of property, " 'which is not by tradition or designation a forum for public communication' "[93] in order to find a public forum.[94] The court found

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87 *Id.* at 1406 (emphasis added).

88 *Id.* at 1411. A more thoughtful approach to first amendment rights in the cable industry would focus on the *different functional aspects of all participants*. In that way a track one, content-oriented approach could be used concomitantly with a content-neutral track two approach. *See infra* text accompanying notes 228-31.

89 *Preferred*, 754 F.2d 1399-1401.

90 *O'Brien*, 391 U.S. at 376.

91 *Preferred*, 754 F.2d at 1407-09. *See supra* text accompanying notes 63-65.

92 *Id.* at 1407. The court used content-neutral track two first amendment analysis. The public forum doctrine is a check on government regulation. However, the first amendment does not *guarantee* access to government-owned property. *Id.* at 1407 (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114 (1981). The doctrine examines the "nature and character of the property," *id.* at 1407, and determines whether it can be construed as a public forum. If the speech occurs in a public forum, it can be regulated only through narrow ways which the government shows are necessary to serve significant governmental interests. If the speech does not occur in a public forum, the state's right to regulate depends on whether the regulation's interference with expression is "substantial." L. TRIBE, *supra* note 19, at 689-92.

93 *Preferred*, 754 F.2d at 1408 (quoting Perry Educ. Ass'n v. Perry Educator's Ass'n, 460 U.S. 37, 46 (1983)). In *Perry*, the Court upheld an exclusive bargaining contract between the union ("PEA") and the school district which provided that PEA would be permitted sole access to the internal school mail system even though this regulation had the effect of preventing rival organizations from communicating its views. *Perry*, 460

that PCI wished to use a nontraditional public forum, utility poles, but that this use was "basically compatible with the normal use of those facilities."[95] Furthermore, California has dedicated surplus space on the utility poles to be used by a cable operator.[96] The city's franchise process is itself a method by which the city grants access.[97] PCI's claim was that the franchise process limits access.[98] Again, the court downplayed the city's interest because "banning the installation of cable is not necessarily an appropriate way to further the City's interest in minimizing disruption of the public domain."[99] Nevertheless, the court concluded that "[t]he City may not solicit 'bids' from prospective speakers and deny access to its facilities to all save the highest 'bidder.' "[100]

U.S. at 45-47. However, this was not the school board's purpose and there was no evidence to support the position that the school board "intended to discourage one viewpoint and advance another." *Id.* at 49. The regulation simply reflected the special status of the official union. Moreover, the school board's interest in "insuring labor peace within the schools [by preventing the school from] 'becoming a battlefield for inter-union squabbles' " was sufficient to uphold the regulation. *Id.* at 52 (quoting Haukedahl v. School Dist. No. 108, No. 75-3641, slip op. (N.D. Ill., May 14, 1976) (footnote omitted)). The Court had analyzed *Perry* on the content-neutral track of first amendment analysis. *Id.* at 46. The Ninth Circuit cited *Perry* to support its public forum argument, but neglected to acknowledge that it was following Justice Brennan's minority position which analyzed the case under a track one analysis. *Id.* at 49 n.9; *see also supra* text accompanying notes 55-65.

94 *Preferred*, 754 F.2d at 1408.

95 *Id.* ("[A]lthough the public utility poles and conduits are not public forums by tradition . . . each may nevertheless serve as a forum for expression via the cable medium." *Id.*). *But see* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). In *Members of City Council*, the Supreme Court upheld a municipal ordinance prohibiting posting signs on utility poles since the regulatory had a valid interest in advancing aesthetic values and the city's regulation did not substantially interfere with the desired expressive activity. *Id.* at 807-08. The Court rejected the plaintiff's contention that the utility poles constituted a public forum. *Id.* at 813-14. Thus a less stringent standard of first amendment review was used. *Id.* at 816. The Ninth Circuit summarily dismissed *Members of City Council* in order to reach its result via a more stringent first amendment analysis. *Preferred*, 754 F.2d at 1408.

96 CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1987).

97 *Preferred*, 734 F.2d at 1400 & n.3; *see also* CAL. GOV'T CODE § 53,066 (West Supp. 1987).

98 *Preferred*, 754 F.2d at 1401. The *amici curiae* brief suggested that the city's franchise process imposed no restrictions on PCI's first amendment rights since the mandatory access and leased access requirements enable PCI to originate programming and, thus, to disseminate its message. Brief for Amici Curiae at 25-26, Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985) (No. 84-5541). This approach represents a well-reasoned analysis, balancing first amendment rights with free-market business considerations. The Ninth Circuit rejected the *amicus curiae*'s approach. *Preferred*, 754 F.2d at 1409-10 n.10; *see also infra* text accompanying notes 228-31.

99 *Preferred*, 754 F.2d at 1408 (citation omitted). The court dismissed other interests as well. *See supra* notes 80-81 and accompanying text. Moreover, *Preferred* suggested no other way to allocate franchises when in fact there is a limitation on the number of cable operators who can use the surplus space. This omission renders the opinion particularly problematic. The holding opens a Pandora's box of uncertainty for every municipality and for every cable company since franchises, henceforth, are unconstitutional. Some regulation is necessary to prevent continuous disruption to the public domain.

100 *Preferred*, 734 F.2d at 1409. Cornelius v. NAACP Legal Defense & Educ. Fund,

In the final analysis, the Ninth Circuit's holding hinges on the content analysis strand of the first amendment. "[T]he City may not suppress expression on [utility poles] merely because it disagrees with the speaker's viewpoint. . . . [T]he City's action in the instant case creates an impermissible risk of covert discrimination based on the *content* of, or the views expressed in, the operator's proposed programming."[101] Calling a cable operator a speaker is confusing because a cable-operator's function is technical not expressive. Moreover, the Ninth Circuit's reasoning is confusing and appears to stretch the logic of its arguments to reach its desired result. If the court is looking at the content[102] of cable programs, then its analysis does not effect content-neutral regulations of "manner, time and place." It is unclear whether the Ninth Circuit really believes that limiting access entails the "risk of covert discrimination."[103] or whether this dicta is intended to advance a cogent first amendment policy for the cable industry. The *Preferred* court tried to justify its conclusion by claiming to fashion a narrow holding.[104] However, the court has yet to explore the implications of its decision.[105]

Inc., 473 U.S. 788 (1985). "[T]he extent to which the Government can control access depends on the nature of the relevant forum. . . . Access to a nonpublic forum . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' " 473 U.S. at 800 (citing Perry Educ. Assoc. v. Perry Local Educators Assoc., 460 U.S. 37, 45-46 (1983)).

101 *Preferred*, 754 F.2d at 1409 (emphasis added).

102 The Ninth Circuit acknowledged that it might have to reach its conclusion another way:

> The city's argument is hard to distinguish from an assertion that a law prohibiting Mr. X or Mrs. Y from publishing a newspaper is valid, so long as each is provided an adequate space to print his or her message in already existing newspapers. Obviously, such a law would be invalid.

Id. at 1410. The court's tacit comparison of the cable industry to the publishing industry obscures the first amendment analysis.

103 *Id.* at 1409. The court acknowledged that there is room for some regulation. "[T]he City must content itself with uniformly applying to all applicants regulations tailored to minimize the burden on public resources and granting franchises to all cable operators who are willing to satisfy the City's legitimate conditions." *Id.* However, it is difficult to ascertain what sort of regulation this court would allow. *See infra* note 216.

104 754 F.2d at 1405.

105 Interestingly enough, the Ninth Circuit reached a different conclusion in evaluating *Preferred*'s antitrust claim:

> [C]able television systems, much like telephone and public utility systems, burden public resources and [a] statute [which] direct[s] the licensing authority to "impose conditions, restrictions, and limitations" on the use of public streets and on the construction of cable television systems . . . constitute[s] . . . a reasonable [exercise] of . . . authorized regulatory activity.

Id. at 1414-15. If the state's regulation is rationally related to the state's purpose in holding an auction, then a consistent and proper first amendment approach might yield a very different result.

IV. A Federal and State Regulatory Scheme

The cable industry's regulatory environment is a confusing myriad of federal, state, and local regulations. A franchise, while administered and awarded on the local level, also includes numerous provisions mandated by the FCC on the national level. It is important, therefore, to understand how the cable regulatory scheme developed as an offshoot from the broadcast industry. This resulted in the early FCC regulators analogizing the cable medium to a broadcast medium.[106] In recent years, however, the cable industry has called the broadcast analogy inappropriate[107] and has instead suggested regulation is an "electronic print" medium.[108]

A. *FCC Regulation*

The Communications Act of 1934 (the "Act")[109] gave the FCC authority to regulate interstate wire and radio communication conducted by common carriers and broadcasters.[110] Radio and television broadcasters transmit electromagnetic energy through the atmosphere.[111] Unlike a signal transmitted through the atmosphere, cable television transmits its signals over coaxial cables laid by a cable operator in a particular geographic area.[112] When cable technology first evolved in the 1940's and 1950's, the FCC was unsure whether cable should be subjected to the FCC's jurisdiction as a broadcasting medium.[113]

In 1948, after experimenting with Very High Frequency

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106 *See infra* text accompanying notes 127-31.

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

108 G. Shapiro, P. Kurland & J. Mercurio, *supra* note 45, at 72-73 (1983). *Preferred* is the first case which advances this proposition. *See infra* text accompanying notes 228-48.

109 47 U.S.C. §§ 151-152 (1982).

110 *Id.*

111 W. Abbot & R. Rider, Handbook of Broadcasting—The Fundamentals of Radio and Television 14-15 (4th ed. 1957).

112 A cable operator uses the streets or other public rights-of-way to lay the cable. The operating company then drops lines extending from the cable to individual television sets, which allows the transmission of television signals through the cable to the subscribers' television sets.

Signals are relayed to the source point or head end where they are amplified and converted to cable channel frequencies. When electrical impulses are relayed to the coaxial cable, the center copper and outer aluminum wires set up a magnetic field within the cable wire. It is this magnetic field which inhibits frequency loss and accounts for cable's large signal carrying capacity. A truck line of coaxial cable, or fiber optic cable, carries these electrical impulses to smaller feeder cables. These feeder cables are either buried underground or attached to utility poles, and are essential for relaying the cable signal into the subscriber's neighborhood, and finally, into the subscriber's home. C. Ferris, F. Lloyd, & T. Casey, *supra* note 1, ¶ 5.02.

113 *Id.* at ¶ 5.04; *see also* Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958); *see infra* text accompanying notes 117-18.

("VHF") and Ultrahigh Frequency ("UHF") channels, the FCC instituted a freeze on the processing of new television station applications.[114] VHF and UHF stations had the technological capacity to reach a wide area of the television public. However, because the FCC perceived that the public interest would best be served by requiring local television stations to fill local needs, it embraced a "policy of localism."[115] Cable stations filled the void left by the FCC's policy, by transmitting clear signals into rural communities.[116] As these cable systems developed, the television industry feared that the cable industry would encroach on television's monopoly. Thirteen television stations brought suit asking the FCC to regulate the cable industry.[117] The FCC refused, claiming it did not have the appropriate jurisdiction.[118]

In 1962, the FCC denied Carter Mountain Transmission Corporation's application to build a cable operating system.[119] Although no grant of authority from Congress had been given, the FCC departed from its earlier steadfastness and asserted authority over cable television.[120] The FCC considered the transmisson company to be a common carrier because its sole function was retransmission and did not involve a subscriber choosing some signals over others.[121]

In 1965, the FCC completely abandoned its hands-off policy.[122] To rectify the unfair or unequal competition between cable systems and local broadcasters and to preserve cable in its

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114 *See* Notice of Proposed Rule Making, 13 Fed. Reg. 5860 (1948).

115 *Id.*; *see also* Television Assignments, Sixth Report and Order, 41 F.C.C. 148 (1952). This policy provided the ideological underpinnings for much of the FCC's future cable regulation.

116 13 Fed. Reg. 5860. Large antennae were built to receive and then to amplify broadcast signals. The cable system improved television signals in rural communities where signal reception was difficult or nonexistent because of topographical conditions or distance from television stations. This filled the void in television service that was created by the FCC's freeze on television station licenses. The first cable system was built in Astoria, Oregon in 1949. In 1950, the first commercial cable station was built in Lansford, Pennsylvania. C. FERRIS, F. LLOYD & T. CASEY, *supra* note 1, ¶ 5.03.

117 Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).

118 The court held that cable technology was unlike a common carrier, and therefore, under section 3(a) of the Act the FCC lacked jurisdiction. "[W]e do not believe that [cable systems] are engaged in performing the service of communications common carriers." *Id.* para. 7 at 253-54. A carrier chooses messages and a cable system chooses only its subscribers. *See* H.R. REP. No. 1850, 73d Cong., 2d Sess. 46 (1934); *see also* CATV and TV Services, Report and Order, 26 F.C.C. 403, paras. 58-63 at 427-29 (1959) (FCC reaffirmed that it did not have jurisdiction over the cable industry and could not regulate it as either a common carrier or broadcaster), *modified by* 32 F.C.C. 459 (1962).

119 *In re* Application of Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

120 *Id.* paras. 7-8 at 461-62, paras. 16-17 at 464-65.

121 *Id.* para. 7 at 461.

122 Rules re Microwave-Served CATV, First Report and Order, 38 F.C.C. 683 (1965).

role as a "supplement rather than a substitute for . . . television service,"[123] the FCC instituted the "must-carry rules."[124] These regulations placed two requirements on cable operators. First, the systems must carry *all* signals of local broadcasters, and second, the cable system may not carry distant signal programming that duplicates the local programming fifteen days before or after the local stations.[125] These rules protected television stations—but at the expense of cable's growth.[126]

In 1966, the FCC widened its authority over the cable industry.[127] In an effort to provide a fair, efficient, and equitable distribution of service, the cable industry was defined by the FCC as ancillary to the broadcast medium in regulatory standards.[128] The cable industry could thus be regulated as any traditional broadcaster.

The first case to challenge this new FCC jurisdiction was *United States v. Southwestern Cable Co.*[129] This case challenged FCC jurisdiction over the cable industry on the ground that CATV was neither a broadcaster nor a common carrier within the meaning of the Act.[130] The Supreme Court upheld the FCC's regulatory authority because it was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[131] Thus, the FCC continued to expand its regulatory role.

In 1968, the FCC instituted local origination rules.[132] These rules prompted the cable industry to originate its own programming.[133] One of the incidental results of the mandatory local

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123 *Id.* para. 4 at 701.

124 *Id.*

125 *Id.* paras. 83-92 at 716-19.

126 During this period the FCC also considered extending its authority over the entire cable industry, not just microwave feed systems. *See* CATV, Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453 (1965).

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

128 2 F.C.C.2d 725. Restrictions were predicated on 47 U.S.C. §§ 152(a), 153(a) (1982).

129 392 U.S. 157 (1968).

130 *Id.* at 164.

131 *Id.* at 178. The fact that the court found that the FCC had jurisdiction over cable helped to substantiate the perception of cable television as a broadcast medium. *See also Black Hills*, 399 F.2d 65 (FCC's authority over cable sustained finding that CATV's had the same constitutional status under the first amendment as other broadcasters).

132 *See* CATV, Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, para. 15 at 422 (1968) (codified at 47 C.F.R. § 71.1111(c) (1970)). In part, these rules developed because the transmission rules proved onerous to both the FCC and the cable operator. Local origination rules required that cable operators set aside facilities for production and presentation of local programming.

133 An incident of these rules was that they were used as a justification for cable franchises. *See* CATV, First Report and Order, 20 F.C.C.2d 201, para. 46 at 222 n.27

origination rules was the extension of broadcast first amendment standards such as "equal time" and "the fairness doctrine"[134] to cable systems. The FCC believed[135] that program origination was in the public interest[136] and the Supreme Court upheld these mandatory origination rules in *United States v. Midwest Video Corp.*[137] Nevertheless, both the cable companies and the FCC later realized that these rules frustrated the potential growth of the industry.[138]

In the early 1970's,[139] local and mandatory access rules were

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(1969). The FCC's report characterized the cable industry as a "natural monopoly" and recognized that a franchise system was an efficient means of accommodating the economic realities of the cable industry.

134 *See infra* notes 169-70.

135 CATV, Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, para. 12 at 421 (1968). The FCC "discuss[ed] . . . the possibility of the CATV operator leasing some channels on the system to others for the purpose of program origination [because] [t]he Commission [was] concerned about a common carrier acting as a program originator."

136 *Id.*

137 406 U.S. 649 (1972). Local origination rules "further the achievement of long established regulatory goals in the field of broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." *Id.* at 667-68.

138 The origination rules proved too difficult for cable operators. By the late sixties when there were almost 2500 cable systems with 4.5 million subscribers, this growth came to a standstill in many of the major markets. By 1974 the FCC eliminated the rules. Cable Television Series, Report and Order, 49 F.C.C.2d 1090 (1974). "The net effect of attempting to require origination has been the expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation." *Id.* para. 33 at 1105.

However other companies such as Home Box Office, Inc. began to develop programming for cable systems. The FCC reacted by regulating these venders through "anti-siphoning rules." CATV, Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970). These rules placed numerous restrictions on pay television companies. For example, pay television stations were barred from showing (1) feature films released less than two years prior; (2) sports events that were regularly televised within the past two years; and (3) 90% of pay cablecasting could not comprise sports and movies. *Id.* para. 2 at 831 app. An ostensible purpose of these rules was to prevent pay television from taking programs away from traditional television broadcasters. For example, NBC and HBO would henceforth be competitors for the same movies. Home Box Office, Inc. v. FCC, 567 F.2d 9, 21-25 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). These rules were struck down. "[T]he series restrictions reflect a policy completely opposed to that adopted . . . in the Prime Time Access Rules . . . and consequently could not [be] affirmed . . . ." *Id.* at 60.

139 Ironically, this was a period in which the FCC was beginning to reevaluate and dismantle the regulatory scheme. *See* CATV Syndicated Program Exclusivity Rules, Report and Order, 79 F.C.C.2d 663 (1980) (eliminating distant signal carriage and exclusivity rules); Cable Television Channel Capacity, Notice of Proposed Rulemaking, 53 F.C.C.2d 782 (1975) (modifying franchise requirements and technical standards); CATV Late Night Television Reporting, Report and Order, 48 F.C.C.2d 699 (1974) (limiting channel capacity requirements); Network Programming, Notice of Proposed Rulemaking, 43 F.C.C.2d 913 (1973) (adjusting signal carriage requirements); *see also* CATV Economic Impact, Notice of Inquiry, 65 F.C.C.2d 9 (1977). Irrespective of this deregulation, the cable industry was still perceived of as a broadcast medium.

instituted.[140] These rules required each cable operator to designate a minimum of four of their channels for specified uses, including leased access by local groups, educational groups, and local government, on a nondiscriminatory basis.[141] However, three years later, the Supreme Court struck down the mandatory access requirement in *Midwest Video Corp. v. FCC*[142] as being beyond the FCC's statutory authority.[143] Today, some type of local access is generally a predominant requirement of municipal franchise regulation.[144]

The FCC's attempts to regulate the cable industry reflect an uneasiness in adapting the Act to the cable industry.[145] Its predilection has been to extend broadcast rules[146] to the cable industry. The FCC also established guidelines[147] to assure that all communities were wired.[148] The federal government's policy ob-

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140 Cable TV Capacity and Access Requirements, Report and Order, 59 F.C.C.2d 294 (1976) (codified at 47 C.F.R. §§ 76.254-.256 (1979)).

141 *Id.*

142 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979). The Eighth Circuit held that the mandatory access provisions violated the Communication Act of 1934 by imposing common carrier obligations on cable operators engaged in broadcasting. *Id.* at 1050-51. However, the court hinted that cable operators may have first amendment protection. "The present access rules strip from cable operators . . . all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media. . . ." *Id.* at 1055-56.

143 *Id.*

144 Local access in this context means that a cable company must set aside a minimum of four channels to be used by public interest groups for "local self-expression" and to promote a "definite societal good." Cable TV Capacity and Access Requirements, Report and Order, 59 F.C.C.2d 294, paras. 8-13 (1976) (codified at 47 C.F.R. §§ 76.254-.256 (1979)).

145 Numerous cases challenged the FCC's regulatory role. Courts thus became a quasi-legislature defining, supplementing, and assisting the FCC in its attempt to regulate a new industry. *See generally* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) ("[T]he FCC has unambiguously expressed its intent to pre-empt [sic] any state or local regulation of . . . [distant broadcast and nonbroadcast] signals carried by cable television systems." 467 U.S. at 701. When state cable regulations conflict with FCC actions, the court indicated its predisposition to uphold FCC action); *see, e.g.*, *Midwest*, 406 U.S. 649 (1972) (mandatory program origination upheld); United States v. Soutwestern Cable Co., 392 U.S. 157, 178 (1968) (upholding FCC's power to impose some restrictions on the growth of cable so long as those restrictions were reasonably ancillary to the Commission's other responsibilities with respect to the regulation of television broadcasters); Community Communications v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981) (municipalities do not have an automatic "state action" exemption from antitrust laws when awarding exclusive cable franchises), *cert. dismissed*, 456 U.S. 1001 (1982); *Midwest*, 571 F.2d 1025 (striking down mandatory access provisions); Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) (sustaining FCC's authority over the cable industry).

146 These rules include the Fairness Doctrine, equal opportunity provisions, signal registration requirements, network nonduplication protection, franchise fee restrictions, and cross-ownership band. *See* Cable Television Service, 47 C.F.R. §§ 76.209, 76.205, 76.12, 76.92, 76.33, 76.501 (1985).

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

148 The FCC stated:

> We emphasize that provision must be made for cable service to develop equitably and reasonably in all parts of the community. A plan that would bring

jective sought to prevent local authorities from "cream skimming."[149]

Recently, Congress passed the Cable Communications Policy Act of 1984,[150] where, for the first time, a national cable policy was considered. The Cable Act codified a cable-regulation role for municipalities, especially the franchise mechanism.[151] In particular, section 541 of the Cable Act establishes franchise procedures that encourage cable growth, but also assures that cable systems are responsive to community needs and interests.[152]

B. *State and Municipal Regulation*

In order to operate a cable system, cable operators must

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cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. No broadcast signals would be authorized under such circumstances.

Id. para. 180 at 208.

The fairness doctrine has been determined to no longer be in the public interest. *See infra* note 172.

149 "Cream skimming" is a practice among cable operators of serving only profitable affluent areas. *See* Camp, *Anti-Television's First Amendment Rights?*, 23 AM. BUS. L.J. 203 (1985) (Camp reviewed the various techniques used by local governments to prevent cream skimming. She concluded that methods such as a cable franchise process, even in the guise of advancing public policy, cannot be sustained under the first amendment because access to cable is not an essential service that needs to be supplied to all neighborhoods.).

150 Pub. L. No. 98-549 (codified at 47 U.S.C. §§ 521-559 (Supp. III 1985) [hereinafter the Cable Act]. This legislation enabled the FCC to close out several dockets and defer ruling on a number of pending issues.

151 Section 541(b)(1) of the Cable Act provides that a cable operator may not provide cable service without a franchise. 47 U.S.C. § 541(b)(1).

152 Section 541 sets forth pertinent franchise requirements:

> (a)(1) A franchising authority may award, . . . 1 or more franchises within its jurisdiction. . . .
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> . . . .
>
> (3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides. . . .
>
> . . . .
>
> (b)(2) a cable operator may not provide cable service without a franchise. . . .
>
> (c) Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

47 U.S.C. § 541. *Cf.* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom.* National Assoc. of Broadcasters v. Quincy Cable TV, Inc., 106 S. Ct. 2889 (1986). *Quincy* successfully challenged the "must-carry rules." These rules require cable operators, upon request and without compensation, to transmit every over-the-air television broadcast signal that is significantly viewed. *See* Cable Television Service, 47 C.F.R. §§ 76.57-.61 (1984).

The Court of Appeals for the District of Columbia found that these rules violated the first amendment rights of cable programmers who sell their programming to cable operators. *Quincy*, 768 F.2d at 1463. The rules impinged upon the cablecaster's freedom of speech since they were broader than necessary to meet the government's policy objective of protecting local television service. *Quincy*, 768 F.2d at 1459-62.

either lay their cable underground, or string it along utility poles; both ways involve municipal-owned rights-of-way.[153] States, therefore, give municipalities authority to control and regulate cable operators.[154] Generally, a municipality solicits bids by a "Request for Proposal"[155] from competing companies who wish to operate a cable system within a geographic area.[156] The city then selects the cable company or auctions off the opportunity to the company that will best serve the area.[157] The company selected is given a franchise[158] to operate in the municipality.

The franchise system has been called a failure by some[159] because many municipalities lack designated standards, procedures, competition, and proper notice, and may allow some political favoritism to mire the selection process. Others consider the franchise system to be extortion[160] which creates a tollgate between the local government and cable customers.[161]

The franchise process and local control, though, serve sub-

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153 Courts have found that the use of city rights-of-way justify municipal participation. *See, e.g.*, Omega Staellite Prods. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985); Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543 (W.D. Ky. 1982).

154 *See, e.g.*, CAL. GOV'T CODE § 53066 (West Supp. 1987).

155 A Request for Proposal ("RFP") must contain a statement of financial well-being, details of how the cable system will be constructed, a timetable for its construction, and the channel capacity of the system. An RFP also requires that filing fees and other administrative fees be submitted.

The city also requires that a number of channels be set aside for leased access and for public access. The cable operator is also required to provide a studio and production facility for the public access channels. *See, e.g., Omega*, 694 F.2d at 119; *Preferred*, 754 F.2d at 1401-03; *Community Communications*, 660 F.2d at 1370; *Berkshire*, 571 F. Supp. at 976; *Hopkinsville*, 562 F. Supp. at 543; *see also* Barnett, *supra* note 6, at 691-95.

156 *See, e.g.*, CAL. GOV'T CODE § 53066 (West Supp. 1987). *Cf.* Williamson, *Franchise Bidding for Natural Monopolies—in General and With respect to CATV*, 7 BELL J. ECON. 73 (1976).

157 *See* Barnett, *supra* note 6 (the selection of a cable company must be made on a content-neutral basis).

158 In this context, a franchise is a grant of authority by a municipality to an individual or company to do certain things the individual or company would otherwise be unable to do. For example, a franchise gives a company the authority to use the streets on a semi-permanent basis. *See generally id.*

A cable franchise is justified by some because cable television may be characterized as a natural monopoly, and hence, the franchise is similar to a utility. *See* Meyerson, *supra* note 73; Johnson & Botein, *The Process of Franchising*, in W. BAER, *supra* note 1, at 69-156. *But see infra* note 161.

159 Large areas of major cities such as Sacramento, Washington, New York, Los Angeles, Detroit, and Chicago are currently without cable service because of political battles which have raged for five or more years. Philadelphia has gone through five franchising battles since 1960 and is still without cable. Hazlett, *Why Cable TV Needs a Free Market*, N.Y. Times, Nov. 17, 1985, § 3, at 2, col. 3; *see also* THE CENTER FOR ANALYSIS OF PUBLIC ISSUES, CROSSED WIRES: CABLE TELEVISION IN NEW JERSEY 65 (1971).

160 Barnett, *supra* note 6, at 691.

161 Lee, *supra* note 73, at 870-74 (1983).

stantial public policy needs. Public access enables cable to reach educational and public interest groups who might not be able to build their own systems.

> As a matter of policy [t]he public interest in cable would be largely frustrated if there were no legal way . . . to modify the terms of outstanding franchises so as to bring into being services or provisions such as increased channel capacity, nonbroadcast channels for cable-originated programming . . . . public access, and government and educational use in particular, production facilities for the users of these channels, two-way capability, interconnection between cable systems, government supervision of service and technical standards, the raising or lowering of subscriber rates as appropriate.[162]

Municipal control assures that *all* neighborhoods are wired to receive cable programs. Only state regulation can assure that all users, even those who could not otherwise afford to build their own systems, have access to cable systems.[163] The courts have upheld the franchise system because it facilitates these public policy goals.[164]

V. The Ninth Circuit Rejects Broadcast-Like Regulation

In *Preferred*, the first case to hold that the local franchise process abridged the cable operator's freedom of speech, the court reviewed the major arguments advanced within the industry to justify broadcast-like regulation: physical scarcity, economic scarcity, and public disruption.[165] As previously indicated, these arguments stem, in part, from cable's early relationship to the broadcast industry.[166] The three arguments are generally used to counter any challenge to the current regulatory scheme.[167] However, the Ninth Circuit rejected these justifications for regulation and struck down most local regulation embodied in the local auction and franchise processes.[168]

A. *Physical Scarcity*

The physical scarcity argument maintains that since there is

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162 Barnett, *supra* note 6, at 703.

163 Miller & Beals, *supra* note 6, at 612.

164 *Berkshire*, 571 F. Supp. at 980. *See also Omega*, 694 F.2d at 129 (to overturn the franchise system would create uncertainty and chaos in CATV).

165 *Id.* at 1403-06, 1411.

166 *See supra* note 35 and text accompanying notes 109-30.

167 *See supra* note 35.

168 *Preferred*, 754 F.2d at 1411. The *Preferred* court went further and, after rejecting the broadcast-like regulation, found that cable operators had been denied their first amendment rights. *See supra* text accompanying notes 98-99.

an absolute limit to the number of signals that can be transmitted over the electromagnetic spectrum, a special broadcast first amendment standard should apply.[169] The physical scarcity doctrine has been applied to insure an opportunity for all who wish to speak.[170] In the early days of cable television the physical scarcity argument was applied to cable as a "broadcaster."[171] However, cable television technology is not subject to the same kind of physical scarcity as is traditional broadcasting.[172] A coaxial cable is capable of transmitting a great number of signals.[173] In *Preferred*, PCI's complaint alleged that there was surplus space on the utility poles for more than one cable.[174] Because the Ninth Circuit accepted these allegations as true, it rejected the physical

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169 *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1934) (the right of free speech does not include the right to use facilities without a license; the physical limitation of the electromagnetic spectrum limits the number of messages of those who wish to speak).

170 The Fairness Doctrine provides that all broadcasters must present all sides of controversial public issues by providing equal opportunity for responses on issues presented. This doctrine reasons that the viewer's or listener's right is paramount. *See* Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 93, 94 (1973); Red Lion Broadcasting v. FCC, 395 U.S. 367 (1979). In *Red Lion* the court stated:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy . . . with obligations to present those views and voices which are representative of his community and which would otherwise . . . be barred from the airwaves.

Id. at 389.

But see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (print media such as newspapers cannot lawfully be regulated by equal access rules which compromise editorial discretion).

171 *See* Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968).

172 *See* Omega Satellite Prods. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982).

However, the FCC ruled, on August 4, 1987, that the fairness doctrine is no longer in the public interest, "[a]rguing that a First Amendment analysis should not focus on the physical difference between the broadcast and print media, but on their functional similarities." Syracuse Peace Council v. Television Station WTVH, Syracuse, N.Y.; Fairness Doctrine, 52 Fed. Reg. 31,768, 31,769 (1987) (to be codified at 47 C.F.R. ch. 1); *see also* N.Y. Times, Aug. 11, 1987, at C16, col. 5; *id.* Aug. 5, 1987, at C26, col. 3.

173 *See id.* (frequency interference is a problem that does not arise with cable television). *See also* Midwest Video Corp. v. FCC, 571 F.2d 1025, 1054 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); Century Federal, Inc. v. City of Palo Alto, 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) (physical scarcity is not applicable to cable and in fact the court is unaware of any case upholding the right of a municipality to deny a CATV franchise on the basis of physical scarcity). *But see* Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 986-87 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). The goal of the scarcity rationale is to promote the first amendment by making a powerful communication medium available to as many citizens as is reasonably possible. Thus, the court stated that "scarcity is scarcity . . . whether 'physical' or 'economic,' [it] does not matter if its effect is to remove all but a small group an important means of expressing ideas." *Id.* at 986-87 (footnote omitted).

174 *Preferred*, 754 F.2d at 1404; *see also* CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1987).

scarcity argument.[175]

The court, however, expressed "no opinion on 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."[176] In essence, this was a tacit acknowledgement that there is a physical limit to the number of cables that can be placed in the same area. Physical scarcity exists, albeit in a different manner from spectrum scarcity, and therefore, it is necessary to limit access.[177] Accordingly, if access must be limited, then a first amendment standard ascribed to cable operators must accommodate a physical limitation of "speakers." In a narrow sense, *Preferred* was correct in dismissing the physical scarcity argument. However, it erred in mandating that a municipality should abrogate its role in regulating access. Furthermore, if a community has limited resources, then the municipality has a significant role in allocating those resources fairly, and in selecting the policy goals to be advanced.[178]

B. *Economic Scarcity and Natural Monopoly*

A natural monopoly is an industry in which the start-up and maintenance costs are so high that it is economically feasible for only one company to operate in a given region.[179] The cable industry has been characterized as a natural monopoly.[180] Thus, only a single cable system can operate profitably or efficiently in a particular area.[181] Duplication of cable facilities is not economically feasible because one cable company can satisfy consumer demand at a lower cost to the customer than if numerous compa-

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

176 *Id.*

177 *See* Cable Television Pole Attachments, Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59, para. 25 at 71 (1979) (there is a physical limit to the number of cable that can be strung); *see also* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1978 (10th Cir. 1981) (cable-like broadcasting involves a scarce commodity in that only a limited number of operators can serve a given area), *cert. denied*, 456 U.S. 1001 (1982).

178 *See infra* text accompanying notes 211-26; *see generally* Miller & Beals, *surpa* note 6, at 623.

179 Miller & Beals, *supra* note 6, at 618-19.

180 A utility company is also considered such an industry. *See, e.g.*, *Community Communications*, 660 F.2d at 1379; Omega Satellite Prods. v. City of Indianapolis, 694 F.2d 119, 127-29 (7th Cir. 1982); Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543, 547 (W.D. Ky. 1982); Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 985-86 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). *But see* Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335, 1364-75 (1986); Note, *Constitutional Limitations*, *supra* note 73, at 197-200.

181 *See* Miller & Beals, *supra* note 6, at 619-22.

nies operated in the same area.[182] As a result, a municipality limits its market entry to one cable company.[183]

Cable systems illustrate the "economies of scale"[184] theory.[185] The cable operator has a tremendous start-up cost to install the system.[186] If these costs are spread over a region, the operator can recoup some of the initial money outlay by subscription rates. An operator with a franchise has a fixed customer base, and hence, derives income from a long peroid of time, making it economically feasible to build and maintain a cable system.

Government franchises are one way of creating a monopoly-type environment for the cable industry. Since the cable industry has been characterized as a natural monopoly, these franchises are indispensable as a means to insure that all individuals have affordable access to cable facilities.[187] Cable television would be characterized as a scarce resource[188] and thus merits regulation similar to a local electric company.

The *Preferred* court dismissed the argument of economic scarcity as unproven.[189] Furthermore, an industry characterized as a natural monopoly is not entitled to special first amendment protection that amounts to keeping other speakers out.[190] The Ninth Circuit analogized cable television to a newspaper, and argued that while only one newspaper may serve many large cities, this type of "economic scarcity" does not automatically give rise

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182 *See* Barnett, *supra* note 6.

183 Similarly, a municipality allows only one utility company to operate within its jurisdiction. *See generally* Myerson, *supra* note 73; Miller & Beals, *supra* note 6, at 618-19. *But see* Goldberg, *supra* note 73, at 592-93 (1981) (unlike utility operators, who have no direct competition, cable operators are faced with substitutes for their services—namely, subscription television and satellite dishes; these services take away from the cable "monopoly").

184 Economies of scale describe an industry with relatively fixed costs, which, as spread over a greater number of people lowers the cost per customer. *See generally* C. MCCONNELL, ECONOMICS—PRINCIPLES, PROBLEMS, AND POLICIES 507-510 (6th ed. 1975).

185 *See Omega*, 694 F.2d at 126. *See generally* Williamson, *supra* note 156; Kreiss, *supra* note 73.

186 *See* Miller & Beals, *supra* note 6, at 618.

187 *See* Finneran, *Local Monopolies Serve the Public Best*, N.Y. Times, Nov. 17, 1985, § 3, at 2, col. 1. *But see* Camp, *supra* note 149, at 225-32.

188 The Tenth Circuit believes that it is legitimate to regulate cable via a franchising process. In Community Communications v. City of Boulder, the court inferred that government has a legitimate role in policing scarce resources. *Community Communications*, 660 F.2d at 1379.

189 *Preferred*, 754 F.2d at 1404-05. *See also* Posner, *supra* note 38, at 4 (the tendency toward monopoly and the argument of economic scarcity, if present at all, is attributable to government action, particularly the municipal franchise process, rather than any natural economic phenomenon); G. SHAPIRO, P. KURTLAND & J. MERCURIO, *supra* note 45 (economic scarcity argument rests on an unproven assumption).

190 *See Berkshire*, 571 F. Supp. at 985-87.

to a duty to provide public access to the press.[191] No such duty exists for publishers.[192]

Cable systems, however, differ from newspapers because the installation of a cable system requires digging up public streets.[193] "[A] cable company must significantly impact [on] the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information."[194] Moreover, a city franchise is not an attempt to influence editorial judgment or content, but rather, it is a way of controlling disruption to the public domain and insuring affordable access. A franchise is simply a conduit control because the city controls who uses its streets and utility poles.[195]

Local governments have attempted to protect citizens from cable's monopoly power by regulating rules of basic service, thereby insuring access for users on a nondiscriminating basis, and setting minimum service standards.[196] Part of local governments' roles is to assure that neighborhoods receive goods and services. This is especially true of infrastructure which is generally an important equalizer of basic services such as phone lines, sewer pipes, gas lines, and electricity. Building a cable system is similar to building other utilities and, as such, may constitute a natural monopoly.[197]

C. *Disruption of Public Domain as a Justification for Government Regulation*

Cable operators must either dig up the public street to lay their cable, or use utility poles to string their cable.[198] Some courts have found this to be a disruption to the public domain,

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191 *Preferred*, 754 F.2d at 1404-05.

192 *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 245 (1974) (newspapers tend to eliminate competing papers in large cities, but cannot be subject to government interference in their editorial decisions and discretion).

193 *Community Communications*, 660 F.2d at 1379.

194 *Id.*

195 *See* Miller & Beals, *supra* note 6, at 618-19 (by referring to the franchise process as a conduit control, Miller likened a cable company to a utility. The role of municipalities in awarding franchises is thus limited, to some extent, to the utility-like function of installing coaxial cables). *See infra* text accompanying notes 252-58.

196 Miller & Beals, *supra* note 6, at 618-19.

197 Arguments have been advanced that find no public policy reason why cable television should be made available to all citizens. *See, e.g.*, Goldberg, Ross & Spector, *supra* note 73, at 592-94. Cable operators are not like "operators of public utilities[; the latter] vies for consumers' dollars and attention." *Id.* at 592-93. "This freedom and this diversity of information is best guaranteed if the communications marketplace is left free of government regulation . . . ." *Id.* at 594.

198 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 1, at ¶ 5.02.

and therefore, to be a legitimate reason for local regulation.[199] The *Preferred* court acknowledged that "the use of public facilities . . . provides [some] justification for some government regulation. The City has legitimate interests in public safety and in maintaining public thoroughfares."[200] Since cable operators must use the public domain to provide access, government and cable are tied together in a way that government and newspapers are not.[201]

The *Preferred* court noted that laying cable is a noncommunicative aspect[202] of the first amendment.[203] Hence, a balance between the values of free expression and the government regulatory interest must be struck.[204]

In *Preferred*, the court believed that 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 [operators] on the basis of the content of, or the views expressed in, their proposed programs.[205]

Selecting a cable company on the basis of possible programming is a content-based objective and would be violative of the cable companies' first amendment rights. Franchises, however, are selected on a content-neutral basis.[206] The Ninth Circuit used its editorial judgment about how the city selected its cable company to tip the balance against the city's interest of protecting the public domain.[207] The court believed that auctioning off the rights to a cable system is not justifiable. "The City's interest is not enough to counterbalance

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199 *See Community Communications*, 660 F.2d at 1377. *Accord Omega*, 694 F.2d at 127-28; *Berkshire*, 571 F. Supp. at 984.

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

201 Anyone can print and distribute a message on a paper leaflet. Neither the means of production nor distribution are controlled by local governments. However, a cable operator must use public facilities, such as streets, to install the technological infrastructure prior to disseminating any message. Thus, of necessity, a relationship exists between cable operators and local government.

202 *See supra* text accompanying notes 55-65.

203 *Preferred*, 754 F.2d at 1405.

204 L. TRIBE, *supra* note 19, at 582 (1978); *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

205 *Preferred*, 754 F.2d at 1406; *see also* Note, *Access to Cable*, *supra* note 73, at 1405-08.

206 The franchise process has been called a "tollgate" and has been referred to as a means of extorting revenue for municipalities. *See supra* text accompanying notes 159-61. However, raising money from franchise fees for the city treasury can hardly be considered "content based regulation." *Cf.* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (unanimous court sharply limited the ability of states to regulate the *content* of cable programming).

207 *See infra* text accompanying notes 218-23.

the risk that diversity in editorial judgments will be limited by the City's determination to choose the cable providers that it will permit to use the medium."[208] Laying cable is purely a technical activity and a cable company's editorial judgments are certainly not made during that time.[209] It is hard to understand why the court believed that the risks of stifling "diversity in editorial judgments" outweigh the disruption of the public domain, as well as other significant government interests.[210]

VI. A First Amendment Analysis for the Cable Industry

A. *The Noncommunicative Standard for First Amendment Analysis*

The scope of first amendment protection differs depending on the medium of expression.[211] By reviewing the city's auction and franchise regulations[212] the Ninth Circuit also reviewed the noncommunicative impact of these regulations on PCI's first amendment rights. The first amendment recognizes the right of listeners and viewers to receive messages.[213]

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[214]

Thus, courts find a violation of noncommunicative first amendment right by balancing the values of free expression and the governmental regulatory interest.[215] The Ninth Circuit purported to use the noncommunicative standard, and thus should have balanced local interests in franchise regulatory schemes with values of free expression.[216]

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208 *Preferred*, 754 F.2d at 1406-07.

209 *See infra* text accompanying notes 252-77.

210 *See infra* text accompanying notes 218-23.

211 *See supra* text accompanying notes 84-105; *see* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) ("[E]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method." *Id.* (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949))); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

212 *Preferred*, 754 F.2d at 1400-01.

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

214 *Id.*

215 L. Tribe, *supra* note 19; *see, e.g.*, *O'Brien*, 391 U.S. at 382.

216 *See supra* text accompanying notes 71-72. Justice Rehnquist underscored the necessity of balancing competing societal interests in his *Preferred* opinion. The Justice wrote that "[c]able television partakes some of the aspects of speech and the communication of ideas. . . . [However,] where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *Preferred*, 106 S. Ct. 2037-38 (1986).

The franchise scheme serves a number of public policy goals: protecting limited public resources; assuring that all viewers can receive cable transmission; providing access to a communications network to all citizens who wish to express their views; and reducing uncertainty in the cable industry. These goals must be balanced against the first amendment right to free speech. If the balance tips toward the listener, it may justify regulation by a municipality for selecting who may construct a cable system.

Courts have recognized that a municipality has an interest in protecting its streets and other rights-of-way from the potentially disruptive impact of cable companies.[217] The city regulatory scheme also protects the interest of viewers by assuring that their neighborhoods are wired.[218] Public policy dictates that all neighborhoods, not just affluent ones, should be wired. If the franchise scheme were abandoned and cable companies operated in a free market, a cable operator might decide to wire only wealthy neighborhoods.[219] This is the danger of "cream skimming." The construction of a cable system is therefore similar to laying the infrastructure for a power company—without the basic access, whole neighborhoods are left in the dark. Once an area is wired, potential viewers can decide whether to subscribe to cable. This decision is similar to deciding whether to purchase a newspaper. Absent a franchise scheme, cable operators might refuse to wire areas, and viewers would be unable, under *any* circumstance, to receive transmission. Viewers would be barred from an important communications medium, and *their* first amendment right would be seriously jeopardized.[220]

Another objective of cable franchising is to provide access for all viewers through public access regulations.[221] By reserving public

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[217] *See, e.g.*, Omega Satellite Prods. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); Hopkinsville Cable TV v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543, 546 (W.D. Ky. 1982).

[218] *Cf.* Hazlett, *Why Cable TV Needs a Free Market*, N.Y. Times, Nov. 17, 1985, § 3, at 2, col. 1 (Many cities have been unable to reach a satisfactory franchise agreement, thus preventing *all* of their citizens from receiving cable television.).

[219] The current FCC regulatory scheme asserts that there is a basis for advancing the goal of a state-of-the-art national communications network. *See supra* text accompanying notes 147-49. *Contra A Strained Comparison*, L.A. Daily J., Mar. 12, 1985, § 1, at 4, col. 1 (it is an unsettled issue, however, whether a cable communication system is the "right" of every citizen and, hence, a viable policy goal); Camp, *supra* note 149, at 247-48.

[220] *See Red Lion*, 395 U.S. at 390-91; *see also* Stanzler, *supra* note 73, at 233-34. ("[T]he right of viewers and listeners to receive ideas is paramount to the right of broadcasters to control the airwaves.") (footnote omitted). Similarly, the right to receive the infrastructure for cable transmission should be paramount to the business exigencies of cable operators.

[221] *See supra* text accompanying notes 139-44.

access channels and production studios, access to communication is made available to all, not just those who can afford to lease space. The print media does not require expensive infrastructure, and a speaker can disseminate messages through inexpensive paper leaflets.[222] In contrast, an individual rarely has several million dollars to develop one's own cable system, and thus, is totally shut out of the medium. Cable technology enabled the development of a different communications medium. Public policy objectives of assuring all speakers a forum can be best achieved by regulating cable systems. Franchising assures the setting aside of channels for public, educational and governmental purposes.

Today, there are over 6,000 cable systems which serve over thirty million Americans.[223] A decision which would call into question the constitutional validity of these 6,000 cable systems would create widespread uncertainty with far-reaching consequences. A decision holding local franchise schemes unconstitutional could result in the dismantling of all cable systems now in existence. There would also be uncertainty as to whether current cable systems could continue to operate, and how prospective cable systems could enter a community.[224]

To truly protect first amendment rights, the new communications medium must be made available to all citizens whether as speakers or as viewers. Balancing public policy goals with a cable operator's right to construct a system favors a larger group of speakers and viewers. Franchise regulations[225] are a rational means of effectuating numerous policy goals.[226]

B. *Broadcaster—Newspaper—Utility: A Functional Analysis*

The Ninth Circuit rejected the assertion that the cable industry is similar to the broadcast industry.[227] Instead, it analogized a

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222 *See* Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 986 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

223 Finneran, *Local Monopolies Serve the Public Best*, N.Y. Times, Nov. 17, 1985, § 3, at 2, col. 1. This statistic accounts for 40% of American families. *Id.*

224 *Back in a Thicket*, L.A. Daily J., Mar. 12, 1985, § 1, at 4, col. 1; *accord* Goodale, *Ninth Circuit Case May Have Impact on Constitutionality of Cable Act*, Nat'l Law J., Mar. 25, 1985, at 23, col. 1. This uncertainty would ultimately result in a litigious environment benefiting lawyers to the detriment of consumers.

225 Access provisions in franchise agreements provide cable program originators with an alternative means of reaching an audience. *See generally* Cable TV Capacity and Access Requirements, Report and Order, 59 F.C.C.2d 294, paras. 53-76 (1976).

226 This Comment does not suggest that all of the franchise regulations and procedures are 100% efficient in effectuating the enumerated policy goals. Rather, municipal franchises provide the only means of insuring all viewers the infrastructure to receive cable communications.

227 *Preferred*, 754 F.2d at 1403.

cablecaster to a newspaper editor.[228] While the court was first to significantly hold that a cable operator's first amendment rights had been infringed,[229] it was not the first court to discuss the first amendment problem. In *Midwest Video Corp. v. FCC*,[230] the Supreme Court hinted at some first amendment protection for cable operators.[231] Specifically, the Court rejected the physical scarcity argument as applied to broadcasters, and found that "[t]he present access rules strip from cable operators . . . all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media."[232] Indeed, the Eighth Circuit's decision in *Midwest* analogized a cable company to a newspaper.[233] "[T]he [FCC] regulations . . . depriv[e] the cable operator of the power to select . . . the programming [and these] regulations wrest a considerable degree of editorial control from the cable operator . . . ."[234] Similarly, the District of Columbia Circuit, in *Quincy Cable TV, Inc. v. FCC*,[235] also rejected the cable-as-broadcaster analogy[236] and found that the "must carry" rules[237] in the 1984 Cable Act violated cable operators' first amendment rights.[238] In both *Midwest* and *Quincy*, claims were brought against the FCC, and hence, the courts' rationales were limited to the role of federal, not local, regulation of the cable industry.

In *Century Federal v. City of Palo Alto*,[239] a cable company di-

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228 *Id.* at 1406-07; *see supra* note 102 and text accompanying notes 169-97.

229 Goodale, *supra* note 224, at 23, col. 1.

230 440 U.S. 689 (1979).

231 *Midwest*, 440 U.S. at 709 n.19 (said that the first amendment claim is not frivolous); *accord* Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

232 *Midwest*, 440 U.S. at 709.

233 Midwest Video Corp. v. FCC, 571 F.2d 1025, 1055-56 (8th Cir. 1978), *aff'd*, 440 U.S., 689 (1979).

234 *Midwest*, 440 U.S. at 700.

235 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986).

236 768 F.2d at 1448-49.

237 The must-carry rules required cable operators, upon request and without compensation, to transmit to their subscribers every over-the-air TV broadcast. Rules re Microwave-Served CATV, First Report and Order, 38 F.C.C. 683, paras. 85-92 (1965).

238 *Quincy* did not:

> discern other attributes of cable television that would justify a standard of review analogous to the more forgiving First Amendment analysis traditionally applied to the broadcast media. . . . The potential for disruption inherent in stringing coaxial cables . . . may well warrant some governmental regulation. . . . But hardly does it follow that such regulation could extend to controlling the nature of the programming that is conveyed over that system.

768 F.2d at 1449. Both *Quincy* and *Midwest* involved challenges by cable programmers against the FCC about programming decisions. *See infra* text accompanying notes 275-77.

239 579 F. Supp. 1553 (N.D. Cal. 1984).

rectly challenged the franchise process. The company sued the city of Palo Alto claiming that a cable operator had a first amendment right to set up a cable company and that the franchise process was an impermissible burden on that right.[240] The district court remanded the case for further factual development in order to determine whether factors of physical scarcity, economic scarcity, or disruptive use of public property warranted franchise regulation.[241]

Preferred was the first case to decide the first amendment issue. It rejected the scarcity arguments which have heretofore validated a broadcast first amendment standard.[242] The Ninth Circuit noted the editorial discretion of cable operators and analogized a cable operator to a newspaper editor.[243] The court concluded that if there is no significant distinction between publishing and cablecasting for first amendment purposes, cable operators, like newspaper publishers, should be free from most government regulation.[244] This would include the FCC, state, and municipal franchise rules which, the court believed, govern access to this medium of expression.[245]

Proponents of the cable-is-a-newspaper analogy believe that the free market, and not government regulation, would best serve the public.[246] "[G]overnment interference with media speech simply has not led to more diversity . . . a result foreseen by the framers . . . when they chose to deny to government the power to interfere with freedom of the press."[247] If a stricter first amendment standard is to be used, the conditions in local franchise agreements would amount to an abridgement of speech, and ultimately would abridge the first amendment rights of cable operators.

It is not readily apparent that rejection of the broadcast analogy is tantamount to acceptance of the newspaper analogy for all

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240 *Id.* at 1555.

241 *Id.* at 1563-65 (Because *Preferred* was decided on a motion to dismiss, its record was far from complete.). *See supra* note 13.

242 *Preferred*, 754 F.2d at 1404-05 (the court observed that newspapers, also subject to economic scarcity and natural monopoly characteristics, did not have a more lenient first amendment standard); *see* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249-58 (1974).

243 *Preferred*, 754 F.2d at 1406-11. *But see supra* note 172 (repeal of fairness doctrine and determination that scarcity in the broadcast media could no longer justify difference in treatment between printed and electronic press).

244 *Id.* at 1409.

245 *See, e.g.*, Goldberg, Ross & Spector, *supra* note 73, at 577; Note, *Access to Cable*, *supra* note 73, at 210.

246 Goldberg, Ross & Spector, *supra* note 73, at 605-06; *see also supra* note 33.

247 Goldberg, Ross & Spector, *supra* note 73, at 605.

cable company functions. The District of Columbia Circuit, in *Home Box Office, Inc. v. FCC*,[248] noted that "in retransmitting signals without alteration or addition or the exercise of editorial judgment . . . cable operators are doing no more than passively conveying the programming of others to viewers."[249] This function of cable operators is distinct from program origination and program selection—both admittedly involving editorial discretion. Justice Douglas analogized these functions to a utility function in his dissent in *United States v. Midwest Video, Inc.*,[250] stating that "CATV is simply a carrier having no more control over the message content than does a telephone company."[251]

There are a few cable-is-a-utility proponents.[252] Under this arrangement, a cable company would be strictly viewed as another utility company.[253] As such, the cable operator would install infrastructure, transmit signals of other venders, maintain and service the system, and collect a fee from venders and customers.[254] Common carrier status would, thereby, eliminate the current problems associated with monopolistic control of the cable television medium by one operator who had received the local franchise. Under the "common carrier approach, maximum access to the cable system is provided, while at the same time the unnecessary duplication of resources—the principle objection to unlimited franchising—is eliminated."[255] Cable service is ensured for all with minimal restriction on first amendment rights of program originators.[256]

One of the difficulties of *Preferred* is that the Ninth Circuit subsumed the entire cable medium under either the "broadcast" or "newspaper" rubric and thereby applied the respective regulatory imperatives to the *entire* cable industry.[257] It is more constructive to analyze the functional characteristics of this new

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248 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).
249 567 F.2d at 45 n.80.
250 406 U.S. 649 (1968).
251 *Midwest*, 406 U.S. at 680 (Douglas, J., dissenting).
252 *See* Note, *Common Carrier CATV: Problems and Proposals*, 37 BROOKLYN L. REV. 533 (1971); *see also* Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972); Verrill, *CATV's Emerging Role: Cablecaster or Common Carrier?*, 34 LAW & CONTEMP. PROBS. 586 (1969); Note, *Of Common Carriage and Cable Access: Deregulation of Cable Television by the Supreme Court*, 34 FED. COM. L.J. 167 (1982).
253 *See supra* note 252.
254 *Id.*
255 Stanzler, *supra* note 73, at 233 (footnote omitted).
256 *See supra* text accompanying notes 180-97. The "natural monopoly" aspect of cable systems need not affect the content of programs. Arguably, a free market is not the best mechanism for insuring the construction of the infrastructure for cable systems. A regulated common carrier appears to best serve the entire community.
257 *Preferred*, 754 F.2d at 1403.

communication medium and to distinguish between them in determining the appropriate first amendment approach.[258]

Examining the *functional* characteristics of a cable company yields a sounder analysis. A cable company combines five basic functions: (1) building the system (construction); (2) monitoring local broadcasts and leased access broadcasts (operations); (3) selecting channels for pay and distant signal programming (retransmission); (4) broadcasting an information service (information); and (5) producing original programs (originator-producer).[259] Of these five functions, a cable company has no control over content in the first four functions, and only acts as a publisher in the fifth function.[260]

The construction and operations functions have no control over the content of the broadcasts.[261] The operations function is most similar to utilities.[262] This function includes building a cable system, technologically maintaining it and collecting a fee from subscribers and program vendors. This function is most amenable[263] to regulation.[264]

The transmission function is an aspect of the operations function. Separated from any program origination, it may be licensed by the FCC to transmit cable programs from vendors to subscribers.[265] Since retransmission is solely a technological task, no editorial discretion is required or used.[266] This function is similar to other common carriers because the cable operator has no control over the information transmitted.[267]

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258 *See generally* Miller & Beals, *supra* note 6, at 614; Note, *CATV and First Amendment*, *supra* note 73; Nadel, *Divorcing the Medium*, *supra* note 73. *But compare* G. SHAPIRO, P. KURLAND & J. MERCURIO, *supra* note 45 *with* Nadel, *Cablespeech for Whom?*, *supra* note 73.

259 Miller & Beals, *supra* note 6, at 614-17.

260 *Id.* at 624-28.

261 *Id.* at 624-25.

262 *Id.*; *see also supra* note 252.

263 In order to ensure that all neighborhoods are wired for cable, the municipality has as a minimum standard, a significant interest in regulating this function. *See supra* text accompanying notes 217-22 & 149.

264 *See, e.g.*, 47 U.S.C. § 544 (Supp. III 1985). The Cable Act codified numerous technological and operations requirements for cable systems. On the local level, franchise regulations and the auction process specify technological standards for the provider of cable services. *Cf.* Williamson, *supra* note 155, at 77.

265 *See* Note, *CATV and First Amendment*, *supra* note 73, at 1008-09.

266 The FCC requires that cable operators retransmit local programs under must-carry rules. These rules have recently been under attack in the courts. *See, e.g.*, *Quincy*, 768 F.2d at 1445-53 (this function does not involve editorial discretion). *See generally* *Home Box Office*, 567 F.2d 9.

267 Miller & Beals, *supra* note 6, at 614. The operator has not selected the programming and, therefore, cannot discriminate among users. *Id.* For example, pay television like Home Box Office, which has frequently challenged FCC regulation, is simply another vendor. A cable operator's role is limited to selecting the signal and assigning it a channel. *See, e.g.*, *Home Box Office*, 567 F.2d at 18-19; *Quincy*, 768 F.2d at 1445 (program

The information service aspect of cable programming provides subscribers with such services as the time and weather, the cable system schedule, and even classified advertisements. These information services bear a superficial resemblance to an electronic newspaper.[268] However, the cable operator functions merely as a passive transmitter of information. The operator selects the information source to use, assigns a channel to the information service, and transmits the information to subscribers.[269]

These functions are similar to a common carrier and are clearly content-neutral. Therefore, a track two first amendment analysis[270] is appropriate. A cable operator's technological functions cannot be said to take place in a public forum.[271] Thus, for the construction, operations, and information functions, a regulator should be required merely to demonstrate that the regulation is rational.[272]

Program selection is a function in which the cable operator is directly involved in selecting the expressive content for viewers.[273] Program origination and production are creative functions. Both functions are necessarily tied to the selection of some views and the exclusion of others. These functions are generally performed by someone is not directly involved with the other technical aspects of cablecasting.[274] These creative functions resemble the function of a publisher or writer, and come closer to a true cable-is-a-newspaper analogy. The first amendment standard used to evaluate claims brought under these functions should be analyzed under the track one, content-based, component of first amendment analysis.[275]

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originator differs from a cable operator). In contrast, newspaper publishers do retain editorial control over the content of stories submitted by wire services or syndicated columnists. *See also* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258-59 (1974).

268 These services are similar to those found in a newspaper, but, the similarities end here because the cable operator, as distinct from a newspaper editor, exercises no discretion in selecting the services provided. *See supra* note 170.

269 The cable operator has no editorial control over the content of the information. Miller & Beals, *supra* note 6, at 616-17.

270 *See supra* text accompanying notes 55-71.

271 *See supra* notes 93-97 and accompanying text.

272 *See supra* text accompanying note 64. Under this type of rational review the auction process in *Preferred* would have been sustained.

273 *See* Miller & Beals, *supra* note 6, at 628.

274 *Id.*

275 *See supra* text accompanying notes 48-52. *Cf.* Miller & Beals, *supra* note 6, at 622-28. Miller and Beals divided the cable industry into three categories: (1) "no control over content"—transmission of broadcast signal—which should receive rational first amendment review; (2) "selection and control over content"—selection of programs and information services—which should be reviewed on the noncommunicative track

The functional analysis reveals that a cable company cannot easily be classified as belonging to either the broadcasting or the publishing industries. In fact, a cable company performs functions most resembling a common carrier and a newspaper.[276] The construction and transmission functions are distinct from the program origination function for regulatory analysis. The construction of a cable system is therefore not a protected first amendment right.[277]

The *Preferred* court failed to examine the distinctive functions cable companies perform. The court asserted first amendment protection to all those who wish to construct a cable system.[278] This assertion ignores the issue of whether the purely technical construction function involves any speaking—symbolic or otherwise.

VII. CONCLUSION

In *Preferred Communications, Inc. v. City of Los Angeles*,[279] the Ninth Circuit analogized the cable operator to a publisher and reached a decision which advanced editorial components of cablecasting.[280] To reach this end, the court's first amendment analysis strained to define the admittedly noncommunicative aspects of a cable operator as protected.[281] However, the court's reasoning side-stepped the true technical function of cable operators. Instead, it reasoned that the city has "create[d] an impermissible risk of covert discrimination based on the content . . . in the operator's proposed programming."[282] This analysis does little to advance first amendment rights in the cable industry. Thus, the Ninth Circuit reached its holding by developing a hybrid first amendment[283] analysis for the cable industry.

A functional component analysis which differentiates a cable operator's activities from other cable activities yields a sounder result. Cable systems more closely resemble utilities and pub-

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using the broadcast model; and (3) "exclusive control over content"—program origination—which should receive strict scrutiny akin to the print medium. Miller & Beals, *supra* note 6, at 622-28.

276 *See supra* text accompanying notes 258-75.

277 *See* Kreiss, *supra* note 73, at 1011-12; Note, *CATV and First Amendment*, *supra* note 73, at 1038. *Accord* Nadel, *Divorcing the Medium*, *supra* note 73, at 208 (certain functions like program origination deserve first amendment protection, although the selection of programs is probably not an editorial activity).

278 *Preferred*, 754 F.2d at 1396.

279 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

280 *Id.*

281 *Id.* at 1409-10.

282 *Id.* at 1409.

283 *See supra* text accompanying notes 76-103.

lishers rather than broadcasters. A court must fashion its first amendment analysis at different functional levels in order to understand whether rights have been violated.

Municipal regulation of the cable industry might be enlarged to allow more than one operator in a geographic area. However, the franchise scheme, advances important policy objectives. Ultimately, it protects the first amendment rights of all speakers and listeners.

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