

CABLE FRANCHISING AND THE FIRST AMENDMENT: CABLE OPERATORS' ACCESS RIGHTS TO UTILITY POLES UNDER THE PUBLIC FORUM DOCTRINE

From sitcom reruns to educational programming, from Australian-rules football to home shopping, the growth of cable television has diversified the resources available within the home.¹ While the technology is readily available, the battle for exclusive franchise rights² is slowing cable expansion.³ Municipalities generally grant one cable op-

1. See *infra* notes 22-28 and accompanying text for a discussion of the history and growth of cable television.

2. See *infra* note 59 and accompanying text.

A 'Franchise' is the term commonly used to describe the license issued by a local governmental entity to a cable television operator to build and maintain a cable system in the community. The original need to license cable systems arose because cable operation, like any other public utility, requires easements across public and private property in order to gain access to individual households. Thus, in the interest of preserving the integrity of the public domain, a licensing or franchising process developed whereby a city could demand assurances of responsible behavior from a prospective cable operator.

Central Telecommunications Inc. v. TCI Cablevision Inc., 610 F. Supp. 891, 895 n.5 (D.C. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986).

3. See generally Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867 (1983) (a blistering attack against municipalities for their disregard of cable operators' first amendment rights). Municipalities force cable operators to battle against each other for the right to obtain a cable franchise. The municipalities can obtain services such as access channels from cable companies by conditioning permission to use public right of ways upon delivery of such services. *Id.* at 873. Municipalities' demands in some cases are so great that they prohibit companies from obtaining franchises. *Id.*

On the other hand, cable operators have sued municipalities in an effort to vindicate their first amendment rights. The lack of a clear standard with which to judge cable

erator access rights to the public property required to deliver cable to a local market.⁴ This system fosters intense politicking,⁵ improper influence,⁶ and bribery.⁷

The first amendment safeguards a speaker's right to disseminate information.⁸ While the Supreme Court has recognized that cable operators engage in activities protected by the first amendment,⁹ the Court has been unwilling to articulate cable television's first amendment status.¹⁰ As a result, the Court has failed to resolve the permissible degree of governmental regulation in granting cable franchises and has left the first amendment rights of cable operators, municipalities, and consum-

operators' and consumers' first amendment rights has left the proper role of municipal regulation in doubt. See generally *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd in part and remanded*, 106 S. Ct. 2034 (1986).

4. See *supra* note 2. See *infra* note 64 and accompanying text (discussing the Cable Franchising Act's requirement that cable operators obtain a franchise from a municipality before engaging in service). See M. HAMBURG, *ALL ABOUT CABLE* § 4.02 (rev. ed. 1985). A franchising authority awarding a cable franchise engages in four steps: (1) assessing community needs, (2) requesting bids, (3) evaluating bids, and (4) selecting an operator. See *supra* note 3, at 871-72.

5. See *New York Today Picks Its Cable-TV Winners for Four Boroughs*, WALL ST. J., Nov. 18, 1981, at 1, col. 6 (description of cable operators lobbying and politicking efforts to secure franchises); *Millions Spent in Contest for 'Showcase' Denver Cable Contract*, N.Y. Times, Feb. 22, 1982, at A12; *Competition for Cable TV Rights Heating Up, As St. Louis Discovers*, WALL ST. J., March 2, 1981, at 19, cols. 4-6.

6. For a discussion of improper influence, see *Central Telecommunications*, 610 F. Supp. at 895. In *Central Telecommunications*, cable operators seeking an exclusive cable contract threatened to ruin the career of a city consultant, attempted to intimidate city officials by threatening to flood the city's market with satellite dishes, and threatened to terminate all cable television services unless the city renewed TCI's franchise. *Id.*

7. *Id.* at 895-98 (operator threatened to withhold franchise fees unless franchise was renewed). See *United States v. Kahn*, 340 F. Supp. 485 (S.D.N.Y. 1971), *aff'd*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

8. *Lovell v. Griffen*, 303 U.S. 444 (1938) (liberty of the press is essential to the nature of a free state).

9. *Preferred Communications*, 106 S. Ct. at 2037. Numerous circuit courts have recognized cable television's first amendment rights. *Quincy Cable TV v. Federal Communications Commission*, 768 F.2d 1434, 1444 (D.C. Cir. 1985); *Tele-Communications of Key West*, 757 F.2d at 1336; *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689.

10. *Preferred Communications*, 106 S. Ct. at 2037. Writing for the Court, Justice Rehnquist observed that cable television shares common characteristics with both broadcast and print media. *Id.* He refused, however, to resolve cable's first amendment status without a more in-depth presentation of the facts. *Id.*

ers in limbo.¹¹ Despite the lack of Supreme Court guidance, lower courts have considered whether the first amendment allows the government the same latitude in regulating the cable television industry as it allows the broadcast media,¹² or whether the degree of protection should be closer to that enjoyed by the traditional media¹³ such as

11. In recent years, cable operators have extensively litigated the proper scope of a municipality's authority to regulate cable operators' access to local markets. *See, e.g., Preferred Communications*, 106 S. Ct. 2034; *Tele-Communications of Key West*, 757 F.2d at 1335-39; *Omega Satellite Product v. City of Indianapolis*, 694 F.2d 119, 125-29 (7th Cir. 1982); *Community Communications Inc. v. City of Boulder*, 660 F.2d 1370, 1375-80 (10th Cir. 1981); *Carlson v. Village of Union City*, 601 F. Supp. 801, 809-12 (W.D. Mich. 1985); *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (W.D. Cal. 1986); *Hopkinsville Cable TV Inc. v. Pennyroyal Cablevision Inc.*, 562 F. Supp. 543, (W.D. Ky. 1982).

12. The Court has employed different standards for judging the constitutionality of governmental regulations of the print and broadcast media. The Court has reasoned that different standards are necessary because the broadcast media faces physical limitations which the print media does not. *See, e.g., Red Lion Broadcasting Co. Inc. v. FCC*, 395 U.S. 367, 386-400 (1986). The *Red Lion* Court upheld the FCC's fairness doctrine, which required broadcasters to allow an individual who was personally attacked in a broadcast to respond to the charges. The *Red Lion* Court found that the government could limit the number of speakers to prevent all speech from being extinguished. *Id.* at 387. Similarly, Justice Frankfurter once wrote that if everyone talked over the air "no one could be heard." *National Broadcasting Co. v. United States*, 319 U.S. 190, 212 (1943). The limitation on access to the broadcast media furthers the first amendment purpose of promoting free speech by ensuring that speakers can reach their audience.

The Court has found that such regulation was not necessary nor constitutional with regard to the print media because no physical impediments exist which limit the number of speakers who can use the medium. In *Miami Herald v. Tornillo*, 418 U.S. 241, 256-58 (1974), for example, the Supreme Court held unconstitutional Florida's right to reply statute, which granted a political candidate equal space to reply to a newspaper's criticism. *Id.* The candidate argued that the an economically privileged few controlled the press and that it is economically infeasible for most cities to support more than one newspaper. *Id.* at 249-50. Noting that the proper concern was not economics, but the ability of a newspaper to decide for itself what to print, the Court held the statute unconstitutional even if the newspaper encountered no added cost in running the reply. *Id.* at 257-58.

See Quincy Cable, 768 F.2d at 1438, 1439 for a description of the technological and economic attributes of the broadcast, print, and cable media.

The Court's analysis in *Miami Herald* focuses on physical barriers to entry instead of economic conditions. Under the print versus broadcast distinction, cable television would clearly fall on the print side. Although it may not be economically feasible, there are no physical limitations to the number of cable operators who can service a community. *See infra* note 159.

13. The Court has traditionally been more willing to allow municipalities to regulate the broadcast media. For example, in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), the Supreme Court found a statute prohibiting editorializing on public broadcast stations to be unconstitutional. The Court noted that although the

newspapers.¹⁴

In *Preferred Communications, Inc. v. City of Los Angeles*,¹⁵ the Ninth Circuit became the first appellate court to limit, on first amendment grounds, a municipality's ability to award an exclusive cable franchise in a local market.¹⁶ The court's reliance on the public forum doctrine¹⁷ is a creative and innovative approach which lends increased

broadcast media "operates under restraints" due to physical limitations that bar access "not imposed on other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern." *Id.* at 380.

The Court has refused to allow municipalities to restrict access of the print media to a local market and has rejected the suggestion that purely economic constraints on the number of viable entities in a community justify intrusions into first amendment rights. *Miami Herald*, 418 U.S. at 258.

14. Several circuits have held that the "physical scarcity rationale" is irrelevant to an evaluation of government regulation of cable television. *Quincy Cable*, 768 F.2d at 1448-49 ("[T]he scarcity rationale has no place in evaluating . . . cable television."); *Omega Satellite*, 694 F.2d at 127 (noting that the problem of frequency interference does not arise with cable television). The court in *Quincy Cable* observed that "unlike ordinary broadcast television, which transmits the video image over airwaves which are capable of bearing only a limited number of signals, cable reaches the home over a coaxial cable with the technological capacity to carry 200 or more channels." 768 F.2d at 1448.

Several circuits following this line of reasoning have held that where a natural monopoly exists with respect to a city's cable television market, the city may offer an exclusive franchise. *Central Telecommunications*, 800 F.2d at 715-17; *Omega Satellite*, 694 F.2d at 127-28 (the "natural monopoly characteristics of cable television provide . . . an argument for regulation of entry"); *Community Communications v. City of Boulder*, 660 F.2d 1370, *cert. denied*, 456 U.S. 1001 (1982).

The Ninth Circuit refused to apply the scarcity rationale to cable in *Preferred*, 754 F.2d at 1403-04. The court did not decide whether a natural monopoly would justify the award of an exclusive franchise. 754 F.2d at 1404-05. The court reasoned that because cable has no physical limitations, it is analogous to print media and therefore is entitled to a greater degree of first amendment protection. A California district court adopted this view in *Century Federal*, 648 F. Supp. at 1471.

The Eighth Circuit interpreted the *Preferred* decision to mean that a natural monopoly would not justify exclusive franchising. *Central Telecommunications*, 800 F.2d at 716.

15. 754 F.2d 1396 (1985), *aff'd in part and remanded*, 106 S. Ct. 2034 (1986).

16. 754 F.2d at 1411. Prior to *Preferred Communications*, several courts considered a city's interest in restricting cable operators' use of city property (i.e., utility poles and public rights of way). See *Omega Satellite*, 694 F.2d 119; *Community Communications*, 660 F.2d 1370; *Century Federal*, 579 F. Supp. 1553 (N.D. Cal. 1984). Subsequent to the Ninth Circuit decision in *Preferred*, one other court faced the question of the government's power to deny cable television operators access to utility poles. See *Central Telecommunications*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986).

17. *Preferred*, 754 F.2d at 1408-09. See *infra* notes 171-178 and accompanying text.

protection to the first amendment rights of cable operators and consumers.¹⁸

The Supreme Court recently declined the opportunity to comment on the Ninth Circuit's use of the public forum doctrine.¹⁹ The *Preferred* court's decision provides increased first amendment protection for cable television, adds a divergent constitutional view to industry governance, and emphasizes the growing need for the Supreme Court to resolve cable television's first amendment status.²⁰

This Note will analyze the Ninth Circuit's use of the public forum doctrine in light of the doctrine's historical development and its applicability to cable television. Part I focuses on the history of cable television regulation. Part II summarizes the development of the public forum doctrine. Part III discusses the *Preferred Communications* decision. Part IV analyzes *Preferred's* use of the public forum doctrine. Finally, this Note concludes that while the Ninth Circuit's application of the public forum doctrine was correct, the effectiveness of the argument is uncertain because the doctrine is generally difficult to apply, particularly to the problems of cable television.

I. THE HISTORY OF CABLE TELEVISION REGULATION

Cable television originated in Pennsylvania during the late 1940's.²¹ Early cable systems extended broadcast television signals to rural areas and small communities that were unable to receive quality reception due to their distance from broadcasters or the interference of geographic barriers.²² A decade after the first system began operating, 550

18. See *infra* notes 203-204 and accompanying text.

19. *City of Los Angeles v. Preferred Communications*, 106 S. Ct. 2034 (1986) (the Court affirmed the Ninth Circuit's decision on the antitrust claim, but remanded to the district court for more fact finding on the first amendment issue).

20. See *supra* notes 12-14 and accompanying text.

21. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). For a more complete discussion of the history of cable television, its development and regulation, see *Quincy Cable*, 768 F.2d at 1438-44; P. PARSONS, *CABLE TELEVISION AND THE FIRST AMENDMENT* 11-20, 29-44 (1987); M. HAMBURG, *supra* note 4, at §§ 1.02, 1-6; Stanzler, *Cable Television Monopoly and the First Amendment*, 4 CARDOZO L. REV. 199, 205-10 (1983).

22. *Southwestern Cable*, 392 U.S. at 163. The Court noted that "CATV systems perform either or both of the functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.* During the 1960's the Court did not consider cable television's first amendment implications be-

cable systems were serving an audience of 1,500,000 to 2,000,000 viewers.²³ The dramatic increase of the cable television industry accompanied the growth of broadcast television during the same period.²⁴ As of 1981, cable systems served approximately 17.2 million subscribers, the vast majority of whom lived in areas also served by broadcast television.²⁵

Rapid technological advances, particularly in the use of communication satellites to distribute programs nationally,²⁶ greatly aided cable television's success. Modern cable systems provide over 100 television channels.²⁷ The bulk of communications transmitted via cable consists of video, entertainment, and news programming. In addition, cable provides services unavailable to the broadcast television viewer. Cable's physical link to the home allows the subscriber to transmit communications back to the operator. The operator, therefore, can provide such services as burglar and fire alarm monitoring and electronic mail delivery services.²⁸

A. FCC Regulation

The Federal Communications Commission's (FCC) objective in regulating cable has been twofold: to protect the broadcast industry from cable and to "provide fair, efficient and equitable" distribution of information to all citizens.²⁹ To achieve these objectives, the FCC has in-

cause no competition existed between cable and broadcast television. P. PARSONS, *supra* note 21, at 3. Cable operators were simply bringing programming to markets that did not receive broadcast television. *Id.*

23. *Id.* at 162. The Court found that the growth of cable television would be "explosive." *Id.* at 163.

24. *Television Digest*, 39 TELEVISION FACTBOOK 72(a) (1970). The broadcast television industry grew from 108 stations serving 15 million viewers in 1952 to 510 stations serving 44 million viewers in 1959. *Id.* at 79(a).

25. M. HAMBURG, *supra* note 4, at § 1.15.

26. See, e.g., *Quincy Cable*, 768 F.2d at 1439 (modern cable systems can handle more than 100 channels). See also *Programmers Show Off Ideas for Cable TV*, Wall St. J., Oct. 14, 1981, at 31, col. 2.

27. *Quincy Cable*, 768 F.2d at 1439.

28. Miller & Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85, 88 n.13 (1981). Cable television performs communicative and noncommunicative services. Noncommunicative services include: security monitoring, (burglar, fire, and police alarms); remote computer terminals providing access to a vast array of computer programs and data bases; medical monitoring; meter reading and transactional services such as home shopping and banking. *Id.*

29. Congress established the Federal Communications Commission with the Com-

creasingly scrutinized cable TV.³⁰ In early years, the FCC was lax in its regulation³¹ due to the complete lack of evidence establishing a link between the importation of television broadcast signals via cable and the economic viability of local broadcasting.³² Cable fulfilled an FCC objective by disseminating information to those unable to receive broadcast television.³³

Beginning in the 1960's the FCC became increasingly active in regulating the cable industry.³⁴ The Commission determined that cable television might pose an economic threat to local broadcasters.³⁵ Specifically, the FCC was concerned that cable operators would divert advertising revenue from local educational television, thus threatening the economic viability of existing stations and discouraging potential entrants.³⁶ The FCC determined that the improved service cable promised did not justify the elimination of local broadcasters.³⁷

munications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-757 (1982)), in order to "make available so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." 47 U.S.C. § 151. *Quincy Cable*, 768 F.2d at 1439.

30. For a description of the FCC's initial regulation of cable and its goals, *See Southwestern Cable*, 392 U.S. at 167-78; P. PARSONS, *supra* note 21, at 12, 13. For a discussion of FCC cable regulation during the last three decades, *see Quincy Cable*, 768 F.2d at 1438-43; P. PARSONS, *supra* note 21, at 15-27.

31. *Quincy Cable*, 768 F.2d at 1439.

32. P. PARSONS, *supra* note 21, at 12, 13.

33. P. PARSONS, *supra* note 21, at 11-13.

34. The FCC's "first movement" in the cable area was in 1962. P. PARSONS, *supra* note 21, at 15. Prior to the 1960's, however, the FCC refused to become involved in cable TV issues. *See, e.g., Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403, 415, 421-22 (1959). *See also* Carroll Broadcasting v. FCC, 258 F.2d 440 (D.C. Cir. 1958). The FCC granted a license without first determining whether licensing a second station would be detrimental to the public interest. The FCC believed that Congress intended free market forces to decide the survivors in the broadcast industry. Only in rare circumstances did the FCC intervene to prevent the natural effects of legal competition. *Id.* at 442.

35. P. PARSONS, *supra* note 21, at 15.

36. *Southwestern Cable*, 392 U.S. 157, 167-68 (the FCC has authority under the Federal Communications Act of 1934 to regulate the cable television industry).

37. *Southwestern Cable*, 392 U.S. at 173-78. The Court noted the Commission's fear that cable might be dividing available audiences and revenues, thereby significantly exacerbating the financial difficulties of UHF and educational stations. *Id.* at 175-77 nn.43-44. The Commission also feared that through "cream skimming," servicing only a small profitable segment of the market, rural areas and small towns might be left without any service. *Id.* The Commission felt that the loss of local stations would

To protect local stations, the Commission adopted "must carry rules"³⁸ requiring cable systems to carry local broadcasts.³⁹ The FCC also prohibited cable systems from transmitting distant signals which duplicated local programming.⁴⁰ In *United States v. Southwestern Cable Co.*,⁴¹ the Supreme Court upheld these regulations as "reasonably ancillary" to the FCC's purpose of protecting local broadcasts.⁴² In 1969 the Commission adopted a rule requiring cable systems with more than 3,500 subscribers to carry some local programming.⁴³ The Supreme Court narrowly upheld this rule in 1972 in *United States v.*

seriously diminish the benefits of broadcast television, thus adversely affecting the public. *Id.* at 176 n.44.

38. "Must carry rules" required a cable operator to include local broadcast signals with cable's programming. See 47 C.F.R. §§ 76.5, 76.51, 76.53, 76.55, 76.56, 76.58 (1987) (description of which broadcast signals are considered local and must be carried with cable's programming).

39. *Carter Mountain Transmission Corp. v. FCC*, 32 F.C.C. 459, 464-65 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963) (the D.C. Circuit upheld the FCC's initial attempt to impose "must carry rules" on cable operator). CATV, Second Report and Order in Docket No. 14,895, 2 F.C.C.2d 725 (1966). The Commission's objective was to allow for the development of cable technology without undermining the financial well-being of "free, community-oriented television." *Quincy Cable*, 768 F.2d at 1440. The Commission believed that if cable could exploit and displace broadcast television in the free market, the loss of the industry would seriously hurt the public. *Id.*

The Court recognized the preservation of local broadcasting as a congressional objective. *Southwestern Cable*, 392 U.S. at 174. Congress' mandate required that the FCC create "[a] system of local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" *Id.* at 174 (footnote omitted) (quoting H.R. REP. NO. 1559, 87th Cong., 2d Sess. 3 (1962)). This objective of protecting and fostering local television continues to enjoy support today. See *Quincy Cable*, 768 F.2d 1434, 1454 n.43.

40. CATV, Second Report and Order in Docket No. 14,895, 2 F.C.C.2d 725, 798 (1966) (importation of signals which duplicate local programming are prohibited if the programming had been shown the day before, the same day, or day after).

41. 392 U.S. 157 (1968).

42. *Id.* at 178. The Court did not consider the first amendment rights of cable operators; instead, the Court labeled the cable industry as a passive transmitter of signals rather than an originator of speech. *Id.* at 161-62. See *supra* notes 22, 29 and 30. See also *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398-400 (1968). The "must carry rules" were recently struck down by the D.C. Circuit as in violation of the first amendment. See *supra* notes 31, 36. See generally *Lee, Cable Franchising*, *supra* note 3; *Lively, Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071 (1985).

43. CATV, First Report and Order in Docket No. 18,397, 20 F.C.C.2d 201 (1969); *United States v. Midwest Video Corp.*, 406 U.S. 649, 671-75, *reh'g denied*, 409 U.S. 898 (1972).

*Midwest Video Corp.*⁴⁴ The Commission repealed the rule two years later.

The FCC's subsequent attempts to expand regulation of cable television have proved less successful. In 1976 the Commission promulgated new rules requiring cable television systems with 3,500 subscribers to have 20-channel capacity by 1985, to make certain access channels available without charge, and to furnish equipment for access purposes.⁴⁵ In *FCC v. Midwest Video Corp. (II)*,⁴⁶ the Supreme Court held that the Commission did not have authority to impose these new requirements.⁴⁷ Furthermore, the United States Court of Appeals for the District of Columbia struck down as overbroad FCC regulations prohibiting the broadcast on pay cable systems of certain sporting events and recent feature films, unless conventional television broadcasters previously rejected programs.⁴⁸

44. 406 U.S. 649, *reh'g denied*, 409 U.S. 898 (1972).

45. *FCC v. Midwest Video Corp. (II)*, 440 U.S. 689, 691, (1979). "[T]he [FCC] promulgated rules requiring cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, [for example, public educational, local governmental, and leased-access views,] and to furnish equipment and facilities for access purposes." *Id.* The rules deprive cable operators of all discretion regarding what will be programmed. *Id.* The Court upheld the regulations, finding them reasonably ancillary to the FCC's authority to regulate cable television and in the public interest under the 1934 Communications Act. *Id.*

46. 440 U.S. 689 (1979).

47. *Id.* at 700-07. The Court recognized that *Midwest Video (I)* sustained the FCC's authority to regulate cable television with the affirmative purpose of promoting goals pursued in the regulation of television broadcasting. *Id.* at 700. The Court determined that with its access rule, however, the Commission transferred control of the content of access channels away from cable operators. *Id.* In so doing, the Court found that the Commission exceeded the scope of authority granted to it by Congress because Congress restricted the FCC's "ability to advance objectives associated with public access at the expense of the journalistic freedom of person engaged in broadcasting." *Id.* at 707.

48. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977). The FCC argued that pay cable subscribers might buy away programming from broadcasters, thereby denying the majority of viewers access to programming. 567 F.2d at 21. The court invalidated the rules on the ground that the FCC: (1) acted beyond its jurisdiction because it failed to show that the restraints were reasonably ancillary to the Commission's broadcasting regulation, and (2) had arbitrarily narrowed the scope of the issues in the hearings on the rules by defining the problem as "how cablecasting can best be regulated to provide a beneficial supplement to the over-the-air broadcasting." *Id.* at 26. The siphoning evidence was inadequate, especially viewed against the disparity of resources between the cable and broadcast industries. *Id.* at 36-40. Moreover, the court found that the Commission's position that cablecasting "must be a supplement to, rather than an equal of, broadcast television" was "capricious." *Id.* at 36.

The trend of recent cases and governmental actions addressing cable television regulation signals a significant reduction in the FCC's role in regulating the cable industry.⁴⁹ For example, the District of Columbia Court of Appeals struck down the FCC "must carry rules" upheld earlier on different grounds in *Southwestern Cable*.⁵⁰ In *Quincy Cable v. FCC*,⁵¹ the court held that the "must carry rules" violate the first amendment rights of cable operators⁵² because of the potential risk of content regulation.⁵³ In *Malrite T.V. of New York v. FCC*,⁵⁴ the Second Circuit, contrary to *Southwestern Cable*, held that cable TV would not spell the doom for local television.⁵⁵ Thus, one of the primary reasons for cable regulation vanished.⁵⁶

B. *The Cable Communications Policy Act of 1984*

Local governments have historically regulated cable television

49. P. PARSONS, *supra* note 21, at 22.

50. *Quincy Cable*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). The D.C. Circuit found that the courts never directly addressed the constitutionality of "must carry rules." *Id.* at 1443.

51. 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

52. *Id.* at 1453. The Circuit Court also found that the FCC failed to adequately justify its regulations and that the regulations were not narrowly tailored to achieve the FCC's end. *Id.* at 1462-63. In addition to holding that the "must carry rules" deprived the cable operator of the guaranteed freedom to select programming, the court found that the rules might operate to deny programmers of a market. *Id.* The court reasoned that if a municipality required a substantial number of local cable channels to carry local broadcast signals, the cable station's own preferences for programming would be secondary. The court concluded that this deprivation of the cable channel's ability to compete afforded the programmer standing to challenge the constitutionality of the rules. *Id.* at 1445 n.24.

53. *Id.* at 1452-54. The court noted that the "[rules] favor one speaker over another" and "impinge on editorial discretion." *Id.* at 1453.

54. 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

55. In 1980 the Commission repealed its distant signal and exclusivity regulations. 652 F.2d at 1147.

56. The court noted that "[f]ree television . . . limits program diversity by its concentration on mass audience shows, which make advertising worthwhile. In shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity, a valid FCC regulatory goal." *Id.* at 1151. The "FCC dismantled large portions of the extensive regulatory structure under which both broadcast and cable television have labored for many decades." *Quincy Cable*, 768 F.2d at 1455. The *Quincy Cable* court noted that this action was a result of the FCC's belief that the public interest in diversity is best served by allowing the market place to decide. *Id.*

through the franchise process.⁵⁷ Generally, a municipality will issue a franchise to a cable operator, thereby granting it exclusive access to public property to construct and operate a cable television system.⁵⁸ Even though regulations usually allow for one or more franchises, municipalities customarily issue only one cable franchise for a geographic area.⁵⁹

Congress provided a model for cable franchising in the Cable Communication Act of 1984 (Cable Act).⁶⁰ The two overriding objectives of the Cable Act are to regulate cable television via the franchising process and to fulfill the public interest in securing the greatest diversity of information possible.⁶¹ Congress intended the Act to establish cable regulation guidelines for federal, state, and local authorities.⁶² Congress further intended that through the Act's framework, the cable industry would achieve the "stability and certainty" essential to its growth.⁶³

The Cable Act requires a cable operator to obtain a franchise before

57. See *supra* note 2. See also, Note, *Cable Franchising and the First Amendment: Does the Franchising Process Contravene First Amendment Rights?* 36 FED. COM. L.J. 317, 323-24 (1984). A municipality's power to regulate cable is based on its need to regulate public areas, streets and alleys, and the municipality's police power to protect the health and safety of its citizens. *Id.*

58. See Lee, *Cable Franchising*, *supra* note 3, at 871-73 for a detailed discussion of a typical franchise auctioning process. *Id.* The author reveals the municipality's blatant disregard for the first amendment rights of cable operators and urges that first amendment protections must extend to the franchise allotment process. Lee argues that municipalities grant only one franchise in order to extract as many conditions as possible from a cable operator. *Id.* These conditions include access channels and rate regulation. *Id.* Due to the demands, cable operators' bids are contingent on receiving an exclusive franchise. *Id.*

59. One survey showed that of the 4,200 cities with cable television, 99.7% had only one franchise. Noam, *Towards An Integrated Communications Market—Overcoming the Local Monopoly of Cable Television*, 34 FED. COM. L.J. 209, 242 n.148 (1982).

60. 47 U.S.C. §§ 521-611 (Supp. II 1984). *Cable Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 107 S. Ct. 1559 (1987) (Cable Act preempts Utah cable act). The Cable Communications Policy Act of 1984 (Cable Act) is contained in title 6 of the Communications Act of 1934, as amended. The Communications Act of 1934 is codified in scattered sections of title 47 of the United States Code. See H.R. REP. NO. 934, 98th Cong., 2d Sess. 20, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS, 4655 (legislative history and purpose of the Cable Act).

61. *Rollins Cablevue, Inc. v. Saienni Enterprises*, 633 F. Supp. 1315 (D. Del. 1986).

62. 47 U.S.C. § 521(3) (Supp. II 1984).

63. 47 U.S.C. § 521(2) (Supp. II 1984); H.R. REP. NO. 934, 98th Cong., 2d Sess. 20, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4455, 4657. The stated purposes of the Act are to:

it can offer cable service.⁶⁴ The Act then authorizes the franchising authority to award "one or more franchises within its jurisdiction."⁶⁵ This provision allows the franchising authority to determine the proper number of cable operators for an area. Once granted a franchise, a cable operator has the authority to construct a cable system over public rights of way and through easements within the area to be serviced.⁶⁶ The cable operator is responsible for protecting the safety and convenience of the public.⁶⁷

The Cable Act requires the operator to include commercial use channels with the system. To achieve Congress' goal of assuring that the communications medium provides the widest possible range of information to the public, the Act demands that the operator devote a fixed percentage of its channel capacity to commercial use by individuals unaffiliated with the operator.⁶⁸ The operator cannot exercise any editorial control over the content of programming on commercial use channels.⁶⁹ While Congress apparently extended first amendment protection to the cable industry, its concerns for diversity are meaningless without safeguarding access to the local market. To insure the greatest

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable system;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

Cable Act, § 601 (codified at 47 U.S.C. § 521) (Supp. II 1984).

64. 47 U.S.C. § 541(b)(1) (Supp. II 1984).

65. The term "franchising authority" refers to "any government entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(9) (Supp. II 1984).

66. 47 U.S.C. § 541(a)(2) (Supp. II 1984).

67. 47 U.S.C. § 541(a)(2)(A) (Supp. II 1984). In using such easements, the cable operator must ensure the safety and convenience of the public and repay the owner of property for any damages caused by the installation or operation of the system. 47 U.S.C. § 541(a)(2)(A)-(C) (Supp. II 1984).

68. 47 U.S.C. § 532(b)(1) (Supp. II 1984). For specified percentage requirements see 47 U.S.C. § 532(b)(1)(A)-(E) (Supp. II 1984).

69. 47 U.S.C. § 532(c)(2) (Supp. II 1984).

diversity possible, Congress should have explicitly extended first amendment guarantees to the franchise process itself.

II. THE PUBLIC FORUM DOCTRINE

The Ninth Circuit's use of the public forum doctrine is a useful legal theory for cable operators who contest a municipality's effort to restrict access to public property. The public forum doctrine provides speakers with nondiscriminatory access, for first amendment purposes, to public places traditionally used for expressive conduct.⁷⁰

While the first amendment protects the right of free speech, it does not absolutely guarantee free speech on public property.⁷¹ Historically, a state's ability to limit free expression depended on the nature of the property or forum to which a speaker sought access.⁷² The Supreme Court identified three classifications of forums.⁷³ The classification of the particular property where access is sought will determine the degree to which a municipality can restrict access,⁷⁴ and thus curtail expressive activity.

In *Davis v. Massachusetts*,⁷⁵ the Supreme Court rendered its first public forum decision. Davis was convicted of delivering a sermon in a Boston Park without the required city permit.⁷⁶ The Court relied on a

70. See generally Werham, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335 (1986) (background and history of public forum doctrine).

71. See, e.g., *Cornelius v. NAACP Legal & Educ. Fund*, 473 U.S. 788, 799 (1985) (the Constitution does not preclude the government from prohibiting "access to all who wish to exercise their right to free speech on every type of government property"); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) (access to property is not guaranteed solely because it is owned by the government); *Greer v. Spock*, 424 U.S. 828, 836 (1976) (first amendment does not allow protesters to express their views wherever they want).

See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the "fairness doctrine" as applied to broadcaster and basing the government's right to regulate the content of broadcast editorials on the medium's scarcity of spectrum space); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (the goal of the first amendment is to promote the widest possible dissemination of information).

The Court has held that even where the first amendment guarantees access, reasonable time, place, and manner regulations may restrict a would-be speaker's actions. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

72. *Id.*

73. *Id.* at 45-46. See *infra* notes 103-114 and accompanying text.

74. 460 U.S. at 45-46. See *infra* notes 103-114 and accompanying text.

75. 167 U.S. 43 (1897).

76. *Id.* at 43. Davis argued that the park is the property of all the inhabitants of

property theory to affirm Davis' conviction.⁷⁷ The Court found that Davis might have a constitutional right to preach, but not on city property.⁷⁸ Davis' right to preach in the park could exist only if he held a property interest superior to the city's.⁷⁹ The Court found that Davis had no superior property interest.

The theory of the *Davis* opinion illustrates the Court's early view of the public forum doctrine. While the first amendment protects free speech, it is not necessarily a basis for a right of access to government property.⁸⁰ The relevant inquiry of the Court "concerned property ownership, not free expression."⁸¹

In *Hague v. C.I.O.*,⁸² the Supreme Court extended greater protection to expressive conduct in streets and parks.⁸³ In a passage which became the foundation of the public forum doctrine, Justice Roberts wrote:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.⁸⁴

The labor union in *Hague* objected to the city's denial of permits for

Boston, and as such is dedicated to the use of these people. *Id.* at 46. Justice Oliver Wendell Holmes, writing for the Supreme Court of Massachusetts, held that "for the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owners of a private house to forbid it in his house." *Commonwealth v. Davis*, 162 Mass. 510, 511 (1895), *aff'd*, 167 U.S. 43 (1897).

77. 167 U.S. at 48.

78. *Id.* at 46-48.

79. *Id.*

80. Werham, *supra* note 70, at 346.

81. *Id.*

82. 307 U.S. 496 (1939).

83. *Id.* at 515-16.

84. Hague, the mayor of Jersey City, New Jersey, attempted to attract business to the city by promising to prevent labor unions from organizing. *Id.* at 501.

public meetings and the distribution of literature, particularly in light of the mayor's encouragement and sponsorship of parades and meetings of anti-union advocates.⁸⁵ The Court found that the city's favoritism violated the labor union's right to free speech.⁸⁶

Writing for the Court, Justice Roberts raised the issue of regulating free speech in streets and parks to the constitutional level of "privileges and immunities" protected by the fourteenth amendment.⁸⁷ The Court found free speech in parks and streets to be a right protected by the first amendment.⁸⁸

Despite the apparent inconsistencies between the two cases, *Hague* did not overrule *Davis*.⁸⁹ Cases decided after *Hague* attest to *Davis*' continuing importance.⁹⁰ For certain types of property the reasoning of *Davis* still controls today,⁹¹ but *Hague* explicitly announced an exception for streets and parks.⁹² In the years following *Hague*, the Court consistently protected a person's right to speak in streets and parks.⁹³ The public forum doctrine evolved from these cases.⁹⁴

In the last 20 years, the Court has encountered almost every type of public property as the subject of public forum litigation. Litigants have sought access to military bases, train stations, and public office build-

85. Gibbons, *Hague v. CIO: A Retrospective*, 52 N.Y. U.L. REV. 731, 732-33 (1977).

86. *Hague*, 307 U.S. at 516.

87. See *Hague*, 307 U.S. at 515. One author concluded that *Hague* recognized "that when the citizen goes into the street, he is exercising a immemorial right of a free man, a kind of First-Amendment easement in streets and parks." Kalven, *The Concept of the Public Forum, Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13. Kalven, writing in light of the civil rights protests of the sixties, discussed whether the city could prohibit demonstrators from using streets and parks to make their case to preserve other uses of public thoroughfares.

88. *Hague*, 307 U.S. at 515-17.

89. *Hague*, 307 U.S. at 515 ("[W]e have no occasion to determine whether . . . the *Davis* case was rightly decided, but we cannot agree that it rules the instant case. . . ."). *Id.*

90. Several courts cited *Davis* during the 1940's and 1950's. See, e.g., *Fowler v. Rhode Island*, 345 U.S. 67, 68-69 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 279 (1951) (Frankfurter, J., concurring).

91. This property is within the nonpublic forum category of public property. See *infra* notes 121-123 and accompanying text.

92. *Hague v. C.I.O.*, 307 U.S. 496, 515-17 (1939).

93. See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

94. See Kalven, *supra* note 87, at 13.

ings for first amendment purposes.⁹⁵ The Court's attempt to reconcile or distinguish these fora from the "streets and parks" cases⁹⁶ has resulted in the inconsistent and confusing application of the public forum doctrine. In *Perry Education Association v. Perry Local Educator's Association*⁹⁷ the Supreme Court attempted to clarify the law of the public forum.

In *Perry*, a public school system granted the incumbent labor union exclusive access to the interschool mail system and the teachers' school mailboxes.⁹⁸ A rival union brought suit alleging that the current union's exclusive access to the mail system violated its first amendment right.⁹⁹ The rival union contended that the mailboxes constituted a public forum, and therefore the first amendment protected its right of access.¹⁰⁰ The Supreme Court held that the mailboxes were not a public forum.¹⁰¹

Writing for the Court, Justice White established three categories of public property: public forum by tradition, public forum by designation, and nonpublic forum.¹⁰² Each respective type of property receives a distinct level of judicial scrutiny for restrictions on access.

The first two categories contain "public" forum.¹⁰³ The first cate-

95. See, e.g., *Greer v. Spock*, 424 U.S. 828 (1976); (Court denied litigants access to a military base); *Knolls Action Project v. Knolls Atomic Power Laboratory*, 771 F.2d 46 (2d Cir. 1985) (speaker sought access to nuclear power plant); *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975) (municipal theater); *Widemar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Perry Education Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983) (Court denied rival union access to school mail boxes); *Gaunett Satellite Information Network v. Metropolitan Transp. Auth.*, 745 F.2d 767 (2d Cir. 1984) (subway station); *Wright v. Chief of Transit Police*, 558 F.2d 67 (2d Cir. 1977).

96. The cases that explicitly analogized to streets and parks typically mentioned a characteristic or two that streets and parks did or did not have in common with the property at issue. See, e.g., *Connecticut State Fed'n of Teachers v. Board of Educ.*, 538 F.2d 471, 480 (2d Cir. 1976) (mailboxes do not resemble thoroughfares); *Moskowitz v. Ullman*, 432 F. Supp. 1263, 1266 (D.N.J. 1977) (subway terminal, like street, is used by thousands of travelers each day).

97. 460 U.S. 37 (1983).

98. *Id.* at 39-41.

99. *Id.*

100. *Id.* at 44-48.

101. *Id.* at 53. The Court also rejected the rival union's equal protection claims under the fourteenth amendment. *Id.* at 54-55.

102. *Id.* at 45-46.

103. *Id.*

gory, traditional public forum, includes public property which citizens have long used for assembly and debate.¹⁰⁴ The Court noted this category includes streets and parks.¹⁰⁵ The Court applied strict scrutiny to evaluate restrictions on access to these properties.¹⁰⁶ Therefore, only restrictions narrowly tailored to serve a compelling state interest are constitutional.¹⁰⁷ Justice White noted that a state may adopt time, place, and manner restrictions which "are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication."¹⁰⁸

The second category, public forum by designation, consists of those public properties that the state has "opened" as sites for communicative activity.¹⁰⁹ These include theaters, auditoriums, and meeting facilities.¹¹⁰ Similar to property in the first category, first amendment rights in a designated public forum are also afforded strict scrutiny protection.¹¹¹

A nonpublic forum includes all public property not included in the

104. *Id.*

105. *Id.* The Court used the first category for public property which traditionally or by government fiat was devoted to the public's use for assembly and debate. *Id.* The Court adopted the *Hague* test to determine what property falls within this classification. *Id.* See *supra* notes 82-94 and accompanying text.

106. *Id.* at 45.

107. *Id.* The Court held that the interschool mail systems were not a public forum and supported its conclusion by pointing to the fact that the mail systems are not open to the public and are only intended to serve the teachers' internal communication needs. *Id.* at 46.

108. *Id.*

109. *Id.* at 45-46. The second category "consists of public property which the state has opened for use by the public as a place for expressive activity." *Id.*

110. *Id.* (citing *Widmar*, 454 U.S. 263; *City of Madison*, 429 U.S. 167; *Southeastern Promotions*, 420 U.S. 546). The court stated that public property opened for a segment of the public becomes a public forum even if the local government was not originally required to open it. 460 U.S. at 45-46.

111. *Id.* at 46. "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* It appears that a city may transform a designated public forum into a nonpublic forum. *Id.* The Court found that the school's selective access to its mail facilities by opening it up to outside groups did not transform it into a public forum accessible to the general public. *Id.* The Court found that the school opened its mail system for a limited purpose which did not create a general right of access. *Id.* at 47-48. Also, the Court held the restriction constitutional because it was reasonable and was not a form of viewpoint discrimination. *Id.* at 48-55.

first two categories.¹¹² Reasonable and viewpoint neutral restrictions on access to this property are constitutional.¹¹³ Thus, the state can enact time, place, and manner regulations. Like *Davis*, the Court found that the state may preserve its property similar to a private property owner.¹¹⁴

In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,¹¹⁵ the Supreme Court considered the appropriate public forum characterization for public utility poles.¹¹⁶ Vincent was a candidate for public office, whose supporters put campaign signs on the city's utility poles.¹¹⁷ The city removed the signs pursuant to a city regulation prohibiting the posting of signs on public property.¹¹⁸ The supporters brought suit, asking the Court to bar the sign removal. They alleged, in part, that utility poles located on streets are a public forum.¹¹⁹ The city sought to validate the regulation, arguing that the signs were an unsightly blemish.¹²⁰

The *Vincent* Court found the telephone poles and lamp posts to be neither traditional nor designated public fora,¹²¹ determined that the

112. *Id.* at 46. The third category, "nonpublic forum," consists of property which is not a traditional public forum nor a designated public forum. *Id.*

113. *Id.*

114. *Id.*

115. 466 U.S. 789 (1984).

116. *Id.* at 813-16. The Court found that § 28.04 of the Los Angeles Municipal Code, which prohibits the posting of signs on public property, was constitutional on its face and was not substantially overbroad. *Id.* at 796-803. The Court noted that government time, place, and manner regulations of speech are permissible when four conditions are met. *Id.* at 804-05 (citing *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968)). The regulation must be within the government's constitutional power; it must further an important or substantial government interest; the government interest must be "unrelated to the suppression of free expression;" and "incidental restrictions on alleged First Amendment freedoms" must be "no greater than [are] essential to the furtherance of that interest." *Id.*

The Court found that in this case the government's interest, advancing aesthetic values, was sufficiently substantial to justify the effect of the ordinance on the campaign workers' speech, and that the restrictions were no greater than necessary to achieve the city's purpose. *Id.* at 807-11. Important to the result was that numerous alternative routes were available by which the campaign workers could convey their message. *Id.* at 812.

117. *Id.* at 792-93.

118. *Id.* at 793.

119. *Id.* at 813.

120. *Id.* at 795.

121. *Id.* at 814. The Court repeated its oft-quoted line that "the First Amendment does not guarantee access to government property simply because it is owned or con-

property was a nonpublic forum,¹²² and concluded that the ordinance was constitutional.¹²³

The Court questioned whether the public forum doctrine provided the proper framework for deciding cases involving tangible property,¹²⁴ noting that “[i]t is of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum.”¹²⁵

The Supreme Court further refined its public forum analysis in *Cornelius v. NAACP Legal Defense and Educational Fund*.¹²⁶ In *Cornelius*, various legal defense and political advocacy groups¹²⁷ challenged the constitutionality of a presidential order which excluded them from participating in the Combined Federal Campaign (CFC).¹²⁸ The order excluded the plaintiffs from participation in fund raising activities oc-

controlled by the government.” *Id.* (quoting *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). The Court noted that property is not a public forum solely because a speaker can use it for communicative purposes. *Id.* The Court argued that any tangible government property “could be used to communicate.” *Id.* at 814 n.31.

122. *Id.* at 814-15.

123. *Id.* at 815. The Court found that the statute served a reasonable purpose, it was viewpoint neutral, and alternative methods of communication were available. *Id.*

124. *Id.* at 815 n.32.

125. *Id.* The Court reasoned that the constitutionality of time, place, and manner restrictions where “First Amendment rights may be exercised in a traditional public forum,” and the question of whether public land constitutes a public forum “may blur at the edges.” *Id.* (quoting *Greenburgh Civic*, 453 U.S. 114, 132).

126. 473 U.S. 788 (1985). The Court’s public forum analysis serves as a model to judge the Ninth Circuit’s application of the doctrine. *See infra* notes 192-202.

127. The groups challenging the Executive Order in this case were the NAACP Legal Defense and Educational Fund, Inc., the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education Fund, the Indian Law Resource Center, the Lawyer’s Committee for Civil Rights Under Law, and the Natural Resources Defense Council. The common characteristic is that each group attempts to sway public policy through one or more of the following means: political activity, advocacy, lobbying, and litigation on behalf of others. 473 U.S. at 793.

128. *Id.* at 792. CFC is an annual fundraising drive among federal employees conducted during working hours at the federal workplace. *Id.* at 790. Participating organizations submit 30 word statements included in the campaign literature which then is distributed to federal employees. The Executive Order limited the organizations permitted to participate in the CFC to “voluntary charitable health and welfare agencies that provide or support direct health and welfare services to individuals or their families.” *Id.* at 795. The Executive Order specifically excluded the legal defense and political advocacy organizations that challenged the regulations. *Id.* The CFC was created to reduce the government’s burden in meeting employees’ health and welfare needs by

curing in federal office buildings, but did not exclude nonprofit, direct health and welfare organizations. The plaintiffs claimed this exclusion violated their first amendment rights.¹²⁹ The Supreme Court set forth a method for applying the public forum doctrine.¹³⁰ The Court found that it must first identify the relevant forum.¹³¹ The majority opined that a court must consider more than the relevant government property when identifying the relevant forum.¹³² The proper focus is the access sought by the speaker.¹³³ The relevant forum in *Cornelius* was the CFC rather than the federal workplace.¹³⁴

Next, the Court determined whether the CFC was a public forum.¹³⁵ After stating the CFC was not a traditional public forum, the Court

providing a convenient, nondisruptive channel for federal employees to contribute to nonpartisan agencies that directly serve those needs. *Id.*

129. *Id.* at 795-796. The Court's blueprint for resolving this issue includes four considerations: (1) Is the speech protected, (2) what is the relevant forum, (3) is it a public forum, and (4) whether the government's justifications for exclusion from the relevant forum satisfy the requisite standard. *Id.* at 797.

The respondents brought an action in federal court challenging the constitutionality of their exclusion under the Executive Order. *Id.* at 795. The respondents contended that the order violated their first amendment right to solicit charitable contributions and that "the denial of the right to participate in undesignated funds violates their rights under the Equal Protection component of the Fifth Amendment." *Id.* at 795-96. The respondent also contended that the direct services requirement was vague. *Id.* at 796.

130. The Court determined that charitable solicitation of funds is a form of protected speech. *Id.* at 797-99.

131. *Id.* at 800. The petitioner asserted that the relevant forum "consists of tangible government property," in this case the federal workplace. *Id.* at 800-01. Respondent contended that the court should define the relevant forum "in terms of the access sought by the speaker." *Id.* at 801. Therefore, the respondent maintained that the CFC is the relevant forum. *Id.*

132. *Id.* The Court found that the relevant forum may be either the property to which a speaker seeks access or a more narrowly defined property. When a speaker seeks general access to public property the appropriate forum is the property. *Id.* (citing *Greer v. Spock*, 424 U.S. 828 (1976)) (a military base to which a speaker sought access was the relevant forum).

"In cases in which more limited access is sought," the Court found that it must identify the relevant forum through a narrowly tailored approach. *Id.* (citing *Perry Education Ass'n*, 460 U.S. 37) (for a rival school union mail system, the relevant forum was the school's internal mail system and the school's mailboxes); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (where the speaker sought to advertise on city owned buses, the advertising space on the buses constituted the relevant forum).

133. 473 U.S. at 8900-01. The Court found that the "respondents [sought] access to a particular means of communication," not general access to the property. *Id.*

134. *Id.*

135. *Id.* at 802.

focused on whether the property was a public forum by designation.¹³⁶ To resolve this issue the Court considered both the government's intent when it created the CFC and the nature of the property.¹³⁷ The Court noted that it could infer a governmental intent to create a public forum through the government's operation and policy in regard to the CFC.¹³⁸ Furthermore, a governmental intent to create a public forum existed if the property lent itself to expressive activity.¹³⁹ The Court found that the CFC was a nonpublic forum.¹⁴⁰

In a nonpublic forum, the *Cornelius* Court held that a regulation must be viewpoint neutral, there must be reasonable alternative means available for the speaker to reach the intended audience, and the regulation must be reasonable in light of the forum's purpose.¹⁴¹ The Court found that the statute satisfied all of these requirements.¹⁴²

136. Neither party contended that the CFC constituted a traditional public forum. *Id.* at 804. The respondents argued that the "[g]overnment created a limited public forum for use by all charitable organizations to solicit funds from federal employees." *Id.* Petitioner contended that neither the government's "practice nor its policy [was] consistent with an intent to designate the CFC as a public forum open to all tax-exempt organizations." *Id.*

137. *Id.* at 802. The Court noted that a government cannot create a public forum by "inaction or permitting limited discourse"; rather, a government may only create a public forum by "intentionally opening a nontraditional forum for public discourse." *Id.*

To determine if the government has created a public forum, the Court reviews "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.* Further evidence of government's intent stems from the Court's analysis of "nature of the property and its compatibility with expressive activity." *Id.*

138. *Id.* at 802. The Court found that the government's policy "has been to limit participation in the CFC to 'appropriate' voluntary agencies and to require agencies seeking admission to obtain permission." *Id.* at 804. The Court determined that such "selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Id.* at 805. Furthermore, the history of the CFC showed that it was designed to reduce distractions in the workplace by limiting solicitations. The CFC lessens the amount of expressive activity occurring on federal property. *Id.*

139. The Court strengthened its conclusion that the CFC is a nonpublic forum by examining the nature of the government property. *Id.* at 805. The Court reasoned that the purpose of the federal workplace is to allow its employees to fulfill their duties. The government employer has great discretion in deciding office rules and procedures, including the right to minimize distractions. *Id.* at 805-06.

140. *Id.* at 806.

141. *Id.*

142. *Id.* at 808-09.

III. THE *Preferred Communications* Decision

The City of Los Angeles controlled the development and operation of cable television through a franchise auction process.¹⁴³ The city prohibited companies from offering cable service without first obtaining a cable franchise.¹⁴⁴ With the approval¹⁴⁵ of the State legislature, utilities throughout California designated excess space for cable operators' use.¹⁴⁶

Preferred Communications, Inc. (PCI), a corporation created for the purpose of providing cable service in Los Angeles, approached two California utilities to negotiate a contract for the use of their surplus poles and conduit space.¹⁴⁷ Both utilities refused to negotiate with PCI because the company had failed to obtain a cable franchise from the city.¹⁴⁸ PCI attempted to rectify the situation by petitioning the city for a franchise.¹⁴⁹ The city declined PCI's request because the company neglected to compete in the franchise process.¹⁵⁰

PCI attempted to vindicate its rights in federal court by alleging that the refusal of the utility companies and city to allow PCI to operate a cable system deprived the company of its right to free speech under the

143. *Preferred*, 754 F.2d at 1400. The Los Angeles franchise system authorized by CAL. GOV'T CODE § 53066 (West Supp. 1984) is similar to Congress' Cable Communications Policy Act of 1984. *Id.* at 1400. See *supra* notes 60-69 and accompanying text for a description of the Cable Act.

144. 754 F.2d at 1400. The city required interested companies to compete in a city auction for franchises and submit to a number of conditions. *Id.* The city demanded a prospective cable operator to pay a \$10,000 filing fee, a \$500 good faith deposit, and to agree to reimburse the city up to \$60,000 for holding the auction. *Id.* Furthermore, the city required companies to provide detailed descriptions of their business plans, experience, and qualifications. *Id.* The city obligated the successful bidder to provide the city with a percentage of future revenues, provide a variety of services, and make available a specified number of access channels. *Id.* For more specific terms and obligations of a franchise contract, see *id.* at 1400-01.

The city evaluated all bids and determined which company would "be best for each area" of the city, and granted an exclusive cable franchise for each region. *Id.* at 1401.

145. *Id.* (citing CAL. PUB. UTIL. CODE § 767.5(b) (West Supp. 1984)).

146. *Id.*

147. *Id.* at 1400. PCI planned to connect its equipment "to existing public utility facilities—poles and conduits located on property owned in fee by the utility and on or under easements owned by the utility running over both public and private rights of way." *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

first and fourteenth amendments.¹⁵¹ The district court found the city's franchising system constitutional as a matter of law.¹⁵²

The Ninth Circuit reversed the District Court's decision, finding that the city's franchise process violated the first amendment.¹⁵³ The court determined that the city could not grant an exclusive cable franchise when surplus space for accommodating additional systems existed.¹⁵⁴ The court analyzed the constitutionality of the franchise process by examining (1) the unique economic and physical characteristics of the cable medium, (2) the government's interest in preventing the disruption of the public domain, and (3) cable operators' access rights under the public forum doctrine.¹⁵⁵

The court initially focused on cable television's first amendment status by comparing the industry's physical and economic attributes to those of the print and broadcast media.¹⁵⁶ The Ninth Circuit found that the government's wide latitude in regulating broadcast television does not extend to its power to regulate cable television.¹⁵⁷ The court refused to apply the physical scarcity rationale, which justifies the regulation of broadcast television, to cable.¹⁵⁸ The court also rejected the

151. *Id.* at 1401.

152. *Id.* at 1399. As well as the free speech allegation, PCI raised federal antitrust and state law claims. *Id.*

153. *Id.* The court also determined that the "city was immune from antitrust liability under the state action exemption established in *Parker v. Brown*, [317 U.S. 341 (1943)]." *Id.* The district court also dismissed PCI's state law claims. 754 F.2d at 1399.

154. *Id.* at 1411. The Court of Appeals for the Ninth Circuit affirmed the district court's ruling on PCI's antitrust claims. *Id.* at 1399.

155. *Id.* The court described the issue before it:

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

Id. at 1401.

PCI raised a bevy of first amendment attacks against the auction process. *Id.* PCI maintained that its right to offer cable services should not be contingent on competing in the auction process or obtaining the city's approval. *Id.*

The city urged that its cable franchising system was justified by its need to prevent disruption on public land, "the fact that cable is a natural monopoly and the physical scarcity of available space on public utility structures. . . ." *Id.* at 1402.

156. *Id.* at 1403.

157. *Id.* See *supra* notes 12-14.

158. 754 F.2d at 1403. The court noted that the physical scarcity of the air waves, which justifies the regulation of broadcasters, is inapplicable to cable. *Id.* A cable oper-

city's contention that economic scarcity justified the franchise process, i.e., that cable is a natural monopoly.¹⁵⁹ The court indicated that the economic burdens a speaker faces in attempting to enter the cable market are irrelevant for first amendment purposes.¹⁶⁰ Similar to the print media, the city cannot base its regulation of cable on the market's inability to support additional cable operators.¹⁶¹

The court next considered whether disruption of public property could justify the city's franchise process.¹⁶² The city maintained that the regulations affected noncommunicative aspects of speech and were necessary to minimize disruption to the public domain.¹⁶³ Government regulation of noncommunicative aspects of speech is constitutionally permissible when the regulation is reasonable.¹⁶⁴ A regulation is reasonable

if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the further-

ator's ability to disseminate information is not lessened by an increase in the number of cable speakers as is a broadcaster due to frequency interference. *Id.* The court noted it was not deciding the case where public property is incapable of accommodating more systems. *Id.* at 1409. The court found that the city's allegations below failed to support a finding that physical limitations justified increased regulation of cable operators. *Id.* at 1403-04.

159. *Id.* at 1404. See, e.g., *Omega Satellite*, 694 F.2d at 127, in which the Court rejected the notion that cable operators suffer from the same physical limitations as broadcasters.

160. *Id.* The Court found that due to the case's procedural posture, it had to accept PCI's allegation "that competition for cable services is economically feasible in the Los Angeles area." *Id.*

161. *Id.* See *supra* note 13 for a discussion of the Court's determination that economic barriers do not justify government regulations which restrict the print media's access to a market. The Court suggested that circuits which have upheld a city's regulation on cable under an economic scarcity rationale are really focusing on cable's disruption to public property. 745 F.2d at 1404. See *supra* note 13 for a discussion of the circuits upholding such regulations. The *Preferred* court contended that the Tenth Circuit's view, espoused in *Community Communications*, that cable's disruption to city property necessitated a franchise process, also "justified the monopoly the city [sought] to create by its auction process." 660 F.2d at 1379.

162. *Id.* In *Miami Herald*, 418 U.S. 241, the Court rejected the view that economic conditions could justify the government's interference with the press. See *supra* note 13 for a discussion of economic constraints.

163. 754 F.2d at 1405.

164. *Id.*

ance of that interest.¹⁶⁵

The court agreed with the city that cable television requires the use of public facilities and thus necessitates governmental regulation.¹⁶⁶ The city has legitimate interests in protecting public safety and allowing traffic to move freely.¹⁶⁷ The Ninth Circuit concurred that the special problems cable presents justify regulating use and inconvenience; however, the court found that the city was attempting to restrict access.¹⁶⁸ The court concluded that the city's interests did not justify the risk that city officials might grant access based upon a particular cable operator's message and viewpoint.¹⁶⁹ The court held that the city must protect its interests through means less intrusive to cable operators' first amendment rights.¹⁷⁰

The court also relied on the public forum doctrine to support its decision.¹⁷¹ The Ninth Circuit identified public utility poles as the relevant forum.¹⁷² The court found that the poles constituted a public forum by designation because of the government's intent to open the forum for communicative purposes.¹⁷³ The state indicated this intent by dedicating surplus space for cable companies' use and by the city's auction process.¹⁷⁴ The court found that the government's regulations

165. *Id.* The reasonableness of a government regulation on noncommunicative aspects of speech is judged under the *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

166. 754 F.2d at 1405-06 (quoting *O'Brien*, 391 U.S. 367, 377 (1968)).

PCI conceded that the city had a legitimate interest in limiting the disruption of public areas and that "this interest is 'unrelated to the suppression of free expression.'" 754 F.2d at 1406. PCI argued, however, that the city's method of minimizing disruption by granting an exclusive franchise was not legitimate because it created a risk that city officials would discriminate on the basis of a cable operator's program contents. *Id.*

167. *Id.*

168. *Id.* The court opined that the unique characteristics of cable television that justify government regulation distinguish cable from the print media. *Id.*

169. *Id.*

170. *Id.* at 1406-07.

171. *Id.* at 1406.

172. *Id.* at 1407-09. *See supra* notes 70-141 and accompanying text for a discussion of the public forum doctrine.

173. 754 F.2d at 1408. The Ninth Circuit found that utility poles do not constitute traditional public fora even though they are located on the streets and alleys. *Id.* The Court found that the property's location did not determine its appropriate characterization. Rather, the court must look to the property's normal usage and the government's actions with respect to the property. *Id.* at 1407-08.

174. *Id.* at 1409.

violated the first amendment.¹⁷⁵

The Ninth Circuit distinguished the Supreme Court's decision in *Vincent*, which held that utility poles constituted a nonpublic forum.¹⁷⁶ The Court of Appeals noted that the posting of signs in *Vincent* was not compatible with the normal use of the utility poles, and that the city prohibited the posting of all signs.¹⁷⁷ In *Preferred*, however, there was evidence of the city's intent to open the property for communicative purposes, and use of the poles for carrying cable lines was compatible with the property's normal use.¹⁷⁸

The court held that the restrictions on access rendered the franchise process unconstitutional¹⁷⁹ because the regulations constituted a prior restraint on speech.¹⁸⁰ The court noted that the franchise process created an impermissible risk of viewpoint and content discrimination.¹⁸¹ The court held unconstitutional the city's award of an exclusive franchise where the property could accommodate more speakers.

The Supreme Court affirmed the Ninth Circuit's decision and remanded the case to the district court for further fact finding.¹⁸² The Court noted that it affirmed the decision on narrow grounds.¹⁸³ The Court found that PCI stated an injury upon which the district court could grant relief.¹⁸⁴ The Court found that the activities of a cable operator implicate the first amendment.¹⁸⁵ In his majority opinion, Justice Rehnquist noted that not all protected speech is permissible everywhere and at all times.¹⁸⁶ Here, where speech and conduct are linked, the Court must test the constitutionality of the regulation by balancing cable operators' first amendment rights against society's

175. *Id.* at 1409.

176. *Id.* at 1408-09. The court noted that it would hold the regulations unconstitutional, even if it found that a utility pole did not constitute a public forum, because the regulation was viewpoint discriminatory. *Id.* at 1409.

177. *Id.* at 1408-09. See *supra* notes 115-125 and accompanying text for a discussion of *Vincent*.

178. 754 F.2d at 1408-09.

179. *Id.*

180. *Id.* at 1409.

181. *Id.*

182. *Id.*

183. *Los Angeles v. Preferred Communications*, 106 S. Ct. 2034 (1986).

184. *Id.* at 2036.

185. *Id.* at 2037.

186. *Id.*

competing interests.¹⁸⁷ The Court refused to conduct such balancing absent further fact finding.¹⁸⁸

Justice Blackmun, joined by Justices Marshall and O'Connor, wrote a separate concurrence joining the Court's opinion.¹⁸⁹ Justice Blackmun emphasized that the Court's opinion left unanswered the proper standard for judging first amendment challenges to a municipality's restriction of access to cable facilities.¹⁹⁰

IV. ANALYSIS

If the *Preferred* case returns to the Supreme Court, the Court will once again address the difficult issue of cable television's first amendment status.¹⁹¹ The parties may ask the Court to consider both the appropriateness of employing the public forum doctrine to define cable's first amendment status and the validity of the Ninth Circuit's public forum analysis.

The Ninth Circuit appropriately determined that the relevant property for public forum analysis was the utility poles¹⁹² owned or controlled by the city.¹⁹³

The court correctly determined that utility poles constitute a limited public forum.¹⁹⁴ Los Angeles' operation and policies with regard to the property illustrated the city's intent to create a public forum.¹⁹⁵ The state legislature acknowledged and tacitly approved the dedication of excess space on utility poles for cable operators' use, and the city's auction process itself opened the property to cable operators.¹⁹⁶ Furthermore, use of utility poles to carry cable is consistent with the normal use of the property.¹⁹⁷

The Ninth Circuit justifiably held the regulations unconstitu-

187. *Id.* at 2038.

188. *Id.*

189. *Id.*

190. *Id.* (Blackmun, J., concurring).

191. *Id.* (Blackmun, J., concurring).

192. *See supra* note 10 and accompanying text for recent cases in which the Court has refused to resolve this issue.

193. *See supra* notes 130-142 and accompanying text for a discussion of the Court's instructions for applying the public forum doctrine.

194. *See supra* notes 133, 146 and accompanying text.

195. *See supra* notes 137-139, 172-174 and accompanying text.

196. 754 F.2d at 1409.

197. *Id.*

tional.¹⁹⁸ Once the court classified the poles as a public forum, any restrictions on the poles' use are subject to strict scrutiny.¹⁹⁹ Los Angeles failed to demonstrate that the regulations were narrowly tailored to serve a compelling state interest.²⁰⁰ The city's franchise process created an impermissible risk of content or viewpoint discrimination.²⁰¹ The court found that less intrusive means to regulate the conduct were available.²⁰²

The public forum doctrine balances cable operator's rights, local governments' interests, and the first amendment's purpose of allowing for broad dissemination of information.²⁰³ The doctrine permits the community to receive information that a particular cable operator may abhor, and it prevents the government from censoring speech or chilling a cable operator through procedural regulations.²⁰⁴ Furthermore, government may only control cable access in a nondiscriminatory manner.²⁰⁵ A city must grant cable operators access where excess space exists on its utility poles. Finally, the doctrine provides that a city's time, place, and manner restrictions are constitutional only when they are content neutral.²⁰⁶

Use of the public forum doctrine for determining the validity of government regulations of cable is more useful than previous judicial attempts to fit cable within the broadcast or print models.²⁰⁷ Cable

198. *Id.* at 1408.

199. *Id.* at 1411.

200. *See supra* notes 114-120 and accompanying text.

201. 754 F.2d at 1408.

202. *Id.* at 1409.

203. *Id.* at 1408.

204. *See* P. PARSONS, *supra* note 21, at 124-126.

205. *See id.* at 124-125.

206. *See id.* at 124.

207. *Id.* Several commentators, however, have questioned the usefulness of the public forum doctrine. Parsons suggested that three elements must be present for the public forum doctrine to apply. First, the government must control the forum; second, the forum must have a nexus to free speech; and finally, the activity must comply with the normal usage of the forum. *Id.* Parsons writes that the doctrine's government control element does not sufficiently provide for the doctrine's application because cable systems are not state-owned. *Id.* at 126, 128. Parsons appears to misapply the public forum doctrine. Courts determine the relevant forum by looking at the government property to which a cable operator seeks access. In *Preferred*, this property would be the city's utility poles. Different questions would arise where a cable operator sought access to another operator's cable lines. *But see* Brunelli, *Why Courts Should Not Use Public Forum Doctrine Analysis in Considering Cable Operators' Claims Under the First Amendment*, 24 AM. BUS. L.J. 541 (1986) (arguing the public forum analysis hides the

television does not suffer from the physical limitations which justify the government's regulation of the broadcast industry.²⁰⁸ Yet cable poses significant problems for public safety and convenience which are not present with the print media.²⁰⁹ The public forum doctrine allows the court to consider a city's interests while being attentive to cable's first amendment implications.

A court must determine the degree of significance it should give to the city's interest in protecting public safety and keeping public land free from disruptions. A city can address these concerns, however, by enacting reasonable time, place, and manner regulations that do not unduly restrict access.²¹⁰

Perhaps a more serious problem is determining what standards should guide a city when the number of cable operators seeking access to government property exceeds the available space.²¹¹ Most municipalities will grant access rights to cable operators who best conform to the mainstream views of the city government and its citizens. Cable operators with radical views and fringe programming will have a difficult time gaining access. Without guidelines preventing content discrimination, consumers will fail to benefit from the Cable Act's purpose of promoting diversity.²¹²

Initially it was relatively simple for a court to determine those places that fit within Justice Robert's definition of "public forum."²¹³ Now that "public forum" comprises more than streets and parks, it is increasingly difficult for a court to distinguish between a public and a nonpublic forum. In *Vincent*, the Supreme Court determined that a utility pole was a nonpublic forum, while in *Preferred*, the Ninth Circuit found the same item to be a public forum.²¹⁴ The Court must decide if certain public property constitutes a public forum for some speakers but not for others.

real issues and interests in cable regulation and urging municipalities to grant access to one cable operator while permitting mandatory and leased access channel requirements).

208. See *id.* See also *supra* notes 12-14 and accompanying text.

209. See *supra* notes 12-14 and accompanying text.

210. 754 F.2d at 1409. See also *supra* notes 12-14 and accompanying text.

211. See *supra* note 207.

212. 754 F.2d at 1406. For example, St. Louis has blacked out the Playboy cable network in the St. Louis area, thus depriving cable viewers of diversity.

213. *Hague*, 307 U.S. at 515.

214. 754 F.2d at 1408-09.

Regulation of cable television is primarily a responsibility of municipalities. The municipality holds virtually unrestricted discretion in awarding cable franchises. Thus, there exists in the present system the potential for first amendment abuses. It is readily conceivable that a municipality may award franchises on the views and programming of a cable operator. Judicial application of the public forum doctrine ensures that the public is provided with the greatest diversity possible.

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