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## Cable TV Users Taxes: A First Amendment Challenge, 8 Computer L.J. 257 (1988)

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# CABLE TV USER TAXES: A FIRST AMENDMENT CHALLENGE

## INTRODUCTION

A growing number of American households are subscribing to cable television to obtain a wider selection of viewing possibilities. Cable services typically offer movies, sporting events, news services, musical videos, and a variety of other programs that conventional television stations do not broadcast. Still other households, especially those in the remote, rural areas, subscribe to cable services to receive better reception. Coaxial cables, utilized by cable services, enable television transmissions to reach rural areas with minimal interference. Absent such cables, television signals in those areas are simply too weak to be picked up by a conventional television antenna.<sup>1</sup> Cable broadcasting thus makes it possible for residents in these outlying areas to enjoy television as if they lived in a metropolitan broadcast zone.

Cable operators provide access to their service by stringing cables along city streets and sidewalks, either on telephone poles above ground, or in utility service conduits below ground.<sup>2</sup> As compensation for the use of public facilities by cable operators, local governments are enacting a compensatory or user tax which is borne by cable subscribers.

This Note will focus on the deleterious effects such a tax will have on cable television's ability to disseminate information to the public. Specifically, the Note will examine how the tax indirectly impairs the public's first amendment right to receive information and how, on the basis of the first amendment, the tax can ultimately be invalidated.

Local governments generally impose user taxes on cable systems

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1. Smith, *Local Taxation of Cable Television Systems: The Constitutional Problems*, 24 CATH. U.L. REV. 755, 771 (1975); see generally Stanzler, *Cable Television Monopoly and the First Amendment*, 4 CARDOZO L. REV. 199, 204 n. 20 (1983) (cable systems do not transmit signals by air, as do conventional broadcast systems, but instead carry them by coaxial cable to subscribers' homes); see also Note, *Cable Franchising and the First Amendment: Does the Franchising Process Contravene First Amendment Rights?*, 36 FED. COM. L.J. 317, 318-19 (1985) (the cable television system allows clear reception of broadcast signals in areas which could not have received such signals with their home antennae).

2. Davis, *Cable Television Franchising—The Role of Local Governments*, 51 FLA. B.J. 79 (1977).

pursuant to the government's police power to "protect the safety, health, and property" of the local citizenry.<sup>3</sup> Such governments claim that disruption and use of public ways and streets during the emplacement and operation of the cable service justifies the imposition of a user tax.<sup>4</sup> The tax, they argue, reimburses the community for the cable operator's use of public facilities.<sup>5</sup>

Government regulations of this type, ordinarily, would not be challenged as improper or unconstitutional. Cable television, however, functions as a disseminator of information, like radio stations and conventional television broadcasters. Regulating cable systems in a manner dissimilar to the regulation of radio and conventional television, raises equitable treatment issues, particularly where user taxes are imposed on cable television due to cable's classification as a public utility, rather than as a broadcaster.

Cable television may be improperly classified as a public utility because it lacks characteristics that public utilities typically possess.<sup>6</sup> Cable television may, however, deserve the same degree of constitutional protection as the press.<sup>7</sup> The United States Supreme Court recently chose to temporarily reserve judgment on this particular issue.<sup>8</sup> This Note will demonstrate that cable television systems should be treated like a newspaper for purposes of first amendment protection. Cable systems' unlimited channel capability enables cable operators to enjoy an editorial latitude similar to that of a newspaper editor.<sup>9</sup> Regulations which excessively inhibit and stifle newspaper growth and distribution are held to violate the first amendment.<sup>10</sup> Likewise, cable user taxes inhibit cable systems' channel expansion and stifle cable subscribership by increasing cable subscription rates. Cable user taxes should, therefore, also be held to violate the first amendment.

This Note will first challenge the user tax as a selective government regulation in light of the heavier burden imposed on cable television relative to the other broadcast of media.<sup>11</sup> The Note will, further, examine the justifications offered for the tax and evaluate their reasonableness under the balancing test set forth by the Supreme Court for

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3. Note, *supra* note 1, at 322 n.29.

4. Davis, *supra* note 2.

5. Davis, *supra* note 2.

6. See *infra* text accompanying notes 37-52.

7. Preferred Communications Inc. v. City of Los Angeles, 106 S. Ct. 2034, 2037-38 (1986), *aff'g* 754 F.2d 1396 (9th Cir. 1985).

8. *Id.*

9. *Id.*

10. Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983).

11. *Id.*

regulations affecting noncommunicative aspects of recognized first amendment media.<sup>12</sup>

The Note will then analogize cable television to the press in order to show that cable user taxes are invalid. The close scrutiny test used in striking down license and user taxes imposed on newspapers in the Supreme Court's *Grosjean*<sup>13</sup> and *Minneapolis Star*<sup>14</sup> decisions will be applied to cable television. Finally, the Note will apply the public forum doctrine to cable television to show the tax's invalidity.

### I. REGULATION OF CABLE TV

Typically, cable television user taxes for the use of public facilities are based on the subscription rate charged to cable television customers by the cable operator. The following is a user tax provision from Stockton, California:

Sec. 8-076. Cable Television User Tax:

1. There is hereby imposed a tax upon every person in the City of Stockton using cable television service. The tax imposed by this Section shall be at the rate of five percent (5%) of the charges made for such service and shall be paid by the person paying for such service.
2. The tax imposed in this Section shall be collected from service user by the person supplying such service.<sup>15</sup>

Municipalities justify the tax as a compensatory regulation imposed on all public utilities that use public facilities as a part of their public service. They argue that cable television is, for all intents and purposes, a public utility because it uses the public domain while furnishing a public service.<sup>16</sup> This justification, however, is without merit.<sup>17</sup>

Cable operators have recently raised a number of first amendment challenges to government regulations restricting the operation of cable service. In three cases before the Ninth and D.C. Circuits,<sup>18</sup> the courts accorded the cable industry a higher degree of first amendment protection than that normally granted to the other traditional broadcast

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12. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

13. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

14. *Minneapolis Star*, 460 U.S. at 575.

15. *Cable Television Taxes*, 32 P & F RADIO REG. 2d 457, 458 (1975); see also San Buenaventura, Cal. Code art. VIII, § 1585 (1984).

16. See generally *Smith*, *supra* note 1, at 763-66 (taxing statutes seem to regularly classify cable with the telephone, gas, and electric industries; the legislators view cable either as a utility, a monopoly, or a forum of communication by wire).

17. See *infra* text accompanying notes 26-34.

18. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985); *Quincy Cable Television, Inc. v. Fed. Communications Comm'n*, 768 F.2d 1434 (D.C. Cir. 1985).

media.<sup>19</sup>

As a result of the higher degree of protection, governmental regulation of cable television briefly resembled the "untrammled" status currently enjoyed by the press. On June 22, 1986, however, the Supreme Court unanimously ruled that it would not go so far as to elevate cable television to the same protected class as the press.<sup>20</sup> The Court explained that a fuller development of the issues is required before a definitive ruling can be made on cable television's proper first amendment classification.<sup>21</sup>

Regulation of cable television when it first appeared was left entirely to the discretion of municipalities, through the municipal franchising process, which, until the early seventies, amounted to no more than granting a permit to lay cable.<sup>22</sup> Radio and conventional television, on the other hand, had been subject to the regulatory framework of the Federal Communications Commission (FCC), as provided under the 1934 Communications Act.<sup>23</sup>

Radio and conventional television fell under federal regulation because of the limited electromagnetic spectrum used to broadcast their programs.<sup>24</sup> Both media transmitted programming within a finite spectrum of channels that was unable to accommodate the messages of all those who wished to use the medium.<sup>25</sup> To ensure that diverse views were aired in the limited spectrum, Congress created the FCC. As stated by Justice Frankfurter in *National Broadcasting Co. v. United States*: "With everybody on the air, nobody could be heard. \* \* \* [T]he radio spectrum is simply not large enough to accommodate everybody."<sup>26</sup> In *Red Lion Broadcasting Co. v. F.C.C.*, the court stated that "[w]ithout the imposition of some governmental control, 'the cacophony of competing sounds' would drown each other out."<sup>27</sup>

While cable television is also involved in broadcasting programs, it is unlike the other two traditional broadcast media because it, theoretically, possesses an unlimited channel capability. This stems from the difference between the way cable television and the two traditional me-

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19. *City of Los Angeles*, 106 S. Ct. at 2037-38.

20. See *infra* text accompanying notes 45-48.

21. See *infra* text accompanying notes 45-48.

22. A. Ciamporcero, *Is There Any Hope for Cities? Recent developments in Cable Television Law* (Report to the 1985 Annual Conference of the League of California Cities, City Attorneys Department, held at San Francisco, California).

23. *Id.*

24. *Preferred Communications*, 754 F.2d at 1403.

25. *Id.*

26. *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1449 (D.C. Cir. 1985) (quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-13 (1943)).

27. *Quincy Cable*, 768 F.2d at 1449 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969)).

dia transmit their signals to their respective audiences. Cable television uses coaxial cables, whereas the two traditional media rely upon airwaves to carry their transmissions. This Note assumes that the use of an atmospheric medium is inherently limited in the number of channels that it can carry, whereas the cable medium affords the broadcaster a vastly larger channel capability.<sup>28</sup> As long as cable operators can string or lay as many cables as they desire, their subscribers have an unlimited number of channels upon which they may view programs.<sup>29</sup>

Cable's technological ability to present diverse viewpoints in an unlimited channel spectrum should eliminate the need for FCC regulation, particularly because the FCC's regulatory role is only compelled by the limited channel spectrum of radio and television.<sup>30</sup> Cable operators, however, originally were involved in retransmission of conventional television broadcasts to areas too remote to receive broadcasts.<sup>31</sup> At that time, conventional television broadcasters transmitted programs and cable operators picked up these signals through specially constructed high antennae. Cable operators then retransmitted the signals to their subscribers through coaxial cables. The FCC ruled that, because cable operators' source of programming was still indirectly affected by the finite channel spectrum, cable operators' retransmission of that programming was subject to FCC jurisdiction. This position was upheld by the Supreme Court in *United States v. Southwestern Cable Co.*<sup>32</sup> In *Southwestern Cable*, the Court ruled that cable television activities were "reasonably ancillary" to FCC broadcast responsibilities.<sup>33</sup>

In 1984, Congress passed the Cable Communications Act (Cable Act) establishing national guidelines for cable television development and clarifying regulatory responsibilities between federal and local authorities.<sup>34</sup> The Cable Act essentially reaffirmed the authority of local governments to decide who would be permitted to string and lay their wires through their cities and counties, and what standard of service

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28. See generally Note, *supra* note 1, at 318-20.

29. See generally *Quincy Cable Television, Inc.*, 768 F.2d at 1438-39.

30. *Preferred Communications*, 754 F.2d at 1403.

31. Note, *supra* note 1, at 318-19.

32. 392 U.S. 157 (1968).

33. *Id.* at 178. While this decision has no impact upon cable television user taxes as a result of the 1984 Cable Act, see *supra* note 20 and accompanying text, the FCC regulated cable television activities from the late 1960's to the early 1980's, concurrently with local and state governments. For a description of this period from the cable industry's perspective, see Wolfe, *Predators and Principalities: The Long Road to Regulatory Freedom*, CABLEVISION, July 22-29, 1985, at 49.

34. Cable Communications Policy Act of 1984, 47 U.S.C. § 609 (1984). The Act was drafted to create order among local, state, and federal administrative regulation which regulated cable concurrently. See Ciamporcero, *supra* note 22, at 5.

these systems would be required to meet.<sup>35</sup> As a result of the Act's accession of regulatory authority to local governments, user taxes fell under the jurisdiction of city hall.<sup>36</sup> This Note's evaluation of the first amendment implications of the tax is, therefore, based on local governments' concerns and justifications.

## II. IMPROPER CLASSIFICATION AS A PUBLIC UTILITY

As mentioned above, local governments generally justify the imposition of cable television user taxes on compensatory grounds. Local governments liken cable service to public utilities that are taxed for their use of public facilities. Cable television, however, should neither be classified nor treated in this manner.

Public utilities generally furnish vital community services such as heat, gas, water, electricity, telephone communications, and so forth. Cable television, on the other hand, does not provide such services. In communities where conventional television broadcasts are easily received by television aerials, cable merely provides the subscriber with better reception and an expanded programming selection. Those without cable can still watch major network or local programming and news by properly positioning their television antennae. In comparison, distant communities rely solely on cable service to provide television programming. Even in remote communities, however, the reception of television programs must still be regarded as a non-vital service when compared to those services typically defined as essential community services.<sup>37</sup>

Public utilities are, among other things, natural monopolies in their communities. The limited number of potential customers dictates that only one utility may economically service a community at a time. Concededly, cable television is constrained by the same economic limitations. That is, only one cable franchise can survive within each community.<sup>38</sup> But, unlike the typical utility, cable services must still compete with other suppliers of the same service, namely conventional television stations.

In a 1966 report, the FCC concluded that cable and conventional television competed against one another as a result of cable's efforts to

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35. Ciamporcero, *supra* note 22, at 9 (from a municipality's standpoint, the Cable Act set forth basic franchising principles and other guidelines pertaining to rate regulation and franchising renewal rules).

36. See *infra* text accompanying notes 107-08.

37. In *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 665 (N.D. Ohio 1986), *aff'd sub nom.*, *Wonderland Ventures, Inc. v. City of Sandusky*, 423 F.2d 548 (6th Cir. 1970), it was held that "[t]he public has about as much real need for the services of a CATV system as it does for hand carved ivory back-scratchers."

38. Smith, *supra* note 1, at 764; see also *Cable Television Taxes*, *supra* note 15, at 465.

offer the viewing public better reception, more signals, and unique programming, which conventional television, for economic or censorial reasons, was unable to duplicate.<sup>39</sup> Since cable and conventional television still appear to engage in the same competition, then the argument characterizing cable television as a public utility, based on its monopolistic tendencies, is unacceptable.<sup>40</sup>

Perhaps the most compelling argument for cable's characterization as a public utility is that, like the other traditional utilities, cable must make significant use of public facilities to service its customers. Assuming that like entities warrant similar treatment, then cable television deserves the user tax that other utility companies are subjected to. Admittedly, the need to string coaxial cables throughout the city makes cable's use of the public facilities appear significant, but upon closer examination of the circumstances under which cable television's cables are strung, cable's public impact appears quite insignificant. In California, for instance, cable operators are merely lessees of easements and rights of way belonging to the public utilities, such as the telephone company.<sup>41</sup> California law dedicates any excess space on or in these preexisting easements to cable use, conditional upon cable operators paying the utility companies a fair rent.<sup>42</sup> Significantly, the rent is paid directly to the easement owner, rather than to the city.<sup>43</sup>

The dedication requirement probably arises because utilities are scarcely inconvenienced by sharing their surplus space with cable television. A thumb-sized coaxial cable with twelve wires can, in theory, carry 132 messages or independent cable television systems at the same time.<sup>44</sup> Thus, for efficiency and economy reasons, it would seem practical to require preexisting easements or rights of way to be the conduits that house cable television's coaxial cables.

Cities are reimbursed for the use of the easements through user taxes on the utilities. Cable services rent their shared use of utilities' easements directly from the utility companies. Subjecting cable television subscribers to the user tax, therefore, results in the subscribers'

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39. *Cable Television Taxes*, *supra* note 15, at 465.

40. Cable television, on the other hand, faces competition from all the sources listed above for transmissions or programs to project on a television viewer's screen. The television viewer, in effect, can elect not to subscribe to a cable service and can still watch shows on his television set because there are a variety of other suppliers of television transmissions or programming (foremost being the television aerial from which most households pick up conventional over-the-air television broadcasts). The inability to be the sole provider to households, therefore, distinguishes cable television from traditional public utilities, such as gas or electricity, which are sole providers.

41. *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 801-02 (1985).

42. CAL. PUB. UTIL. CODE § 767.5(b); *Salvaty*, 165 Cal. App. 3d at 802.

43. CAL. PUB. UTIL. CODE § 767.5(b)

44. *Id.*



double taxation. In addition, the fallacy of cable's alleged significant use of the public domain negates any justification for classifying cable television as a public utility.

Cable television is, therefore, improperly classified as a public utility because its characteristics are dissimilar to those of public utilities. First, cable television is not an essential service like heating, lighting, or water, but instead, merely one of many sources of information and entertainment. Second, the inability to operate as a natural monopoly negates the justification that cable's monopolistic tendencies warrant public utility classification. Finally, cable television's insignificant use of public facilities undermines the final justification that cable should be treated similar to public utilities which make significant use of public facilities.

Assuming cable television is improperly classified as a public utility, then it is unclear what cable's proper classification should be. Cable operators argue that they should be treated similar to newspaper for two reasons. First, cable operators, like newspaper editors, can select programs without any fear that alternative viewpoints might be precluded. Newspaper editors select stories without reservations that the printed pages will be unable to accommodate the alternative viewpoint to a story or article chosen for publication. Like a newspaper publisher, cable operators have a potential for an unlimited channel capability.

Second, cable operators argue that cable television's ability to distribute information and entertainment through cable programs is similar to the way a newspaper editor disseminates information through printed pages.<sup>45</sup> Thus, on the basis of characteristics shared with newspapers, cable operators argue for first amendment classification for both mediums.

In *City of Los Angeles v. Preferred Communications, Inc.*,<sup>46</sup> the Supreme Court unanimously held that "[c]able television partakes some of the aspects of speech and the communication of ideas, as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers."<sup>47</sup> Justice Rehnquist justified this decision on a "pick and choose" rationale, explaining that cable operators pick and choose from an array of programming that they offer to their customers—not unlike the publishing discretion of a newspaper editor.<sup>48</sup> The decision left unresolved, however, whether cable television enjoys the same degree of first amendment protection as newspapers. In reviewing the Ninth Circuit's decision to classify cable television under the

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45. *Greater Fremont Co.*, 302 F. Supp. at 657 n.5.

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

47. *Id.* at 2034 (1986).

48. *Id.* at 2037.

first amendment like newspapers, Justice Rehnquist stated that the Court was not ready to go that far but would await "a fuller development of the disputed issues" surrounding the regulation of cable television.<sup>49</sup>

Cable operators correctly argue that cable should be classified as a newspaper for purposes of the first amendment. Treating cable television as a medium undeserving of first amendment protections bestowed on the press undermines the underlying goal of the first amendment. Some have described first amendment policy as the achievement of "the widest possible dissemination of information from diverse and antagonistic sources"<sup>50</sup> since in "an uninhibited marketplace of ideas[,] . . . truth will ultimately prevail."<sup>51</sup> Cable broadcasting, in light of its potential for an unlimited channel capability, seems particularly suited to achieving such a goal.

Cable broadcasts can accommodate virtually any viewpoint assuming cable television is allowed unlimited channel capability. Measures should be taken, therefore, to ensure that cable systems' channel expansion is not needlessly hampered. This is best achieved by granting cable systems the same degree of first amendment protections given to the press.

Concerning newspapers, the first amendment is invoked to ensure that government regulations do not unnecessarily frustrate the attainment of an "untrammelled press."<sup>52</sup> If cable broadcasting was treated similarly, then government regulations could not needlessly restrain cable systems from evolving to the broadcasting equivalent of an untrammelled press—an uninhibited disseminator of information with an unlimited channel capability. Since cable systems can acquire a vast channel capability (through the use of multiple coaxial cables strung along pre-existing poles or conduits currently used by public utility companies) the Supreme Court must realize that promoting the expansion of the cable medium by stringent first amendment protections will entail little social cost. It is rare when society can achieve a fundamental goal of the Constitution at so small a price.

### III. RAISING CONSTITUTIONAL CHALLENGES TO USER TAXES

Courts characterize protection of free speech and press as "fundamental" liberties<sup>53</sup> and have imposed more exacting judicial scrutiny in

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49. *Id.*

50. *Id.* at 2038.

51. *Associated Press v. United States*, 326 U.S. 1, 20 (1944).

52. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

53. *Grosjean*, 297 U.S. at 249-50.

protecting such liberties from "legislation [which] appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when embraced within the fourteenth amendment."<sup>54</sup> In practical terms, this means that "first amendment rights have been accorded special protection throughout [U.S.] history and have been restricted only in limited and compelling circumstances."<sup>55</sup>

In three cases decided in 1985, cable operators argued that cable television was similar to the press in disseminating information to the public.<sup>56</sup> They maintained that cable's information-providing function warrants the application of first amendment protections normally applied to newspapers.<sup>57</sup> If this argument were recognized, any governmental regulation of cable television challenged as abridging the first amendment would have to withstand the Supreme Court's close scrutiny tests.

Accepting the cable operators arguments, the Ninth Circuit and the D.C. Circuits<sup>58</sup> applied traditional first amendment safeguards (*i.e.*, *O'Brien* reasonableness test, public forum doctrine) in evaluating the validity of various cable television regulations imposed by local governments.<sup>59</sup> As stated earlier, however, the Supreme Court's recent decision to reserve judgment on actual first amendment status of cable television, leaves uncertainty in the propriety of those circuits' treatment of cable television. While indicating that the Court would be unwilling to go so far as to say that cable television is the equivalent of newspaper, as the Ninth and D.C. Circuits have indicated, the Court, nonetheless, acknowledged that "the First Amendment values [of cable television] must be balanced against competing societal interests."<sup>60</sup>

The Ninth and D.C. Circuits rejected analogies to radio and television, specifically to the finite nature of those mediums' channel capability, as justification for regulating the operation of cable services.<sup>61</sup> The courts, instead, held that the unlimited channel capability of cable television meant that cable operators could pick and choose the programs of their choice, with little fear that alternative viewpoints would not be broadcast due to the limited number of channels available for broad-

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54. *Palko v. Connecticut*, 302 U.S. 319 (1937).

55. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

56. *Preferred Communications*, 754 F.2d at 1396; *Tele-Communications of Key West*, 757 F.2d at 1330; *Quincy Cable Television*, 768 F.2d at 1434.

57. *Preferred Communications*, 106 S. Ct. at 2035-36; *Tele-Communications*, 757 F.2d at 1335-36; *Quincy Cable Television*, 768 F.2d at 1437.

58. *See infra* text accompanying notes 68-89.

59. *See infra* text accompanying notes 66-89.

60. *See supra* text accompanying note 52.

61. *See infra* text accompanying notes 66-89.

casting all viewpoints.<sup>62</sup> This unlimited broadcasting capability prompted the circuit courts to bestow upon cable television the same standard of first amendment protection as that normally accorded to the press.<sup>63</sup>

While the Supreme Court's recent *Preferred Communications* decision temporarily undermines the status of the three 1985 circuit court decisions,<sup>64</sup> cable television's recognized similarity to newspapers, based on its ability to broadcast all necessary viewpoints through an unlimited channel capability, appears to validate the first amendment analysis adopted by the Ninth and D.C. circuits for evaluating the constitutionality of the challenged cable television regulations. Thus, the *O'Brien* reasonableness test and the public forum doctrine, as applied by the lower federal courts, may constitute the appropriate standards to evaluate the validity of cable television regulations.<sup>65</sup>

It is also unclear whether courts should aspire to attain the same "untrammelled" status for cable as that sought for the press and speech.<sup>66</sup> Applying the balancing tests set down in *O'Brien* and under the public forum doctrine, the Supreme Court's decision on this issue could make the difference where local governments present strong justifications for their challenged cable regulations.

#### A. *PREFERRED COMMUNICATIONS, INC. V. CITY OF LOS ANGELES*

In *Preferred Communications*,<sup>67</sup> the cable operators' analogy of cable television as similar to newspapers was accepted by the Ninth Circuit.<sup>68</sup> Preferred Communications, Inc. (PCI), a cable operator, challenged Los Angeles' cable franchising system as unconstitutional under the first amendment. The franchising system consisted of an auction

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62. *Preferred Communications*, 754 F.2d at 1403-04; *Quincy Cable Television*, 768 F.2d at 1448-50.

63. *Preferred Communications*, 754 F.2d at 1403-04; *Quincy Cable Television*, 768 F.2d at 1448-50.

64. *Preferred Communications*, 106 S. Ct. at 2038.

65. *Preferred Communications*, 754 F.2d at 1405-11; *Tele-Communications*, 757 F.2d at 1337-39; *Quincy Cable Television*, 768 F.2d at 1450-51.

66. As reported by the Los Angeles Times the day following the Supreme Court's decision, James P. Mooney, president of the National Cable Television Association which represents more than 6000 cable firms, stated that the Supreme Court's language indicated that the Court had "affirmed cable operators' status as editors, under the First Amendment." On the other hand, Edward Perez, a Los Angeles assistant city attorney, was reported as calling the Court's ruling a "very narrow decision." L.A. Times, June 2, 1986, § 1, at 3, col. 2.

67. *Preferred Communications*, 754 F.2d at 1396; see also *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir. 1977) (holding no constitutional distinction existed between cable television and the press where the parties invoke the first amendment).

68. *Preferred Communications*, 754 F.2d at 1403-05.

process in which cable operators bid for exclusive franchise rights to certain sectors within the city borders. Franchises were awarded based on the type of services offered by the operator. Rather than engage in the bidding process, PCI filed suit contending that cable television is essentially like a newspaper in the way it disseminates information. As a consequence, PCI argued, the city's limitation on franchises, to one per community, abridged the first amendment, particularly because PCI's right to spread information by means of its programming was curtailed.<sup>69</sup>

The City of Los Angeles countered, arguing that PCI's newspaper analogy was flawed. The more accurate analogy, the city claimed, was to conventional broadcasters.<sup>70</sup> Like television and radio, public access to the medium required some regulation because of physical limitations inherent in the technology. The city conceded that cable did not have a limit to the number of channels that it, as a broadcaster, could use. But, the city maintained the limitations affecting cable, instead, lay with the fact that an unlimited number of cables could not be hung safely on a pole. Since a city could only accommodate a fixed number of cables within its borders, a regulation limiting public access to the emplacement of cables was warranted. The Ninth Circuit rejected this argument, relying on PCI's assertions that room existed for the installation of cable without interference.<sup>71</sup> Several cases were cited to support this conclusion.<sup>72</sup>

Other justifications offered for the taxation of cable television in-

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69. *Id.* at 1396.

70. *Id.* at 1403.

71. *Id.* at 1404.

72. See generally *Home Box Office*, 567 F.2d at 45; see also *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127 (1982).

The Ninth Circuit's holding regarding physical scarcity, while favorable to cable, must nevertheless be regarded as a limited victory. The *Omega* and *Home Box Office* decisions went only so far as to say that physical scarcity does not apply to cable *per se*. As Ciamporcero points out in *Recent Developments*, *supra* note 21, the next line in the *Omega* case, which the court omitted, states that "cable television involves another type of interference—interference with other users of telephone poles and underground ducts." 694 F.2d at 127.

The Ninth Circuit also noted that, in evaluating the justifications offered for a city regulation, of which physical scarcity will probably be included, a city's reasons must apply specifically to the challenged city's own problems, and not to generalized problems most cities encounter with regard to their cable system. The court stated, "[a]s we indicated in *Playtime Theaters*, the City must justify its regulations in terms of its own problems. It may not rely on the problems faced by other communities or on justifications that are merely conclusory and speculative." *Preferred Communications*, 754 F.2d at 1400 (citation omitted). Thus, while no general justification can be proffered to show that a user tax furthers an important or substantial government interest, the possibility will always exist that a particular city might be able to show some unique problems as justification for such a tax.

cluded the natural monopoly rationale and the "disruption of the public domain" argument.<sup>73</sup> The Ninth Circuit chose not to rule on the monopoly issue although it noted that the Supreme Court rejected such an argument as a basis for first amendment-related regulation in a prior newspaper case.<sup>74</sup> As for the "disruption" argument, the court held that the city had a legitimate interest in minimizing disruption. Under the Supreme Court's "reasonableness test" for challenges to regulations that hamper first amendment media, however, the Court held that the protection of the public domain was insufficient to justify a government grant of monopoly.<sup>75</sup>

The reasonableness test applied by the Ninth Circuit was derived from analysis of a first amendment issue decided by the Supreme Court in *United States v. O'Brien*.<sup>76</sup> The test states as follows:

[A] government regulation is sufficiently justified if [1] it is within the constitutional power of the government; [2] if it furthers an important or substantial government interest; [3] if the government 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.<sup>77</sup>

The *O'Brien* test is triggered by government's attempt to regulate the "noncommunicative aspects" of whatever communicative medium is involved.<sup>78</sup> Any attempts to control the "communicative aspects" of that medium are foreclosed by the first and fourteenth amendments.<sup>79</sup> The Supreme Court has not identified a "bright-line" between what constitutes communicative and noncommunicative aspects. The Court has, however, indicated that it is necessary to make "a precise appraisal of the character of the ordinance as it affects communication."<sup>80</sup> The D.C. Circuit in *Home Box Office* was more definitive, describing the regulations on noncommunicative aspects as "incidental burdens on speech—regulations that evince a governmental interest unrelated to the suppression or protection of a particular set of ideas."<sup>81</sup> These were distinguished from the regulations on communicative aspects, those restrictions that are "intended to curtail expression—either directly by banning speech because of . . . its communicative or persuasive effect on its intended audience . . . or indirectly by favoring certain classes of

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

74. *Id.* at 1405-06.

75. 391 U.S. 367 (1968).

76. *Id.*

77. *Id.* at 376.

78. *Preferred Communications*, 754 F.2d at 1405 (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981)); see also *Quincy Cable Television*, 768 F.2d at 1434.

79. *Metromedia, Inc.*, 453 U.S. at 503.

80. *Home Box Office*, 567 F.2d at 47-48.

81. *Id.* at 47-48.

speakers over others."<sup>82</sup>

Application of this test is significant because it heralds a growing acceptance of the trend established in *Home Box Office* that cable television and newspapers are similar for purposes of analysis under the first amendment. The *O'Brien* test, used primarily for the press, was, for the first time outside the D.C. Circuit, applied to the new broadcast medium. Radio and television regulations had traditionally been evaluated with broadcast scarcity in mind. As discussed earlier,<sup>83</sup> however, the Ninth Circuit holds that broadcast scarcity, or any variation of that concern, simply does not apply to cable television.<sup>84</sup> The court stated that "significant differences" existed between cable and conventional television.<sup>85</sup> It also holds that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it,"<sup>86</sup> and that "[d]ifferences in the First Amendment standards applied to them."<sup>87</sup>

Apparently, cable television's unlimited channel capability was enough to convince the Ninth Circuit that first amendment protections applicable to newspapers were appropriate for the cable medium as well.<sup>88</sup> The court also considered the public forum doctrine, discussed in greater detail later in this Note,<sup>89</sup> as applicable. These positions were followed later in that same year (1985) by the D.C. Circuit in *Telecommunications of Key West*<sup>90</sup> and in *Quincy Cable TV*.<sup>91</sup> In *Telecommunications*, the court applied the public forum doctrine to a cable operator's franchise renewal application in a U.S. airforce base.<sup>92</sup> In *Quincy Cable*, the "content-neutral" analysis afforded the press and free speech was applied to "must carry" rules required of a cable operator by the FCC.<sup>93</sup>

Traditional protections for speech and the press, thus, appeared to be the judicial safeguards of cable television, at least until the Supreme Court's decision in *Preferred Communications*. Yet, because the Supreme Court's acknowledgment of the "pick and choose" discretion of cable operators regarding their programming selection, it would ap-

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82. See *supra* text accompanying notes.

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

84. *Preferred Communications*, 754 F.2d at 1403.

85. *Id.* (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)).

86. *Id.*

87. *Id.* at 1403-05.

88. *Id.*

89. See *infra* text accompanying notes 133-60. Courts apply the public forum doctrine to regulations that allegedly unconstitutionally abridge free speech in public places.

90. 757 F.2d 1330 (D.C. Cir. 1985).

91. 768 F.2d 1434 (D.C. Cir. 1985).

92. *Telecommunications*, 757 F.2d at 1330.

93. *Quincy Cable TV*, 757 F.2d at 1330.

pear safe to evaluate cable television user taxes under either those same tests applied by the circuit courts, or through prior newspaper cases where selective taxes were invalidated for abridging the first amendment.

The characterization of user taxes as "incidental burdens on speech," triggered the *O'Brien* test. However, where the taxes can be characterized as regulations on communicative aspects of speech, particularly because they favor conventional broadcasters over cable broadcasters by selectively taxing cable, the *Grosjean* and *Minneapolis Star* cases, regarding the selective imposition of taxes on newspapers can be used to invalidate the taxes. Where no selective taxation can be shown, the taxes can, nonetheless, be characterized as a direct ban on speech, especially because they restrict access to poles and conduits which the government has set aside for communicative cables. Under this approach, the "public forum" doctrine is used to invalidate the tax.

#### B. APPLICATION OF THE *O'BRIEN* REASONABLENESS TEST

As stated earlier, the *O'Brien* test is triggered whenever government attempts to regulate the noncommunicative aspects of a first amendment medium.<sup>94</sup> Using the Stockton ordinance as typical of most user taxes,<sup>95</sup> one would have to conclude that these types of legislation appear to be directed towards noncommunicative aspects. This is particularly true because such ordinances are generally enacted on the basis of either cable's classification as a public utility or on the basis of cable's impact on the public domain. Not every municipality, however, will have these justifications. Assuming they do, however, one would have to conclude that such taxes are directed at noncommunicative aspects because they are not aimed at controlling the content of cable television broadcasts. Rather, they evince a "governmental interest unrelated to the suppression or protection of a particular set of ideas."<sup>96</sup>

Assuming that a noncommunicative aspect is affected by legislation, one must then show how the first amendment is implicated (since the *O'Brien* test only protects against regulations that needlessly suppress free expression).<sup>97</sup> One could argue that the subscriber tax reduces what cable operators would otherwise charge their customers for a subscription to the service. This necessarily assumes that the rates cable operators charge their subscribers are subject to price elasticity—any

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94. 768 F.2d 1434, 1438 (D.C. Cir. 1985). These rules require a cable operator, when requested by broadcasters, to carry all TELEVISION broadcast signals that are "significantly viewed" in the cable community.

95. *Preferred Communications*, 754 F.2d at 1405.

96. *See supra* text accompanying note 15.

97. *O'Brien*, 391 U.S. at 377.



slight increase affects the public's decision on whether or not to use the cable service.<sup>98</sup> If cable television is affected by price elasticity, then cable operators are unable to randomly increase their subscription rates without losing a significant portion of their customers. The rate is set at a threshold level that attracts people to the service; any slight increase will cause people to discontinue their subscription.

When a user tax becomes part of the total price a television viewer pays to subscribe to cable television, cable operators must include the amount of viewer taxes before setting the subscription rate to be charged. When the price is elastic, the presence of a tax reduces the cable operator's profit margin because the rate that is eventually charged must be diminished to offset the amount of the subscriber pays in taxes. The operator's reduced returns might then trigger either a reduction in the cable services offered or a deterioration in its quality. Cable operators would find themselves unable to expand their channel capability, implicating the first amendment by restricting the free dissemination of information. Consider the effects of a user tax on a hypothetical community wired for cable.

Assuming a 5% user tax imposed on a subscription rate of \$60, one would be faced with a \$3 levy on each cable subscriber. Cable operators would argue that but for the tax, they would have charged their subscribers \$63 per billing period as opposed to \$60. The operators would then claim that their plans to increase channel capability are frustrated without the additional \$3 that they would otherwise have received from each subscriber. This is particularly likely where the subscribers number in the thousands, which is the case in most major urban areas. With less money available to develop channel capabilities, cable television's ability to disseminate ideas to the public is proportionately reduced.

Alternatively, cable operators can argue that the tax increases the cost to the subscriber of using cable television. In some instances, that slight increase could mean the difference between a household's choice to subscribe or not subscribe to a cable service. Dissuading the public from the use of cable television implicates the first amendment since the dissemination of information is hampered by the reduction in viewers using cable television as a source of information and entertainment.<sup>99</sup>

Having established the applicability of the *O'Brien* test to user

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98. *Id.* at 376-77.

99. Operators who challenge the imposition of a user tax actually argue this, claiming that "[t]he demand for cable television, unlike the demand for generally recognized public utilities such as telephone and power companies, is not impervious to price. [They claim it] is characterized by elastic demand, and [has] a definite ceiling on the amount people will pay for the service." *Cable Television Taxes*, *supra* note 15, at 459.

taxes, we proceed to the four-prong test set down by the Supreme Court.<sup>100</sup> The first part of the test asks whether the government regulation is "within the constitutional power of the government."<sup>101</sup> In *McGowan v. Maryland*,<sup>102</sup> the Supreme Court held that state statutes dealing with fiscal and tax regulation are accorded a presumption of constitutionality.<sup>103</sup> Challengers of the tax, therefore, have the burden of proving that the tax is unconstitutional.<sup>104</sup> Describing the scope of this presumption, the Court stated:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objectives. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it.<sup>105</sup>

With the user tax in question, grounds may exist for challenging cable television classification as a public utility for taxation purposes. The State's presumption of validity, however, probably prevails on the ground that the lines through which cable television transmits its broadcasts go through the government's public ways and streets. Thus, for purposes of the first factor of the *O'Brien* test, one might have to concede that the user tax enjoys a presumption of constitutionality.

Alternatively, this presumption may also be properly read as being unconstitutional, assuming cable's classification as a specially protected media. If the assumption is valid, then the presumption of unconstitutionality applied to taxes on other specially protected media, such as the press, also apply to cable. In *Grosjean*<sup>106</sup> and *Minneapolis Star*,<sup>107</sup> discussed in the upcoming section, the taxes were presumed to be unconstitutional since they were selectively imposed on the newspapers and had a history of being levied to curtail the broader circulation of the newspaper.<sup>108</sup> Cable user taxes are arguably the same, as demonstrated in the next section. If so, then the user taxes are presumptively unconstitutional unless the government is able to rebut this presumption. Absent such proof, the taxes fail the *O'Brien* test's first factor.

Assuming the taxes are within the constitutional power of the government, one then considers if the tax "furthers an important or sub-

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100. *O'Brien*, 391 U.S. at 377.

101. *Id.*

102. *Id.*

103. 366 U.S. 420 (1961).

104. *Id.*

105. *Id.*

106. *Id.* at 425-26.

107. *Grosjean*, 297 U.S. at 233.

108. *Minneapolis Star*, 460 U.S. at 575.

stantial government interest."<sup>109</sup> The city might argue that the tax is levied as a means of compensation for materials and services that are used in installing the cables throughout the city. It is cable operators, however, that usually install the cables and repair the streets.<sup>110</sup> Alternatively, the cables are occasionally run through surplus facilities owned by public utilities; cable operators lease the surplus space from the utility company who, in turn, pays the city for the disruption caused by its poles and conduits, by way of a user tax imposed on utility companies. Subjecting cable to the same user tax operates as a double tax unlikely to be characterized as an important or substantial government interest. Cities must, therefore, generally concede that they cannot pass the second prong of the test. As discussed previously,<sup>111</sup> however, each city must justify its regulations in terms of its own problems.

Assuming that such a justification exists, one then inquires whether "the government interest is unrelated to the suppression of free expression."<sup>112</sup> The most plausible government interest that might prevail on this second factor of the *O'Brien* test involves the compensation of government. Assume that cable operators must compensate the city for both the installation of cables and use of the public ways during the course of the cable service. It is unlikely that the courts will regard this situation as an interest that is related to the suppression of free speech. Cable broadcasting activities are not manifestly curtailed because of the content of the shows being broadcast. One, therefore, proceeds to the final factor of the *O'Brien* test.

The fourth prong asks whether "the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>113</sup> Assuming that a government were operating under a compensatory motive in imposing the tax, a cable operator is unlikely to persuade a court that the restriction on its ability to disseminate information is "greater than is essential." Taxation is the least complex method to compensate for public utility use. The cable operator, at best, might be able to show that the amount of taxation is greater than what is required to compensate the city. A reduction in the tax might ensue, but the tax itself would still remain.

On the other hand, if the government justifies the tax on the basis of protecting the public domain, then the tax becomes overly protective. Courts are willing to recognize that "a city needs control over the number of times its citizens must bear the inconvenience of having its

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109. *Grosjean*, 297 U.S. at 250-57; *Minneapolis Star*, 460 U.S. at 592.

110. *O'Brien*, 391 U.S. at 377.

111. See *supra* notes 22-36.

112. *Preferred Communications*, 754 F.2d at 1406 n.9.

113. *Cable Television Taxes*, *supra* note 15, at 463 (quoting *Station WBT, Inc. v. Poulnot*, 46 F.2d 671 (1931)).

streets dug up and the best times for it to occur.”<sup>114</sup> Moreover, it is probable that the courts will also acknowledge a city’s concern that an innumerable number of cables might be suspended from its telephone poles.<sup>115</sup>

Subjecting cable subscribers to a user tax, however, appears too extreme a means to protect the public domain. Regulating the number of cables would be one way of ensuring public safety. Imposing user taxes tends to discourage the profitability of hanging an unlimited number of cables on telephone poles. Sturdier telephone poles, however, could just as easily protect the public from the dangers posed by hanging too many cables. Alternatively, cables can be developed to accommodate more channels, reducing the number of cables that must be suspended for a “vast channel capability.”

The street disruption caused by laying underground coaxial cables can also be minimized by limiting this activity to off-peak travel hours. During these times, less pedestrian or motorist traffic is exposed to hazard and inconvenience caused by street construction projects. Admittedly, as long as streets are torn up, public safety is jeopardized, regardless of what hours street work takes place. Moreover, unless the stringing of cable can be accomplished overnight, cable installation could interfere with peak traffic hours.

Perhaps traffic hazards occasioned by public construction are best viewed as necessary evils of progress. As such, attempts to eliminate such hazards altogether is tantamount to overcautiousness. Public safety is always at risk when “progress” is furthered—in this case, a wider dissemination of information. Curtailing the means of achieving such progress is excessive since the dangers to be avoided are necessary risks which cannot be completely obviated. Therefore, where the tax is greater than is essential to further the interest of public safety, user taxes are unreasonable under *O’Brien’s* fourth prong.

User taxes, prior to the Ninth Circuit’s turning point in *Preferred Communications*, could probably withstand constitutional challenges brought by cable operators. Courts would treat cable television as not unlike another public utility and allow city governments to impose the user taxes that are normally applied to other public utilities. The Ninth Circuit, however, ruled that cable television is not a public utility, but rather a first amendment medium similar to radio and conventional television because it plays a vital role in disseminating information to the public. But, unlike the other two media, cable does not operate under the finite channel spectrum that impedes radio and conventional television’s channel expansion. Instead, cable enjoys an unlimited channel

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114. *O’Brien*, 391 U.S. at 377.

115. *Preferred Communications*, 754 F.2d at 1406.

capability for all of its programming. Consequently, the Ninth Circuit felt compelled to apply the first amendment protections traditionally applied to newspaper, as in the *O'Brien* reasonableness test.<sup>116</sup> Under such a test, user taxes would probably fail since the first, second and fourth prongs, as discussed above, are not satisfied.

#### IV. ANALOGOUS INVALID TAXES ON NEWSPAPERS

If the Supreme Court accorded cable television the first amendment protections traditionally used for the press and speech, cable operators, when challenging user taxes, would be able to invoke as precedent cases where newspapers have successfully invalidated miscellaneous taxes on first amendment grounds. The following cases provide notable authority for such a purpose.

In *Grosjean v. American Press Co.*,<sup>117</sup> the Supreme Court invalidated a state statute which imposed a license tax on all newspapers or magazines having a weekly circulation in excess of 20,000. The statute taxed the privilege of engaging in the business of selling advertising in newspapers or magazines. The Court ruled that the law violated the first amendment because the tax was imposed in a form marred by suspicious circumstances.<sup>118</sup>

In evaluating the statute's history and present setting, the Court found that the law was actually a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled to in light of constitutional guarantees."<sup>119</sup> The tax was "measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers."<sup>120</sup>

User taxes may also be described as marred by "suspicious circumstances."<sup>121</sup> Radio and conventional television, for example, despite being broadcasters like cable television, find themselves exempt from any form of user tax.<sup>122</sup> Cable television, on the other hand, is subject to

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116. *Preferred Communications* rejected this justification. *Id.* at 1406. The Ninth Circuit limited its decision regarding this issue, however, to the particular circumstances surrounding the case.

117. 297 U.S. 233 (1936).

118. *Id.* at 251.

119. *Id.*

120. *Id.*

121. *Id.*

122. In part this probably stems from the fact that the 1934 Communications Act granted to the FCC exclusive regulatory power over the two media, but another reason probably has to do with the fact that these two media do not utilize the public domain the way cable television does. These conventional broadcasters require only the air to trans-

such a tax. This differential treatment penalizes one type of broadcaster relative to the others, impairing the dissemination of information which the public would otherwise receive from cable sources. As discussed earlier,<sup>123</sup> this occurs either because the tax prevents cable operators from expanding their channel capability or it dissuades potential cable subscribers from using cable service.<sup>124</sup>

In *Grosjean*, the license tax was deemed to have two effects: a curtailment in the amount of revenue realized from advertising, and a tendency to restrict circulation. These same effects are caused by a user tax on cable television. Revenue derived from subscribers is reduced, particularly in those communities where market forces impose a ceiling on the amount a cable service can charge its subscribers. In those areas, cable operators reduce their profit margin to accommodate the amount that goes toward satisfying the user tax. Moreover, the cable equivalent to newspaper circulation, cable subscribership, is also constrained. In some instances, imposing a user tax as an additional charge for the cable service could determine television viewer's choice to subscribe or not to subscribe.<sup>125</sup> The presence of the tax, therefore, restricts circulation, as in the *Grosjean* case.

The Louisiana legislature in *Grosjean* may have had legitimate reasons for imposing a license tax on newspapers exceeding a certain circulation. The Supreme Court, however, chose not to consider the justifications in its decision to invalidate the tax because the promotion of an "untrammelled press" was deemed to be of paramount impor-

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mit broadcasts whereas cable must string cables underground or above ground on telephone poles.

123. See *supra* text accompanying notes 98-102.

124. Properly analyzed, a utility user tax is a tax on consumption of a service. When one purchases electricity from a utility, one receives a service providing heat or light. Similarly, a user tax on cable television subscribers is a tax on the purchase and consumption (watching, reading, and listening) of the audio and visual information provided.

A user tax on cable television is, therefore, unconstitutional because it falls on the "pure" first amendment activity of gaining knowledge and information—the very sort of tax, "a tax on knowledge," which *Grosjean* deprecates. If a subscriber decides to take two or more cable television services, *e.g.*, basic programming plus a premium or pay service such as HBO, the subscriber pays a higher tax than if he took only a single service. In effect, the tax directly deters the first amendment activity of listening, watching, and learning—even though the burden on the city's resources has not increased. It is thus clear that the tax has the potential for impermissibly interfering with the viewer's exercise of choice. *Grosjean*, 297 U.S. at 245-47. It is a special tax capable of hostile use against the freedom to watch, listen, and read. It is no more valid than a tax on standing on a street corner to listen to a speaker on a soapbox. Such a tax on the activity of listening can only be invalid because it infringes on the right to know. Plaintiff's Opposition, *supra* note 24, at 20.

125. The ensuing decrease in subscribers would then influence the amount of revenues realized by the cable television operators.

tance.<sup>126</sup> Assuming that cable deserves the same first amendment treatment as speech and the press, then the justifications offered for the user taxes should also be irrelevant. Instead, the courts' first amendment analysis of the tax should focus on an "untrammelled broadcasting system." Thus, any legislation attempting to curtail cable television channel expansion would be invalid.

The recent Supreme Court case of *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*,<sup>127</sup> contains an alternative challenge. In *Minneapolis Star*, the Court struck down as unconstitutional a use tax selectively imposed on the Minneapolis newspaper.<sup>128</sup> The use tax in that case was different than the one imposed by city governments on cable services; rather than taxing a communicative medium on the basis of its use of public facilities, the Minnesota statute taxed the newspaper for its use of out-of-state paper and ink products to deter Minnesota newspapers from purchasing such products to avoid paying a state sales tax.<sup>129</sup> The Minneapolis Star argued that the tax abridged their first amendment rights by "[singling] out the press for special treatment," demonstrating a government motive to suppress the paper's freedom of expression.<sup>130</sup>

The Supreme Court held that "[differential] treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."<sup>131</sup>

For purposes of the above test, radio, television, and cable would all be synonymous with the press by virtue of their ability to disseminate information through broadcasts. Where the press disseminates its information through the circulation of its printed pages, these three broadcast media accomplish the same through their electronic transmissions. The applicability of this test assumes that the Supreme Court extends

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126. *Grosjean*, 297 U.S. at 250.

127. 103 S. Ct. 1365 (1983).

128. 460 U.S. 575 (1983).

129. *Id.* at 592.

130. *Id.*

131. *Id.* (citations omitted). Some challengers to cable user taxes have argued that *Minneapolis Star* stands for the proposition that regardless of the intent of the legislating body, at 592, or the extent of the burden, if any, on the exercise of first amendment rights, differential taxation of first amendment activity violates the first amendment. They stated that the principles enunciated in *Grosjean*, 297 U.S. at 233, were liberated and made a standard by which *all* taxes may be judged. Plaintiff's Opposition, *supra* note 24, at 11.

to cable the same degree of first amendment protection as that granted to the press.

Differential user taxation on cable television occurs when radio and television are not subject to such a tax. To prevail under the above test, local governments would have to show "a counterbalancing interest of compelling importance" that cannot be achieved without differential taxation.<sup>132</sup>

A tax on cable operators who make no payments towards repairing or maintaining the public facilities used during the course of cable service should probably prevail under this test because there appears to be no other means of receiving compensation for the public facilities used. Where cable operators either repair and maintain the public facilities themselves, or lease the facilities from telephone or other utility companies, the amounts that the operators pay for self-repair or leasing corresponds to what they would pay in user taxes. Consequently, the tax operates as a substitute where self-repair or leasing does not occur. Where self-repair or leasing already occurs, and the tax is still imposed, the tax should be invalidated in order to avoid a situation of double taxation.

Protecting the public domain, on the other hand, encounters significant problems. Imposing a tax to further public protection is an indirect way of dealing with the traffic or safety problems occasioned by the emplacement of cables below ground or on telephone poles. As discussed above, installation during off-peak traffic hours, cables with greater channel capability, or sturdier telephone poles should adequately protect the public from the dangers posed by tearing up streets to lay underground cables or by hanging too many cables from telephone poles. The first course diminishes the volume of traffic exposed to construction work, and the second and third eliminate the hazards caused by overlaid telephone poles.

Since differential treatment of cable broadcasting, relative to radio and conventional television, is not essential to the furtherance of public

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132. In defending a challenge brought against a cable user tax, city attorneys for the California city of San Buenaventura defended the tax by arguing that *Grosjean*, 297 U.S. 233, and *Minneapolis Star*, 460 U.S. at 475, prohibit only those taxes that apply to no one else but the press or any other speaker. Cable television user taxes, they argued, do not fit such a category since the taxes are of "general applicability," particularly since the other public utilities are also subjected to the tax. Because the "suspicious circumstances" of invidious discrimination were not present, the city attorneys argued for a rational basis test, as opposed to close scrutiny, to evaluate the user tax. Defendant's Notice of Demurrer and Demurrer to the Complaint at 15-18, *Weimer v. City of San Buenaventura*, No. 88662 (Cal. Sup. Ct., Ventura Co., filed Dec. 6, 1985).

The city attorney's argument, however, lacks merit since, as discussed previously, cable television is improperly classified as a public utility. Cable's improper classification as a utility actually serves to enable the city to single out cable for the tax.



protection, the user tax in this instance deserves to be invalidated. The continued existence of the tax could burden the medium to the extent that the tax "operat[es] as effectively as a censor to check critical comment by the press [or other first amendment mediums], undercutting the basic assumption that the press will often serve as an important restraint on government."<sup>133</sup>

## V. CHALLENGING THE TAX UNDER THE PUBLIC FORUM DOCTRINE

Another possible challenge to the user tax lies with the public forum doctrine developed by the courts to invalidate government regulations that restrict public access to "forums" that serve as stages for disseminating diverse ideas to the public. Under this doctrine, public forums are divided into three categories of varying accessibility to the public.<sup>134</sup> The first type of public forum consists of "places which by long tradition or by government fiat have been devoted to assembly and debate."<sup>135</sup> While the government may not ban communication in these places entirely, it may enforce content-neutral regulations of the time, place, and manner of expression that are "narrowly tailored to serve a significant government interest . . . [leaving] open ample alternative channels of communication."<sup>136</sup> If the regulations that limit access to this forum are based on the contents of whatever speech is being excluded from the forum, then the regulation must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" to pass constitutional scrutiny under the first amendment.<sup>137</sup>

A second category recognized is "public property that the State has opened up for use by the public for expressive activity."<sup>138</sup> Although the state is not required to retain an open character for the property indefinitely, the government must adhere to standards applicable to traditional public forums, when regulating access, while the property remains open.

The third and last category consists of property "which is not by tradition or designation a forum for public communication."<sup>139</sup> In these properties, the "State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public

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133. *Minneapolis Star*, 460 U.S. at 590.

134. *Preferred Communications*, 754 F.2d at 1407-08.

135. *Id.* at 1407.

136. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

137. *Id.*

138. *Id.*

139. *Id.* at 46.

officials oppose the speaker's view."<sup>140</sup> The "time, place, and manner regulations" present in the other forums must also be adhered to here as well.<sup>141</sup>

To successfully challenge user taxes under this doctrine, cable operators must argue that the taxes, in effect, limit their access to the utility poles and conduits that serve as cable television's forum for expression of programs.<sup>142</sup> This is because the doctrine only operates to invalidate government regulations that unreasonably impede access to one of the three public forums listed above. Showing a direct impediment based simply on the language of most user taxes is difficult, however, since these taxes express no patent desire to discourage the use of the poles and conduits by television cable operators.

An examination of the justifications for the tax, on the other hand, could reveal an unreasonable impediment. Cable operators with small profit margins could argue that the tax inevitably drives them away from the cable business since their profits are consumed accommodating the tax.<sup>143</sup> This argument entails a complex financial analysis to establish a causal link between the taxes and the profitability of the cable service, but showing an impediment in such manner is not too remote a possibility.

Assuming that the taxes were shown to discourage a cable operator from seeking access to poles and conduits, the first step to apply the public forum doctrine would be to establish which of the three categories of public forums cable television's coaxial cables fall under.<sup>144</sup> This determines the level of scrutiny the tax will be subjected to when evaluated. The first two, the "traditional" and the "open for use" forums, would require the tax to be narrowly tailored to achieve either a "compelling" or a "significant" government interest in order to be a valid restraint on access.<sup>145</sup> In third forum, context, on the other hand, a

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140. *Id.*

141. *Id.*

142. In *Preferred Communications*, 754 F.2d 1396, 1407-11 (1986), where the public forum doctrine was first posited as being applicable to cable television, and in *Tele-Communications*, 757 F.2d at 1338, where the doctrine was actually applied, franchising regulations had limited the use of the conduits set aside for cable television use to one cable operator. These cases seemed to indicate that the doctrine is triggered in the franchising context where sufficient space exists in the conduits or poles set aside for cable television to accommodate more than one operator yet the franchising regulations preclude others from also using them for the same broadcast purpose.

With user taxes, the doctrine is probably triggered where the taxes imposed on the poles and conduits set aside for cable television use are shown to discourage potential cable operators who want to use the poles and conduits.

143. See *supra* notes 98-102 and accompanying text.

144. *Preferred Communications*, 754 F.2d at 1407.

145. *Id.* at 1407-08.

regulation need only be "reasonable in light of the purpose" to be valid.<sup>146</sup>

In 1984, the Supreme Court tried to set the standard for "traditional" forums. In *Members of the City Council of The City of Los Angeles v. Taxpayers for Vincent*,<sup>147</sup> the Court held that utility poles and conduits do not qualify as traditional public forums, even though such poles and conduits ran underneath public streets and ways, because the plaintiff had not demonstrated "the existence of a traditional right of access respecting such items as utility poles for purposes of their communication comparable to that recognized for public streets and parks."<sup>148</sup>

In 1985, the Ninth Circuit distinguished *Preferred Communications* from *Vincent* and held that public utility poles and conduits were either "traditional" or "dedicated 'surplus space'" on public utility structures for use by cable television companies.<sup>149</sup> It ruled that "[p]ublic property, . . . which is neither a traditional nor a designated public forum, [could] still serve as a forum for First Amendment expression if the expression [was] appropriate for the property . . . and [was] not 'incompatible with the normal activity of a particular place at a particular time.'"<sup>150</sup>

Coaxial cables are typically placed along public ways and streets for the express purpose of being used as mediums for either telephone or cable services. Under the rationale set down by the Ninth Circuit in *Preferred Communications*, virtually every utility pole or conduit set aside for cable or telephone use should be able to qualify as a designated public forum.<sup>151</sup> The expression of programs through the cables is appropriate for that kind of property and is compatible with the normal activity of that place.

The Supreme Court agreed with the Ninth Circuit that the circumstances in *Preferred Communications* distinguish the dispute from *Vincent*.<sup>152</sup> Similar to the argument analogizing cable television to the press, the Supreme Court refrained from ruling that the way cable implicates the first amendment warrants the application of the public forum doctrine, at least until the disputed issues of the case are fully

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146. *Id.* at 1408.

147. 466 U.S. 789 (1984).

148. *Id.* at 814.

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

150. *Id.* (quoting *Gannett Satellite Information Network v. Metropolitan Transportation Authority*, 745 F.2d 767, 773 (2d Cir. 1984) (citation omitted) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972))).

151. *Preferred Communications*, 754 F.2d at 1408-09.

152. *Preferred Communications*, 106 S. Ct. at 2034.

developed.<sup>153</sup>

Assuming the Supreme Court were to eventually accept the Ninth Circuit's position that cables can be classified as "traditional" or "designated" public forums,<sup>154</sup> user tax challenges must first ask whether the tax is levied because of the content of the programs they broadcast, or for some other reason irrespective of the programming content. This author would speculate that, in most cases, the tax is levied as compensation for public facilities and services used by the cable operator. The tax is essentially content-neutral. The test for reasonableness under this situation is whether the tax is "narrowly tailored to serve a significant government interest, [leaving] open ample alternative channels of communication."<sup>155</sup> Under this analysis, the tax could well be reasonable.

The tax is reasonable because compensation for the use of public facilities appears to be a significant public interest. Absent a requirement for compensation, users of public facilities would exercise little prudence in the way they utilized the facilities, abusing them to the point that others would be unable to use them because of deterioration.<sup>156</sup> The presence of a compensatory tax either induces the users to be more prudent in the use of the facilities or it at least creates a fund for refurbishing the facilities when they deteriorate. Without incentives for conserving public facilities or mechanisms for maintaining them, the public would be left with inferior public facilities. Thus, to ensure quality public facilities, it is imperative that a system to exact compensation for their use is available. Taxation appears to be the simplest and most narrowly tailored means of achieving this objective. If one does not wish to receive cable because of the tax, an alternative channel of communication—conventional television—is still available, since conventional television broadcasters are not subject to the tax.<sup>157</sup>

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153. *Id.* at 2037.

154. *Preferred Communications*, 754 F.2d 1396, 1407. This petition was adopted by the D.C. Circuit in *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985), in which the validity of franchising regulations governing cable services on a U.S. Air Force base were evaluated.

155. *Preferred Communications*, 754 F.2d at 1407.

156. This argument assumes that people never exercise any self-initiative where providing for the public good is concerned. Generally, with no specific requirement or prospect for a return favor, one will not undertake projects to further the good of the community.

157. Arguably, franchising fees or even public subsidies can be as narrowly tailored as taxation for purposes of ensuring the maintenance of public facilities. As a prerequisite to receiving a cable television license, operators are required to pay a certain fee to the city. A part of this fee could be set aside for the upkeep and repair of the public streets and poles used by cable operators. Alternatively, public funds could subsidize these repairs since cable renders a form of public service with the information and entertainment it

On the other hand, if no compensatory motive can be found for the tax, particularly in those communities where cable operators either repair the streets themselves or lease the use of utility poles or underground ways from public utility companies, then a city's avowed compensatory motive should be regarded with suspicion. Challengers to the tax can alert the courts to the possibility that the city's tax "creates an impermissible risk of covert discrimination based on the content of, or the views expressed in the operator's proposed programming."<sup>158</sup> Since no compensatory basis exists, the tax is probably levied in response to programming content. Consequently, in order to be valid, the tax must be "necessary to serve a compelling state interest . . . narrowly drawn to achieve that end."<sup>159</sup> Assuming that a city adhered to its compensatory justification, the tax would fail for lack of tangible compelling state interest.<sup>160</sup> If, however, the protection of the public domain is asserted as a justification, the content-neutral test is applied. The tax also fails under this judicial test since more direct means exist to achieve the public's protection. Thus, under either a compensatory or a protective justification, user taxes are invalidated under the public forum doctrine.

In the event the Supreme Court eventually holds that cable television warrants the same degree of first amendment protection as the press and speech, the public forum doctrine would be an effective means of invalidating user taxes. A cable operator must first put together a complex financial discussion of how the taxes, alone, impair the public or cable operator's access to the utility poles, or access ways used by cable services. Once past this hurdle, the operator must seek classification as either "traditional" or "designated" public forums for the reasons enumerated by the Ninth Circuit in *Preferred Communications*. The reasonableness standard for these classifications requires a close scrutiny analysis which would probably result in the failure of a non-compensatory tax.

### CONCLUSION

Prior to the Supreme Court's recent decision in *Preferred Communications*, it appeared as if cable television would enjoy the traditional first amendment protections afforded to speech and the press. Both the Ninth and D.C. Circuits have already applied traditional first amend-

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airs. If these means are more narrowly drawn to the purpose of public compensation than are taxes, then the taxes fail this part of the test.

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

159. *Id.* at 1407.

160. There are several recognized compelling state interests. Under these circumstances, a sufficiently compelling state interest would, arguably, be a compensatory tax imposed for a cable operator's actual, uncompensated use of public facilities.

ment safeguards such as the *O'Brien* reasonableness test and public forum doctrine to cases where government regulations were believed to impair cable television's ability to disseminate information. Once cable television is afforded first amendment protection, the *Grosjean* line of cases, where various taxes were invalidated for restricting freedom of the press, suddenly become appropriate precedents for challenges to cable television.

The Supreme Court's decision to reserve judgment on the proper standard of first amendment protection afforded to cable television clearly creates uncertainty in cable television litigation. It appears definite, however, that cable television's activities are indeed analogous to those protected by the first amendment. Whether that implication will elevate cable to the same protected class as the press and speech remains to be seen.

In the event that cable television broadcasting receives heightened constitutional protection, cable operators will have several attractive approaches available for invalidating user taxes, or most any government regulation that can be characterized as restricting the cable medium from being untrammelled.

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