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# PACE LAW REVIEW

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## Cable Television and Communications Issue

### Articles

#### ***Preferred Communications: Preamble to Breakup of Local Cable Franchising?***

**Sol Schildhause†**

In this Article, Mr. Schildhause, whose law firm represents Preferred Communications in the assault on local cable franchising practices as violative of the first amendment, suggests that the Supreme Court decision in *City of Los Angeles v. Preferred Communications, Inc.* confirms serious doubts about the survivability

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† Sol Schildhause is the Washington partner in the law firm of Farrow, Schildhause & Wilson, with offices in Washington, D.C. and Oakland and Los Angeles, California. The firm was intimately involved with the development of cable's copyright accommodations in the early and mid-1970's, was prominent in the achievement of pole attachment legislation in California and at the federal level, and is now in the forefront of the movement to achieve first amendment status for cable television. The firm has been successfully litigating the *Preferred Communications* case against the City of Los Angeles.

Mr. Schildhause is a graduate of Harvard Law School. He was, until 1974, the first Chief of the Cable Television Bureau at the Federal Communications Commission where he directed the FCC's cable television operations dating from the time the Commission first assumed direct jurisdiction over the industry in 1966 until after the 1972 Report that began to date the emancipation of cable. He has been a staunch advocate of the promise of cable television and has participated in most of the bruising battles that have beset the industry.

of the core of local franchising and of many of the substantive features of the Cable Communications Policy Act of 1984.

## I. Introduction

The terms of cable television franchising are currently among the key issues in telecommunications. With most of the country already wired or franchised,<sup>1</sup> the awarding of franchises for new uncabled territory is just about over; nonetheless, the same issues abound in renewing franchises (with modification of franchise terms possible) and thousands of existing licenses are coming up for renegotiation during this decade.

In virtually every community in the country, cable systems receive a monopoly franchise from local governments. It is in fact a monopoly, even though it is almost always decorated with the sham label of "non-exclusive franchise."<sup>2</sup> In return for the exclusive right to sell cable television service, communities impose a panoply of regulatory controls and extract substantial franchise fees, a process that amounts to discriminatory taxation, if not outright kickback. This cozy arrangement has been described as one in which "viewers are . . . stuck with whatever cable system the politicians pick for them."<sup>3</sup>

The existing dubious procedures for cable franchising and refranchising will undoubtedly be altered as a result of the decision of the United States Supreme Court in *City of Los Angeles v. Preferred Communications, Inc.*<sup>4</sup> That case poses a direct challenge to the right of local governments to exercise monopoly power over cable television through the device of limiting access to the market, and it also threatens a number of the comfortable legislative compromises that were built into the Cable Communications Policy Act of 1984.<sup>5</sup>

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1. About 75% of all U.S. television households were passed by cable as of December 31, 1985. PK Cable TV Franchising, June 25, 1986, at 8. Apparently not reflected above are such franchised but not built-out major areas as Chicago, Cleveland, Detroit, Baltimore, Washington, D.C., Sacramento, Philadelphia, and the boroughs of New York City outside Manhattan.

2. CATO Institute, Policy Analysis, Mar. 13, 1984, at 4 [hereinafter CATO Institute].

3. *The Nature of Cable*, Wall St. J., June 5, 1986, at 26, col. 1.

4. 106 S. Ct. 2034 (1986).

5. 47 U.S.C. § 521 (Supp. III 1985).

This Article addresses aspects of the continuing, though shifting, struggle between local government franchising authorities, entrenched cable interests, and clamoring new cable aspirants, all viewed in a context of evolving judicial concern and cast against the background of a light that may fail — the Cable Communications Policy Act.

## II. *Preferred Communications* Dispute: Prototype of a Franchising Experience

The franchise selection process for the south central area of Los Angeles, principally including the Watts area, began in October of 1982, with the city soliciting applications by publishing a "Notice of Sale of a Cable Franchise and Request for Proposals and Instructions to Applicants." The notice specified that only one franchise would be awarded.<sup>6</sup> The bidding process was later described by the Court of Appeals for the Ninth Circuit as follows:

The City allocates franchises through an auction process. . . . The City requires companies wishing to participate in the process to submit to a variety of conditions. A potential bidder must pay a \$10,000 filing fee and a \$500 good faith deposit and must agree to pay up to an additional \$60,000 to reimburse the City for expenses incurred in holding the auction. It must provide the City with a detailed proposal outlining its intended operations over the succeeding nine years and must demonstrate to the satisfaction of the City that it has a "sound financial base," that its proposed operations constitute "sound business plans," and that it has the proper "character qualifications" and "demonstrated business experience." The City also requires hopeful bidders to agree to pay the City a percentage of future annual gross revenues and to provide a variety of customer services, including at least 52 channels of video service and interactive (two way) service.

More significantly, the City exacts a commitment to provide various mandatory access and leased access channels. Bidders must agree to provide, without compensation, two channels for use by the City and by other government entities, two channels for use by educational institutions, and two channels for use by the general public, along with staff and facilities to aid in pro-

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6. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2035-36 n.1 (1986).

gramming. Bidders must further agree to provide two leased access channels as well. An undertaking to provide portable production facilities and to permit free use by the City of all poles, towers, ducts, and antennas is also required.

Finally, potential cable operators must agree to leave a variety of business decisions to the discretion of the City. Pricing and customer relations are left to the City's control. The operator must form a "cable franchise advisory board," subject to City approval. Lastly, the City reserves the right to inspect the cable operation upon demand and requires a waiver of any right to recover for damages or other injury arising from the cable franchise or its enforcement.<sup>7</sup>

Preferred Communications did not enter the bidding contest but later sought a franchise as a matter of right. Its request was denied. Preferred then sued in the United States District Court for the Central District of California, contending that the city's refusal to grant its request for a franchise violated both the first and fourteenth amendments to the Constitution and various federal antitrust laws. Plaintiff, Preferred Communications, alleged that: 1) it had asked the City's Department of Water and Power and the Pacific Telephone and Telegraph Company for permission to lease space for cable television on existing poles and in the utility conduits; 2) the utilities stated that they would not lease space until Preferred Communications obtained a franchise from the city; and 3) Preferred Communications sought a franchise but was turned down by the city because Preferred Communications had refused to participate in the auction for the right to be the sole cable television operator.<sup>8</sup>

### III. Tracking *Preferred Communications* from District Court to Supreme Court

The district court dismissed the complaint. As to the first amendment claim, the court stated: "The City's regulatory scheme, which herein has had the effect of regulating access to the erection, construction, and operation of a cable television system, does not, as a matter of law, violate the First Amend-

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7. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1400-01 (9th Cir. 1985).

8. *Preferred Communications*, 106 S. Ct. 2034, 2035 (1986).

ment rights of an alleged prospective cable television operator such as plaintiff . . . .”<sup>9</sup> The court further found that the defendants<sup>10</sup> were immune from antitrust liability because their conduct was state action under *Parker v. Brown*.<sup>11</sup>

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part.<sup>12</sup> The district court’s conclusion that defendants were immune under the federal antitrust laws was upheld. As to the free speech claims, Preferred Communications had contended that its right to construct a cable television system and to disseminate programming should not be conditioned on having to participate in an auction procedure or be otherwise subject to the city’s discretion.<sup>13</sup> The complaint alleged, inter alia, that there was space on the poles, that Preferred Communications was ready and willing to abide by all reasonable police power regulations of the city, that cable placed no greater burden on public rights-of-way than did newspapers, movie theaters, and other first amendment speakers, and that Preferred Communications was eager to compete for viewers with any other cable operator.<sup>14</sup> The Ninth Circuit held that, taking the allegations in the complaint as true,<sup>15</sup> the city’s refusal to issue a franchise to Preferred Communications amounted to a violation of the first amendment to the Constitution. The court rejected the claim by defendants that the decision to limit the number of franchises could be justified by physical limitations of space on

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9. CV-83-5846-CBM (C.D. Cal. Mar. 8, 1984). The district court opinion is unreported. See also *Amici Curiae Brief for the United States and the FCC at 13, City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986) (No. 85-390) (describing the reasoning of the district court as “skeletal”).

10. The defendants are the City of Los Angeles and the Department of Water and Power.

11. 317 U.S. 341 (1943).

12. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1399 (9th Cir. 1985). An order amending the Ninth Circuit’s opinion and denying a petition for rehearing was entered on June 13, 1985. The order noted that “no judge of the court has requested a vote on the suggestions for rehearing en banc.”

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

14. *Id.* at 1401-11.

15. *Id.* at 1399. Under FED. R. Civ. P. 12(b)(6) a defense to a complaint may be entered by way of a motion to dismiss for “failure to state a claim upon which relief can be granted.” But, as the Ninth Circuit noted: “In conducting this review, we must accept all material allegations in the complaint as true.” *Id.* at 1399 (citing *Berner v. Lazzaro*, 730 F.2d 1319, 1320 (9th Cir. 1984)).

the poles and in the conduits. The defendants' claim that the refusal to issue a second franchise was justified because cable television is a natural monopoly also failed.<sup>16</sup> The court noted that these justifications were contradicted by allegations in the complaint and thus could not be invoked to justify the conduct of the defendants at this stage of the proceeding.<sup>17</sup>

The Ninth Circuit decision stands, however, as something more than a slim triumph on procedural grounds because the court went on to express its strong inclination to view cable television as a form of publishing very much like newspaper publishing. Thus, relying heavily on *Miami Herald Publishing Co. v. Tornillo*,<sup>18</sup> the court declared that: "Allowing a procedure such as the City's would be akin to allowing the government discretion to grant a permit for the operation of newspaper vending machines located on public streets only to the newspaper that the government believes 'best' serves the community, a practice which we find clearly invalid."<sup>19</sup>

The justification for local franchising practices is customarily couched in these terms: cable systems use property held for the benefit of the public, and the use of public right-of-way is comparable to the use of spectrum by broadcasters (a use that is classically perceived as justifying FCC regulation of broadcasting<sup>20</sup>); there are "some" physical scarcity limitations on the number of cables that can be accommodated in the public right-of-way; cable "feels" more like broadcasting than newspaper publishing; construction of a cable system entails a far more disruptive use of the public domain than does the distribution of newspapers; and there is no tradition of completely unfettered speech in the medium of cable as there is in the case of newspapers.<sup>21</sup>

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16. *Id.* at 1404-11.

17. *Id.* at 1401-10.

18. 418 U.S. 241 (1974). The Supreme Court invalidated a state statute granting political candidates a right to equal space to reply to criticism in newspapers. The Court refused to accept a contention that, by virtue of the circumstance that economic conditions assure most newspapers a monopoly position in their markets, government could for that reason impose a right of access.

19. *Preferred Communications*, 754 F.2d at 1409.

20. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

21. NATIONAL LEAGUE OF CITIES & U.S. CONFERENCE OF MAYORS, CABLE FRANCHISING AND REGULATION: A LOCAL GOVERNMENT GUIDE TO THE NEW LAW at III-Q-4-5 (1985)

Although the Ninth Circuit's decision was not a complete rebuttal to the above, the opinion went a long way in confronting the standard arguments for regulation. The pole space analogy to broadcast spectrum was rejected.<sup>22</sup> While the economic scarcity or natural monopoly characteristics of cable as justification for regulation was not decided, the tone of the opinion did not denote any significant degree of sympathy with that contention.<sup>23</sup> The argument that the disruptive effects of a second cable system justifies the restricting of access also failed.<sup>24</sup>

The Ninth Circuit did not reject traditional cable franchising as inherently unconstitutional, nor did it categorically declare that cable is entitled to the same first amendment protections that are applicable to newspaper publishing. However, it drew parallels between cable and newspaper publishing and declared that "[a]rranging programming for an entire cable television system entails engaging in a wide variety of protected activities."<sup>25</sup> Furthermore, "[i]n addition to originating their own programming, cable television operators exercise considerable editorial discretion regarding what their programming will

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[hereinafter CABLE FRANCHISING AND REGULATION] (This guidebook was produced for the benefit of mayors, council members, cable administrators, city attorneys, and other local officials.).

22. *Preferred Communications*, 754 F.2d at 1404. Here the court stated:

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

23. *Id.* at 1404-05 ("Although the Court [in *Tornillo*] acknowledged that most newspapers enjoy a monopoly in their areas of distribution, it did not conclude that this circumstance gave rise to a duty to provide public access to the press.").

24. The Ninth Circuit maintained that:

Cable television . . . requires the use of public facilities, and this provides a justification for some government regulation. The City has legitimate interests in public safety and in maintaining public thoroughfares . . . .

Regulating such use and inconvenience, however, is quite different from restricting access, as the City attempts to do here. It has not been alleged that public utility facilities owned or controlled by the City can only support the use of a single or a few cables. Indeed, PCI [Preferred Communications] has alleged precisely the contrary. A different and more sharply focused response by the City could protect the legitimate interests of the City and its citizens.

*Id.* at 1406 (citation omitted).

25. *Id.* at 1410.

include."<sup>26</sup>

The court specifically declared that cable television requires the use of public facilities and that such a feature "provides a justification for some government regulation."<sup>27</sup> Inter alia, plaintiff Preferred Communications conceded that cities have authority to regulate cable within the limits of their police power.<sup>28</sup> This is significant in light of the court's observation with respect to § 621(a)(1)<sup>29</sup> of the Cable Communications Policy Act (the Cable Act) which empowers a local authority to "award . . . 1 or more franchises":

To the extent that this provision authorizes the government to protect its interest in regulating disruption of public resources through a system of permits or franchises, see *id.* § 621(a)(2) (noting government's interest in promoting safety and in ensuring that the costs of installation and operation are borne by the cable operator); see also *id.* § 602(8) (defining "franchise" as an initial authorization (or a renewal thereof), whether designated as a franchise, license, permit, or otherwise), it passes muster under the principles announced here. But we cannot agree with the suggestion in the legislative history that the provision "grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area." H.R.Rep. No. 934, 98th Cong., 2d Sess. 59 . . . . A construction of such breadth would be invalid.<sup>30</sup>

The court's reference to local concerns with public safety appears to be more than casual and seems approving of the plain-

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26. *Id.* at n.10. The court continued that:

Editorial judgment is entitled to First Amendment protection. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58, 94 S. Ct. 2831, 2839-40, 41 L.Ed.2d 730 (1974). Undeniably, cable operators do transmit programs produced by others. To the extent an operator does so, however, we believe it would be treated for First Amendment purposes as would be theater owners, booksellers, and concert promoters. Their First Amendment protection is not diminished because they distribute or present works created by others.

*Id.*

27. See *supra* note 24.

28. This police power is generally understood to be concerned with such matters as protecting health and safety. *Preferred Communications*, 754 F.2d at 1406.

29. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 621(a)(1), 98 Stat. 2779, 2786 (1984). This section is now codified at 47 U.S.C. § 541(a)(1) (Supp. III 1985).

30. *Preferred Communications*, 754 F.2d at 1411 n.11.

tiff's own position on the extent of the municipal police power to regulate cable.

The court also addressed the contention that the disruption that cable visits on the public domain justifies a greater degree of regulation than does the distribution of newspapers.<sup>31</sup> Its opinion would accept some regulation but clearly not the amount contemplated in the typical franchise contract. Commonly, most of the consideration of disruption proceeds from an intuitive sense that accepts the notion that cable is obviously a greater burden on public facilities than is the newspaper business; but that assumption may be unwarranted. Counsel for Preferred Communications offered evidence that newspaper distribution is, by a wide margin, a greater burden than is cable television.<sup>32</sup>

The relevance of the traditional argument in favor of municipal restraints — that cable has always been regulated and newspapers have not — also received gruff treatment from the Ninth Circuit. The court noted that: "The Tenth Circuit also suggested that newspapers had enjoyed a long tradition of freedom from government interference, while cable television had not. *Community Communications Co.*, 660 F.2d at 1379; *accord Berkshire Cablevision of Rhode Island*, 571 F.Supp. at 985. This distinction merely begs the question."<sup>33</sup> That reflection of the Ninth Circuit appears beyond dispute. Reliance on a long-term pattern of conduct to justify ratifying the process even if it is unconstitutional is thin and illogical. It seems reasonless because it would approve the creation of an incentive for government to move in early to regulate every new medium of communications as it surfaces.

The Ninth Circuit's opinion merits a final overall look. At the outset, the court framed a "fundamental issue" in terms which, if decided in favor of the city, would require affirmation of the district court; but "which, if decided adversely to the

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31. *Id.* at 1405-06.

32. BROBECK CORP., *ATHERTON-MENLO PARK-PALO ALTO JOINT CABLE SYSTEM STUDY* (1984). This document was submitted as exhibit 4 to Appellant's Response to the Amici Curiae Brief of the Cities of Palo Alto, Menlo Park and Atherton, and is a study outlining public sector costs for newspapers and cable TV, the continuing litter problem being a major consideration in the higher costs attributable to newspapers.

33. *Preferred Communications*, 754 F.2d at 1405 n.8.

City, would require reversal and a redesign by the City of its procedures relating to cable television.”<sup>34</sup> The court identified that fundamental issue as follows:

Can the City, consistent with the First Amendment, limit access by means of an auction process to a given region of the City to a single cable television company, when the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system?<sup>35</sup>

In saying “no” to that question, the court was plainly signalling that it expected the city to redesign its procedures concerning cable television. The Supreme Court’s opinion<sup>36</sup> did not go that far and, for that reason, is being hailed by the apparatus of local government regulators as a victory for the continuation of business as usual at city hall.<sup>37</sup>

#### IV. Supreme Court Decision: A Standoff Or a Win for Cable?

On certiorari, the Supreme Court affirmed the judgment of the Ninth Circuit and remanded the case to the district court. An opinion by Justice Rehnquist expressed the unanimous view of the Court that the cable television company’s complaint should not have been dismissed because the activities in which it sought to engage plainly implicated first amendment interests.<sup>38</sup> But the Court did not think it was desirable to express any more detailed views on the proper resolution of the first amendment question without a more thoroughly developed record of proceedings in which the parties would have an opportunity to prove the factual assertions on which they rely.<sup>39</sup>

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34. *Id.* at 1401 (emphasis added).

35. *Id.*

36. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986).

37. *Tentative Move Toward Cable’s First Amendment Rights*, BROADCASTING, June 9, 1986, at 36. (Quoting Los Angeles Assistant City Attorney: “[W]e’re going to win. . . . The Supreme Court didn’t tell us not to continue with the competitive bid process.”).

38. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2037 (1986). Justice Blackmun, joined by Justices Marshall and O’Connor, wrote a concurring opinion in which he states that he joined the majority opinion on the understanding that it leaves open the question of the proper standard for judging first amendment challenges to local government restriction of access to cable facilities. *Id.* at 2038 (Blackmun, J., concurring).

39. *Id.* at 2037.

The plaintiff cable company is surely entitled to claim victory because the right to trial on its original complaint — all it ever sought — is now assured. The opposing side will find refuge, however, in the fact that although the Supreme Court agreed with the court of appeals that the complaint should not have been dismissed, its affirmance was “on a narrower ground.”<sup>40</sup> Is affirmance “on a narrower ground” a repudiation of the lower court? That question must be viewed in light of the course taken by the Supreme Court and in anticipation of its effect on subsequent proceedings.

As presented to the Supreme Court, as was the case before the Ninth Circuit, the record consisted only of the plaintiff's complaint. For the purposes of the district court, the Ninth Circuit, and the Supreme Court, every allegation of the complaint was deemed to be true.<sup>41</sup> Thus, because the matter before the Supreme Court was to review the action of the Ninth Circuit, which had reversed the decision of the district court granting a motion to dismiss, the options available to the Supreme Court were limited. It could have chosen to reverse the Ninth Circuit and to reinstate the decision of the district court. There were no votes for that. It could have decided that certiorari was improvidently granted and dismissed the appeal without opinion; this would have left the Ninth Circuit's decision in place but without the imprimatur of Supreme Court affirmation. No one proposed that in either the majority or concurring opinion. It could have affirmed, but at the same time indicated its lack of confidence in the Ninth Circuit by ordering that its opinion not be treated as precedent, either within or without the Ninth Circuit. There was no support for that. It could have affirmed the Ninth Circuit and sent the case back to the lower court for trial, in effect not detracting from the published opinion of the Ninth Circuit.<sup>42</sup> All

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40. *Id.* at 2036.

41. *Id.* at 2037. *See also supra* note 15.

42. In federal practice, a circuit court opinion does not lose precedential value unless reversed by the Supreme Court, and then only as to the issues that led to the reversal. Federal circuit court opinions are routinely cited for matters that were not touched by a reversing opinion. Thus, a standard citation for the subsequent history of a federal case is “*rev'd on other grounds.*” *See* HARVARD LAW REVIEW ASS'N, A UNIFORM SYSTEM OF CITATION § 10.7.1, at 49-50 (14th ed. 1986). Supreme Court practice expressly recognizes this fact. When the Court wants to deprive the circuit court's opinion of precedential value, it vacates the circuit court's judgment. For example, in *Lawlor v. National Screen*

nine justices voted for that.

The litigation then is back to the district court, but not in the same posture. The prospective trial in the district court is now restrained by the appellate rulings that the services of cable television "plainly implicate First Amendment interests."<sup>43</sup> The Supreme Court opinion declined to address whether the threat of visual blight or other aesthetic interests,<sup>44</sup> the possibility of traffic disruption, or the prospect of the local-monopoly nature of cable television justified government limits on the number of cable systems or other forms of regulation. However, the idea that cable could be regulated under some rule of reasonableness, that perhaps applies to non-speech activities, was rejected. As a minimum, the Court declared that governing communities must make a showing that regulation advances governmental interests. Thus, "where speech and conduct are joined in a single

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Serv. Corp., 352 U.S. 992 (1957), the Court in a one-paragraph per curiam opinion granted certiorari solely to vacate the Third Circuit's opinion so that the issues decided by the circuit court, which the Court deemed unnecessary for the decision, would not be binding on the district court. The Court stated:

We agree with the Court of Appeals that the motion for summary judgment should have been denied. However, in our view, this disposition of the case made it unnecessary for the Court of Appeals to pass on any other issue than that of the *per se* invalidity of exclusive contracts under the Sherman Act. In order that the District Court *not be bound* by the consideration the Court of Appeals gave to the remaining issues, and without reaching any of the same, we grant the petition for writ of certiorari, vacate the judgments, and remand the cause to the District Court for trial.

*Lawlor*, 352 U.S. at 992 (emphasis added).

Likewise in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), where the Fifth Circuit had affirmed a district court's decision without the benefit of the Supreme Court's recent decision on qualified immunity in *Wood v. Strickland*, 420 U.S. 308 (1975), the Court vacated the circuit court's judgment. *O'Connor*, 422 U.S. at 577. "Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the *sole* law of the case." *Id.* at 577-78 n.12 (emphasis added). It is therefore clear that when the Supreme Court affirms a circuit court's judgment and does not vacate it, the circuit court's opinion remains both valid precedent and law of the case. That being so, the Ninth Circuit's *Preferred Communications* opinion is not displaced by the Supreme Court's affirmance. And, since the Supreme Court's opinion nowhere expressly disapproves of anything stated in the Ninth Circuit's opinion, the latter remains the law of the Ninth Circuit and binding as precedent and law of the case on the district court on remand in *Preferred Communications*.

43. *Preferred Communications*, 106 S. Ct. at 2037.

44. *Id.* But cf. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (prevention of aesthetic harm is a substantial governmental interest).

course of action, the First Amendment values must be balanced against competing societal interests.”<sup>45</sup> The opinion is unusually candid in its admission that the Court does not know enough about how cable is installed on utility poles, stating that: “We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them.”<sup>46</sup>

## V. Local Government Involvement

The potential of cable, sometimes described as “breathhtaking,” is also characterized as inhibited by a long history of re-

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45. *Preferred Communications*, 106 S. Ct. at 2038. PK Cable TV Law Reporter, June 13, 1986, at 2 states:

This suggests that the court is leaning toward the *O'Brien* test [United States v. O'Brien, 391 U.S. 367 (1968)] to balance cable's right to enter a market against a city's aesthetic interests.

If so, then franchising requirements will be upheld only if they further an important governmental interest, and if the incidental restriction on the First Amendment freedoms is no greater than is essential to the furtherance of that interest.

46. *Preferred Communications*, 106 S. Ct. at 2038. In both the Ninth Circuit and Supreme Court opinions there is a common thread of apparent acceptance of the proposition that the stringing of cable on poles is somehow a use of streets and rights-of-way, that use being the anchor justification for local government intervention in cable franchising. In another view, however, the attaching of cable to utility poles is simply a matter of accepting a public utility service offered by common carriers (power and telephone companies) who long ago dedicated their property and have over a long period of time willingly offered the service to cable companies. In that light, pole attachment service is viewed as available to a cable operator as is ordinary telephone service to any telephone user. And, the argument runs, the cable operator does not use streets and rights-of-way any differently than does the ordinary telephone user. That position was argued in the Supreme Court by counsel for Preferred Communications (see PK Cable TV Law Reporter, May 21, 1986 at 2) and is also contended for in an *amici curiae* brief (*Amici Curiae Brief of Nor-West Cable Communications and Preferred Communications, Inc., FCC v. Florida Power Corp.*, Nos. 85-1658 and 85-1660.). In the case of *Florida Power Corp.*, the Supreme Court, on December 3, 1986, heard argument on an appeal from a decision of the Eleventh Circuit that held unconstitutional the federal statute in 47 U.S.C. § 224 (1982) that regulates pole attachment rates and practices. *Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir.), *reh'g denied*, 778 F.2d 793 (11th Cir. 1985). The opinion by Justice Rehnquist in *Preferred Communications* may be prescient in its perception that the Court will be better able to decide the constitutional questions in franchising when it knows more about pole attachment practices.

pression at the federal and local levels of regulation.<sup>47</sup>

At the federal level, the cable industry was subjected to a roller coaster of regulation by the FCC. The Commission's attitude toward cable has been described as one of little interest in the 1960's to one of extensive engagement in the 1970's at the importuning of the broadcast industry, and back to "minimal" regulation in recent years.<sup>48</sup> Beginning in early 1966, the FCC had clamped a freeze on cable that effectively kept it out of the major population centers, permitting it a kind of free growth in the areas of the country that were less served by over-air broadcast television.<sup>49</sup> The assigned reasons — to preserve the broadcast television structure because the poor could not afford cable and because cable would jeopardize broadcast television and not wire every market — were perhaps less a sign of protectionism than a manifestation of an unreadiness to deal with new technological developments. The Commission was not prepared for the impact of cable and did not know what to do about it.<sup>50</sup> As a result, the agency imposed the equivalent of a freeze while it spent the next decade groping for a solution. The freeze lasted until 1972 when a thaw emerged in the form of the *Cable Television Report and Order*<sup>51</sup> that blueprinted the more recent phases of cable's evolution.

The federal agency presence has abated.<sup>52</sup> Now, it is said,

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47. See CATO Institute, *supra* note 2. See also, Remarks by Anne P. Jones, Commissioner of FCC, in Washington, D.C. 2 (Oct. 29, 1982) ("[T]he Commission [FCC] deliberately regulated this technology [cable] in such a way as to hinder its development.").

48. 2 N. JESUALE, R. NEUSTADT & N. MILLER, CABLE TELEVISION INFORMATION CENTER CABLEBOOKS: A GUIDE FOR LOCAL POLICY (1982) [hereinafter A GUIDE FOR LOCAL POLICY].

49. *Second Report and Order in Docket 14895*, 2 F.C.C.2d 725 (1966).

50. *Report and Order in Docket 20988*, 48 Rad. Reg. 2d (P & F) 171 (1980). See also, Remarks of Tyrone Brown, Commissioner of FCC, in Anaheim, Cal. 3 (Dec. 7, 1978).

51. 36 F.C.C.2d 143 (1972). See also, D. KELLEY & R. DONWAY, LAISSEZ PARLER: FREEDOM IN THE ELECTRONIC MEDIA 19 (1983) [hereinafter KELLEY & DONWAY].

52. 25 JURIMETRICS J. 201, 212-15. See also, KELLEY & DONWAY, *supra* note 51, at 22. But the FCC is again giving signs that it may be about to back off from its lowered regulatory profile. In the face of a strong decision from the Court of Appeals for the D.C. Circuit that declared an earlier FCC must-carry rule invalid as an invasion of first amendment rights, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1437 (D.C. Cir. 1985), *cert. denied sub nom.*, *National Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 106 S. Ct. 2889 (1986), the Commission on August 7, 1986 announced its intention to adopt a new mandatory carriage rule. *FCC News*, MM Docket 85-349. In the same announce-

the greatest threat to cable's potential is at the local level, through the franchise process and the countless restraints that the process sustains.<sup>53</sup> To a significant extent, the local regulatory interest was stirred by the FCC's drawing back in the 1972 Cable Report and by the agency's obvious sense of relief at being able to hand off a variety of functions to local levels of government. Thus, for example, the Commission noted that "the rapid expansion of the cable television industry [had] led to overlapping and sometimes incompatible regulations" at the federal and local levels.<sup>54</sup> The Commission considered the federal pre-emption of cable regulation but rejected it out of a stated concern that federal licensing "would place an unmanageable burden on the Commission."<sup>55</sup> For that reason and because it was also maintained that "local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts," the FCC opted for what it called "creative federalism" and "structured dualism," both of which translate into dividing up the regulatory turf.<sup>56</sup> The Commission retained control over signal carriage<sup>57</sup> and program exclusivities<sup>58</sup> (matters of obviously high concern to the broadcast television constituency) and turned over for local administration the chaos of such aspects as franchise bidding, subscriber rates and

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ment, the Commission also unveiled (Fact Sheet accompanying *FCC News* of August 7) its plans to examine the possibility of reinstating its former syndicated program exclusivity rules and to study the compulsory copyright license that the Congress made available to cable beginning in 1978 to cover the carriage of broadcast signals. All of this may be suggesting that the FCC is in an ascendant phase in its roller-coaster regulatory attitude toward cable.

53. See CATO Institute, *supra* note 2. See also, Comments of James C. McKinney, Mass Media Bureau Chief at Federal Communication Bar Association, in Washington, D.C. 6 (Oct. 18, 1983):

Unless we take that task [FCC pre-empt local regulation], the marketplace will be strewn with local regulatory waste and abuse. . . . Frankly, I believe we can either pre-empt now or pre-empt later when local regulators strangle innovative local communications service and the federal government has to step in to protect the national communication system.

54. *Cable Television Report and Order*, 36 F.C.C.2d 143, 204 (1972).

55. *Id.* at 207.

56. *Id.*

57. *Id.* at 170-72.

58. *Id.* at 181-85.

rate changes, service complaint procedures, franchise fees, construction timetables, and the like.<sup>59</sup>

Over time, the FCC's deferral to the local process and its willingness to let state and municipal governments prevail grew into a process that became almost a national scandal<sup>60</sup> — "cronyism,"<sup>61</sup> over-promising,<sup>62</sup> "pork barrel politics,"<sup>63</sup> and extortion<sup>64</sup> are some of the less flattering characterizations that have been applied to the local process. Another observer has labeled "virtually all franchising decisions" as "intensely political," at its worst embracing "improper influence, bribery, and conspiracy."<sup>65</sup> Even those disposed to championing the municipal rationale for current franchising practices freely admit that: "The cable operator normally agrees to limitations and controls (for example, rate regulation and specified service criteria) that are not normally imposed by municipalities on other local businesses."<sup>66</sup> The way the system works is described as a partnership between the municipality and the cable company, with the city preventing other cable firms from entering the market.<sup>67</sup> In exchange for what is in fact an exclusive franchise, local governments extract extensive concessions.<sup>68</sup>

The symbiotic relationship between overreaching local regulators and their monopoly clients did not evolve without challenge. The challenge did not come from the mainstream of the cable industry, which has been absorbed with playing the franchise game in order to get on with the business of wiring the nation, but rather from free-speech voices<sup>69</sup> that for years have

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59. *Id.* at 207-10.

60. Cohen, *Cable-Television Firms and Cities Haggles Over Franchises That Trail Expectations*, Wall St. J., Dec. 29, 1983, at 34, col. 1 [hereinafter *Cable-Television Firms*].

61. Wash. Post, May 20, 1984, Outlook section, at 1.

62. See *Cable-Television Firms*, *supra* note 60.

63. *Id.*

64. CABLEVISION, Dec. 7, 1981, at 128 (quoting Preferred Communications counsel Harold Farrow).

65. Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867, 870 (1983) [hereinafter *Cable Franchising and the First Amendment*].

66. See A GUIDE FOR LOCAL POLICY *supra*, note 48, at 5.

67. Lee, *A Regulatory Lock Box on Cable TV*, Wall St. J., Oct. 15, 1984, at 32, col. 3 [hereinafter *Regulatory Lock Box*].

68. *Id.*

69. See, e.g., *Cable Franchising and the First Amendment*, *supra* note 65, at 868-

been patiently questioning the legality of the process.<sup>70</sup> The judicial process has, however, been painfully slow. With both local governments and the cable industry benefitting from the status quo of current franchising practices, a cooperative dedication emerged to seek a legislative solution that would preserve for each side the principal benefits of their uneasy bond.

The legislative momentum was moved into high gear by agreements between the cities and cable operators that were reached in March 1983,<sup>71</sup> May 1984,<sup>72</sup> and September 1984.<sup>73</sup> The entire process was accelerated by local government apprehensions resulting from the Supreme Court's decision in *Capital Cities Cable, Inc. v. Crisp*<sup>74</sup> (sharply curtailing state and local authority to interfere with cable programming on the basis of FCC pre-emption) and by the FCC's affirmation of its decision in *In re Community Cable TV, Inc.*<sup>75</sup> (restricting local regulation of rates to tiers that include must-carry broadcast signals).

The Cable Communications Policy Act of 1984<sup>76</sup> (the Cable Act) passed the House and Senate by voice vote on October 11, 1984,<sup>77</sup> and went into effect on December 29, 1984. The Cable Act consists of a set of amendments to the Communications Act of 1934, adding a new "Cable Communications" title (now subchapter V-A).<sup>78</sup> Section 521 states the purposes of the new legislation as follows:

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70. Lloyd, *Franchising Under Free-Speech Attack*, CABLE T.V. LAW & FINANCE, June, 1984, at 1 (relying on, for example, *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Century Fed., Inc. v. City of Palo Alto*, 579 F. Supp. 1553 (N.D. Cal. 1984)).

71. PK Cable TV Franchising, Nov. 1, 1984, at 4.

72. Letter from Negotiators for National League of Cities-U.S. Conference of Mayors (NLC-USCM) and National Cable Television Association (NCTA) to John Dingell, Chairman, House Committee on Energy and Commerce (May 30, 1984).

73. Letter from Alan Beals, James P. Mooney, and J. Thomas Cochran to John Dingell, Chairman, House Committee on Energy and Commerce (Sept. 27, 1984).

74. 467 U.S. 691 (1984).

75. 54 Rad. Reg. 2d (P & F) 1351 (1983), *aff'd*, 56 Rad. Reg. 2d (P & F) 735 (1984).

76. Pub. L. No. 98-549, 98 Stat. 2379 (1984).

77. "Not a single member rose to challenge the bill's fundamental assumption that cable TV is not fully protected by the First Amendment." See *Regulatory Lock Box*, *supra* note 67.

78. The Cable Act designated a new Title VI. But, as codified in Title 47 of the United States Code, the Cable Act designations and section numbers have been changed from the 600 series and renumbered in the 500 series.

(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 systems;

(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 subchapter; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.<sup>79</sup>

At the heart of the Cable Act is the ratification of the authority of municipal governments to control market entry; thus, with minor exceptions, "a cable operator may not provide cable service without a franchise."<sup>80</sup> Cities are specifically given authority to "award . . . 1 or more franchises" within their jurisdictions.<sup>81</sup> The legislative history declares that the authority to award confers on the local process the discretion to deal with such matters as terms and conditions of the franchise (i.e., duration of franchise, extent of service area), system construction and operating terms (extension of service, construction timetable, safety standards), and enforcement and administration (reporting requirements, bonds, insurance).<sup>82</sup>

The Cable Act is intended to put an end to the uncertainty that attends the jurisdictional questions and to establish a comprehensive regulatory scheme.<sup>83</sup> But, it appears to leave open

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79. 47 U.S.C. § 521 (Supp. III 1985).

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

81. 47 U.S.C. § 541(a)(1) (Supp. III 1985).

82. H.R. REP. NO. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4696.

83. *Id.* at 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4656; *see also* 47 U.S.C. § 521 (Supp. III 1985).

nearly as many questions as it resolves.<sup>84</sup> To summarize the principal provisions, the Cable Act: 1) establishes the authority of local governments to regulate cable television through the franchise process;<sup>85</sup> 2) allows municipalities to collect franchise fees of up to five percent of the cable operator's gross revenues, thereby eliminating FCC restrictions on such fees up to the five-percent limit;<sup>86</sup> 3) terminates local rate regulation after two years unless the FCC finds that the cable system in the particular area is not subject to effective competition;<sup>87</sup> 4) requires the set-aside of channels for lease by persons who have no affiliation with the cable operator and who desire to provide video programming over the system;<sup>88</sup> 5) allows franchising authorities discretion to insist on cable system access channels, without limit, for public, educational, and government use;<sup>89</sup> 6) establishes restrictions on the ownership of a cable system by the owners of a local television station or by local telephone companies and their affiliates;<sup>90</sup> 7) defines procedures and requirements by which cable operators may obtain modifications of franchise provisions that relate to services, facilities, or equipment;<sup>91</sup> 8) creates procedures and fixes standards that cable operators and franchising authorities may invoke in connection with franchise renewal decisions (Although there is no presumption of renewal specified, a franchising authority's discretion is limited by the stated criteria.);<sup>92</sup> 9) grants cities affirmative au-

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84. See CABLE FRANCHISING AND REGULATION, *supra* note 21; Cable Television Law (MB) (Spec. Supp. 1985).

85. 47 U.S.C. § 541 (Supp. III 1985).

86. 47 U.S.C. § 542 (Supp. III 1985).

87. 47 U.S.C. § 543 (Supp. III 1985). Following passage of the Act, the FCC defined effective competition as the presence of three or more unduplicated broadcast television signals in the franchise market. *Report and Order in MM Docket 84-1296*, 58 Rad. Reg. 2d (P & F) 1 (1985).

88. 47 U.S.C. § 532 (Supp. III 1985).

89. 47 U.S.C. § 531 (Supp. III 1985).

90. 47 U.S.C. § 533 (Supp. III 1985).

91. 47 U.S.C. § 545 (Supp. III 1985).

92. 47 U.S.C. § 546 (Supp. III 1985). Standards are whether:

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been reasonable in light of community needs;

thority to require upgrading of facilities and channel capacity during the renewal process;<sup>93</sup> 10) specifies how a buy-back price for the system will be arrived at in cases where a franchise is not renewed and the franchising authority purchases the system or effects a mandatory transfer of the system to a third party;<sup>94</sup> 11) requires that cable service be made available in all parts of the franchise area;<sup>95</sup> 12) requires a cable operator to establish a program to ensure equal employment opportunities in all aspects of its employment policies and practices and seemingly codifies existing FCC policies (which rely on goals and timetables to compel cable operators to reach for local workforce parity);<sup>96</sup> and 13) provides for the regulation and restriction of certain kinds of cable programming.<sup>97</sup> For example, one section gives the franchising authority power to restrict leased access programming that, in the judgment of the franchising authority, is "obscene" or "in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States."<sup>98</sup> Another section allows cable operators and franchising authorities to specify in a franchise or renewal that certain cable services "shall not be

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(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

93. 47 U.S.C. § 546(b)(2) (Supp. III 1985).

94. 47 U.S.C. § 547 (Supp. III 1985).

95. 47 U.S.C. § 541 (Supp. III 1985).

96. 47 U.S.C. § 554 (Supp. III 1985). For a discussion of FCC policies, see *Report and Order Docket 20829*, 44 Rad. Reg. 2d (P & F) 839 (1978). See also *Report and Order in MM Docket 85-61*, 58 Rad. Reg. 2d (P & F) 1572 (1985).

97. See *infra* notes 98-100 and accompanying text. Although the Act minces around the subject, it is clear that the target is adult programming that may be locally objectionable even when it does not meet the strict obscenity standards. See, H.R. REP. NO. 934, 98th Cong. 2d Sess. 95, 69, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, 4655, 4732, 4706 ("pornographic programming"), ("indecent" speech)). The "otherwise unprotected" standard is aimed at holding open for local discretion the power to ban "indecent" programming in the event new court decisions expand the types of speech that may be restricted. *Id.* ("This provision would also permit changing constitutional interpretations to be incorporated into the standard set forth in § 624(d)(1) [now codified at 47 U.S.C. § 544(d)(1) (Supp. III 1985)], should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable.").

98. 47 U.S.C. § 532(h) (Supp. III 1985).

provided" if they are "obscene or are otherwise unprotected by the Constitution of the United States."<sup>99</sup> Yet another section creates a new criminal penalty for the transmission over any cable system of "matter which is obscene or otherwise unprotected by the Constitution of the United States."<sup>100</sup>

#### VI. The Cable Act and *Preferred Communications*: Collision Course?

The Cable Act was only months old when the Ninth Circuit issued its decision in *Preferred Communications, Inc. v. City of Los Angeles*, raising the possibility that municipal franchising of cable, as it is currently and typically practiced, is an actionable intrusion on the first amendment rights of cable operators. The case holds intriguing implications for the frailty of the Cable Act. The Ninth Circuit opinion, for example, went out of its way to express clear skepticism about the validity of key features of the Act. The court stated: "We note, however, that the mandatory access and leased access requirements contained in the City's franchising scheme and called for by §§ 611-612 [now renumbered as §§ 531-532] of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2782-85, pose particularly troubling constitutional questions."<sup>101</sup>

#### VII. Resolution of Conflicts Compounded by Cable Industry Ambivalence and Search for its Own Identity

The reaction of the cable television industry to these goings-on has been one of uncertainty. The industry seems to be in an internal struggle to identify its own common goals and to knit its divergent interests into a uniform fabric. It went all out to support the passage of the Cable Act that blesses the local franchising process.<sup>102</sup> Thus, an industry that has for most of its

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99. 47 U.S.C. § 544(d)(1) (Supp. III 1985).

100. 47 U.S.C. § 559 (Supp. III 1985).

101. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 n.4 (1985).

102. The professional management at the top of the National Cable Television Association was in transition during 1984. But both the outgoing and new presidents declared their dedication to the passage of cable legislation. See *Turnover at the Top for NCTA*, BROADCASTING, Apr. 9, 1984, at 34 (outgoing president: "I am personally committed to passage of this bill."; incoming president: "I sleep and dream about it [the bill].").

growing years been beset by the restraining hand of government at both the federal and local levels, nevertheless found itself in late 1984 participating in a political process to bring down on itself and to legitimize the very franchising practices that are at the heart of local repression. At the same time, the industry was proclaiming its devotion to full free-speech entitlements<sup>103</sup> and, in early 1985,<sup>104</sup> was applauding the landmark decision of the Ninth Circuit in *Preferred Communications* — a case that is viewed as a big advance toward the goals of identifying cable television as a first amendment speaker, of eventually undoing the franchising process that has served to perpetuate practices that impede cable's march to full status as a publisher and fearless community voice, and of peeling back the layers of local intervention that are now enshrined in the Cable Communications Policy Act of 1984.

The dedication of the cable industry's national leadership to passage of cable legislation that endorsed and validated local franchising practices seems curiously inconsistent with the cable experience that was compiled during a long history that has been described as near war between cable operators and local regulating authorities.<sup>105</sup> The plausible explanation is that cable leadership made an important election and committed the industry to supporting legislation that held out the promise of insulating existing operators from competition. That, of course, is what the Cable Act figured to accomplish because it would ratify and perpetuate the existing franchising and franchise renewal practices which serve to maintain exclusive licensing.

In bargaining for the promise of local monopoly, cable's support of legislation that validates local licensing and regulation has required a trading away and a giving in to local government in such areas as franchise fees for the privilege of doing business (now sanctioned by the Act and not required to be tied to the cost of regulation),<sup>106</sup> guaranteed public access to the use of cable channels (free of editorial control by the cable operator

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103. *Allen Surprise Choice as NCTA Chairman*, BROADCASTING, Apr. 9, 1984, at 35 [hereinafter *Allen Surprise Choice*].

104. *Cable Claims First Amendment Victory*, BROADCASTING, Mar. 11, 1985, at 50.

105. See *Cable-Television Firms*, *supra* note 60, at 34.

106. 47 U.S.C. § 542 (Supp. III 1985).

and expected typically to be free of charge to users),<sup>107</sup> and mandatory set-asides of cable channels that are required to be held for leasing by third party programmers (without regard to the preferences of the cable operator).<sup>108</sup> But, the nature of the relinquishments that the cable industry yielded up seems clearly to mark a concession by cable that it stands somewhere below newspapers on the publishing ladder.<sup>109</sup> In the circumstance, the concurrent devotion to "establishing cable's First Amendment rights"<sup>110</sup> seems irresolute. Passage of the Cable Act would appear, at the very least, to complicate the task of establishing cable's first amendment rights. The final irony is that the *Preferred Communications* case may eventually deny the monopoly prize that cable's national leaders bargained for and may offer up as a reality the unspeakable — the notion of competition. It is becoming evident, however, that the industry could never be protected from that risk.<sup>111</sup>

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107. 47 U.S.C. § 531 (Supp. III 1985).

108. 47 U.S.C. § 532 (Supp. III 1985).

109. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (special state use tax against newspapers violates first amendment); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state statute granting political candidate right of access to newspaper space in order to reply to criticism by newspaper violates the first amendment guarantee of a free press); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (state license tax based on gross receipts of newspapers precluded by fourteenth amendment).

110. See *Allen Surprise Choice*, *supra* note 103, at 35 (statement by Edward M. Allen, NCTA Chairman-elect).

111. At the very least, telephone companies now seem poised to re-enter the cable business. For example, a Petition for Declaratory Ruling, for Rule Making, and for Institution of § 403 Inquiry has been pending with the FCC since it was filed on February 13, 1984. That pleading includes a letter from Pacific Telephone, dated May 26, 1983, that bluntly states:

Pacific Telephone is now exploring the possibility of taking part in the cable television industry. As part of its investigation, Pacific is looking at areas with new or renewing cable television franchises, including Palo Alto.

Pacific's interest in cable television is consistent with its views expressed before the California Public Utilities Commission in OII 83-02-01. As Pacific told the Commission, it wishes to investigate many business opportunities and, at the same time, preserve its sole provider status.

History records that only through the active intervention of the FCC was the telephone industry prevented from using its monopoly control of utility poles to take complete domination over the emerging cable television technology. The intervention by the Commission manifested itself in a holding that channel service (a device by which telephone built the plant and leased channel space to the cable operator) was an interstate offering that required the filing of tariffs (*Common Carrier Tariffs for CATV Sys.*, 4

The other side of that coin is that *Preferred Communications* now casts doubt on the survivability of the core practices of local franchising. What it comes down to for the cable industry, this early in the life of the *Preferred Communications* litigation, is whether the open door to competition is a fair price to pay for the live prospect that public access, leased access, franchise fees, and all the overseeing by local government built into the current franchising process are now available to legal challenge.<sup>112</sup> And they may be challenged without fear of reprisal because if anything can be said to emerge clearly from *Preferred Communications*, it is the prospect that a win will mean that

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F.C.C.2d 257 (1966)), in a decision that the construction by telephone companies of facilities for cable television service required FCC approval under Section 214 of the Communications Act (*General Tel. Co. of Cal.*, 13 F.C.C.2d 448 (1968), *aff'd*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)), and in the adoption of a rule barring telephone ownership and operation of a cable television system within the telephone company's exchange area (*Final Report and Order in Docket 18509*, 21 F.C.C.2d 307 (1970), *aff'd sub nom.* *General Tel. Co. of Southwest v. FCC*, 449 F.2d 846 (5th Cir. 1971)). The Cable Act (47 U.S.C. § 533 (Supp. III 1985)) codifies FCC rules and bars telephone companies and their affiliates from providing video programming services directly to subscribers in their telephone service areas.

All of this containment of telephone appears to be on the verge of disintegrating. In the guise of encouraging competition, the FCC announced (on the day it declared its intention to reinstate the compulsory carriage of local broadcast stations), that it had instructed its staff "to prepare a Notice of Inquiry to obtain information on the question of the restriction on cable ownership placed on local exchange telephone companies, to develop possible legislative proposals, if appropriate." FCC NEWS, MM Docket No. 85-349, Aug. 7, 1986, Fact Sheet, at 2. The signs are clear that the FCC means to employ the proceeding on the Notice of Inquiry to start the process of reversing its own ban on telephone/cable cross-ownership and to trigger congressional interest in reversing the statutory hurdle on telephone re-entry that is built into the Cable Act. See *Telco Ownership NOI Revives Old Cable Nightmare*, BROADCASTING, Aug. 18, 1986, at 37, 38 (reporting that FCC Chairman Fowler has declared that there is no reason cable operators should not face direct competition, and that telcos are "the most likely immediate potential competitors").

112. If the *Preferred Communications* litigation eventuates in a conferring on cable television of first amendment rights equivalent to those customarily enjoyed by the print media, a substantial number of the legislative compromises that were built into the 1984 Cable Act are questionable. For example, the rate regulation in 47 U.S.C. § 543 (Supp. III 1985), the mandatory dedication of channels for public, educational, governmental, and commercial leased access in 47 U.S.C. § 531 (Supp. III 1985), gross revenue franchise fees in 47 U.S.C. § 542 (Supp. III 1985), the prospect of denial of franchise fees in 47 U.S.C. § 546 (Supp. III 1985), the requirement of 47 U.S.C. § 541 (Supp. III 1985) to serve low-income areas are among those that are constitutionally suspect. See *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Near v. Minnesota*, 283 U.S. 697 (1931); *Pacific Gas & Elec. Co. v. PUC of Cal.*, 106 S. Ct. 903 (1986).

cities can no longer retaliate against an existing operator. In that sense, *Preferred Communications* also is a threat to the cities of the loss of their leverage at franchise renewal time. If a willing cable operator cannot be excluded from the market, it follows that a renewal applicant need no longer be concerned with having to justify its continued presence in the market. In that sense, then, *Preferred Communications* offers to the cable industry a more bankable prospect of renewal expectancy than does the now suspect Cable Act, one of the purposes of which is to "establish an orderly process for franchise renewal"<sup>113</sup> by setting up procedures and safeguards against unfair denials,<sup>114</sup> but which does not establish any guarantee or any "presumption in favor of renewal."<sup>115</sup>

The FCC, the cities, and now the Congress have had their turns and have produced something less than a model climate for the full development of the promising new technology of cable television. It is now up to the courts to sort out the tangle. But, because institutions once established give ground only stubbornly, the machinery of franchising and the bureaucracy it supports may be expected to draw out the process of judicial testing.

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113. 47 U.S.C. § 521 (Supp. III 1985).

114. 47 U.S.C. § 546 (Supp. III 1985).

115. See CABLE FRANCHISING AND REGULATION, *supra* note 21, at II-35.