Cable Franchising and the First Amendment: Preferred Problems, Undesirable Solutions

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by DANIEL L. BRENNER*

Introduction

The English language, thanks to the cable industry, has added another definition to the word "overbuilding." The term describes the act of a competitor constructing a cable system over a territory already served by or franchised to another. For example, a city may decide to issue more than one franchise to a territory; a second operator might construct a system in unincorporated areas not under any franchising authority, but already served by a neighboring operator; or a private developer could enter into an agreement with an operator to provide service regardless of what the city has decided. In each of these cases, an area is considered to have been overbuilt.¹

Overbuilding, most often considered an economic or political policy question,² has potentially become a constitutional inquiry. Although invoking the label "nonexclusive,"³ municipal

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¹ The pressure for overbuilding is growing. One major factor is the continually increasing disparity between the cost of building a cable system, around $500 per subscriber for an overhead system, and the price of acquiring an existing system. Jackson, *Cable and Public Utility Regulation*, in UNNATURAL MONOPOLIES, THE CASE FOR DEREGULATING PUBLIC UTILITIES 54 (R. Poole, Jr. ed. 1985). Purchase of an existing system has climbed in the last three years from $1000 to $2800 per subscriber, depending on the location of the buyer and the economic profile of the system. See CABLEVISION, Feb. 1, 1988, at 11.

² For example, Illinois, Florida and Minnesota have laws, passed at the request of incumbent operators, that require a competing second cable franchise to abide by the same requirements as an existing operator. See MULTICHANNEL NEWS, Sept. 5, 1988, at 15; MULTICHANNEL NEWS, May 30, 1988, at 11.

³ Some states explicitly prohibit exclusive grants for any franchised activities, see, e.g., HAW. REV. STAT. § 440G-8 (1976); LA. REV. STAT. ANN. § 33:4361 (West 1976); MASS. GEN. LAWS ANN. ch. 166A § 3 (West 1976); N.Y. EXEC. LAW § 815 (McKinney 1982). In TM Cablevision of San Diego County v. Daon Corp., 6 Media L. Rep. (BNA)
authorities generally grant only one franchise, through a competitive bidding process. Three recent cases concluded that cities violated the first amendment rights of potential operators when they granted only one franchise where wires for more than one could have been accommodated on the poles and in the ducts. The United States Supreme Court’s 1986 decision in *City of Los Angeles v. Preferred Communications, Inc.*, reviewing a fourth case, does not go quite so far. *Preferred* held that operating a cable system “plainly implicate[s] First Amendment interests.” The Court ordered a trial to determine how substantial the City’s reasons were for its exclusive franchising policy. The results of that inquiry are to be used to decide whether those interests outweigh the first amendment rights of the overbuilder.

Cable operators enjoy first amendment protection, but denial of a franchise for noncontent-related reasons does not violate

2576 (Cal. Sup. Ct. 1981), California law was interpreted to preclude nominally exclusive franchises. In Community Comms. Co. v. City of Boulder, 455 U.S. 40 (1982), the Supreme Court held that cities could be held liable for antitrust violations in connection with the grant of a cable franchise unless immunized specifically by state law. Some relief was subsequently provided by Congress in the Local Government Antitrust Act, 15 U.S.C. §§ 34, 36 (Supp. III 1985), which bars money damages against cities or their employees found to have violated antitrust laws in an official capacity.

4. The 1984 Cable Act does not specify the way in which a franchising authority may select its operator(s), 47 U.S.C. § 541 (Supp. III 1985), but the intent was that local franchising be the primary means of regulating cable television. Rollins Cablevue, Inc. v. Saienni Enterprises, 633 F. Supp. 1315, 1318 (D. Del. 1986). The typical process involves a city issuing a Request for Proposals (RFP) indicating the territory and services (so far as permitted by the Cable Act) sought. Bids are received and are typically reviewed and ranked by an outside consultant, whose report is then considered by the franchising authority, usually a city council. Applicants have been known to load up ownership of their companies with persons who are considered influential or who occupy positions of community leadership to help differentiate their applications from others. The process can range from relatively nonpartisan decision-making to corrupt practices. See infra notes 46-50 and accompanying text. Officials have attempted to divide territories among applicants, to the unlawful exclusion of others. Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983), aff’d en banc, 735 F.2d 1555 (5th Cir. 1984).

5. Cable television systems receive television and other signals by means of conventional television antennae, microwave, and satellite dishes. Systems may also generate their own signals. All signals are collected at the system’s headend, amplified, downloaded to other frequencies, and fed into the system’s distribution path. This path must travel from the headend into the community over wires attached to utility poles or cradled in underground ducts. From these wires, drop lines carry the signals to the individual subscriber. See generally D. Brenner & M. Price, *Cable Television and Other Nonbroadcast Video: Law and Policy* § 1.03 (1988).

6. 476 U.S. 488 (1986), aff’g on narrower grounds, 754 F.2d 1396 (9th Cir. 1985).

7. *Id.* at 494.
that constitutional right since first amendment interests are only weakly implicated in the franchising process.\textsuperscript{8} This is largely due to the fact that proposed program content is not, and may not be, a factor in the franchising decision.\textsuperscript{9} \textit{Preferred} does not reach this conclusion, nor does it contradict it. It calls instead for a greater inquiry into the factual basis of a city's policy, including an investigation of such indicia as traffic congestion, disruption and esthetic blight caused by a second cable operator, and economic demand for competing systems.

The \textit{Preferred} case presents a novel problem of constitutional adjudication. After examining the \textit{Preferred} decisions, this Article concludes that the Supreme Court's proposed examination is likely to yield an analytical dead-end. Offers of proof are unlikely to lead to a decision about whether city interests are sufficiently weighty, assuming there is a first amendment right to a franchise. Ultimately, the Court's decision offers a confusing, costly, and mostly useless direction for resolving cable's first amendment status.

Of course, were an applicant's viewpoint or proposed program content to enter into a franchising decision, the first amendment would apply. Beyond this circumstance, however, and in the absence of a shortage of alternatives for excluded speakers, judicial resolution of cable franchising should focus on the process's economic and predominantly nonspeech character. Franchise grants should be annulled for violations of due process. Otherwise, the franchising process should be left to the policies established by Congress in the 1984 Cable Communications Policy Act, which permits cities to grant one or more franchises.\textsuperscript{10}


\textsuperscript{9} 47 U.S.C. § 544(a) (Supp. III 1985) limits franchisor regulation to only those activities specifically mentioned in the Act. Franchises in existence on or before December 29, 1984, the effective date of the Act, may be enforced as to their program provisions. \textit{Id.} at § 544(c). This is subject to the operator's right to modify contained in § 545. Franchises granted after the Act's effective date may not have specific requirements for video programming, \textit{id.} at § 544(b), but may indicate "broad categories of video programming or other services," \textit{id.} at § 544(b)(2)(B). Thus, a franchisor may not make carriage of a particular network, program, or viewpoint a requirement of the franchise, although categories such as "children's programming" or "news and public affairs" can be specified. The execution of program decisions to meet such categories lies with the franchisee, however.

I

The Preferred Decisions

Preferred Communications, Inc. (PCI) wanted to operate a cable system in the south-central district of Los Angeles. The Los Angeles Municipal Code prescribes a competitive bidding process which leads to a single franchisee. Instead of participating in the bidding, PCI originally sought to lease space on the poles and conduits of two public utilities in Los Angeles. The utilities said that a franchise was required before leases could be arranged. PCI petitioned for a franchise but, because it had failed to participate in the auction, its petition was denied by the City of Los Angeles. PCI sued the City, claiming the denial violated its first amendment rights.

PCI claimed that a franchise—particularly, permits to use conduits and poles—is the necessary passkey to the exercise of its right as a first amendment speaker. PCI argued that because it might not choose to provide the same programming as the auction winner, the City's denial of a second franchise caused a loss of communication from the perspective of all parties involved. This diminution in selection formed the basis of its constitutional claim, although no particular program, network, or point of view was identified as being potentially excluded.

A. The Ninth Circuit Decision

The district court found as a matter of law that the City's denial of a franchise did not violate PCI's first amendment rights.

11. The Los Angeles ordinance, No. 58,200 (June 13, 1927), prescribes a competitive bid procedure authorizing an award to the bidder offering "the highest percentage of gross annual receipts" or "such other . . . consideration . . . as may be prescribed by the Council in the advertisement for bids and notice of sale."

12. The auction participant in Preferred was required to pay filing fees, provide a detailed proposal of intended operations, demonstrate that it had both a sound financial base and business plan, and promise to provide a percentage of future annual gross revenues, a 52-channel system, leased and public access channels, portable production facilities, and other items detailed in the city's RFP. Preferred, 754 F.2d 1392, 1400-01 (9th Cir. 1985).


14. PCI also claimed violations of federal antitrust laws, as well as various state law violations. The court of appeals affirmed the district court's dismissal of the antitrust claims and the state law claims were dismissed without prejudice for refiling in state court. Preferred, 754 F.2d at 1399 n.1.

rights and dismissed the complaint. The U.S. Court of Appeals for the Ninth Circuit reversed "in an extremely muddled opinion not helped much by heavy rewriting on petition for rehearing." Describing the actual findings of the opinion is difficult, due in part to the case's procedural posture. The court of appeals was bound to accept PCI's allegations as true as it was reviewing the district court's motion to dismiss the complaint. To affirm, the court had to conclude, beyond doubt, that the plaintiff could show no set of facts that would entitle it to relief. As a result of the procedural nature of the review, the appellate court was forced to identify whether some factual issue might be subject to dispute. It identified physical scarcity as the linchpin issue in question, suggesting that if PCI could show that more than one system could be physically accommodated, then an auction process violated its first amendment rights.

16. Id. This unreported decision is summarized in Franchising Litigation Roundup, CABLE TV LAW REPORTER, Oct. 19, 1984, at 2.

17. Preferred, 754 F.2d 1396 (9th Cir. 1985). See Barnett, Franchising of Cable TV Systems to Get Airing at Supreme Court, NAT'L L.J., Apr. 21, 1986, at 42. Cf. L. Powe, Jr., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 243 (1987) (describing the opinion as "scholarly" and "excellent"). Id. at 280.

18. 754 F.2d at 1399.

19. The court expressed its initial concern that the opinion that followed must avoid drawing "the charge of rendering advisory opinions poorly disguised as sweeping dicta." Id. at 1401. The court then seemed to do just what it warned against.

20. Id. This issue is repeated at the end of the court's first amendment discussion. Id. at 1411. As the Supreme Court recognized, the Ninth Circuit was incorrect in reducing the first amendment question to one factual matter.

The question arises whether the court meant by this ruling to forbid cities from using methods other than the auction process to achieve exclusive franchising. For instance, if the municipality decides to construct and operate a cable system itself, would the first amendment be violated if space on the poles exists for a second one? Further, if Los Angeles could not show that only one system could be physically accommodated, then the city would have to "redesign ... its procedures relating to cable television." Id. at 1401. Does this mean that PCI must be granted a franchise? It seems to be the point of the case, but the language is vague enough to allow the city considerable maneuverability. (The 1987 TELEVISION AND CABLE FACTBOOK, CABLE & SERVICES VOLUME, includes the following types of cable system ownership and these corresponding numbers of systems having that form of ownership: community owned, 5; community owned and operated, 6; local investors, 10; local stockholders, 1; municipally owned corporation, 1; municipally owned, 17; municipally owned and operated, 39; nonprofit member association, 2; nonprofit community organization, 1; nonprofit owned, 1; nonprofit co-operative, 4; nonprofit corporation, 6; nonprofit subscriber owned, 8; nonprofit municipally owned and operated, 1; subscriber owned, 10; subscriber owned and operated, 17; local shareholders, 4; and locally owned and operated, 2. [CABLE AND SERVICES] TELEVISION AND CABLE FACTBOOK 1987; Telephone interview with Representative of Warren Publishing (Sept. 26, 1988)).
Was this particular factual matter truly at issue? Probably not. Los Angeles did not admit or deny the existence of physical capacity to accommodate more than one cable system, but there was evidence suggesting that space for an additional line was available. Indeed, the Supreme Court found that the City admitted "the existence of excess physical capacity on the utility poles, the rights-of-way and the like." Thus, the factual issue highlighted by the Ninth Circuit decision as decisive was one the parties had not contested.

What was hotly debated was whether economic scarcity could justify exclusive franchises and, more generally, whether the City had an obligation to do more than state what it believed were substantial interests behind its policy. The City argued that cable is a natural monopoly in the territory under consideration and that exclusive franchising is the best way to deal with the entity that would occupy that monopoly position. PCI maintained that competition for cable services is economically feasible. The Ninth Circuit ignored this factual issue in setting up its linchpin question, although it refers to it as an open issue elsewhere in the opinion.

B. The Supreme Court Opinion

In affirming the Ninth Circuit, the Supreme Court found that the questions of economic scarcity and the effects of physical scarcity were in factual dispute. The majority disregarded the Ninth Circuit's first amendment theory, and a concurring opinion emphasized that the decision left the standard for first amendment challenges to a city's exclusive franchising policy

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21. In its brief to the Supreme Court, the City of Los Angeles indicated that more than one cable could be strung on the pole, since the City insisted that the issue was not sufficient pole space. Brief for Petitioners at 38, Preferred, 476 U.S. 488 (1986). Los Angeles appears to argue that, regardless of whether an additional operator could be squeezed in, the City has a right to exercise discretion over such issues because there may be competing claims for pole space in the future that may be more important than use by a second cable operator.


23. Preferred, 754 F.2d 1396 (9th Cir. 1985). The court states:

The City asserts next that, because cable television is a natural monopoly, economic scarcity justifies government regulation. We need not decide this issue at this time. PCI's complaint alleges that competition for cable services is economically feasible in the Los Angeles area. As we must accept this allegation as true, we assume that no natural monopoly exists.

Id. at 1404. One is left wondering whether a city that could not show physical scarcity but could show economic scarcity would still be barred from using an auction scheme.

24. 476 U.S. at 492-94.
wide open.\textsuperscript{25}

Instead, in a remarkably short opinion, the Supreme Court expressed a desire for more information about other interests advanced by the City to maintain an exclusive franchising scheme.\textsuperscript{26} The Court identified the triable factual issues as: (1) the visual blight created by installation and repair of the systems; (2) the traffic delays and hazards imposed by the systems; and (3) the use that a cable operator makes of public property.\textsuperscript{27}

The City's view was that these questions, along with the natural monopoly issue, were not triable matters.\textsuperscript{28} It unsuccessfully argued that the factual bases for these asserted interests need not be proven, even if experience shows it wrong, so long as the City was reasonable in coming to them.\textsuperscript{29} The Court rejected this contention because the claims related to activities that "plainly implicate First Amendment interests."\textsuperscript{30}

C. Implications of the Court's Opinion

The Court's decision repudiates the Ninth Circuit's view that an absence of physical scarcity on poles and conduits is enough to nullify an auction approach to franchise licensing. However, it subjects a city's decision to grant an exclusive franchise to a factual scrutiny rather than leaving the matter as solely a question of a city's policy preference. Cities may not decide unilaterally how much traffic inconvenience to bear, how much visual blight to endure, or when a proposed competitive system is too much of a burden to absorb. The Court could have found that, whatever the weight of those interests, a city's good faith judgment to proceed by exclusive licensing, without demonstrating the factual basis for those judgments, was sufficient. It considered but declined to accept this more deferential standard.\textsuperscript{31}

The Court's acknowledgement of the first amendment's ap-

\textsuperscript{25} Id. at 496-97 (Blackmun, Marshall, and O'Connor, J.J., concurring).
\textsuperscript{26} Id. at 495.
\textsuperscript{27} Id. at 493-94.
\textsuperscript{28} Brief for Petitioners at 43-45, Preferred, 476 U.S. 488 (1986).
\textsuperscript{29} Id.
\textsuperscript{30} 476 U.S. at 494.
\textsuperscript{31} Id. at 496. As support for a contrary proposition, the Court cites Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), which held that a "lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation" to oversee such activities. 436 U.S. at 459.
lication to cable television, without detailing how or whether it applies to licensing, is understandable. The first amendment should apply to cable speech in its role as editor or creator of expression. Given the "abstract posture" of the case, the recommendation of the Solicitor General to avoid broad pronouncements, and the Court's evident desire to issue a ruling before the end of its term, the Court properly avoided saying more. Further, given the Court's admitted lack of knowledge about cable television, the decision to overturn a motion to dismiss, in an effort to gain more facts, was almost assured.

Questions remain as to what constitutes a sufficient showing by a city to allow it to grant an exclusive franchise. Will a strong showing of blight, but a less conclusive case of economic monopoly result in a first amendment violation? How about the reverse?

Although interest balancing is a principal tenet of constitutional decision-making, ordering further fact-finding to establish the strength of governmental interests where the first amendment is involved is a bit novel. For example, the Court

32. "We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. . . . We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised by the respondent's complaint and the City's responses to it without a fuller development of the disputed issues in the case." Preferred, 476 U.S. at 494, 495.

33. Id. at 494. See Brenner, supra note 8, at 335-41.


35. The case was argued April 29, 1986 and decided June 2, 1986. The term ended June 30, 1986.

36. The Court might have dismissed the petition for certiorari as improvidently granted given how little it said. See, e.g., United States v. Quinn, 475 U.S. 791 (1986); Roadway Express, Inc. v. Warren, 464 U.S. 988 (1983). However, by issuing an opinion that gave no credence to the Ninth Circuit's first amendment analysis of the case, it wiped clean the slate for lower courts and, ultimately, itself on the question.

37. "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." Preferred, 476 U.S. at 495. Also, the Court had little in the way of useful judicial discussion of the case, given the sometimes confusing Ninth Circuit opinion and the absence of a district court opinion. These factors may explain why the Court's opinion is vague as to the exact issues it wished to have explored at trial.

38. This question differs from more routine fact-finding in the first amendment context, e.g., jury review of allegedly obscene materials, truth or falsity in defamation suits, or justifications for gag orders.
did not require a showing of broadcast outlet scarcity in every market in which the fairness doctrine operated, although it relied upon spectrum scarcity as its rationale for upholding adoption of the doctrine by the FCC. Moreover, the Court permitted the city of Renton to rely on the experiences of other cities, rather than conduct its own factual investigation, when it upheld a municipal ordinance limiting the permissible locations of adult movie houses. For cable, however, a more searching test is specified. Having little precedent to determine how much evidence is required to substantiate or disprove a governmental interest, and with no advice to follow on the degree of protection to be afforded the franchising process, the parties in Preferred and like cases face a standardless and costly evidentiary exploration.

Moreover, casting the denial of a franchise as a violation of the first amendment, absent evidence of intended viewpoint discrimination, confuses the expressive and nonexpressive aspects of a cable operation. Denial of a franchise, on its face, does not preclude a party from saying or writing anything, or the audience from receiving any particular message. If there were insufficient alternatives for expression absent a franchise, a denial might be unlawful. However, the Cable Act espe-

40. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). The Court held: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Id. at 51-52. The Court could have directed the district court to adopt this standard. However, Los Angeles did not argue that it was relying on the franchising experiences of other cities, although it noted that "[n]early 7000 locations now wired for cable" acted as Los Angeles had. Brief for Petitioner at 45, Preferred, 476 U.S. 488 (1986).
41. The high costs of discovery associated with vaguely defined issues is one problem. See Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 AM. B. FOUND. RES. J. 787 (1980).
42. Brenner, supra note 8, at 367-72.
43. United States v. O'Brien, 391 U.S. 367 (1968), established a four-part test to determine when a government interest sufficiently justifies the regulation of expressive conduct:

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

Id. at 377. In practice, the O'Brien test is highly deferential to the government. See Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46, 52 n.23 (1987). In cable, the
cially provides for individual access for persons unaffiliated with the operator, substantially reducing the impact of an exclusive grant.\footnote{44}

Municipal franchising has not been the occasion for discrimination among applicants on the basis of viewpoint; there are no reported cases of channel content being the basis for the grant of a franchise to one party over another.\footnote{45} But apart from first

excluded speaker can reach the cable audience through access provided for under the Act. And, generally speaking, the first amendment interest of the audience in a diverse choice of cable services may be as well served by one operator as by several. This is likely because the most popular cable services (e.g., CNN, ESPN) would likely be carried by both in order to attract the preponderance of viewers. Also, excluded services could use the leased access channels to program themselves directly to the viewer. These arguments are more fully developed in a companion article. \cite{Brenner, supra note 8, at 370-71.}

\footnote{44. The Cable Act provides for access for individuals unaffiliated with the operator on a leased basis, 47 U.S.C. § 532 (Supp. III 1985), or, subject to franchise negotiation, on an unpaid basis, \textit{id.} at § 531. Even if access is not available, a court should consider all other speech alternatives available to the excluded speaker before finding that a franchise denial violates the first amendment. Were cable poles and ducts deemed to be a public forum, the presumption would be that speech should be permitted. There is no basis to conclude that these facilities should be the equivalent of streets and parks, however. \cite{See Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). The Ninth Circuit opinion in Preferred struggles with the claim but fails to conclude that the poles and ducts amount to a public forum. 754 F.2d at 1408-09. The underlying premise of public forum analysis is to extend a presumption that the first amendment's guarantee of freedom of speech applies only to those sites which constitute public forums. In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 447 U.S. 455 (1980), the Court attempted to break down the concept into three categories: public property which has been devoted to speech activity; designated public forums which have been opened for use as a place for expressive activity; and public property which by neither tradition nor designation is a forum for communication (nonpublic forum). In addition, some private property which functions as public property may be viewed as having the attributes of a public forum. This private forum concept has developed in relation to private shopping centers. \textit{Compare Amalgamated Food Employees Union v. Logan Valley Plaza}, 391 U.S. 308 (1968) \textit{with Hudgens v. NLRB, 424 U.S. 507 (1976) and Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).}

Professor Nimmer grouped the forum cases as either focusing on the speech-dedicated attribute of a site or the incompatibility of the proposed expression with the site, favoring the latter standard as more faithful to the aims of the first amendment. M. NIMMER, \textit{NIMMER ON FREEDOM OF SPEECH} § 4.08(D)(1)(a), at 4-74 (1984). But critical to the forum concept under either formulation is a site at issue where expression can occur, not mere transmission capacity. One might argue, in seeking access to a broadcast or cable channel, that such a facility is a public forum. But the transmission capacity itself—the wires or the transmitter (or for that matter, the ink and paper used by a newspaper)—is not the “forum.” It may be that the “abstraction” of forum, \textit{id.} at 4-68, becomes too strained to be usefully applied to the problem of characterizing the first amendment character of exclusive franchises, at least as to transmission capacity.}

\footnote{45. As Judge Posner stated in Omega Satellite Prods. v. City of Indianapolis, 694}
amendment objections, potential operators may have legitimate objections to a noncompetitive franchising policy.

More likely, franchising problems involve corruption, real or perceived, in the grant process. In Pacific West Cable Co. v. City of Sacramento,46 one of the cases finding that a municipality's exclusive licensing policy violated the first amendment, the jury found that the city and county had used their exclusive licensing policy "as a pretext to obtain cash payments, in kind services and increased campaign contributions."47 The Pacific West case illustrates the "rent-a-citizen" approach taken in several franchising battles, offering equity or consultant arrangements to prominent community leaders in a cable franchise application for use of their names. Indeed, it is difficult to conclude that the jury verdict in the Pacific West case had much to do with the freedom of expression—the jury reached no verdict on whether suppression of viewpoint was involved.48 Instead, the case illustrates jury antipathy toward a process fatally infected with favoritism.49 Beyond favoritism, cable franchising has seen more serious proof of corruption.50 Given the financial stakes involved, close scrutiny of franchising is appropriate.51 The proper remedy for such abuses is to find a violation

F.2d 119, 128 (7th Cir. 1982), in reviewing a first amendment and antitrust attack on an exclusive franchise grant: "The City of Indianapolis could not deny a franchise to Omega because Omega carried programs critical of the Republican Party. Nothing of that sort is alleged, though."

47. Id. at 1338.
48. Id. at 1342-43. The only speech-related special verdict answered in plaintiff's favor (in the negative), "Have defendants left open ample alternative channels of communication for plaintiff, and persons like plaintiff, who wish to express their views?" id. at 1343, would seem to prove too much. Read literally, anyone who did not possess a cable franchise would lack ample alternative communication channels. The court did not emphasize this verdict in its discussion of the first amendment issues in the case. Id. at 1331-39.
49. In response to the jury's verdict, the City established a five-year license plan for all applicants. One observer stated: "[T]he jury might have perceived a 'political fix' based on evidence of increased campaign contributions by cable bidders to city council members and local politicians running for office." CABLE TV L. REP., July 16, 1987, at 3. The forewoman of the six member jury was reported as stating that the jury made its decision primarily because of the role played by a group of investors of prominent Sacramentoans (the "Gang of 73") who had invested in the winning franchise bid ("We felt the whole thing was written up to exclude competition and it had to do with this Gang of 73—and they got their share."). Sacramento Bee, July 19, 1987, at 1, col. 1.
51. Of course, putting the city through a fact-finding process may not lead to the
of due process rights or state anti-corruption statutes. Trials on these matters are appropriate.

It was, however, the first amendment, and not corruption, that formed the basis for the Court's insistence on a further factual showing in Preferred. Even supposing that a less deferential standard of constitutional review applies to exclusive franchising than the one proposed here, Preferred's solution requires evidentiary presentations likely to lead to highly subjective or arbitrary findings of fact.

II

The Balancing Factors Identified in Preferred

The Preferred decision identified visual and esthetic blight, traffic delays and hazards, economic scarcity, and disruption of rights-of-way as state interests worthy of factual consideration. As shown below, parties are likely to have a difficult time making a convincing showing in any of these areas.

A. Esthetic Blight and Traffic Delays

In Metromedia, Inc. v. City of San Diego, the Supreme Court faced a city ordinance banning outdoor billboards except on-site commercial advertising. The City had claimed that the ban was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City." A plurality of the Court held that the ordinance was unconstitutional on its face because it discriminated between commercial and noncommercial on-site advertising.

The Court did not require an evidentiary showing as to whether the statute did, in fact, sufficiently "directly ad-
vance"\textsuperscript{58} the government's interest in traffic safety or in the appearance of the city. Indicating that there was a "meager record"\textsuperscript{59} on the traffic question, the Court applied a reasonable relation test.\textsuperscript{60} Similarly, it recognized that "esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose."\textsuperscript{61} Even so, without more than the City's asserted views and the absence of an ulterior motive, the Court concluded: "It is not speculative to recognize that billboards by their very nature and wherever located and however constructed, can be perceived as an 'esthetic harm.'"\textsuperscript{62}

The Supreme Court's Preferred decision implicitly rejected this highly deferential approach for municipal claims as to esthetic and traffic matters in multiple cable installations. The Court may have been correct in not applying the low level of scrutiny used in Metromedia. For instance, the Court may be expected to know more about billboards, long a part of the U.S. landscape, than the varying esthetic and construction characteristics of cable installation.

Further, traffic delays caused by a second cable operator are not self-evident. The intrusiveness caused by the second operator could be significantly mitigated by requiring both competi-

\textsuperscript{58} This criterion was one of four established for commercial speech regulation in Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. 557, 563-66 (1980), and which in word, if not application, is reminiscent of the O'Brien standard. 391 U.S. at 376-77; see supra note 43. In Central Hudson, the New York state public service commission banned public utility advertising which promoted the use of electricity because it was contrary to the national policy of conserving energy. The Court invalidated the regulation, setting forth a test for commercial speech that asks whether the expression concerns lawful activity and is not misleading; whether the asserted government interest is substantial; whether the regulation directly advances the governmental interest asserted; and whether it is not more extensive than necessary to serve that interest. 447 U.S. at 566.

\textsuperscript{59} 453 U.S. at 508.

\textsuperscript{60} Id. at 508-09.

\textsuperscript{61} Id. at 510.

\textsuperscript{62} Id. Nor was a more searching analysis made of the esthetic claims in Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). The case was decided on cross-motions for summary judgment after discovery, and the district court judge determined that the illegally posted signs on telephone poles "'constitute[d] a clutter and visual blight,'" 466 U.S. at 794 (quoting district court opinion). The Court did not address the significance of the esthetic blight. Id. at 802. Rather, the issue was whether the interest in eliminating visual blight was sufficiently weighty to justify the ban on such posters. Id. In Preferred, the Court seemed to accept that the question of blight was unanswered.
tors to lay cable at the same time. Since the City was willing to endure any cable construction, the added burden of the second operator seems minor. Second, even in competitive builds there is not necessarily overlapping construction; instead, competitors race to be first, not to overbuild.63

Cities allow frequent disruptions for other types of building activities.64 Imposing less restrictive alternatives to outright bans, such as requiring overbuilders to pay compensation to a city for special disruption due to nonsimultaneous construction, is one viable alternative. Such penalties may also deter alleged line-cutting of the incumbent system by overbuilders.65

Arguably, greater esthetic blight will be caused by unregulated billboards than by a second overhead cable. Given existing cables, one cable, more or less, is difficult to see as determinative of blight. For underground installations there is no evident blight from the wires. Conversely, there can be extensive (even if reparable) damage and blight to individual property owners who will be required to allow a second franchisee to cross lawns, driveways, and other private property to install a system. Large pedestal boxes may also be needed for below-ground builds, and the appearance of more than one such box at or near private property may constitute an eyesore for property owners, who may not wish to subscribe to any cable service.66

63. In Phoenix, Ariz., where systems were allowed to compete openly in the late 1970's, competitors would not build on the same street. "[I]f one company started digging in one direction . . . the next company dug in the other." Sacramento Bee, July 19, 1987, § B, at 4, col. 4.

64. L. Powe, Jr., supra note 17, at 280 n.42: "Given the existing problems of sewer repair, road construction, and new building, I believe that the traffic disruption most municipalities allow will guarantee cable entry."


66. The Brief for Petitioners in Preferred characterized the blight problem this way:

When cable is installed in trenches along a right-of-way that crosses private property . . . [t]rees, shrubs, fences, and lawns must be cut or displaced. If two cables are laid simultaneously, a larger trench is needed. If they are laid at different times a second trench is necessary to avoid disturbing the first
Presumably, triers of fact will be required to make these judgment calls as to traffic and blight. It may be hard for either party to make an overwhelmingly convincing claim on either issue. A case can be made, of course, that two operators are a greater burden than one, that two cables are more unsightly than one, and that traffic will be congested more often with more than one cable.

These conclusions are destined to be subjective and speculative. It is not evident what legal significance should attach to a showing of "some" blight, as opposed to "substantial" blight, or "some," but not "substantial" disruption. And it is unclear what a jury's finding of "some" blight and disruption actually means. A court inclined to view cable system construction as a first amendment activity will minimize the finding. A court viewing cable system construction as a nonspeech-related enterprise may find a city's case availing. In either event, the evidentiary showing, replete with photos of dangling wires and maps revealing wires carefully cradled in underground ducts, will add little.

Where the first amendment is concerned, the Court has rightfully been reluctant to attach too much weight to the visually upsetting, and the Preferred decision indicates factual records were desirable on these stated government interests. But has much been gained by this declaration? The fate of excluded cable operators, vis-a-vis the first amendment, seems to hang in the balance, given the Preferred formulation, yet the subjectivity of these matters makes a trial unlikely to yield more insight as to their substantiality than does the good-faith assertion by a city of their existence.

B. Cable as Natural Monopoly

Both Preferred decisions accept, as a triable issue of fact,
PCI's assertion that competition for cable service is economically feasible in the Los Angeles area. Neither opinion articulated what factual showing is necessary to demonstrate that economically feasible competition is possible. The Ninth Circuit acknowledged, but rejected, the City's claim that, as a matter of law, the natural monopoly characteristics of cable preclude feasible economic competition.

1. Definition of Natural Monopoly

The definition of natural monopoly is elusive. Even those who have studied the cable television industry specifically fail to define measures to use to determine whether competition is feasible. One theory suggesting that cable exists as a natural monopoly argues that franchises which allow only one system to serve the market at a time are efficient because a second system built alongside the first is a wasteful duplication of resources. Competing economic theories of natural monopoly are considerably more complex.

A market defined as a natural monopoly lies at the opposite end of the spectrum from the theoretical ideal market state of "perfect" competition. In the idealized market, buyers and

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69. 476 U.S. 488, 492 (1986); 754 F.2d 1396, 1404-05 (9th Cir. 1985).
70. Several courts have opined that cable television may be considered a natural monopoly. See, e.g., Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1563 (5th Cir. 1984); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); Berkshire Cablevision of Rhode Island, 571 F. Supp. 956, 985-86; Hopkinsville Cable TV, Inc. v. Pennroyal Cablevision, Inc., 562 F. Supp. 543, 547 (W.D. Ky. 1982). Three district courts have tried the question: see Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891 (W.D. Mo. 1985), aff'd, 800 F.2d 711 (8th Cir. 1986), cert. denied, 107 S. Ct. 1358 (1987) (natural monopoly found); Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987) (no natural monopoly found); Nor-West Cable Communications Partnership v. City of St. Paul, 3-83 Civ. 1228 (D. Minn. June 10, 1988) (natural monopoly found), reported in CABLE TV L. RPTR. June 30, 1988, at 3-5. The first two cases involved misconduct that might have influenced the outcomes; in the first instance by the incumbent franchisee, in the latter, by the franchisor. See infra note 151.
71. See infra notes 73-146 and accompanying text.
73. "Natural monopoly" originated in the writings of John Stuart Mill. 2 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY (J. Robson rev. ed. 1965)(7th ed. 1871). Mill drew upon his views of the competitive markets for gas and water supply in London in the eighteenth century. Mill suggested that significant economies would result if only one firm existed in these markets. A sole provider would experience increasing revenues with declining marginal costs. The rate of profit, which would otherwise increase, would be controlled by regulating, in fact lowering, the prices charged for the
sellers are so numerous that no single actor can set a market price by individual conduct. There are no barriers to new firms entering the market and all participants have equal knowledge of market conditions. In this type of market, buyers differentiate among sellers based solely on the price of the goods offered. In this market, price equals cost: Consumers pay the cost of goods rather than remitting a supranormal profit to the seller who acts as a price taker, taking the price as given by outside forces.7

These conditions prevent a seller from raising its price above anyone else's because alternative sources are ready to satisfy buyer demand at lower cost.75 Markets close to the competitive model cause greater efficiency in the use and allocation of resources and the development of more efficient techniques and improved products and services.76

In a natural monopoly, production technology exhibits declining marginal costs. Broadly speaking, the bigger a firm gets, the lower its cost-based price, to a point.77 The monopoly is "natural" in the sense that, over time, the big firm, harnessing the power of the production technology, drives out smaller ones. The cost characteristics of the technology make competition nonsustainable.78

Most markets lie between the two extremes. Several factors determine whether a market is "workably" competitive.79 The

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76. For these reasons competition is favored in the antitrust laws. 2 P. AREEDA & D. TURNER, ANTITRUST LAW § 401, at 267-68 (1978).
77. See A. ALCHIAN & W. ALLEN, supra note 74, at 275 (citing example of automobile industry); Lowry, Justification for Regulation: The Case for Natural Monopoly, 92 PUB. UTIL. FORT. 17 (1973).
79. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) (identifying ten factors to determine if a market is "workably" competitive: (1) number of effective competitive sellers; (2) opportunity for entry; (3) independence of rivals; (4) predatory preclusive practices; (5) rate of growth of the industry or market; (6) character of market incentives to competitive moves; (7) product differentiation and product homogeneity; (8) meeting or matching the prices or rivals; (9) excess capacity; and (10) price discrimination). Id. at pt. 8, 324-36.
theory of natural monopoly is based on the premise that some markets will never be workably competitive. Government regulation of these markets, based on an acceptance of that inevitability and fear of the intervening “ruinous” competition, is, according to this viewpoint, the wiser course.

This philosophy, taken to its extreme, would lead to a state-controlled economy and a repudiation of the role that competition can play in lowering prices and improving services.\(^8\) A free enterprise system relies on the allocative efficiency that competition induces and a recognition of the “persistence of competition.”\(^2\) Buyers desire competition and would-be market entrants want to offer it. Designating a market a natural monopoly must be done carefully because it triggers forfeiture of competition’s benefits.\(^8\)

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80. Two major industries moving from a regulated to competitive arrangement, airlines and trucking, have shown the benefits of competition in lowering prices and expanding choice of carrier. See S. Morrison & C. Winston, The Economic Effects of Airline Deregulation 72 (1986); Moore, Trucking and Rail Regulation in Regulatory Reform: A Post Mortum (L. Weiss & M. Klass 1986); Moore, U.S. Airline Deregulation: Its Effects on Passengers, Capital, and Labor, 29 J.L. & Econ. 1, 27-28 (1986). The deregulation of cable television itself involved removing unnecessary restrictions on program sources and rate flexibility and can be seen as a further example of the force of competition on an otherwise regulated environment. See Besen & Crandall, The Deregulation of Cable Television, 44 Law & Contemp. Probs. 77 (1981).


82. In the cable context, it may mean loss of competition for roughly equivalent program service offerings, less costly program packages based on fewer channel offerings, and the potential for some loss of program choice, although access schemes minimize some of that risk. See supra note 43 and accompanying text.

The advantage of price competition may in fact be at odds with the goal of greater program diversity. Say a cable franchisee provides 52 channels as its basic offering, doing so as a result of an RFP aimed at providing the city with a relatively “state of the art” system. The broader mix of services comes at a lower cost per subscriber because the specialty channels are offered to all subscribers, in much the way that sections of newspaper may not be read by each subscriber but all sections presumably appeal to at least some subscribers and it is more efficient to send the entire paper to all readers. There may be some customers who would prefer a stripped down package at a lower cost (e.g., customers who subscribe to cable primarily for enhanced broadcast signal reception). The first amendment goal of more choice to the public, which is part of PCI’s argument, ironically favors the sole franchisee with the broader program selection over an overbuilder who wants to give the cheaper, smaller package. The overbuilder is arguing for competition, in this instance, not for some diversity-enhancing reason but because it can provide the product some consumers want at a lower price. The franchisee, having built the system with the city’s expectations in mind and hoping to spread the cost of a 52-channel basic offering across its entire subscriber base, may be unable to compete with the overbuilder head to head on the
The theory of natural monopoly has looked to economies of scale as the test of its existence.83 A business that possesses substantial fixed costs will, if allowed to control the market, experience declining average costs, reflecting the economies of scale. The theory of a government controlled natural monopoly is that the benefit of lower average costs, through regulation, is passed along to the consumer.84

Even this general description leads to disagreement among economists about determining the presence of a natural monopoly in a specific market. Critics have effectively shown that scale economies are neither necessary nor sufficient to identify a natural monopoly.85 Further, a natural monopoly can exist under increasing cost conditions.86

Some commentators have suggested that focusing on economies of scale is wrong. Instead, a given market is examined to see if it is “contestable.”87 Even where scale economies exist, a market may still be contestable in that the threat of entry by a competitor into the market may cause a natural monopoly to behave competitively.88 A firm may hold a de facto monopoly,89 but it is always threatened by the entry of others.

Contestable markets, however, require either low entry barriers or low exit barriers or both. Otherwise, a would-be competitor poses no threat to the de facto monopolist.90 Because

89. By de facto monopoly, it is meant that the operator is the sole provider of cable service, even though it is not considered to be a monopoly by the franchising authority. See supra note 3.
90. In determining barriers to entry, one focuses on sunk costs, the cost of assets which can be used only in one market, instead of fixed costs. Coursey, Isaac, Luke &
cable television operation is characterized by high sunk costs that act as a barrier to entry and exit, it would be hard to describe it as contestable.

Another definition of natural monopoly looks to whether lower costs are obtained if there is only one producer in the market. A natural monopoly is said to exist where cost conditions are subadditive, that is, "if and only if a single firm can produce the desired output at lower cost than any combination of two or more firms." Thus, subadditivity exists where direct competition involves "unbearably great inefficiencies" and regulation is appropriate.

Subadditive conditions may be brought about by cable systems. For example, one study estimates that a single cable firm

Smith, Market Contestability in the Presence of Sunk (Entry) Costs, 15 RAND J. ECON. 69, 70-71 (1984). The difference in these types of costs is illustrated by deregulation in the airline industry. H. HOVENKAMP, supra note 75, § 1.5, at 35-36; Brodley, Antitrust Policy Under Deregulation: Airline Mergers and the Theory of Contestable Markets, 61 B.U. L. REV. 823 (1981). Under regulation, it was the accepted view that a particular route, say between Sacramento and Minneapolis, could support only a single supplier. Id. at 824-25. Rate regulation under natural monopoly theory was indicated. Under a competitive model, if the sole incumbent firm reduces the number of flights and raises prices to those consistent with monopoly behavior, a new airline may enter and undercut. This behavior is possible because the principal cost factor of serving the route is controlled by the expense of purchasing an airplane. The price of the plane is fixed, but because the plane can be used to service other routes if the incumbent makes competition no longer desirable, it is not a sunk cost. Having restored competition, the entrant can pocket its short-term gains, exit the market, and operate elsewhere. Because the fixed cost of the airplane is not sunk, but is salvageable, it is unnecessary to prohibit potential entry because of natural monopoly; the market is contestable. Id. at 833-35.

91. Id.
92. See Comment, Regulating Cable Television: Quincy Cable's Unnatural Approach to Cable's Natural Monopoly, 31 N.Y.L.SCH. L. REV. 591, 633-34 (1986). On the other hand, near-substitutes like multichannel multipoint distribution systems (MMDS) with lower sunk costs point in the direction of contestability. See D. BRENNER & M. PRICE, supra note 5, at § 16.04[1][b]. MMDS requires line of sight from the transmitter but none of the expensive wiring of cable television.

93. Posner argues that plant and equipment could be sold to a successor firm at the original cost less depreciation. Posner, The Appropriate Scope of Regulation in the Cable Television Industry, 3 BELL J. ECON. 98, 116 (1972). Williamson points out that such transfers involve complicated transaction costs of valuating the property. Williamson, supra note 87, at 85-88.

95. W. SHARKEY, supra note 83, at 54.
97. Even then, the costs of regulation might outweigh the harms of inefficiency. This is the view of Professor Hazlett, see Hazlett, supra note 83, at 1340-64. See also Webbink, Should Cable TV be Regulated As a Public Utility?, 89 PUB. UTIL. FORT. 32, 33-34 (1972).
with 30,000 subscribers would incur an average cost per subscriber about eighteen percent lower than two overbuilt firms with 15,000 subscribers each. The authors of this study, however, note that this eighteen percent lies in the range of markups one might expect without competition or effective regulation. Thus, competition might still be preferable to a monopoly, despite the cost penalty from lost scale economies. Two other studies report costs up to twenty-eight percent higher to cable customers if two franchises rather than one are issued. Others have found that, putting aside competition by telephone companies, cable possesses the economies of scale characteristics of a natural monopoly.

On the other hand, some studies have found that competition is feasible within certain so called "cherry-picked," or prime, areas but is unworkable system-wide. Thus, overbuilding may only make sense in selected zones of a franchise territory and will not otherwise be likely to bring about a return on in-

98. Owen & Greenhalgh, Competitive Considerations in Cable Television Franchising, 4 CONTEMP. POL'Y ISSUES 69, 76 (1986).
99. Hazlett, The Policy of Exclusive Franchising in Cable Television, 31 J. BROADCASTING & ELECTRONIC MEDIA 1, 5 (1987) discusses unpublished studies by the accounting firm of Touche, Ross & Co. One study, prepared for the City and County of Sacramento, forecasted costs 23.9% higher than in a monopoly situation. A second study, prepared for the city of Denver, projected higher costs of between 23% and 28% if two rather than one operator was in place. Touche, Ross & Co., Financial and Economic Analysis of the Cable Television Permit Policy of the City and County of Denver (1984). For a critique, see Hazlett, supra, at 5; Hazlett, supra note 83, at 1363 n.100; but see Nadel, CableSpeech for Whom?, 4 CARDOZO ARTS & ENT. L.J. 51, 62 (1985).
100. Noam, Local Distribution Monopolies in Cable Television and Telephone Service: The Scope for Competition, in TELECOMMUNICATIONS TODAY AND TOMORROW 358-59 (E. Noam ed. 1983). Noam declines to conclude that cable television is a natural monopoly and urges that phone companies be allowed to compete wherever there is a well-established cable operator. Id. 376-77. An unpublished study by Paul Bortz, introduced into evidence in the St. Paul overbuilding suit, prepared for Continental Cablevision, see infra note 151, indicated that "competition isn't feasible in any top-30 market." CABLE TV L. RPTR., June 30, 1988, at 5.
101. "Cherry-picking" refers to the practice of selective wiring of high density areas or areas which, based on other marketing characteristics such as residential income, are expected to lead to higher penetration rates per mile wired.
102. Touche Ross & Co., Metro-Dade Report on Overlapping Cable Franchise Study 44-45 (Oct. 7, 1987). In the cherry-picked area of 6,500 homes, half were assumed to go to the overbuilder. Over ten years, the loss to the existing operator would be $2.3 million, while the overbuilder would show a gain of $200,000. Id. at 33-34. A 1987 Malarkey-Taylor Associates study found a full overbuild to be uneconomic in St. John's County, Florida. Malarkey-Taylor Assocs., Economic Analysis of An Overbuild in St. John's County, Fla. (July 24, 1987).
vestment that is reasonable in light of the risk involved.\textsuperscript{103}

Thus, while these studies suggest subadditivity in cost conditions under competition, they do not resolve whether exclusive franchising is preferable. First, they assume that cherry-picking of denser areas cannot or should not occur. While the Cable Act forbids the exclusion of cable service based on income,\textsuperscript{104} it does not require a city to insure that all of its areas are wired.\textsuperscript{105} Even studies that suggest that overbuilding is generally uneconomic in the long run do not eliminate the possibility of viable overbuilding in cherry-picked areas.\textsuperscript{106}

Additionally, the evidence indicates that while overbuilding is generally not profitable or sustainable, it has persisted in a few places it has been permitted. Allentown, Pennsylvania has had twenty years of some head-to-head competition, although it has been argued that each of the systems there subsidizes losses by drawing on profits from exclusive franchises in neighboring municipalities.\textsuperscript{107} Allentown is joined by other communities where there is some overbuilding due to multiple franchising of the same territory.\textsuperscript{108}

\begin{thebibliography}{100}
\bibitem{103} Book, \textit{Do Overbuilds Make Sense?}, CABLE MARKETING, Nov. 1987, at 34.
\bibitem{105} ACLU v. FCC, 823 F.2d 1554, 1580 (D.C. Cir. 1987).
\bibitem{106} Book, \textit{supra} note 103, at 36. "In sum, there are situations where full-system overbuilds may work and may be in the best interest of consumers, but we believe such cases are few and far between." \textit{Id}.
\bibitem{107} Comment, \textit{supra} note 92, at 628. In Allentown, Eli Noam has pointed out that subscriber rates "are above the national average." Noam, \textit{Economies of Scale in Cable Television: A Multipart Analysis}, in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY 114 (E. Noam ed. 1985). There are some parts of Allentown in which a viewer can choose between two companies, although other areas are served by only one provider. Interview with Sylvia LaWiler, Television Editor of the Allentown, Pa. Morning Call (Aug. 13, 1987). An additional reason for Allentown's heavy cable concentration may lie in the fact that Allentown and the Lehigh Valley are considered part of the Philadelphia market for television purposes but have a clear identity as both a newspaper and radio market separate from Philadelphia. Was Allentown considered a separate market, a station assigned to it might have been able to acquire a network affiliation and the need to import network signals from Philadelphia or New York would have been less significant, reducing the importance of cable. See Morning Call (Allentown), Mar. 17, 1986, § D, at 1.
\bibitem{108} See Hazlett, \textit{supra} note 83, at 1373, citing direct competition in Chapman, Kan., Colorado Springs, Colo., and Niceville, Fla. Competition ended in Chapman in mid-1987 when the city revoked one of the two competing franchises for failure to abide by its terms; the revocation was not challenged in court. Telephone interview with Marietta Lucas, Chapman City Clerk (Aug. 17, 1988).

Colorado Springs maintains some head-to-head competition over a portion of the city although other areas are served by only one of two operators. Telephone interview with Colorado Springs City Clerk's Office (Aug. 17, 1988).

There is no competition in Niceville. A 1985 referendum recommended that the
A 1982 study conducted for Monroe, Georgia, surveyed ninety-three communities where multiple franchising occurred, including twenty-four cities that chose to allow head-to-head competition. Consolidation by one of the competitors of the other occurred in fourteen of the twenty-four cities allowing direct competition. In six others, competitors carved up the territory, granting each other de facto exclusivity. The remaining four franchises continued as direct overbuilds. One study of the data showed that, of the ninety-three communities, fifty-one "exhibited varying degrees of direct competition." 

A 1986 Department of Justice study examined the factors that lead to the viability of overbuilds. As one might expect, the extent and effects of overbuilding are "highly sensitive to local market conditions and to the rules governing market entry." Successful overbuilding is more likely to occur when all competitors enter the market simultaneously and there is high demand for cable service. Still, the study described the welfare effects of competition as "ambiguous." 

Further, there are sometimes substantial costs of regulation attached to a noncompetitive model that are avoided by licensing everyone who meets minimum qualifications. Open licensing leaves to the marketplace the task of sorting out whether one or more operators will survive. Additionally,
because regulation of cable television rates is substantially eliminated under the Cable Act,\footnote{118. Implementation of the Provisions of the Cable Communications Policy Act of 1984, Report & Order, MM Docket No. 84-1296, 50 Fed. Reg. 18,637, 18,653 (1985) [hereinafter "Implementation"], aff'd in part, ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), implementing 47 U.S.C. § 543(b) (Supp. III 1985).} the regulatory tools needed to control a natural monopolist do not exist. Finally, regulation ignores the view that a realistic threat of entry, not rate regulation, more effectively responds to rate increases or poor service.\footnote{119. See supra note 87.}

2. \textit{Problems in Determining Subadditivity}

Studies that predict the viability of overbuilds must base their opinions on various assumptions. There are several difficulties as to the reasonableness of these assumptions, not because of the economic analysis, but because of the way cable markets are defined. These difficulties may make it impossible ever to conclude whether a specific cable franchise territory inevitably involves subadditive conditions.

In the cable area, the standard of subadditivity confuses economies of scale with economies of density.\footnote{120. See Hazlett, supra note 83, at 1364 n.104: "Strictly speaking, economies of density are a distinct type of economies of scale. Density economies are scale economies where volume is measured on a per mile or per number of homes passed basis rather than on an absolute size standard."} The boundaries of a franchise territory are not set by market forces. They are political, set at the outer ends by a city's jurisdictional boundaries. Subadditivity may exist only because the size of a political territory forces a franchisee to operate beyond, or short of, efficient parameters.\footnote{121. Furthermore, the Cable Act may require cities to insure that even uneconomic wiring occurs. 47 U.S.C. § 541(a)(3) (Supp. III 1985) requires franchising authorities to "assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." This provision is designed to insure that operators do not engage in "redlining" of poorer areas. H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 59 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4696. Research has not revealed any published studies indicating whether cable system profitability is related to the income level of the area served. However, to the extent such areas do exist, § 541(a)(3) becomes an additional market distortion. See Century Fed., Inc. v. City of Palo Alto, 63 RAD. REG. 2d (P & F) 1736, 1740 (1987).} Market forces define the ideal service area with geographic, and not political, parameters.\footnote{122. For example, the city-ordered studies referred to in supra notes 98-102 are tied to particular political boundaries; a market-based division might show that cost conditions are not subadditive. The statement in the text refers to interstate rather...}
The definition of the territory is not only distorted by boundaries set by the parameters of a city, but also by the inability of cities to grant franchises in adjacent areas outside their sphere of influence. Systems operating in adjacent jurisdictions or contiguous internal territories might find it economically sensible to overbuild into a neighboring territory. Without franchising, they could do so. For instance, in 1985 the Department of Justice refused to challenge consolidation of overbuilt and adjacent Phoenix cable systems because consolidation might increase productive efficiency.123

Density variations within a franchise territory make it difficult to say whether or not competition is viable, on the whole, posing another difficulty in determining subadditivity. Whether overbuilding makes sense turns on the intensity of demand relative to the cost per mile of cable and the marginal cost per subscriber. Myriad factors, which often change block by block in a neighborhood, influence these variables. Adequacy of over-the-air reception, desirability of satellite programs,124 and availability of substitutes for cable125 are a few of the variables that influence demand intensity.

Cost per mile of cable, or economies of density, depend on terrain and population. One 1987 study indicates that, in order to have profits from a complete overbuild, there must be about 110 houses per mile or about 90 houses per mile with very poor reception of over-the-air broadcast signals.126 Thus, according

than international boundaries. In the latter case, tariffs or politics could affect market efficiency; short of a tariff-free world, those geopolitical limitations remain. International boundaries could be affected by tariffs or the view, universally held, that cable service must be locally authorized. Unlike newspapers, videos or even broadcasters (whose signals may cross borders), cable operators have been subject to local regulation. Foreigners may own local cable systems. D. BRENNER & M. PRICE, supra note 5, at § 4.04[3].

123. Dept. of Justice, Press Release, Apr. 1, 1985. See Discussion Paper, supra note 113, at 5-6. The market solution in these cases is for one adjacent system to buy out the other or for two operators to trade adjacent systems owned in locations, permitting consolidation. See Kahn, Cablevision Pays Premium in Viacom Deal, CABLEVISION, August 29, 1988, at 16, 20 (consolidation of adjacent Long Island, N.Y. systems). Even where systems are separately owned, operators often join together to form “interconnects” so that local advertising spots on satellite networks like CNN can be sold marketwide, in competition with local broadcasters.

124. One example might be homes with specific language requirements. A non-English speaking household may be more inclined toward foreign language programming available via satellite or a local independent broadcaster not carried on cable.

125. For discussion of substitutes for cable, see infra notes 135-45 and accompanying text.

126. MULTICHANNEL NEWS, Apr. 13, 1987, at 17, col. 1 (citing Malarkey-Taylor Re-
to this study, the critical mass, the point at which a given territory ceases to be subadditive, may be present in some, but not all, parts of a franchise territory. Marginal cost also turns on billing procedures, marketing efforts, as well as physical plant costs. Factors such as managerial expertise, capital market conditions, and construction technology may also play a part.

Another problem in determining true subadditivity arises because the most likely overbuild candidate, the local telephone company, is forbidden from being a cable operator under the Cable Act and was excluded by prior FCC rule. While the twisted copper wires comprising the current sunk costs of the local phone network lack sufficient bandwidth to carry cable television service, new plant or upgrades to systems of fiber optic cables are capable of providing a competitive transmission path to coaxial cable. Once fiber optic systems are built, and their costs become sunk, only government regulation will prevent competition. Whether or not there are independent research, Economic Analysis of Cable System Overbuilds, Jan. 1987 (unpublished study for Times Mirror Cable TV)). The 1987 Touche, Ross & Co. Metro Dade Report, supra note 102, at 32, indicated that overbuilder Telesat Cablevision, the Florida Power and Light subsidiary, would lose up to $138 million over a 10 year period, were it to overbuild the county's existing 240,000 subscribers.

127. For example, a residential development might have higher density townhouses and lower density one-acre tracts. Overbuilding might be profitable in the townhouse community but not the larger homesites. Were the two separated as distinct cable districts, one might expect overbuilding in the first part but not the latter.

128. Cable system operating costs vary with improvements in technology. For example, fiber optic transmission systems afford lower maintenance costs, fewer service outages and improved signal quality, even though original construction costs are higher than coaxial wire. Over time, these costs may minimize significant differences on the economies of density. Further, because cable is a system of hubs feeding to trunk lines and thereafter to feeder and drop lines to the homes, distant-insensitive technologies like microwave can further reduce the apparent high costs of low-density wiring. See Dawson, Fiber Systems Proliferate As Interest Grows, CABLEVISION, Apr. 11, 1988, at 36.


130. 47 C.F.R. § 63.54 (1988) maintains the cross-ownership rule and a waiver policy for telephone company provision of cable service in rural areas. The FCC "tentatively" decided to recommend to Congress that it repeal the 1984 ownership bar and consider liberalizing its standards for affiliation between cable and telephone companies and for cross-ownership waivers. CABLETV L. RPR, July 26, 1988, at 1.

131. Telephone companies may lease space on their lines to cable operators, but they may not operate cable systems themselves. Sometimes this results in the telephone company building a coaxial system for a cable operator. Telephone companies may provide facilities for unaffiliated cable systems. See, e.g., In re Matter of Wisconsin Bell, Inc., Memorandum Opinion and Order, 56 RAD. REG. 2d (P & F) 1262, para. 1 (1984). One telephone company, Southern Bell, believes that a fiber optic system is cost effective even without a cable lessee. CABLEVISION, Sep. 28, 1987, at 16. With
sons for the continued bar to telephone entry in the cable business,\textsuperscript{132} it is hard to insist on the existence of a natural monopoly given the large shadow cast by this outlawed competitor.

In addition, a finding of natural monopoly depends on identifying a "product" whose output can be controlled by the sole provider and for which there are no substitutes.\textsuperscript{133} Substitutes for cable exist, but there is disagreement as to whether they are complete substitutes.\textsuperscript{134} It depends on how one defines the market of services cable provides.

An important substitute arises when cable franchise areas contain unaffiliated satellite master antenna systems (SMATV) serving multiple dwelling units.\textsuperscript{135} In a SMATV arrangement, property developers or landlords install a satellite receiving dish and master antenna system in an apartment building and offer "private" cable, carrying cable satellite network and broadcast signals taken from the satellite dish and conventional TV antenna to residents.\textsuperscript{136} Because no rights-of-way are involved, no franchise is required.\textsuperscript{137} Cable companies object to such systems in place, it will be easier for a telephone company to launch a competitive service to cable, if permitted.


137. \textit{Id.}
this competition in their franchise area and may in fact try to “overbuild” those buildings.\textsuperscript{138}

Such scattershot competition in apartment areas belies the notion that a cable service is a natural monopoly in a given territory, even though two full-service cable systems might be economically infeasible. But SMATV is not a complete substitute. A franchise territory of apartment complexes may find SMATV a full substitute to cable service for both over-the-air and satellite delivered signals; but a single-family housing community may not, because each home would need its own dish and the equipment to combine over-the-air and satellite signals on one tuner,\textsuperscript{139} a service more efficiently done by cable at its headend.\textsuperscript{140}

Nor are broadcast signals a complete substitute. The FCC found that the cable industry is generally subject to “effective competition,” the standard set forth in the Cable Act to eliminate cable rate regulation.\textsuperscript{141} This “competition,” however, refers to the provision of over-the-air signals, as opposed to satellite cable services.\textsuperscript{142} Under the FCC’s definition, an estimated eighty-four percent of subscribers enjoy such effective competition.\textsuperscript{143} However, cable is desirable for other services

\textsuperscript{138} In Cox Cable San Diego, Inc. v. Bookspan, 195 Cal. App. 3d 22, 240 Cal. Rptr. 407 (4th Dist. 1987), a cable system claimed that its exclusion from an apartment building in favor of a SMATV operator selected by the landlord violated the first amendment. The state court of appeals concluded that the cable operator had no right of access to the tenants' dwellings. The cases did not address the question of whether a tenant who desired the Cox Cable service over the SMATV service provided by the landlord would have a right to receive it under the first amendment. Accord Wilco Elec. Sys. v. Davis, No. 02907 (Pa. Super. June 8, 1988), reported at CABLE TV L. RPTR., June 30, 1988, at 6.

\textsuperscript{139} Hazlett, \textit{supra} note 83, at 1391.

\textsuperscript{140} See \textit{supra} note 5.


\textsuperscript{142} Cable systems are subject to effective competition where there are at least three broadcast TV signals that cover 100 percent of the homes or are “significantly viewed” in the cable system's community. 64 RAD. REG. 2d (P & F) 1276 (1988). The original definition allowed the three signals to cover “any portion” of the franchise territory. Implementation, \textit{supra} note 118, at 18,653. The FCC revised its ruling after the D.C. Circuit found the definition arbitrary and capricious. ACLU v. FCC, 823 F.2d 1554, 1572 (D.C. Cir. 1987).

\textsuperscript{143} “When the rules were first adopted, NCTA estimated that seventy-five percent of all cable systems serving ninety percent of all cable subscribers would be de-
with which over-the-air broadcasting cannot compete, such as premium and basic satellite channels, making broadcast signals an incomplete substitute.

The other technologies often cited to fill out the picture of the competitive video marketplace—over-the-air subscription TV, medium power or high power direct broadcast satellites, multichannel multipoint distribution service,144 and videocassette outlets—also are imperfect substitutes. No one of these services offers the range of local and satellite services and convenience of cable. Still, their presence, taken together, tends to mitigate the concern that a customer is without alternatives145 if dissatisfied with cable programming.146

Given the conflicting data and theories concerning cable television as a natural monopoly, there is no reason to expect much certainty to arise from any trial held to determine whether competition is viable in a particular community. One response to this conundrum is to conclude that it is better to let would-be entrants make the decision to enter.147 This would avoid the questionable economic policy in which “self-interested business

regulated. After the court decision, it said that systems serving six percent of all cable subscribers would have the return of regulation as a result.” BROADCASTING, Mar. 28, 1988, at 36.

144. D. BRENNER & M. PRICE, supra note 5, at § 16.04. An exhaustive list of alternatives to the various services offered by cable in addition to video is provided in Jackson, supra note 1, at 155-64.

145. A customer who needs cable for over-the-air reception of local broadcast signals has no alternative but to subscribe. Under these circumstances, the FCC allows franchisors to continue to regulate the rates of the operator. See supra note 141. In that way, the franchisor can theoretically hold the operator accountable for inadequate service. In some areas, customer service is less than admirable. Problems include unanswered phone calls, haphazardly scheduled service calls, and outages during popular pay-per-view events. Customers may prefer an improved cable system to switching to one of the competing technologies. Telephone survey of selected Falcon Cable customers, Aug. 1987.

146. It also tends to weaken the argument that cable television is like water, telephone, or power services, for which universal service is generally viewed as a social necessity. On the other hand, a franchising authority must ensure that cable television is not denied to a group of potential subscribers due to their income. See, e.g., 47 U.S.C. § 541(a)(3) (Supp. III 1985). Even if essential, it does not follow that it is desirable to have a single provider. But see supra note 82.

147. Judge Posner, in Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982), suggested that “[i]f the most efficient method of determining which firm should have the natural monopoly is a competitive process that will inevitably destroy the other firms, the antitrust laws presumably would forbid interference with that process.” Id. at 127. He went on to suggest, however, that if a city wishes to spare consumers “a competitive free-for-all,” it may do so. Id. In Omega, the court declined to grant an injunction based on first amendment and Sherman Act claims against a city’s grant of an exclusive franchise, concluding that “[t]here is no
persons, risking their own dollars and reputations, are [seen as] less able to recognize ruinous competition than city council members who do not directly realize any profit or loss.148 Assuming that the potential entrant is not seeking entry only to be bought out later, there is considerable merit to assigning the choice of whether to enter to the party who will suffer for a bad judgment.149 On the other hand, a city may be concerned that free entry would reduce the quality of service provided by the ultimate winner or discourage the best operators from applying.150

Whether competitive entry is more or less desirable as a matter of policy, the question left by Preferred is different. If a city decides to grant an exclusive franchise, claiming natural monopoly as a basis, Preferred holds that the city's assumption must have evidentiary support. Evidence as to economies of density, demand for cable service, and other measurements discussed earlier are relevant. But even with such evidence, as the foregoing conflicting studies and definitional pitfalls show, a "finding" of a natural monopoly is likely to be a decision fraught with serious shortcomings. Moreover, this determination is to be made by the jury, which may be inclined to take a "monopoly, shmonopoly" approach to the question and seek some other basis on which to decide the propriety of overbuilding.151

precedent for condemning an exclusive franchise in these circumstances, at least out of hand." Id. 148. Hazlett, supra note 83, at 1351. Hazlett cites the cost of municipal regulation, the use of "rent-a-citizens" and other abuses of the franchising process, the delays caused by auctions, and the inferiority of political choice displacing consumer choice in arguing for open competition in cable. Id. at 1351-64. 149. There was this suggestion in the jury's Nor-West verdict. See infra note 151. 150. These considerations, which seem as imponderable by a reviewing court as classifying a market as a "natural monopoly," are summed up by Victor Goldberg: "Would the firm have come into the market initially without some protection from competition? Would it have come in on terms as favorable as it did? What will be the rate of supply of innovations in the future if potential suppliers realize they will not be protected by the regulator?" Goldberg, Regulation and Administered Contracts, T BELL J. ECON. 426, 435 (1976). See also J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 88 (1950). 151. Two of the reported cases where a finding on natural monopoly was reached support this conclusion. In Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987), the jury found that cable television was not a natural monopoly in the Sacramento market. Id. at 1349. See supra note 49 and accompanying text. In Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891 (W.D. Mo. 1985), aff'd, 800 F.2d 711 (8th Cir. 1986), cert. denied, 107 S. Ct. 1358 (1987), the court decided that the existence of a natural monopoly was a question of fact, not law.
C. Right to Control Rights-of-Way

The remaining issue\(^{152}\) on remand in *Preferred* arises from the Court's statement that "[t]he City . . . justifies the limit on franchises in terms of minimizing the demand that cable systems make for the use of public property."\(^{153}\) While the precise contours of this government interest are not discernible, the issue concerns the City's claim that it may act to control rights-of-way so as to best benefit the public.\(^{154}\) This issue is not primarily a question of fact, but a matter of law.

It is in the nature of a representative form of government that a city should operate as a trustee for the people.\(^{155}\) Responsibility for property held in trust by the city allows a city to regulate access to streets by cable based on what it perceives to be the best interests of its people. The city may concern itself with which system of franchising leads to the best price/value ratio.\(^{156}\) However, it may choose noneconomic objectives as

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Here, the jury proceeded to find that a natural monopoly existed in the franchise territory. 610 F. Supp. at 901 n.33. There, too, extenuating circumstances existed, i.e., anti-competitive conduct by the incumbent franchisee. *Id.* at 903. This led to a $32.4 million judgment on the antitrust claim and, in the alternative, $35.8 million on a state law claim.

In the third case, Nor-West Cable Communications Partnership v. City of St. Paul, 3-83 Civ. 1228 (D. Minn. June 10, 1988), reported at CABLE TV L. RPTR., June 30, 1988, at 3-5, a jury decided that there was insufficient demand to support more than one cable television company in St. Paul. There is at least the suggestion that the jury did not believe that Nor-West, the potential overbuilder, was actually interested in building a system. Four of the special verdicts indicated that the jury did not find that Nor-West had the financial or technical capability to construct a system in competition with the incumbent operator.

152. Other issues, not specifically identified in the *Preferred* decisions, may also come up at trial as other "competing societal interests" of importance to the City of Los Angeles. *Preferred*, 476 U.S. 488, 495 (1986), *aff'd on narrower grounds*, 754 F.2d 1396 (9th Cir. 1985). These might include how an application furthers the city's minority business enterprise policies or whether an applicant complies with its ban against doing business with entities that do business with South Africa.


154. *Id.* at 492, 495.

155. The first portion of the well-known words of Justice Roberts in *Hague v. CIO* apply: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." 307 U.S. 496, 515 (1939).

156. R. POSNER, ECONOMIC ANALYSIS OF LAW 361-62 (3d ed. 1986). The city acting as agent for the residents could solicit bids, setting as its goal the best possible contract for its subscribers. This differs from the current arrangement described by Judge Posner as one "to extract concessions from the franchisee as the price of permitting it to charge a monopoly price." *Id.* at 361. One of the difficulties Professor Hazlett seemed to face in his review of natural monopoly and cable is the lack of a condemnation of cable regulation in Posner's writings, to which he accords considerable weight. Hazlett, *supra* note 83, at 1348-51. In particular, he relies on Judge Posner's critique
well, such as a desire to enhance diversity through franchising conditions relating to access, access studios, and channel capacity, even though those choices may not be based on market demand. Some cities are so concerned that cable television meet their community's expectations that they construct their own systems.

A city is empowered to make these choices because the operator has sought a privilege essential to engaging in its particular business, a privilege not sought by SMATV, over-the-air TV, or direct broadcast satellite operators, for instance. First, it desires nontransient use of poles and ducts to carry on its business. Unlike the transient uses of streets made by newspapers, cable's use of city facilities is more akin to leasing a city-owned warehouse or other facility. But government's involvement is even greater than with a leased warehouse because the poles and ducts are often privately owned, yet they must be made available to the operator at government-regulated rates by the cable operator's likeliest overbuilders—the telephone and power companies.

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157. Diversity, measured by either ownership of media or resulting viewpoints, is a sustainable basis for content-neutral regulation. See FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1981) (permitting newspaper-broadcast station cross-ownership bar to increase diversity); see also Associated Press v. United States, 326 U.S. 1, 20 (1944); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385, 390 (1969). The Cable Act established one of its purposes as assuring "that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4) (Supp. III 1985).


159. See supra note 20.

160. It is not an insignificant privilege. In California, for instance, the statutory scheme provides that cities are authorized to prescribe the conditions by which that use may occur. Cal. Gov't Code §§ 53066, 53066.1(a)(4).


163. One commentator compares the use of poles and ducts and acquisition of
Second, an operator, through its franchise, is empowered to acquire easements for and between property that would otherwise have to be negotiated with each property owner involved. The city makes available to the franchisee its power of eminent domain to engage in this taking. The franchise gives the operator access to property of the utility pole and duct owners, as noted earlier, as well as to the property of homeowners. Although a token fee may be involved as payment for the use, without the franchise the operator would have to bear the high, potentially imponderable, transactional costs of such arrangements.

The Court's suggested factual inquiry about how a franchisee is selected to enjoy rights-of-way may adduce some illicit motive in the approach taken by a city. It can serve to check well-meaning, but content-related, bases for franchising as well. But beyond these subjects, and generally testing the sincerity of the franchising officials, there is little that a factual presentation about rights-of-way will prove. Either the city is granting these benefits to operators or it is not. If it is, then the city's justification as cast by the Court has been established, and the city's franchising behavior should be judged by the standards appropriate to economic, not speech, regulation.

Conclusion

The Supreme Court's decision in Preferred to seek a more

rights-of-way by the cable operator to the ordinary telephone user's use of the same facilities. Schildhause, Preferred Communications: Preamble to Breakup of Local Cable Franchising?, 7 PACE L. REV. 1, 13 n.46 (1986). However, comparison of the operator to the telephone company is more appropriate, since in both instances the entities are seeking nontransient use to operate communications businesses. The telephone user is a customer who does not directly profit from the grant of the facilities.


166. A series of homeowner hold-outs might make access to some homes difficult or impossible. The granting of easements differentiates the cable operator from the SMATV operator, who must negotiate with the landlord for the rights to service the building involved. Operators seeking to serve private residential developments obtain easements by express conveyance from the developer for these rights. Easements for cable may then be included in the documents of title when the property is conveyed to the homeowner. See, e.g., 10 CALIFORNIA REAL ESTATE LAW AND PRACTICE § 343.15(1) (1988).

167. 476 U.S. 488 (1986), aff'g on narrower grounds, 754 F.2d 1396 (9th Cir. 1985). The City of Los Angeles had appealed the case to the Court in the first instance, but the appeal was dismissed for want of jurisdiction and the papers were treated as a
thorough record, and thereby say as little as possible, before deciding on a first amendment regime for cable television was unavoidable. The Court-ordered trial of issues, dimly designated by either the Ninth Circuit or the Court, is unlikely to resolve much. The questions posed about esthetics, traffic delays, and natural monopoly are not necessarily beyond the decision-making capabilities of a jury. But a decisive showing on any of these questions is unlikely. Dubious clarifications will little aid the trial judge in deciding whether the first amendment has been violated.

A *Preferred*-mandated trial could bring up facts more relevant to the first amendment, i.e., viewpoint discrimination against a would-be franchisee; but this result, too, is unlikely. Other nefarious behavior, entirely unrelated to the first amendment interests but wrongs nonetheless, may emerge. Alternatively, the factual findings now required by *Preferred* may cause franchising authorities to consider more carefully the heretofore almost universal policy of exclusive licensing. Given the pressures that will result from potential overbuilders, possibly including the telephone companies, this reexamination may be quite timely. But an understanding of the first amendment aspects of cable franchising will not be much advanced.

Absent evidence of suppression of viewpoint in the franchising process, the act of seeking a franchise under the 1984 Cable Act should not be characterized as an exercise of speech under the first amendment, nor should denial be deemed a violation of that constitutional protection. For a variety of reasons, the Court was not ready to reach this conclusion in *Preferred*. The unfortunate result is the essentially dead-end route which this and similar litigation must now travel.

certiorari petition. Perhaps the Court viewed it as a mistake to have granted the petition for writ of certiorari, given the brevity and nondecisiveness of its opinion. Professor Powe's view of the decision suggests as much: "In short—indeed in what for the current Court is a spectacularly short opinion—the Court ducked." *L. Powe, Jr.*, *supra* note 17, at 243.