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Special Cable to America's Cities - The Hollow Interests Justifying the Single Franchise Policy Cannot Withstand First Amendment Challenge

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SPECIAL CABLE TO AMERICA'S CITIES!: THE HOLLOW INTERESTS JUSTIFYING THE SINGLE FRANCHISE POLICY CANNOT WITHSTAND FIRST AMENDMENT CHALLENGE

I. INTRODUCTION

In most United States cities, cable television ("CTV") broadcasting is offered to consumers by a monopoly franchise. This stems from municipal governments' adoption of a "single franchise policy," which limits to one, the number of companies given access to build CTV systems. The single franchise policy has proven detrimental to CTV companies and consumers alike. CTV companies cannot expand into new municipal markets and dissatisfied consumers are left without alternatives when looking for new CTV service.

In *Group W Cable, Inc. v. City of Santa Cruz,*[1] *("Group W")* the Northern District Court of California heard competing arguments regarding the validity of the single franchise policy. Group W Cable Company charged that Santa Cruz's single franchise policy was an unconstitutional abridgment of its first amendment freedoms of speech and of the press. Santa Cruz justified its single franchise policy as necessary to protect important governmental interests which flow from CTV broadcasting.

The *Group W* court held that Santa Cruz's single franchise policy abridged Group W's first amendment rights.[2] While some federal courts have reached the same conclusion as the *Group W* court,[3] others have upheld the single franchise policy as a constitutionally valid restriction on speech.[4] With conflict among the circuits, the exclusive franchising issue faced by the *Group W* court will find its ultimate resolution in the United States Supreme Court. The Court has a responsibility to articulate a first amendment standard for CTV broadcasting that will lead the industry into the twenty-first century. If CTV is not properly protected

1. 669 F. Supp. 954 (N.D. Cal. 1987).

2. *Id.* at 975.

3. Pacific West Cable Company v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987); Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986).

4. *See, e.g.,* Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986).

as a first amendment speaker, the unique and promising medium may be crippled with respect to future expansion of its communication niche.

This casenote presents the conflicting arguments about the exclusivity of CTV franchising within the framework of the *Group W* case. A reasonable constitutional solution is suggested so that both a city's and a CTV operator's interests are equally protected.

II. STATEMENT OF FACTS

In the city of Santa Cruz, Group W and its predecessor operated a monopoly CTV franchise since 1966.[5] When Group W and Santa Cruz could not reach an agreement for renewal of the City's CTV franchise, offers to provide service to the Santa Cruz area were solicited from other CTV operators.[6] Santa Cruz received four proposals, including one from Group W.[7]

In September, 1986, Santa Cruz denied Group W a renewal of its existing franchise and refused to grant it a new one.[8] Group W then brought suit in the Northern District Court of California to enjoin the City and County of Santa Cruz from terminating its CTV franchise.[9] The court granted summary judgment for Group W, holding that Santa Cruz's single franchise policy violated Group W's first amendment protections of free speech and press.[10]

The prevailing issue in *Group W* was what degree of first amendment protection CTV should be afforded. The Supreme Court has held that "each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[11] "In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of CTV make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."[12]

Group W argued that CTV operated analogously to a newspaper and therefore deserved the same broad constitutional protections a news-

5. *Group W*, 669 F. Supp. at 956.
6. *Id.* at 957.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Group W*, 669 F. Supp. at 967.
11. Southeastern Promotions Limited v. Conrad, 420 U.S. 546, 557 (1975). A first amendment standard for the FAX machine needs articulation someday.
12. Central Telecommunications v. TCI Cablevision, 800 F.2d 711, 715 (8th Cir. 1986).

paper is afforded.[13] Group W asserted, therefore, that the holding in *Miami Herald Publishing Co. v. Tornillo*[14] (*"Miami Herald"*) should free CTV of governmental regulation.

In *Miami Herald,* the Supreme Court addressed the constitutionality of a Florida statute which required newspapers to grant free reply space to political candidates who were criticized in the papers' columns.[15] The Court struck down the statute, holding that government could not regulate the exercise of editorial discretion in the newspaper business consistent with first amendment guarantees of a free press.[16] *Miami Herald* established that newspaper publishers have the right to choose what to print in their columns without governmental interference. Group W asserted that since governments are forbidden from regulating which newspapers are permitted entry into their markets and what editorial content they may contain, CTV should also be free from the same governmental restrictions.

The City of Santa Cruz asserted that it had substantial or important governmental interests in limiting access to only one CTV company. Santa Cruz justified the single franchise policy as necessary to protect against: (1) scarcity of an economic marketplace capable of supporting more than one CTV company's profitability ("economic scarcity" or "natural monopoly"); (2) scarcity of physical space for cable wires on utility poles and in underground conduits to accomodate more than one CTV company's cable wire ("physical scarcity"); and (3) undue physical disruption to the public domain caused by installing more than one CTV system over public rights-of-way ("physical disruption").[17]

Arguing for a restrictive first amendment standard, Santa Cruz asserted that CTV broadcasting should be treated as analogous to radio and television broadcasting, because the physical and economic scarcity aspects of CTV closely resemble the scarcity aspects of a broadcaster.[18] Santa Cruz asserted that CTV should be subject to the Supreme Court's holding in *Red Lion Broadcasting Co. v. United States*[19] (*"Red Lion"*). *Red Lion* established legal authority for regulation of broadcasting by government.

The Supreme Court in *Red Lion* was confronted with a Federal Communications Commission ("FCC") regulation, similar to the Florida

13. *Group W,* 669 F. Supp. at 961.
14. 418 U.S. 241 (1974).
15. *Id.* at 243.
16. *Id.* at 258.
17. *Group W,* 669 F. Supp. at 961-62.
18. *Id.* at 960-61.
19. 395 U.S. 367 (1969).

statute in *Miami Herald.* The FCC regulation required broadcasters to allow reply time to people who were criticized over their airwaves (the "Fairness Doctrine"). The *Red Lion* Court upheld the FCC's Fairness Doctrine, recognizing that greater governmental intrusion into the broadcast media (i.e., radio and television) is allowed because of the physical scarcity of radiowaves.[20]

Thus, in the broadcasting business, because the electromagnetic radio spectrum is limited to a finite number of channels, government must regulate who is given the opportunity to broadcast over them.[21] The *Red Lion* case stands for the general proposition that the award of a broadcast license may be subjected to reasonable regulations by government if the regulations are aimed at goals other than the suppression of ideas.[22] Under *Red Lion,* Santa Cruz believed it had the authority to regulate the number of CTV broadcasters in much the same way wireless broadcasters are regulated.[23]

III. THE *GROUP W* COURT'S REASONING

The *Group W* court concluded that "unless cable television differs in some material respect from the print media, the First Amendment standards that apply to newspapers apply with equal force to cable."[24] The court went on to state that "there is no doubt that the government would be prohibited under the First Amendment from decreeing that a newspaper is barred from publishing and disseminating information in a specific community."[25]

The *Group W* court, however, did not end its constitutional analysis with the analogy of CTV to newspapers. In first amendment jurisprudence, it is recognized that "the mere fact that a regulation imposes a limitation on constitutionally protected speech does not mean the regulation is invalid; the question is whether the regulation represents a constitutionally permissible restriction on speech."[26] The *Group W* court continued its analysis, therefore, to determine whether the single

20. *Id.* at 390. "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.*

21. Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1403 (9th Cir. 1985) *aff'd.*, 476 U.S. 488 (1986). "[T]he electromagnetic spectrum simply is physically incapable of carrying the messages of all who wish to use the medium." *Id.*

22. NOWAK, ROTUNDA, YOUNG, CONSTITUTIONAL LAW 894 (1983).

23. *Group W,* 669 F. Supp. at 961.

24. *Id.*

25. *Id.* at 960.

26. Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322, 1331 (E.D. Cal. 1987).

franchise policy was unrelated to the *content* or communicative aspect of Group W's CTV speech.

The court found that Santa Cruz's single franchise policy was directed toward Group W's *conduct* in building and operating a CTV system (e.g., tearing up city streets) and not at the views being expressed over the broadcast medium.[27] Thus, the *Group W* court determined that the single franchise policy was a "content-neutral" regulation of the non-speech aspects of CTV.[28] The issue still remained whether this content-neutral regulation infringed upon Group W's first amendment rights.

To answer this question, the *Group W* court applied the content-neutral balancing test of *United States v. O'Brien*[29] (*"O'Brien"*) to determine if Santa Cruz's regulations were constitutional. In the CTV context, the *O'Brien* test balances a city's interests in preventing more than one CTV company from receiving a franchise against a CTV operator's first amendment rights. The *O'Brien* test states that a government regulation is sufficiently justified:

> 1. if it is within the constitutional power of the government;
> 2. if it furthers an important or substantial governmental interest;
> 3. if the governmental interest is unrelated to the suppression of free expression; and
> 4. if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.[30]

The *Group W* court held that Santa Cruz satisfied the first prong of the *O'Brien* test.[31] The Cable Communications Policy Act of 1984,[32] which established a national policy concerning cable communications, authorizes local governments to award one or more CTV franchises within their jurisdictions. Santa Cruz's award of only one CTV franchise, therefore, was within its constitutional power.

The second prong of *O'Brien* is whether the single franchise policy furthers an important or substantial governmental interest. Santa Cruz asserted three important or substantial governmental interests: (1) eco-

27. Santa Cruz's franchising policy would have been "content-based," for example, if the City had the discretion to forbid certain programming or dictate that only city-approved shows would air.

28. *Group W,* 669 F. Supp. at 962.

29. 391 U.S. 367 (1968).

30. *Id.* at 377.

31. *Group W,* 669 F. Supp. at 963.

32. 47 U.S.C. § 521 *et. seq.* (1982).

nomic scarcity; (2) physical scarcity; and (3) physical disruption.[33] For summary judgment purposes, however, the *Group W* court held that Santa Cruz failed to show that these interests in fact existed.

One of Santa Cruz's arguments was that because the City's CTV market would give rise to a natural or eventual monopoly, there was an important or substantial governmental interest in choosing the single best CTV provider at the outset and granting it an exclusive franchise.[34] A natural monopoly occurs when an economic market cannot support competition in a given business. For example, if a number of CTV companies set out to build competing systems in the same city, the demand for services would be insufficient to keep all operators in business, and only one would survive economically. This process leads to wasteful duplication of effort and increased fees to subscribers.[35] When an industry is a natural monopoly, regulation insures reasonable service at a fair rate in the best interest of the subscribers.[36]

The *Group W* court, however, rejected the natural monopoly argument as justification for granting an exclusive CTV franchise. By analogizing the CTV medium to newspapers, the court followed the reasoning of *Miami Herald.* In *Miami Herald,* the Supreme Court acknowledged that newspaper publishing may be a monopoly controlled by the owners of the market,[37] however, "it has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . . ."[38] The Court further stated that a city "may have legitimate interests in matters that concern it . . . but promoting economic efficiency is not among them."[39] The *Group W* court held that since CTV was analogous to newspapers, even if a natural monopoly existed, it was not a sufficient justification for granting an exclusive franchise.

Santa Cruz also alleged that space on utility poles and under city streets was physically incapable of handling the four applicants who applied to enter the market.[40] Of the four CTV franchise applications Santa Cruz received, however, only two companies sought concurrent

33. *Group W,* 669 F. Supp. at 961-62.

34. *Id.* at 964.

35. "Competition may exist for a time but only until bankruptcy or merger leaves the field to one firm, in a meaningful sense, competition is self-destructive." National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1023 (8th Cir. 1985).

36. *Group W,* 669 F. Supp. at 965.

37. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249 (1974).

38. *Id.* at 258.

39. *Group W,* 669 F. Supp. at 965.

40. *Id.* at 966.

access to the market.[41] The other two CTV companies wanted exclusive franchises free from competition. Because Santa Cruz's declarations failed to address whether utility pole space could accomodate the two CTV companies which sought concurrent access, for purposes of summary judgment, the City failed to raise a triable issue of fact whether there was scarcity of available space.[42]

Santa Cruz's final argument was that it had a substantial governmental interest in protecting city residents from the resulting physical and aesthetic disruption which would occur during installation of more than one CTV system.[43] Santa Cruz offered declarations that the nonsimultaneous installation of four new CTV systems would necessitate tearing up streets and tampering with utility poles.[44] The court found, however, that if Santa Cruz was willing to suffer the disruption of Group W dismantling its existing system while a second company installed a new system,[45] the resulting disruption could be no worse than if two companies built new systems simultaneously.[46] Thus, for summary judgment purposes, the court held that Santa Cruz failed to raise a triable issue of fact whether its interest in regulating physical disruption was a sufficient justification for limiting the City to only one CTV franchise.[47]

The *Group W* court concluded that Santa Cruz failed the second prong of the *O'Brien* test, because it did not have important or substantial government interests.[48] The court rejected Santa Cruz's analogy that the first amendment standards applicable to broadcast regulation permit CTV to be regulated in the same way.[49] Although the *Group W* court agreed with Santa Cruz that the City could not physically support unlimited CTV operators, the court stated that this fact alone did not justify granting only a single CTV franchise.[50] The court held Santa Cruz in violation of Group W's first amendment rights and permanently enjoined

41. *Id.*

42. *Id.*

43. *Id.* at 966. The court stated: "Santa Cruz also argues that the physical and aesthetic disruption to the public domain that will necessarily result from the construction of multiple cable systems justifies granting a single franchise." *Id.*

44. *Group W,* 669 F. Supp. at 966.

45. *Id.* at 967. "It is difficult to perceive the existence of a substantial government interest in preventing the installation of the second system at the same time Group W's existing cables are replaced." *Id.*

46. *Id.*

47. *Id.*

48. *Id.* Since Santa Cruz did not pass the second prong of *O'Brien,* the court did not address the third or fourth parts of the test.

49. *Group W,* 669 F. Supp. at 967.

50. *Id.*

the City from interfering with Group W's Santa Cruz CTV operations.[51]

IV. HISTORICAL PERSPECTIVE: THE PREFERRED DECISIONS

The same constitutional arguments addressed by the *Group W* court reached the United States Supreme Court by way of the Ninth Circuit's opinion in *Preferred Communications, Inc. v. City of Los Angeles*[52] (*"Preferred I"*). In *Preferred I,* the City of Los Angeles, like Santa Cruz in the *Group W* case, contended that economic scarcity, physical scarcity and physical disruption justified singling out one CTV provider and granting it an exclusive monopoly franchise.[53] The Ninth Circuit held that if Los Angeles' public utility facilities could physically accommodate more than one cable system, the City could not limit access to a single CTV franchise consistent with the first amendment.[54] The court, therefore, reversed the district court's dismissal of Preferred's first amendment claim.[55]

A critical part of the *Preferred I* opinion focused on the single franchise policy as a means which government could use to regulate the *content* of cable broadcasting. The granting of a monopoly franchise created "a serious risk that city officials will discriminate among cable providers on the basis of the content of, or the views expressed in, their proposed programs."[56] The *Preferred I* court further stated that there was too great a risk that diversity in editorial judgments would be limited by Los Angeles' determination of which cable providers would be permitted to use the medium.[57] The court believed that the possibility of content-based discrimination over editorial aspects of free speech justified dismantling of the single franchise process.

In *City of Los Angeles v. Preferred Communications,*[58] (*"Preferred II"*), the United States Supreme Court agreed to hear the single franchise issue. The Court was presented with a case of first impression: whether municipal regulations which allow only one CTV company access to cities are in violation of the first amendment. The Court realized that CTV broadcasting implicated some amount of first amendment protection,[59] because of its similarity to the traditional enterprises of speech

51. *Id.* at 975-76.
52. 754 F.2d 1396 (9th Cir. 1985).
53. *Id.* at 1402.
54. *Id.* at 1411.
55. *Id.* at 1415.
56. *Preferred I,* 754 F.2d at 1406.
57. *Id.* at 1406-07.
58. 476 U.S. 488 (1986).
59. *Id.* at 494.

and communication of ideas, like newspapers, book publishers, public speakers and pamphleteers. The Court also stated, however, that CTV implicated first amendment interests similar to those of wireless broadcasters in the fields of radio and television communication.[60]

One of Los Angeles' arguments was that "the process of installation and repair of such a [CTV] system in effect subjects City facilities designed for other purposes to a servitude which will cause traffic delays and hazards and [a]esthetic unsightliness."[61] In order to address this assertion and therefore articulate the appropriate constitutional standard, the Court needed more fact-specific information. The case was remanded for a determination of the present uses of Los Angeles' public utility poles and rights-of-way and how Preferred proposed to install and maintain CTV facilities on them.[62]

By failing to determine whether the single franchise policy was constitutional, the Court left the CTV industry and lower courts in a precarious position. CTV companies are now faced with the prospect of having to bring lawsuits in order to gain access to municipalities which have single franchise policies. As was seen in the *Group W* opinion, despite the *Preferred* decisions, lower courts have no clear precedent to follow in determining the constitutionality of the single franchise policy. Without guidance from the Supreme Court, lower courts have been forced to formulate their own first amendment standard regarding the relatively new medium of cable communication. The *Group W* court faced this challenge.

V. THE POST-*Preferred* Era

The confusion facing the *Group W* court and other lower courts after the *Preferred* decisions involves two factors. The first factor was discussed in *Preferred I:* whether cities will grant CTV franchises based upon the content of programming, rather than objective qualifications (i.e., whether the CTV company can provide the entire city with service, has state-of-the-art equipment and the financial capability to install and maintain a new system). The second factor was discussed in *Preferred II:* whether, if two or more CTV companies are given franchises, the disruption caused during installation would give rise to a substantial interest justifying a single franchise regulation.

The *Preferred I* court recognized that municipal authorities can dis-

60. *Id.*
61. *Id.* at 493.
62. *Id.* at 495.

guise content-based restrictions behind a single franchise policy. For example, the CTV company which offered family shows or programs preferred by local politicians would receive the single franchise. A logical extension of this argument is that franchising authorities may be influenced into granting franchises to those CTV companies offering better fringe benefits, like political campaign contributions.

Indeed, in *Pacific West Cable Co. v. City of Sacramento*,[63] a case involving the same franchising issues as the *Preferred* decisions and the *Group W* case, the jury found that in awarding CTV franchises Sacramento officials were motivated by more than the applicants' objective qualifications.[64] In *Pacific West,* the jury found that Sacramento "used cable television's allegedly monopolistic nature as a pretext to obtain cash payments, in-kind services and increased campaign contributions."[65]

The second factor facing the *Group W* court after the *Preferred* decisions was whether the installation of more than one CTV system will cause undue physical disruption to the public domain. In *Preferred II,* the Supreme Court remanded the case for more factual development of the proposed uses of utility poles and rights-of-way in Los Angeles. When the issue again reaches the Supreme Court, therefore, the alleged interest in preventing undue physical disruption may prove decisive in the Court's decision.

VI. ANALYSIS OF SANTA CRUZ'S ASSERTED GOVERNMENTAL INTERESTS

The *Group W* court saw the single franchise policy as a content-neutral regulation and therefore applied the *O'Brien* test. The Supreme Court in *O'Brien* stated that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations of First Amendment freedoms."[66] When the issue of CTV franchising again reaches the Supreme Court, assuming the *O'Brien* test is adopted, the Court will have to analyze cities' alleged governmental interests to determine whether they have the sufficient quantum of importance necessary to abridge first amendment freedoms. Upon a closer inspection of Santa Cruz's purported governmental interests, the

63. 672 F. Supp. 1322 (E.D. Cal. 1987).

64. *Id.* at 1338.

65. *Id.*

66. United States v. O'Brien, 391 U.S. 367, 376 (1968).

sufficient quantum of importance necessary to abridge first amendment rights is clearly missing.

A. Natural Monopoly

The *Group W* court analyzed and rejected the argument that because CTV is a natural monopoly, a substantial government interest existed in granting only one CTV franchise. The *Group W* court should have recognized that neither the court, nor Santa Cruz, had the ability to decide whether an industry was a natural monopoly. Deciding that CTV is a natural monopoly is not a task that politicians (local franchising authorities) are equipped to handle either. Experienced cable operators are in a far better position to assess the risks and rewards of operating competing municipal CTV franchises.[67]

Decisions not to compete in the CTV market "stem from the conclusions that, as a business matter, survival in a particular competitive environment is uncertain or that, because of limited space on existing poles or conduits, the cost of building a new system is such that the investment is deemed unsound."[68] Making these types of economic decisions is no different than the decisions that might inhibit the start of any economic venture, including a newspaper.[69] If the situation should develop that too many CTV operators are competing for the same subscribers, the economic marketplace will bear out the CTV operator chosen by consumers, and not politicians. Government regulation over the selection of a community's CTV operator is no more justified than selection of the newspaper publisher.[70]

While a CTV operator may think twice about spending excessive money to enter a new market, the current operator will not easily give potential competitors cause to enter its market.[71] The incumbent CTV operator will have greater economic incentive to keep its customers satisfied, because of its fear of losing market share. If an operator has a government protected monopoly, it has little economic incentive to keep

67. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise,* 134 U. PA. L. REV. 1335, 1351 (1986). "To argue that self-interested business persons, risking their own dollars and reputations, are less able to recognize ruinous competition than city council members who do not directly realize any profit or loss is a curious economic theory, indeed." *Id.* at 1351.

68. G. SHAPIRO, P. KURLAND, J. MERCURIO, CABLESPEECH, THE CASE FOR FIRST AMENDMENT PROTECTION 196 (1987).

69. *Id.*

70. *Id.*

71. Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise,* 134 U. PA. L. REV. 1335, 1376 (1986).

its system state-of-the-art and provide viewers with the best possible service.[72]

For example, in *Quincy Cable TV, Inc. v. FCC*,[73] *("Quincy")* the court found that new CTV systems can offer up to 200 channels.[74] Currently, operational systems may carry fewer channels, ranging from twelve to thirty-six.[75] If an existing CTV system carries only thirty-six channels and is a monopoly franchise, it probably will fail to improve its channel capacity because competitive economic pressures which normally would force it to do so will be absent. Customers of these older systems, therefore, will not receive the same quality of service that newer systems can offer.

Advancing technologies like pay-per-view[76] may also be affected by the existence of monopoly franchises. If existing operators do not feel economic pressure to bring their systems up to the state-of-art, pay-per-view and other emerging technologies will not be widely available to consumers and their future growth will be stifled. A monopolist hurts consumers because the free market forces will not affect entrenched operators and force them to provide the most technologically advanced equipment.

B. Physical Scarcity

The *Group W* court also rejected Santa Cruz's assertion that physical scarcity of space prevented the City from accepting more than one CTV franchise.[77] The court, however, did not deny that a valid governmental interest in preventing access to more than one CTV company could exist if physical space on utility poles and under streets could not accommodate all who wished to broadcast.

The physical scarcity interest is closely related to the natural monopoly interest. Although CTV is not a natural monopoly, a municipal market cannot financially support an unlimited number of franchisees. If operating competing CTV franchises proves uneconomic in some cities

72. "While municipalities emphasize the costs of overbuilding, they fail to perceive that such costs make established firms very dedicated to the preservation of their financially viable market by not inviting entry." *Id.*

73. 768 F.2d 1434 (D.C. Cir. 1985).

74. *Id.* at 1439 n.8.

75. *Id.* at 1439.

76. Pay-per-view is a newer service offered to households which receive basic cable service. Pay-per-view offers special sports programming or pre-selected movies to those people who notify the provider in advance that they want to see the featured programming. Payment is incurred on an as-view basis (pay-per-view), rather than on a monthly charge with conventional movie channels like HBO or Showtime.

77. *Group W*, 669 F. Supp. 954, 964 (N.D. Cal. 1987).

or is perceived as being uneconomic in others, this possibility will serve to regulate the number of entrants without the need for a single franchise policy.[78] An example of this was seen in *Group W,* where only two of four franchise applicants sought competing franchises in Santa Cruz. The other applicants were unwilling to risk the capital investment necessary to build competing franchises.

Assuming a city can support a reasonable number of franchises, it probably will not face overwhelming numbers of prospective operators. It should be possible for a city to accommodate those few CTV operators who are willing to operate non-exclusive franchises. The economics of operating competing CTV systems will deter many new companies from seeking franchises in municipalities which already have existing service.

C. Physical Disruption

Santa Cruz's final argument supporting the single franchise policy was that it had a substantial governmental interest in preventing the undue disruption that would result if two or more CTV companies were installing systems in the City. The *Group W* court recognized that protection against physical disruption in Santa Cruz justified some amount of governmental regulation. The court stated that Santa Cruz had "legitimate interests in public safety and in maintaining public thoroughfares,"[79] but that the real issue was whether the public safety concerns "provide a sufficient justification for the granting of a monopoly franchise."[80] The court, therefore, seemed to look at whether the *potential* for public disruption rose to the level necessary to justify impingement on first amendment rights. Since Santa Cruz was willing to endure the disruption of Group W dismantling its existing system while a second company installed a new system, the court held it failed to show that there would be undue disruption if two companies built up simultaneously.

In *Preferred II,* because the Court remanded the case for more factual development of Preferred's proposed uses of municipal utility poles and rights-of-way, it seems the Court was most concerned with Los Angeles' alleged interest in protecting the public against undue disruption. When the Supreme Court again reviews whether the single franchise policy is constitutional, it may view the prevention of physical disruption as an important governmental interest under *O'Brien* and thus validate the

78. Hazlett, *Private Monopoly and the Public Trust: An Economic Analysis of the Cable Television Franchise,* 134 U. PA. L. REV. 1335 (1986).

79. *Group W,* 669 F. Supp. at 966.

80. *Id.*

single franchise regulation. The Court, however, may view the prevention of physical disruption as only a valid or legitimate interest and therefore not a sufficient justification for a single franchise regulation. In any event, this interest may prove paramount to the Court's decision.

VII. RECOMMENDATION

Standing alone, a local government's interest in preventing dangerous or disruptive uses to public streets and rights-of-way should normally be viewed as a substantial or important government interest. As was seen in *Group W* and in the *Preferred* decisions, the physical disruption interest is speculative and unproven. CTV operators can assert, therefore, that the governmental interest of protecting against physical disruption does not rise to the level of importance necessary to curtail first amendment freedoms.

The speculative nature of the physical disruption interest coupled with the fact that there are viable and equally effective alternatives cities can use to protect against it, should give CTV broadcasters' first amendment interests more weight than the interests of municipal governments. The interest in preventing undue public disruption, therefore, should not be viewed as important or substantial, but rather only as valid or legitimate. A valid governmental interest should not rise to the level necessary for justifying the denial of first amendment rights. Support for this is found in *Quincy,* where the court stated: "[W]e cannot agree that . . . the mere fact that cable operators require use of a public right of way—typically utility poles—somehow justifies lesser First Amendment scrutiny."[81]

Regulation over *how* CTV systems are built should be a substantial and important governmental interest. Under a local government's health and safety powers, it should have the authority to regulate the *method* of CTV installation as a means to minimize public disruption. As the *Quincy* court recognized, "[t]he potential for disruption inherent in stringing coaxial cables above city streets may well warrant *some government regulation of the process of installing and maintaining the cable system.*"[82] The power to regulate the process of installation, however, should not extend to deny that installation by more than one company can take place at all.

The answer to CTV franchising lies with local governments' regulation of the CTV installation process. The Supreme Court can solve the

81. *Quincy,* 768 F.2d at 1449.
82. *Id.* (emphasis added).

problem raised in *Preferred I*, concerning the possibility of content-based restrictions inherent in a single franchise policy, and also address the physical disruption interest explored in *Preferred II* by allowing cities to regulate the manner in which CTV systems are built. This can be done with time, place and manner regulations.

A. Time, Place and Manner Regulations

Time, place and manner regulations are stated in terms of a three-part test. A court should uphold time, place and manner restrictions as long as the restrictions are "content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[83] An example of a time, place and manner restriction was illustrated by the court in *Pacific West Cable.*[84] The court suggested a city may regulate CTV installation by restricting the intervals at which CTV systems are installed, such as allowing access to underground utility conduits every few years.[85]

A compromise can thus be worked between cities and CTV operators so that the interests of both sides are met. Cities can protect their interests and at the same time afford CTV companies their first amendment rights by regulating the installation process of a CTV system. A city may require that the building take place in the late hours of the night or perhaps only on weekends. A city can also require that cable wire be manufactured in the same color as the utility poles to which it is attached. The cable will blend in visually with the poles and prevent blight.

Furthermore, if two or more CTV companies seek concurrent access to a city, they should be required to build up simultaneously to minimize the amount of public disruption. Indeed, forcing CTV operators to build competing systems at the same time will make it more economical for all involved. The cost of digging up streets or erecting new poles can be spread equally among those currently installing systems and will also avoid costly duplication of effort. As the *Group W* court recognized, Santa Cruz was willing to endure the undue disruption of Group W dismantling its existing CTV system while a new company's system was built. There would be much less disruption if the incumbent operator is allowed to remain and only the new entrant impacts the public while building a new system.

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83. United States v. Grace, 461 U.S. 171 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators Ass'n 460 U.S. 37 (1983)).

84. 672 F. Supp. 1322, 1332 n.11 (E.D. Cal. 1987).

85. *Id.*

VIII. CONCLUSION

Although the single franchise policy is supposed to protect important government interests, it also affects "values that lie near the heart of the First Amendment."[86] The purpose of the first amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[87] Thus, the possibility that city authorities may be corrupted by campaign contributions or other extrinsic factors when deciding which CTV company will receive a city's single franchise is disheartening to first amendment freedoms.

The nature of cities' interests can be promoted through means more protective of the first amendment. Although the Supreme Court has recently narrowed the content-neutral tests of *O'Brien* and time, place and manner by giving greater discretion to the states,[88] in the CTV context, operators should be afforded greater free speech rights. Without the ability for CTV operators to lay cable, they are completely foreclosed from speaking and left without alternative forums in which to speak.

As implied by *Preferred II,* the only governmental interest that the Court finds legitimate for balancing against the rights of a first amendment speaker is the interest in preventing undue disruption to public rights-of-way. This valid governmental interest can be accomplished with much less violence to the first amendment by using time, place and manner regulations, rather than a single franchise policy.

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86. *Quincy,* 768 F.2d at 1453.

87. *Pacific West,* 672 F. Supp. at 1334.

88. In United States v. Albertini, 472 U.S. 675 (1985), the Court stated that an incidental burden on speech is permissible under *O'Brien* "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 689. In Ward v. Rock Against Racism, 58 U.S.L.W. 3146 (Aug. 30, 1989), the Court stated that a time, place or manner regulation must be narrowly tailored to serve legitimate governmental interests, "but that it need not be the least-restrictive or least-intrusive means of doing so." *Id.* at 15. The *Ward* Court continued from *Albertini* where the Court stated that narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Albertini,* 472 U.S. at 689.