OLD FRANCHISES NEVER DIE? DENYING RENEWAL UNDER THE FIRST AMENDMENT AND THE CABLE ACT

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I. INTRODUCTION

Nearly forty percent of all cable television franchises in the United States will expire in the next three to five years.[1] Most franchises will be renewed without serious controversy.[2] Nonetheless, the ability of cities to require operators to substantially upgrade facilities as a condition of renewal, and the ability of cities to enforce the franchises entered into, will be affected by the answers to the following questions:[3] (1) Can an operator be denied renewal and forced to remove its wires from the public rights-of-way?[4] (2) If so, under what circumstances?

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[1] Wolfe, *The Cable Policy Act and Refranchising: Take Nothing For Granted, Experts Advise*, CABLEVISION, Mar. 17, 1986, at 44. By contrast, initial franchising has been completed in most communities. According to one analyst, by the end of 1985, cable wires passed by about 64.4 million homes—about 75 percent of all United States television households. KAGAN, CABLE TV FRANCHISING 8 (June 25, 1986).

[2] *Options for Cable Legislation: Hearings on H.R. 4103, H.R. 4229 and H.R. 4299 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98 Cong., 1st Sess. 841 (1983) (statement of John J. Gunther, Executive Director U.S. Conference of Mayors) [hereinafter *Cable Options Hearings*]. For one comparision of the number of renewals versus denials, see CABLE TELEVISION INFORMATION CENTER, THE CABLE FRANCHISING ACTIVITY REPORTER (A. Ramirez ed. 1987). The Jan./Feb. 1987 issue listed 57 cities which had completed renewal or revocation proceedings between February 1986 and February 1987. Franchises had been renewed in 45, or 79 percent, of those cities. Franchises were about to expire and franchises had been revoked or renewed in eight cities. In four cities listed, the franchise had been revoked for reasons apparently unrelated to renewal issues.

[3] *Cable Options Hearings*, *supra* note 2, at 841-42 (statement of John J. Gunther). Mr. Gunther testified that unless a franchising authority can deny renewal, it will be unable to assure that the cable operator will provide an adequate system and, additionally, will have difficulty enforcing the franchise during its term. *Id.*; *cf. id.* at 77-78 (Owens & Greenhalgh *Research Report*) (arguing that competition for franchise can be effective if winner is required to leap promises and if bids are evaluated in terms of consumer welfare effects).

[4] For convenience, the terms "franchising authority," "city," and "local government" are used interchangably throughout this Article. However, a "franchising authority" could be a county or a state. In some states, cities do not have franchising authority. For example, the state has had preeminent franchising responsibility in Alaska, Connecticut, Rhode Island, Hawaii, and Vermont. ALASKA STAT. § 42.05 (1983); CONN. GEN. STAT. § 16-330-333g (Supp. 1987); HAWAII REV. STAT. § 440G (1985); R.I. GEN. LAWS § 39-19 (1977); VT. STAT. ANN. 30 §§ 501-08 (1986).

Part II of this Article will examine one reason why a community may decide to establish a franchising process and concludes that the franchising process protects substantial societal interests. In Parts III and IV respectively, this Article will examine the first amendment and the Cable Communications Policy Act of 1984 ("Cable Act"),[5] two sources that courts will look to for answers to the renewal questions posed above. In Part III, this Article attempts to balance the first amendment interests of the cable operator and the competing interests (including first amendment interests) of the public in terms of the values underlying the public forum doctrine. This Article concludes that, consistent with those values, cities can deny renewal to incumbent operators without running afoul of the first amendment. In Part IV, this Article argues that the protections afforded to the operators in the renewal sections of the Cable Act are primarily procedural and, while significant, also need not stand in the way of replacement of one operator with another. As a result, cities should have substantial authority to shape and enforce franchises.

II. A Rationale for Franchising and Renewals

The initial and renewal franchising processes are not radically different in purpose.[6] Cable operators, at the time of renewal and during the initial franchising process, seek the right to maintain permanent fixtures, including wires and other appurtenances, in the public rights-of-way.[7] The rights-of-way which the cable companies desire to use can support a unique community

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[5] Cable Act, 47 U.S.C. §§ 521-559 (Supp. III 1985). The Cable Act establishes a uniform, optional federal renewal procedure. *See infra* notes 143-45 and accompanying text.

[6] *See, e.g.*, Rice, *Renewals and Refranchising: Municipal Options and Procedures*, in Cable TV Renewals & Refranchising 4 (J. Rice ed. 1983) [hereinafter Cable TV Renewals]. That is, the goals of a city renewing or initially franchising *now* are not very different. However, the goals of the city considering renewal now are likely to be very different from the goals that the city had 15-20 years before when the franchise was originally issued. This is due in part to the significant changes in cable technology and changes in the perception of cable as a community communications medium. *Id.*; *see also* H.R. Rep. No. 934, 98th Cong., 2d Sess. 20-23 *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655 [hereinafter House Report citing to U.S. Code Cong. & Admin. News].

[7] *Cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428-30 (1982) (cable wires installed on apartment building "permanently occupy" property; holding based in part on analogy to placement of telegraph wires on public property). Thus, through the franchise, operators are typically granted the right to place coaxial cable above or below all public ways and places in a city, including streets, alleys, highways, and tunnels and any other property with respect to which the city acquires a compatible easement. C. Ferris, F. Lloyd, T. Casey, Cable Television Law, III-2 app. (1986); *see also* Cable Act § 621(a)(2), 47 U.S.C. § 541 (Supp. III 1985).

communications resource. Cable can offer "an abundance of channels" and has the potential to present "many tongues speaking many voices."[8] Cable can provide important "communications links for business, government offices, and schools,"[9] and can serve a critical role as part of local communications networks.[10] There are, therefore, important social and governmental communicative interests contained in this public resource. Through initial or renewal franchising, a franchising authority may attempt to vindicate these public interests by requesting proposals for construction of a cable system and requiring applicants to: provide service to all residents;[11] construct a system which has the channel capacity and technical capability to serve the needs and interests of the public;[12] and provide adequate access to others who wish to speak via the cable medium.[13] For example, many franchising authorities require operators to set aside "access" channels. These channels allow "groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas."[14] The result of the franchising process is a type of social contract—franchise—under which a cable operator is delegated the function of providing certain communication facilities, equipment, and services. In return for performing this function, the operator is given the right to use public rights-of-way[15] for a period of years[16] to achieve private gain through sale of cable services to subscribers.[17]

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8 HOUSE REPORT, *supra* note 6, at 4656.

9 *Id.* at 4664.

10 I. POOL, TECHNOLOGIES OF FREEDOM 173 (1983). Whatever alternative means of communication exist "nothing else can offer the equivalent of the multiservice broadband cable running past every house." *Id.*; *see also* HOUSE REPORT, *supra* note 6, at 4657-60.

11 Cable Act § 621(a)(3), 47 U.S.C. § 541(a)(3) (Supp. III 1985); HOUSE REPORT, *supra* note 6, at 4696. The renewal franchise area may contain new, rural, or low income areas which were not built during the initial franchise term. CABLE TV RENEWALS, *supra* note 6, at 8.

12 *See, e.g.*, Cable Act § 624(b)(1), 47 U.S.C. § 544 (Supp. III 1985); HOUSE REPORT, *supra* note 6, at 4705 (authorizing communities to require operators to provide specified facilities and equipment, including adequate channel capacity). The "public" includes listeners, speakers, and other users who purchase or provide nonspeech services over cable.

13 *See, e.g.*, Cable Act § 611, 47 U.S.C. § 531 (Supp. III 1985); HOUSE REPORT, *supra* note 6, at 4668-73 (access channels are not under editorial control of the operator or the government, and are open to all members of the community who wish to speak via cable).

14 HOUSE REPORT, *supra* note 6, at 4667.

15 *Id.* at 4658-61.

16 *Id.* at 4662.

17 12 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 34.01, at 8 (3d ed. 1986) [hereinafter MCQUILLAN] (Franchises are now regarded "not so much as privi-

Cities have asserted that, given cable's characteristics, such a franchise is necessary to prevent public property from being lost to purely private use.[18] Cities have argued that cable uses a physically and economically scarce resource, so that not all potential speakers or uses can be accommodated.[19] Indeed, it has been argued that cable is a natural monopoly[20] so that over the long term only one cable system will serve any particular franchise area.[21] Competing systems are not likely to be built.[22] Even if multiple systems are built, cities argue that competition is likely to be limited and short-term, and ultimately may prevent the surviving operator from complying with the franchise. Therefore, cities have argued that they should be permitted to choose the best among competing applicants for a franchise, initially and at the time of renewal, replacing meaningless competition on the poles with meaningful competition through the franchise process.[23] Even if some competition is possible (and should be per-

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leges, but rather as functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control.").

[18] Public property can be converted to private use in several ways. Broadly speaking, members of the public share rights in common to use the public rights-of-way. Problems may arise whenever one user is granted a right which cannot be exercised in common by all. Placement of permanent structures (such as wires) on the public rights of way can deprive the public of the common use in favor of a special and exclusive use exercised by one user. St. Louis v. Western Union Tel. Co., 148 U.S. 92, 99-102 (1893). Similarly, the members of the public share an interest in ensuring that the public rights-of-way are regulated and developed in a manner consistent with their public character. Hague v. CIO, 307 U.S. 496, 515-16 (1939). Placement of permanent structures in the rights of way may inhibit development of public resources or make it physically or economically impossible to provide public services. Consistent with the notion that the public rights-of-way are held as a public trust, it has been held that cities have a right to condition special uses of the streets and further, cannot generally dedicate a portion of a public highway to private purposes:

> The municipal corporation holds its streets and public ways in trust for public use and is, therefore, without authority to grant a permit for a private purpose . . . unless the power to grant such a franchise has been expressly conferred by the legislature.

12 McQUILLAN, *supra* note 17, § 34.17 at 71-72.

[19] See argument presented in Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1402 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

[20] A natural monopoly exists where the market "cannot efficiently support more than one firm." S. BREYER, REGULATION AND ITS REFORM 15 (1982).

[21] *See* Brief for Petitioners at 27-30, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (No. 85-390).

[22] *See infra* notes 23-26 and accompanying text.

[23] *See* Central Telecommunications, Inc. v. TCI Cablevision, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1358 (1987); Geller & Lampert, *Cable, Content Regulation and the First Amendment*, 32 CATH. U.L. REV. 603, 625-26, *reprinted in Cable Options Hearing*, *supra* note 2, at 446, 472-73; *see also* Moohakis, *Range Wars*, CABLE TELEVISION BUSINESS, Sept. 15, 1985, at 23 [hereinafter *Range Wars*]. Cities have also argued that limitations on the number of franchises is justified because construction of multiple cable systems would place significant additional burdens on public rights-of-way (and ultimately result in a decrease, rather than increase, in the diversity of speech available in the community). One court, however, has found that the alleged

mitted), since only a handful of operators at most can have access to the rights-of-way, cities argue that all franchises issued should be conditioned to protect the interests of all citizens in access to and development of the public rights-of-way.[24]

There is substantial support for the arguments made by the cities. Cities can point to a number of analyses which conclude that cable is a natural monopoly.[25] At the time of renewal, the

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differences between the burdens caused by construction on one system and more than one system are not significant. Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986). However, the matter is hardly resolved and there is some evidence that multiple franchising does create significant additional burdens on the rights-of- way. *See* Amicus Curiae Brief of Wisconsin Bell at 7-8, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (No. 85-390) [hereinafter Amicus Curiae Brief of Wisconsin Bell]. However, the existence of additional burdens at the time of construction is not key to the argument raised here.

[24] There is an interest in assuring that public resources are available to many users, and a separate (although not entirely distinct) interest in developing the potential of a public resource.

Even some opponents of franchising appear to concede that the franchising process results in construction of cable systems different than the cable systems which would be constructed if government regulation vanished. *See* Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335, 1384-85 (1987). Services and facilities (it is argued) should be determined by the marketplace; the marketplace will force the operator to provide all programming and services for which consumers are willing to pay, and will also result in the operator providing appropriate access to third parties. *Id.*; Note, *Access to Cable, Natural Monopoly and the First Amendment*, 86 COLUM. L. REV. 1663, 1680 (1987). The argument is factually suspect. Congress found that the marketplace cannot be relied upon to assure a diversity of viewpoints. HOUSE REPORT, *supra* note 6, at 4687. Further, the argument seems based on the factually incorrect assumption that operators charge the price the market will bear for each individual service. In fact, operators tie products together into packages, or tiers of service, so that the consumer does not select only those services desired, and hence the cable marketplace does not provide a clear measure of the intensity of viewer preferences.

More importantly, from the franchising authority's perspective, the marketplace approach allows one or a handful of operators to decide who is economically worthy to use public rights-of-way to speak via cable. Media theorists have pointed out that those who are likely to be deemed economically unworthy under such a regime are speakers who have views which are deemed unpopular and therefore antithetical to maximizing revenues. *See* Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1660-63 (1967); *see also* Note, *supra*, at 1683 (operator will select programming which generates goodwill). In short, government has a legitimate reason to fear that allowing private economic motivation to dictate use of public property will result in exclusion of speakers who have traditionally been deprived of access to media, and may also substantially limit the use of the public rights-of-way as a forum for controversial and substantial debate on public issues. *See* HOUSE REPORT, *supra* note 6, at 4667.

[25] *See, e.g.*, Noam, *Local Distribution Monopolies in Cable Television and Telephone Service: The Scope for Competition* in TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 351 (E. Noam ed. 1983). TOUCHE, ROSS & CO., FINANCIAL AND ECONOMIC ANALYSIS OF THE CABLE TELEVISION PERMIT POLICY OF THE CITY AND COUNTY OF DENVER (Dec. 28, 1983). An industry-sponsored study submitted to Congress during its consideration of legislation which ultimately became the Cable Act concluded that head-to-head competition at best was likely to be "fragile." *Cable Options Hearings*, *supra* note 2, at 111 (Owen and Greenhalgh). *See also Central Telecommunications*, 800 F.2d at 717 (finding cable to be a natural monopoly in Jefferson City, Mo.). MULTICHANNEL NEWS recently reported that a "major study" by Malarkey Taylor Associates concluded that in order for two operators to make a profit where each wires all portions of a city, there must be about 110 houses

economic characteristics of cable are particularly significant. A new operator which seeks to displace the incumbent faces substantial obstacles.[26] Indeed, unless the incumbent operator's request for renewal can be denied, there is good reason to suppose that no competition will appear.[27]

Similarly, there is evidence that the rights-of-way used by cable systems constitute a physically scarce resource. Wisconsin Bell has estimated that approximately twenty percent of the utility poles in use recently are thirty feet tall or under, and therefore may only be capable of supporting one cable system.[28] In addition, even where the poles are tall enough to support more than one cable system, substantial "make-ready" work may be required to rearrange existing wires to accommodate a new entrant.[29] While it may be possible to make space available for a

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per mile, of which 90 houses per mile must be in an area with very poor broadcast reception. Freeman, *Study Finds Profits Elusive When Two Systems Overbuild*, MULTICHANNEL NEWS, April 13, 1987, at 17. One of the research vice presidents for Malarkey Taylor concluded, "[m]y feeling is that at best, subscribers [in this situation] benefit only in the short term and that can be a very short time." *Id. But see* Pacific West Cable Co. v. City of Sacramento, No. S-83-1034 slip op. (E.D. Cal. Aug. 13, 1987). In *Pacific West Cable*, the jury was asked the following: "Is 'head to head' competition among cable television systems unlikely to occur and endure in the Sacramento market?" Special Verdict No. 12(a). The jury answered, "No." *Id.* However, the jury analysis was not limited to whether competition could occur in a substantial part of the market. In ruling on an objection, the court stated that it was "interested in knowing whether the jury thinks that competition is possible anywhere in the market." Ruling on Objections at 2. Hence, the jury verdict may only affirm that "cream-skimming" can occur in Sacramento. It does not mean most citizens of Sacramento will have a long-term choice between two or more cable systems. *See also* Hazlett, *Private Monopoly and the Public Interest: An Economic Analysis of the Cable Television Franchise*, 134 U. PA. L. REV. 1335 (1987). Hazlett appears to conclude that cable television is not a natural monopoly, although the "capital salvageability" test he suggests should be applied to determine whether cable is a natural monopoly, is not applied in reaching this conclusion. *Id.* at 1335-36, 1364-75.

[26] There is not and has not been much head-to-head competition in the cable industry. In 1981, such "overbuilds" existed in only 0.24 percent of the 4,200 franchises in the country. Moohakis, *Co-Franchising: Boon or Bane?*, TVC, Dec. 1, 1981, at 68. Any competition between private companies that does not appear is likely to be short-term and destructive, leaving the community with one cable system which may not be able to provide adequate services. *See* K. WEBB, THE ECONOMICS OF CABLE TELEVISION 41 (1983) (referring to 20 cities where overbuild competition has not lasted); *Cable Options Hearings*, *supra* note 2, at 396-97 (statement of Samuel Simon) (overbuilding estimated to increase cable system construction costs by over $500,000 in Paramus, N.J. and competing systems ultimately merged).

[27] *Central Telecommunications*, 610 F. Supp. at 900 (in a natural monopoly, advantage of the incumbent is such that "no one would dare compete"). *See also Cable Options Hearings*, *supra* note 2, at 89, 111 (Owens and Greenhalgh *Research Report*) (suggesting incumbent will have substantial incentive and ability to cut prices to fend off competitors).

[28] Amicus Curiae Brief of Wisconsin Bell, *supra* note 23, at 7-8. *But cf. Pacific West Cable*, slip op. at 12 (reciting jury finding that capacity of public rights of way and utility easements in Sacramento not limited to any significant degree).

[29] TOUCHE, ROSS AND CO., *supra* note 25, at 5; *see also* Brief for Respondent, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (No. 85-390).

second operator,[30] the fact remains that the second operator may be required to bear costs it would not have had to incur if it had access to the space occupied by the incumbent.[31] The incumbent's continued occupation of the space can thus be a barrier to entry by others.

As a result, granting unregulated franchises to all who request them is not a neutral act. As a practical matter, the grant of a franchise to some, effectively excludes others who wish to speak via cable. The question is, therefore, whether, notwithstanding this exclusionary effect, the first amendment or federal law requires a community to grant a franchise and, ultimately, perpetually renew that franchise if an operator seeks it.

III. The First Amendment Does Not Compel Renewal

A. *The Courts: No Clear Guidance*

It is now well settled that franchising implicates the first amendment interests of cable operators.[32] However, the fact that operators' speech interests are implicated does not mean that franchising violates the first amendment,[33] nor does it mean that operators' interests are the only interests to be considered in evaluating the constitutionality of franchising. Rather, the operators' interests must be balanced against competing societal interests.[34] These competing interests include: the general governmental interest in preserving the property under its control for the uses to which it is lawfully dedicated;[35] the speech interests of others who desire access to the medium;[36] the interests of listeners;[37] and the interests of nonspeakers.[38] "[T]he people as a whole retain their interest in free speech [on public

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30 Touche, Ross and Co., *supra* note 25, at 5-6. The Touche, Ross study concluded that while physical scarcity is an obstacle to competition among cable television operators, it is not ultimately a decisive one in most areas since space can be made available. However, the study also concluded that space limitations "can cause the need for significant pole modifications." *Id.*

31 *Id.*; *see also* Amicus Curiae Brief of Wisconsin Bell, *supra* note 23, at 12 (utility ratepayers bear the cost of larger poles on cross bars erected to accomodate cable operators if the operators fail and can no longer pay the charges contemplated for pole attachment).

32 City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034, 2037 (1986).

33 City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

34 *Preferred*, 106 S. Ct. at 2038.

35 Greer v. Spock, 424 U.S. 828, 826 (1976).

36 Cox v. New Hampshire, 312 U.S. 569 (1941) (regulation required to avoid conflicts between competing parades upheld).

37 Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) (rights of broadcasters balanced against rights of listeners in scarce public resource).

38 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 296 (1984) (rights

property] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."[39]

Courts have analyzed cable's first amendment rights in a variety of ways, and their approach to franchising issues are still evolving. The Eighth Circuit, in *Midwest Video Corp. v. FCC*,[40] considered the constitutionality of the Federal Communications Commission ("FCC") rules which required cable operators to set aside channels for public access. In *Midwest Video*, the Eighth Circuit found nothing on the record to indicate a constitutional distinction between cable and newspapers. Following the analogy, the court suggested that, because newspapers could not be compelled to provide access, the federal government probably could not compel cable operators to provide access either.[41] However, in 1986, the Eighth Circuit heard an appeal of a case which involved, in part, a challenge to local authority to limit the number of franchises issued. In contrast to its earlier decision, the Eighth Circuit's decision in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*[42] noted "that the cable medium may be distinguishable from the newspaper medium and that more government regulation of the cable medium may be permissible because cable requires use of public ways."[43] The Eighth Circuit concluded that because of the natural monopoly characteristics of cable, cities could grant *de facto* exclusive franchises to a single cable television operator.[44]

Similarly, on two appeals from FCC orders, the D.C. Circuit has suggested that there is little to distinguish cable from newspapers.[45] However, the only local franchising case to recently come before the D.C. Circuit is *Tele-Communications of Key West, Inc. v. United States*.[46] In *Tele-Communications*, the court did not reiterate its comparison of cable to newspapers. Instead, the D.C. Circuit warned the district court to take care in adapting historic

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of speakers to pitch tents in parks balanced against right of millions to "see and enjoy them [the parks] by their presence").

39 *Red Lion*, 395 U.S. at 390.

40 571 F.2d 1025 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

41 *Midwest Video*, 571 F.2d at 1056.

42 800 F.2d 711 (8th Cir. 1986), *aff'g*, 610 F. Supp. 891 (W.D. Mo. 1985), *cert. denied*, 107 S. Ct. 1358 (1987).

43 *Id.* at 714.

44 *Id.* at 717.

45 *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1449 (D.C. Cir. 1985), *cert. denied sub nom.* National Assoc. of Broadcasters v. Quincy Cable TV, Inc., 106 S. Ct. 2889 (1986); Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977), *cert. denied sub nom.* American Broadcasting Cos. v. Home Box Office, Inc., 434 U.S. 829 (1977).

46 757 F.2d 1330 (D.C. Cir. 1985).

first amendment jurisprudence "to the new context."[47] This result suggests that the D.C. Circuit may not be willing to transfer analogies developed in FCC cases to local franchising cases, at least not without further consideration.

Most circuits which have considered the question appear to have reached the conclusion that the characteristics of cable may justify the exercise of substantial regulatory control over the medium (including through the selection of the best among competing applicants for a franchise).[48] However, at least where initial local franchising and renewal are concerned,[49] the courts have not yet agreed how the demands made by the operator are to be balanced against the collective interest of the public in public resources. Indeed, some courts have even failed to recognize the need for balancing altogether.[50] The Supreme Court's decision

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47 *Id.* at 1339.

48 *See id.* at 1338-39; Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) (*Omega* and *Community Communications* suggest that franchising *may* be justified by the characteristics of cable television.); Central Telecommunications, Inc. v. TCI Cablevision, 610 F. Supp. 891, 899 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1358 (1987); *see also* Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) (district court upholding right of state to impose access obligations based, *inter alia*, on cable's natural monopoly characteristics); *compare* Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986) *with* Pacific West Cable Co. v. City of Sacramento, 798 F.2d 353, 355 (9th Cir. 1986) ("Nothing in our earlier decision . . . requires that a municipality open its doors to all cable-television comers, regardless of . . . threat to the ultimate capacity of the system."); *Pacific West Cable*, 798 F.2d at 355 (policy of limiting number of franchises issued does not pass constitutional muster in light of jury findings that there are no physical or economic reasons to limit the number of franchises issued in Sacramento; also, government interests in promoting universal service, diversity, and development of technically and financially sound cable systems, while important, do not justify limiting the number of franchises issued since the interests can be promoted by uniformly imposing access, universal service, technical, and financial requirements on all franchisees); *but see* Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465 (N.D. Cal. 1986) (city has no basis for limiting number of franchises on basis of natural characteristics of cable, or based on alleged burdens that multiple cables put on rights-of-way); Group W Cable, Inc. v. City of Santa Cruz, No. C-84-7546, slip op. (N.D. Cal. Sept. 9, 1987) (finding access, universal service, and technical requirements unconstitutional and franchise fee requirements constitutional, so long as fee does not exceed fair market value of property; also finding limits on number of franchises issued unconstitutional).

49 Many of the most publicized cable cases, including *Preferred*, involve initial franchising. However, while the factual focus of the cases may appear to suggest that the issue involves whether franchising authorities must allow interested cable operators to compete for the video hearts and minds of the subscribers, the industry views the cases differently. Thus, CABLEVISION reported that, "Michael Schooler, associate general counsel of the National Cable Television Association, said that the NCTA views *Preferred* 'not as a case about overbuilds, but about renewals.' " Wolfe, *supra* note 1, at 49.

50 *Century Federal*, 648 F. Supp. at 1553, provides an interesting example. In 1986, the Court of Appeals for the Fourth District in California had found that cable's use of rights-of-way was different from the use accorded to others. *See* Cox Cable San Diego, Inc. v. San Diego County, 185 Cal. App. 3d 368, 229 Cal. Rptr. 839 (Cal. Ct. App. 1986).

in *City of Los Angeles v. Preferred Communications, Inc.*[51] provides little guidance for lower courts. The Court declined to decide the substantive franchising issues raised by the parties, did not explain how it believed the first amendment rights of cable operators should be balanced against societal interests and left open the question of whether existing standards applicable to other media could be applied to cable.[52]

This Article, relying on the public forum doctrine and the "equality" principle which underlies that doctrine, examines one possible approach to balancing the conflicting interests of the public and the cable operator at the time of renewal. As suggested by the D.C. Circuit, there may be difficulties in using the public forum doctrine to analyze cable franchising.[53] Nonetheless, public forum analysis does provide a useful method consid-

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The California court found "[cable's] rights of use . . . are exclusive of anyone else's similar rights." *Cox Cable*, 229 Cal. Rptr. at 848. It concluded that the "constant presence aspect" of cable's occupation distinguished its use of rights-of-way from "the general public's use." *Id.* In *Century Federal*, by contrast, the district court never considered the nature of the right of access to public property sought by cable companies and the effect of that access on the use of the property by others. As a result, it never came to grips with the issue of whether the special rights sought, or the effect of the exercise of those rights on others, justified regulation.

[51] 476 U.S. 488 (1986).

[52] *Preferred* involved the question of whether a cable operator's first amendment claim should have been dismissed in the face of allegations that Los Angeles could physically and economically support more than one cable system. *Preferred*, 106 S. Ct. at 2035-37. In ruling that the claim should not be dismissed, the Ninth Circuit discussed cable's first amendment rights in very broad terms. The Ninth Circuit "held that, taking the allegations in the complaint as true, the City violated the First Amendment by refusing to issue a franchise to more than one cable television company when there was sufficient excess physical and economic capacity to accomodate more than one." *Id.* at 2036 (citations omitted). The Court affirmed the lower court's determination that the complaint should not have been dismissed, but refused to adopt the Ninth Circuit's first amendment analysis. *Id.* On the merits of the first amendment issues raised below, the Court concluded that franchising implicated a cable operator's first amendment rights, but stated that those rights had to be "balanced against competing societal interests." *Id.* at 2038. The Court then concluded that it would not be "desirable to express any more detailed views" on the resolution of the first amendment issues. *Id.* Justice Blackmun, concurring, joined in the Court's opinion on the understanding that it left open the proper standard for judging first amendment challenges to cable franchising. *Id.* "[T]he Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or . . . require a new analysis." *Id.* (Blackmun, J., concurring).

[53] Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1339 n.4 (D.C. Cir. 1985) (public forum jurisprudence may not be appropriate for analysis of relationship between cable and franchising since factual assumptions underlying public forum doctrine do not apply to cable). Many, including the author, have noted that public forum analysis may be difficult or inappropriate to apply to cable because, *inter alia*, cable does not "speak" from the public property it uses. The cable occupying the space in public rights-of-way is a conduit, not speech itself. *See, e.g.*, Amici Curiae Brief for the National Federation of Local Cable Programmers at 22-27, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (No. 85-390); Amicus Curiae Brief for the Department of Justice, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (No. 85-390).

ering the collective and individual interests in use of public property.[54] As a number of commentators have demonstrated,[55] franchising can also be analyzed, and justified, in terms of general first amendment principles, or by applying traditional first amendment tests for considering the constitutionality of content-neutral regulations that incidentally affect speech.[56]

B. *The Public Forum Doctrine: A Model for Public Access, Not Private Monopolization*

1. Franchising is Justified Under a Straightforward Application of the Public Forum Doctrine

The argument that denying renewal violates the first amendment rests on the claim that every operator has a right to place wires in the public rights-of-way, absent some showing that there are more applicants than spaces available. That is, the city cannot grant franchises to some, while denying access to other, similarly situated, cable operators.[57] It is argued therefore, that an operator is guaranteed renewal, at least in those circumstances when it offers to meet the legitimate conditions established by the franchising authority.[58]

Under the public forum doctrine, the existence of a right of access to public property and the standard by which limitations

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[54] The Supreme Court has adopted public forum analysis as a means of balancing government interests against the interests of those seeking access to property. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985). *But see* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) (no mention of the public forum doctrine in dicussing the relationship of franchising to the first amendment).

[55] *See, e.g.*, I. POOL, TECHNOLOGIES OF FREEDOM (1983); Geller and Lampert, *supra* note 23; Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM/ENT 1 (1981); Miller and Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85 (1981); Nadel, *Cablespeech For Whom?* 4 CARDOZO ARTS & ENT. L.J. 51 (1985). This list is not exhaustive for arguments against franchising which go beyond the minimum required to assure safe and orderly installation and operation of cable systems. Knox, *Cable Franchising and the First Amendment: Does the Franchising Process Contravene First Amendment Rights?* 36 FED. COMM. L.J. 317 (1984); Saylor, *Municipal Ripoff: The Unconstitutionality of Cable Television Franchise Fees and Access Support Payments*, 35 CATH. U.L. REV. 671 (1986); G. SHAPIRO, P. KURLAND AND J. MERCURIO, 'CABLESPEECH': THE CASE FOR FIRST AMENDMENT PROTECTION (1983).

[56] *See* United States v. O'Brien, 391 U.S. 367 (1968). Some courts have recently considered franchising questions have not analyzed the first amendment issues in terms of the public forum doctrine, but have applied an *O'Brien* test. *See* Pacific West Cable Co. v. City of Sacramento, No. S-83-1034, slip op. at 22 (E.D. Cal. Aug. 13, 1987); Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465, 1475 (N.D. Cal. 1986).

[57] This argument is set forth in the Ninth Circuit's decision in Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1409 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986).

[58] There is dispute as to what those conditions may be. In *Preferred*, for example, Preferred Communications challenged the constitutionality of franchise conditions beyond the minimum required for public safety. *Id.* at 1406.

on such a right must be evaluated differ depending on the character of the property at issue and the use of the property contemplated.[59] The Supreme Court has identified three basic types of public property: the traditional public forum, the limited public forum, and the nonpublic forum.[60]

If the property used by cable systems is a nonpublic forum, government can limit access based on subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral. The clearest statement of this principle appears in the Court's recent decision in *Cornelius v. NAACP Legal Defense and Education Fund*.[61] *Cornelius* involved a challenge to the Combined Federal Campaign ("CFC"). The CFC provided a mechanism through which nonprofit groups were permitted access to the federal workplace to raise funds. The NAACP Legal Defense Fund was excluded from the campaign in part because the Legal Defense Fund was considered too controversial. It was argued that inclusion of advocacy groups such as the Legal Defense Fund would result in, *inter alia*, fewer total contributions to the CFC.[62] The Court clearly recognized that the exclusion of the Legal Defense Fund was based on the identity and nature of the activities of that nonprofit organization.[63] It also recognized that charitable solicitation was protected by the first amendment.[64] The Court nonetheless concluded that, because the CFC was a nonpublic forum, groups could be excluded on the basis of identity, or on the basis of the content of their speech, so long as the decision to exclude

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59 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

60 *Id.* at 45-46. A public forum is a place which by long tradition has been devoted to speech and assembly. In the quintessential public forum, government may not prohibit all communicative activity, but can enforce narrowly tailored content-neutral regulation of the time, place and manner of expression which leave open ample alternative channels of communication. *Id.* A limited public forum may be property which the state has opened to the public as a place for expressive activity. The property need not be held open to the public indefinitely, but if open to the public generally, the same rules apply as in a traditional public forum. *Id.* Government also has the right to establish a limited public forum which is open to certain classes of speakers or for discussion of certain topics within those classes. While the facility is operated as a limited public forum, access must be provided on a nondiscriminatory basis to entities of a similar character. Calash v. City of Bridgeport, 788 F.2d 80, 83-84 (2d Cir. 1986). The nonpublic forum is governed by different standards: the state may discriminate on the basis of subject matter and speaker identity so long as the regulation on speech is reasonable in light of the purpose served by the forum and is not an effort to suppress expression based on the viewpoint of a speaker. *Perry*, 460 U.S. at 46; *see also* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 806 (1985).

61 473 U.S. at 788 (1985).

62 *Id.* at 808-12.

63 *Id.*

64 *Id.* at 797.

had a reasonable basis,[65] and was not based on hostility to the speaker's views.[66] The Court found that excluding potentially controversial nonprofit groups was a reasonable way to further the government's goal of optimizing the effectiveness of the CFC.[67]

As illustrated in Part II, governments have substantially more than a mere reasonable basis for concluding that a policy under which the franchising authority chooses one among competing cable applicants will further important goals (including optimizing development of the rights-of-way). It follows that, under *Cornelius*, if the property used by operators is a nonpublic forum, an incumbent denied renewal in competition for the franchise can be required to remove its wires from the public rights-of-way.

There is every reason to suppose that the property used by cable operators is a nonpublic forum, as that term is used by the Supreme Court. The Court in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*[68] suggested that utility poles are neither traditional public fora nor public fora by designation.[69] Moreover, *Cornelius* holds that the key inquiry in determining the nature of the public property is whether government has, through policy or practice, intended to open the property to the public.[70] Placing communications wires on public property has long been considered a special use of that property, one distinct from the use made by the ordinary passerby, motorist, or speaker.[71] Other users of the property to which cable companies

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65 "The Government's decision . . . need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Id.* at 808 (emphasis in orignal).

66 *Id.*

67 *Id.* at 810-12.

68 466 U.S. 789 (1984).

69 *Taxpayers for Vincent*, 466 U.S. at 814-15. In Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986), the Ninth Circuit argued that while utility poles did not constitute a traditional public forum, they were a quasi-public forum. The Ninth Circuit had two reasons for reaching this conclusion. First, it suggested that, even if the poles were a nonpublic forum, the poles could serve as a forum for speech by cable because the use of the poles by cable was compatible with the normal activity of the place. *Id.* at 1408. Second, the court concluded that by granting access to one operator, the city had opened the poles to all cable operators who were willing to abide by criteria established by the city. *Id.* at 1409. However, *Cornelius* rejects the "compatibility test" applied by the Ninth Circuit and also makes it clear that permitting access to some speakers is not enough to turn a nonpublic forum into a limited or traditional public forum in the face of evidence that government did not intend to create a public forum by permitting such access. *Cornelius*, 473 U.S. at 793-804.

70 *Cornelius*, 473 U.S. at 801-02.

71 St. Louis v. Western Union Tel. Co., 148 U.S. 92, 99 (1893) (installation of telegraph poles and wires "dispossesses the general public as if it had destroyed that amount of ground.").

seek access — the telephone and electric companies — have been granted the right to use the property subject to stringent regulation, including entry regulation.[72] The very fact that local governments have generally required franchises prior to cable operation strongly indicates that franchising authorities intend to condition and limit access to the property used by the cable system.[73] Indeed, the modern tendency is to regard a franchise as a delegation of a governmental function to private entities in the furtherance of the public welfare.[74]

An unlimited and continuing right of access is antithetical to the traditional concept of a franchise. It has been held that the grant of a franchise does not give the franchisee any property interest in the public property used.[75] The franchise terminates upon expiration,[76] and the franchisee can be required to remove its equipment from public rights-of-way.[77] There is no reason to suppose that, in issuing cable franchises, the government meant to depart from this tradition.[78] Under a straightforward *Cornelius* test, the property is therefore a nonpublic forum and restrictions on entry should be upheld as constitutional.

2. Beyond Labels: Renewals and Public Forum Principles

a. Limited places and limited voices

The foregoing should not be read to suggest that renewal cannot be constitutionally denied if the rights-of-way used by cable operators are labelled as a public forum or a limited public forum. The fundamental values underlying the public forum doctrine suggest that franchising should be found constitutional, no matter how the property is described. In the typical case, a finding that property to which access is sought is a public forum leads to the conclusion that government may not allow one

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72 POOL, *supra* note 10, at 102-07.

73 12 MCQUILLAN, *supra* note 17, § 34.03, at 10 (3d ed. 1986); *see* Borough of Scottdale v. National Cable Television Corp., 476 Pa. 59, 381 A.2d 859, 862 (1977).

74 1 C. FERRIS, F. LLOYD, T. CASEY, CABLE TELEVISION LAW, *supra* note 7, § 13.13. *See also* 12 MCQUILLAN, *supra* note 17, § 34.01, at 7.

75 *See, e.g.*, State of Idaho *ex rel* Rich v. Idaho Power Co., 81 Idaho 487, 498, 346 P.2d 596, 601 (1959).

76 12 MCQUILLAN, *supra* note 17, § 34.50, at 168. After a franchise to use the city streets expires, no further obligations between the city and the grantee can be implied from the franchise. Detroit United Ry. v. City of Detroit, 229 U.S. 39 (1913), *aff'g*, 172 Mich. 136, 137 N.W. 645 (1912). 12 MCQUILLAN, *supra* note 17, § 34.51, at 171.

77 *Detroit United Ry.*, 229 U.S. at 45-46.

78 *See* Cable Act §§ 601, 621, 47 U.S.C. §§ 521, 541 (1982 & Supp. III 1985). These sections contemplate the cities may decide to insure "one or more" franchises and will condition operation (and renewal) on the operator's willingness to meet the community's cable-related needs and interests.

group to use the forum while denying access to others who wish to use the property for similar purposes.[79] However, this basic rule of the public forum is predicated on the assumption that the property is available to a multitude of users for a multitude of purposes.[80] As Professor Kalven notes,[81] it is assumed that the forum can accomodate the interests of all who seek to use it.[82] Far from being the private property of a single speaker, traditional public fora are places for debate and for "communicating thoughts between citizens, and discussing public questions."[83] To paraphrase one commentator, it is because the streets and parks are readily available that guaranteeing access to them (and limiting government authority to deny access) virtually assures that willing speakers and listeners always will be able to exchange ideas.[84] Where public property can only accommodate a few users, application of a rule limiting government authority to condition access makes far less sense. Rather than leading to give and take among many, application of the rule provides a special speech advantage to the few who take over the public property. Therefore, it is probably inappropriate to classify property whose use is effectively limited to the few as a public forum, even if the property is suitable for speech, and it is certainly inappropriate to assume that traditional rules for a public forum must apply to such property. The best example may be the airwaves, which are used for speech by broadcasters and others. The air waves are not considered a public forum[85] and public forum rules requiring equal access do not apply. The public forum rules are supplanted by the statutory obligation on the licensee to operate in the public interest.[86]

Facilities used by cable will accommodate a limited number of cable systems at best.[87] As a practical matter no more than

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79 *See, e.g.*, Schneider v. State, 308 U.S. 147, 160 (1939); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

80 Hague v. CIO, 307 U.S. 496, 515 (1939).

81 Kalven, *The Concept of the Public Forum Doctrine: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965).

82 *Id.* at 26–27.

83 Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 813 (1984) (quoting *Hague*, 307 U.S. at 515-16).

84 Goldberger, *A Reconsideration of Cox v. New Hampshire: Can Demonstraters Be Required to Pay the Costs of Using America's Public Forums?* 62 TEX. L. REV. 403, 420 (1983).

85 Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1041-43 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).

86 *See, e.g.*, CBS. v. Democratic Nat'l Comm., 412 U.S. 94, 101-02, 129 (1972) (indicating that public forum cases provide little guidance in broadcast area in light of broadcasters' affirmative and independent statutory obligation to provide full and fair coverage of public issues).

87 *See supra* notes 28-31 and accompanying text.

one operator is likely to survive in any franchise area.[88] The fact that only a few systems can be accommodated suggests that different rules apply to cable than in an open forum. Indeed, because access granted to one operator effectively excludes others, one district court has concluded that "it would be a dereliction of a city's fiduciary duty" to grant a franchise without conditioning the grant to benefit the general public.[89]

The right of individuals to obtain access to public property may also depend on the nature of the use for which access is sought. Short-lived, temporary uses of public streets and rights-of-way for face-to-face communication have generally been treated as normal and protected uses of a public forum.[90] Indeed, Supreme Court cases on the public forum doctrine appear to presuppose that the use, if protected, will be short-lived and temporary.[91] On the other hand, where the speaker's chosen "tangible medium" of expression, by its nature, interferes with the enjoyment of the forum by others, the government need not

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88 *See generally supra* text accompanying notes 6-31.

89 Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 595 (W.D. Pa. 1987). *Erie* involved, *inter alia*, a constitutional challenge by the cable television operator to franchise fee and public access provisions in the Erie franchise. On cross-motions for summary judgment, the district court ruled in favor of the city of Erie on all federal constitutional claims, and found that both the franchise fee and access provisions pass muster under the first amendment and the equal protection clause of the Constitution. *Id.* In part, the district court decision is based on the court's conclusion that the rights-of-way used by cable are held by government in trust for public use. A city may therefore protect the interests of all, even at the expense of the franchise. *Id.* at 594-95 nn. 22-23.

90 *See, e.g.*, Schneider v. State, 308 U.S. 147 (1939); *cf. Taxpayers for Vincent*, 466 U.S. at 809-10 (contrasting the right to engage in face-to-face communication with the right to engage in communication via unattended signs).

91 Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985) (charitable solicitations in Combined Federal Campaign); United States v. Albertini, 472 U.S. 675 (1985) (entry with banner and leaflets to military base); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (sleeping in park); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (campaign signs on utility poles); United States v. Grace, 461 U.S. 171 (1983) (leaflets, banners on sidewalk); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (leaflets in teachers's mailboxes); Widmar v. Vincent, 454 U.S. 263 (1981) (religious meetings in university classrooms); Council of Greenburgh Civic Ass'ns v. United States Postal Service, 453 U.S. 114 (1981) (unstamped messages in letterboxes); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (booth on state fairground); Carey v. Brown, 447 U.S. 455 (1980) (picketing in front of houses); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (mail from prisoners' union in prison mailboxes); City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (speech in Board of Education meeting); Greer v. Spock, 424 U.S. 828 (1976) (political meetings on military base); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (play in municipal auditorium); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (political advertisements on buses); Grayned v. City of Rockford, 408 U.S. 104 (1972) (noisy picketing on school sidewalk); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (picketing on school sidewalk); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972) (handbills in private shopping center).

tolerate that use, but may regulate to ensure the public resource is available to all.[92] More permanent uses, or uses which do not involve direct communication from speaker to listener, have been assumed to interfere with the public resource in a different way than leafletting or face-to-face communication.[93] In *Clark v. Community for Creative Non-Violence*,[94] the Supreme Court went so far as to suggest that the Park Service could ban tents to shorten the duration of protests and thereby assure that the property would be available to others.[95] It is unlikely that *Clark* stands for some general proposition that government has authority to prohibit twenty-four hour vigils[96] and long-term demonstrations. However, *Clark* does indicate that the Court recognizes the existence of a practical difference between permanent and exclusionary uses of public property and other uses.[97] The twin principles underlying cases such as *Clark* appear to be that the rights of access to a public forum do not include a right to expropriate the property of the public, and that the rights of access do not prevent the government from developing the public property to advance its use by all. It is thus doubtful that the public forum doctrine gives an entrepreneur the right to build a theater in a public park without the permission, or against the will of the government. Simi-

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92 *Taxpayers for Vincent*, 466 U.S. at 810 (recognizing government right to prohibit a "tangible medium" of expression which is deemed to adversely affect the aesthetic interests of government).

93 *Id.* (unattended signs); *see also Clark*, 468 U.S. at 297 (tents in parks).

94 468 U.S. 298 (1984).

95 *Id.* at 299 (with the ban, at least some around-the-clock demonstrations will not materialize, thereby serving the Park Service's interest in conserving the Park areas for use by the public). *But cf.* Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984) (upholding the authority of newspapers to place vending racks on public property). However, *City of Hallandale* and other similar cases do not recognize a general right to place vending machines in all neighborhoods. Moreover, the cases appear to assume that placement of newspaper boxes does not foreclose access by other speakers or other users of the property. Finally, the cases, most of which precede *Clark* and *Vincent*, generally invalidate ordinances on the ground that ordinances leave too much discretion to grant and deny requests for licenses in the hands of local officials. *Cf.* Gannett Satellite Information Network, Inc. v. Metropolitan Transp. Auth., 745 F.2d 767 (2d Cir. 1984) (upholding a licensing fee imposed by the MTA on newsracks). Gannett proposed to permanently occupy the public property involved. The court noted that Gannett would have to pay rent to the owner if it placed racks on private property and concluded the fact that the property in question was owned by MTA should not confer a special benefit on Gannett. *Id.* at 775.

96 *See Clark*, 468 U.S. at 309 (Marshall, J., dissenting).

97 The distinction between permanent and temporary uses is a common one where the case involves a question of whether there has been a taking. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982), this distinction was expressly relied upon to analyze the rights of access to private property granted to cable companies under New York law. The court contrasted the permanent rights granted the cable company under *Loretto* with access rights granted to the public in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

larly, it is doubtful that if the government establishes a stadium on public property for use by speakers, the public forum doctrine would allow others to expropriate public land to build a private stadium.[98] However, the cable operators' claim would require that the public forum doctrine be read to give one or a handful of speakers a right to permanently occupy public property, even to the exclusion of others.

b. Regulating for equality

What rules should apply to cable? The application of the antitrust laws to media may suggest part of the answer. The Supreme Court has affirmed that there is generally a strong governmental interest in fostering "the widest possible dissemination of information from diverse and antagonistic sources."[99] Accordingly, the Court has validated content-neutral government actions which prevent bottlenecks in distribution of information.[100] For example, the Court has upheld bans on cross-ownership of newspapers and broadcast stations designed to increase the number of media voices in a community;[101] approved orders restricting the rights of a theatre chain to acquire or maintain control over theatres;[102] and affirmed orders limiting the right of American Telephone & Telegraph ("AT&T") and the local telephone companies (after divestiture) to originate electronic publishing, in order to protect "the First Amendment principle of diversity in dissemination of information to the American public."[103] The Newspaper Preservation Act[104] grants a public benefit—exemption from the antitrust laws—to newspapers entering into a joint operating agreement, but makes that benefit conditional.[105] To maintain communications diversity, newspapers which seek an exemption from the antitrust laws under the Newspaper Preservation Act may not merge editorial staffs, and editorial policy must be determined separately.[106] All of these regulations obviously limit the speech rights of the individuals affected, may also affect their profits, and may require the

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98 *Cf.* Calash v. City of Bridgeport, 788 F.2d 80 (2d Cir. 1986).

99 Associated Press v. United States, 326 U.S. 1, 20 (1945).

100 *Id.*

101 FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

102 Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948).

103 United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 184 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

104 15 U.S.C. §§ 1801-1804 (1982 & Supp. III 1985).

105 15 U.S.C. §1802(2).

106 *Id.*

speaker to incur costs (such as the cost of maintaining separate editorial staffs) in order to effectuate the government's goals.[107] However, these content neutral structural regulations, designed to promote diversity in dissemination of information, have not been found to run afoul of the first amendment.[108] The government interest in preventing information bottlenecks has even more force on public property, where the government's mandate is to protect the collective interests in the public resource.[109]

Indeed, the Supreme Court has long recognized that content neutral structural regulation is particularly important where a scarce public resource is being used. In *National Broadcasting Co. v. United States*,[110] the Court upheld chain broadcasting rules designed to prevent monopolistic domination in the broadcast field. Similarly, in *Red Lion Broadcasting Co. v. FCC*,[111] the Court noted that government may regulate broadcasting to protect the "legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views,"[112] and "to preserve an uninhibited marketplace of ideas . . . . rather than to countenance monopolization of that market, whether it be by the Government itself or a private license."[113]

This respect for the right of legislatures to allocate public

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[107] The Newspaper Preservation Act is particularly intriguing in this regard since it contemplates that before two newspapers enter into a joint operating agreement, the Attorney General will determine whether the agreement effectuates the policies of the Act, 15 U.S.C. § 1803(b), which include maintaining "a newspaper press editorially and reportedly independent and competitive in all parts of the United States." 15 U.S.C. § 1801. This requirement appears to permit a detailed government appraisal of the editorial practice of a newspaper under a proposed operating agreement and a corresponding intrusion into the editorial discretion of the parties to the agreement.

[108] *See supra* notes 99-103. The constitutionality of the Newspaper Preservation Act does not appear to have been challenged by newspapers seeking to escape the requirement that, to be eligible for an exemption under the antitrust laws, a newspaper's joint operating agreement must provide for maintenance of separate editorial staffs. However, the Newspaper Preservation Act has been challenged by speakers who contended that granting an antitrust exception would provide established newspapers with an unfair advantage, chill competing speech, and therefore, violate the first amendment. In the face of such challenges, the courts have found that the Newspaper Preservation Act does not violate the first amendment and provides an appropriate means for preserving independent editorial voices. Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467 (9th Cir. 1983), *cert. denied*, 464 U.S. 892 (1983); Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972).

[109] *See infra* notes 110-17 and accompanying text. *See also* Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987) (basic concept of public forum as enunciated in Hague v. CIO, 307 U.S. 496 (1939), is premised upon the notion that property is held in public trust and may be regulated in the interest of all; the interests of any individual are subordinate to the general comfort and convenience).

[110] 319 U.S. 190, 219 (1943).

[111] 395 U.S. 367 (1969).

[112] *Id.* at 400.

[113] *Id.* at 390.

resources where users claiming access would occupy them to the effective exclusion of others is consistent with the basic principles underlying the public forum doctrine. As suggested above, one of the core values of the public forum doctrine is the notion that there is a "constitutional equality of status in the field of ideas,"[114] and "the government may not use public facilities to favor one idea [or one speaker], over another."[115]

Thus, the government acts consistently with basic first amendment values when it engages in viewpoint-neutral structural regulation designed to effectuate the legitimate rights[116] of the public to access public property.[117] Application of this equality principle suggests at least two general reasons why communities ought to have the authority to deny renewals. First, as noted above, franchising is a viewpoint-neutral mechanism through which the government can assure that the public resources, necessary to protect the legitimate claims of others in the community, are provided.[118] Those interests are advanced by ensuring

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114 Schiffrin, *Government Speech*, 27 UCLA L. REV. 565, 572 (1980) (relying on Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972)).

115 *Id.* The "equality" principle is not the only value underlying the public forum doctrine. The public forum doctrine also seems to stand for the principle that the government must allow the public to access some property to speak, without regard to whether others use the property for that purpose as well. Thus, for example, "one who is rightfully on a street open to the public 'carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.' " Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984) (quoting Jamison v. Texas, 318 U.S. 413, 416 (1943). *But cf.* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 313 (1984) (Marshall, J., dissenting) (public forum analysis of majority puts into operation the well established principle that the government may not grant use of a public forum to those whose views it finds acceptable and deny use to those who express less favored views, but overlooks the fact that government regulation may satisfy this principle by imposing silence on all).

116 In a free society, these rights do not include the right to be free from exposure to objectionable or unsettling ideas. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949); Cox v. Louisiana, 379 U.S. 536, 551 (1965).

117 Kalven, *supra* note 81, at 23-27; *Cox*, 312 U.S. at 574 (The issue is "whether [government] control is exerted so as not to . . . unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion . . . associated with resort to public places.").

118 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) is not to the contrary. *Tornillo* involved an unconstitutional infringement on freedom of the press; though a number of courts, and the above text, *see supra* notes 40-52 and accompanying text, may suggest this, the *Tornillo* decision does not say that a regulation which is not constitutional as applied to newspapers should determine whether or not a similar regulation is constitutional as applied to cable systems using public property.

More importantly, the concerns which led the Court to reject the statute at issue in *Tornillo* are not present in cable franchising. In Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (upholding a California constitutional provision permitting individuals to exercise free speech rights in a private shopping center), the Court distinguished *Tornillo* on the ground that (1) it exacted a penalty on the basis of the content of the newspaper and (2) there was a danger it would dampen the vigor of public debate. Franchising decisions are viewpoint-neutral; the decisions are not based on the content

that the community is served by a system which meets cable-related needs and interests and by denying renewal to operators unwilling or unable to meet those needs and interests. Similarly, the economic and physical characteristics of cable suggest that the government advance equality interests by conducting franchise competitions to select the operator best suited to serve community needs and interests. If the incumbent loses in that competition, renewal can be denied in favor of the new applicant.[119] Second, the incumbent operator who asserts a right of renewal has been, for decades, the beneficiary of the very system he attacks. Most operators who are awarded a franchise voluntarily agree to a terminable contract with significant public service obligations, and are awarded the franchise on the basis of those promises. At this point it would be extremely difficult to undo the advantages granted the operator.[120] The advantages obtained "are the fruit of a preferred position conferred by the Government."[121] Having attained his present position as a result of its initial government selection, an operator should not be permitted to assert the position that the government lacks the authority to franchise.[122] Otherwise, the cable operator would be able, in essence, to convert the initial grant into a deed to the public rights-of-way.

Of course, the foregoing assumes the government will act, through franchising, to advance the "equality" principle. If it chooses not to, then the argument above could not be asserted as a means to justify granting a franchise to some, but not to others.

Courts disapproving of the franchising processes whereby cities select a single operator, and deny franchises to others, have found that such franchising creates an impermissible risk of covert discrimination based on the content of, or the views expressed, in an operator's proposed programming.[123] This concern, however, seems misplaced in the context of cable franchising. The Supreme Court's decision in *Cornelius* suggests that even if there is a risk of covert discrimination, there may be

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of what the operators intend to say. As suggested above, there is every reason to suppose franchising will enhance rather than diminish the vigor of debate.

119 Moreover, denying renewal would allow a new speaker to enjoy the benefits enjoyed by the incumbent operator. Dispersing control by changing franchisees would itself serve significant first amendment values. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 794-96 (1978).

120 *See supra* notes 25-27 and accompanying text.

121 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969).

122 *Id.*

123 Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1409, *aff'd on narrower grounds*, 476 U.S. 488 (1986).

grounds sufficient to support reasonable regulation designed to ensure that a forum is used for its intended purpose.[124] In the case of cable franchising, protecting against the mere possibility of covert discrimination has resulted in granting a few companies the right to control speech on public property, which is at odds with the government's duties to manage the public resources in the interest of all.[125] Moreover, the risk of covert discrimination is minimized to the extent that government, consistent with the equality principle, requires the franchised cable system to provide access to all those who wish to speak via the cable medium, regardless of their views.

Courts have also found that franchising violates the first amendment since a disappointed applicant has no adequate means of communicating with the public.[126] However, regulating to assure equality, by providing for access channels, is one important way to assure that the franchising decision leaves open ample alternative channels for communication.[127] Access channels, for example, provide a disappointed applicant the same access to the cable medium as is provided to the general public, and that is enough to satisfy any requirements of the public forum doctrine.[128] However, within these limits—and the limits

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124 Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985).

125 *See supra* notes 108-17 and accompanying text.

126 *Preferred*, 754 F.2d at 1410-11.

127 In order to pass scrutiny under the public forum doctrine, the challenged regulation must leave open adequate alternative channels of communication. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 815 (1984). There is a suggestion in *Cornelius* that in a nonpublic forum, the availability of alternatives ordinarily may be assumed. *Cornelius*, 473 U.S. at 809.

128 In *Preferred*, the Ninth Circuit concluded that access channels were not an adequate alternative for a disappointed franchise applicant, 754 F.2d at 1410-11, but, the court's analysis is misdirected. First, as discussed *supra*, the public forum doctrine does not guarantee special access to any speaker. *See supra* notes 79-86 and accompanying text. But the Ninth Circuit's opinion incorrectly suggests that a cable operator must be granted a right which as a practical matter cannot be provided to other members of the public. *Cf.* Gannett Satellite Information Network Co. v. Metropolitan Transp. Auth., 745 F.2d 767, 774 (2d Cir. 1984) (first amendment does not guarantee access to least expensive method of distribution). Second, allowing an operator access to one channel should be adequate. Certainly, a broadcaster is not considered deprived of adequate speech alternatives because the number of stations it can control is limited. FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 794-796 (1977). Moreover, the decision reflects an over-solicitude for the cable operator's asserted right to control all channels on a cable system and a complete indifference to the effect of recognizing that claim on alternatives available to the public. This indifference is particularly disturbing in light of the realities of the cable industry. Most cable companies are tied to other mass media interests. The ties include ties to broadcast properties, newspapers, programming distributors, and producers and movie studios. TELEVISION AND CABLE FACTBOOK, Stations Volume, Vol. 54 at A1217-1232. For example, Time Inc. owns ATC, one of the largest cable operators in the country, which in turn has an interest in Home Box Office, one of the most popular cable pay services. *Id.*, Cable and Services Volume, at

imposed by due process—the cable operator can claim no right to renewal under the first amendment.

IV. Renewal and the Cable Act: Opportunity, But No Promises

The cable industry has argued that, even if the Constitution does not give cable systems a right to expect renewal, the Cable Act does.[129] Arguably, however, the protections afforded to the operators in the renewal sections of the Cable Act are primarily procedural. Thus, although cities face a number of significant procedural hurdles, the Cable Act would not prohibit the replacement of one operator with another.

A. *What Concerned Congress*

Prior to the passage of the Cable Act, renewal procedures varied "from city to city, and state to state."[130] Congress was concerned that the franchising process had developed into a bidding war in which operators made unrealistic proposals and cities "commonly awarded the franchise to the highest bidder,"[131] without considering the fact that "the proposal which offered . . . the most was not necessarily the best."[132] Congress was also concerned that if the renewal process was arbitrary, operators would be discouraged from making investments throughout the franchise term.[133]

In light of these concerns, Congress established an "orderly process" to protect operators against "unfair denials of renewal" by the franchising authority.[134] However, while Congress intended to protect operators to some degree, the Cable Act represents a careful balancing of a number of different goals. The stated purposes of the Cable Act[135] are to (1) establish a national policy concerning cable communications; (2) establish guidelines

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B1126. To effectively subordinate the public interest to private interests on the ground that such companies do not have enough control over speech is ironic.

129 *See* Wolfe, *supra* note 1, at 46.

130 House Report, *supra* note 6, at 4662. The Cable Act does not change matters entirely, since the Act contemplates that most renewal applications will be considered by franchising authorities following procedures entirely distinct from the formal procedures established by federal law. *Id.* at 4709.

131 *Id.* at 4658-59.

132 *Id.* at 4658. The Committee Report noted that the practice of granting a franchise to the highest bidder was often immediately followed by a request that the franchise be renegotiated. *Id.* at 4660.

133 *Id.* at 4709.

134 Cable Act § 601(5), 47 U.S.C. § 521(5) (Supp. III 1985); *see also* House Report, *supra* note 6, at 4709.

135 Cable Act § 601(1)-(6), 47 U.S.C. § 521(1)-(6) (Supp. III 1985).

for the exercise of federal, state and local authority; (3) establish an orderly process for franchise renewal; (4) promote competition in cable communications and minimize unnecessary regulations that would impose an undue economic burden on cable systems, and perhaps most importantly, (5) assure cable communications "provide the widest possible diversity of information sources and services to the public" and (6) develop franchise procedures and standards which encourage growth and development of cable systems and which "assure that cable systems are responsive to the needs and interests of the local community."[136] While Congress sought to eliminate "unnecessary regulation," it also concluded that the goals of the Cable Act, including the central diversity goal, could not be satisfied without regulation.[137] Congress decided that regulation should primarily be left to local franchising authorities.[138] Local franchising authorities were given authority to shape and enforce franchises,[139] at the time of initial franchising, during the franchise, and during franchise renewal.[140]

In short, while Congress meant to curb franchising abuses, there is no indication that it meant to do so at the expense of preventing cities from requiring operators to meet local needs and interests, as determined by the community.

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[136] *Id.* At least two courts have found that the predominant objectives of the Cable Act are:

> 1) to make the local franchising process the primary means of cable television regulation, and 2) to insure that the public receives the widest possible diversity of information services and sources, in a manner which is responsive to the needs and interests of the local communities.

Rollins Cablevue, Inc. v. Sainni Enterprises, 633 F. Supp. 1315, 1318 (D. Del. 1986), (citing Housatonic Cable Vision v. Department of Pub. Util., 622 F. Supp. 798, 811 (D. Conn. 1985)).

[137] Cable television offered "an abundance of channels, with the potential to present a wide variety of perspectives from many different types of program providers." HOUSE REPORT, *supra* note 6, at 4656. However, Congress also recognized that "cable operators do not necessarily have the incentive to provide a diversity of programming sources." *Id.* at 4685. Therefore, the Cable Act gives local governments the authority to impose substantial requirements on cable operators at the time of franchising or renewal, including requirements for provision of public, educational and governmental access channels, facilities and equipment. Cable Act § 611, 624, 47 U.S.C. §§ 531, 544 (Supp. III 1985).

[138] HOUSE REPORT, *supra* note 6, at 4661. Congress intended that after passage of the Cable Act, as before, "the franchise process [should] take place at the local level." *Id.*

[139] *Id.* at 4663. The ability of a local government to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems "are to be tailored to the needs of each community." *Id.*

[140] Thus, among other things, the Cable Act grants franchising authorities "affirmative authority to require upgrading of facilities and channel capacity during the renewal process." *Id.* at 4657-58.

B. *Congress Balanced Its Concerns By Providing Primarily Procedural Protections, Without Renewal Guarantees*

1. An Overview of the Renewal Provisions

Some of the congressional renewal concerns described above were satisfied by inclusion of general provisions which define what communities may require an operator to provide through the franchising process.[141] However, the primary renewal provision of the Cable Act is Section 626.[142] That section, *inter alia*, establishes a voluntary,[143] national, uniform[144] renewal process, which can be initiated by either the city or the cable company.[145] The formal process consists of several interlocking stages: (1) an initial public proceeding; (2) submission and preliminary evaluation of the incumbent's proposal; (3) a formal hearing; and (4) judicial review of that hearing.[146]

An examination of the language of the renewal section demonstrates that the renewal provisions are primarily intended to correct abuses by establishing procedural requirements with minimum interference with local determinations of community needs and interests. However, before examining the renewal provi-

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[141] For example, Section 611 of the Cable Act authorizes local governments to require an operator to set aside channels for public, educational or governmental use as part of a renewal proposal. Cable Act § 611, 47 U.S.C. § 531 (Supp. III 1985). Section 624 of the Cable Act permits the franchising authority to include proposal requirements for facilities and equipment (including facilities and equipment for access). Cable Act § 624, 47 U.S.C. § 544 (Supp. III 1985). Section 632 of the Cable Act permits a franchising authority to include provisions in any renewal franchise for enforcement of customer service requirements and requirements for the construction of the system. Cable Act § 632, 47 U.S.C. § 552 (Supp. III 1985). However, Section 624(b) of the Cable Act prohibits a community from establishing, in its request for proprosals, requirements for video programming or other information services but permits a community to enforce any requirements "for broad categories of video programming or other services" which are ultimately included in the franchise agreement. Cable Act § 624(b), 47 U.S.C. § 544(b) (Supp. III 1985).

For a good discussion of the provisions of the Cable Act as a whole, see Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543 (1985).

[142] Cable Act § 626, 47 U.S.C. § 546 (Supp. III 1985).

[143] The legislative history clearly indicates that "Section 626 sets forth procedures . . . which may be used for the renewal of cable franchises. The provisions contained in this section are not mandatory." HOUSE REPORT, *supra* note 6, at 4709. Indeed, the process is designed so that even if it is initiated, it can be stopped at almost any time. *Id.* at 4710. Congress anticipated that most renewals would not be considered pursuant to the formal procedures established by the Cable Act. *Id.* at 4709.

[144] *See id.* at 4662.

[145] The formal procedure is set forth in Cable Act §§ 626(a)-(g), 47 U.S.C. §§ 546(a)-(g) (Supp. III 1985). Section 626(h) of the Cable Act establishes an entirely distinct and informal renewal procedure. Cable Act § 626(h), 47 U.S.C. § 546 (h) (Supp. III 1985). Section 626(h) of the Act provides that a cable operator may submit a renewal proposal at any time, and permits a franchising authority to grant or deny the proposal if the franchising authority affords the public notice and an opportunity for comment.

[146] *See infra* note 149 and accompanying text.

sions in detail, it is important to examine provisions which were eliminated prior to passage of the Cable Act. In this case, the omissions reveal much about the manner in which Congress balanced the interests of the operator, the franchising authority, and the public.

2. The Dogs That Don't Bark: The Vanishing Renewal Expectancy and Bar To Competition

As reported out of the Senate Committee on Commerce, Science and Transportation, S. 66,[147] the bill which, after significant revisions, became the Cable Act,[148] included a renewal provision which the Senate Report stated was intended to establish "a renewal expectancy for cable operators."[149] The renewal expectancy was explicitly incorporated into the renewal provisions of the preliminary staff drafts of the bill which became H.R. 4103, the House revision of the Cable Act.[150] When H.R. 4103 was introduced in the House, the "renewal expectancy" language was dropped.[151] By the time the Cable Act passed, references to a renewal expectancy were gone from both the bill and the legislative history. In addition, S.66 originally prohibited the franchising authority from requesting, accepting, or considering any other franchise application until the incumbent franchisee's application had been denied or approved.[152] The franchising authority was required to negotiate in good faith with the cable operator regarding renewal.[153] However, the bill was amended

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147 S. REP. No. 66, 98th Cong., 1st Sess. (1983).

148 The bill was introduced by Senator Goldwater as the "Cable Telecommunications Act of 1983." After substantial revision in committee, it was passed by the Senate on June 14, 1983. 129 CONG. REC. S8324-25 (daily ed. June 14, 1983). The House ultimately adopted its own bill, H.R. 410, as an amendment to S.66. The Senate adopted the House version of S.66, with some further amendments. 130 CONG. REC. S14,283-85 (daily ed. Oct. 11, 1984).

149 S. REP. No. 67, 98th Cong. 1st Sess. 26-27 (1983) [hereinafter SENATE REPORT]. The report stated that the section was intended to grant franchising authorities the same control over the application of renewal tests that the FCC had over renewal of radio and television broadcast licenses. It went on to state that it intended to grant the same renewal expectancy for cable operators that was proposed for broadcasters in S.55. S.55 barred FCC consideration of competing applications for renewal, and required the FCC to renew a license if it found that the operator of the station had been free of "serious violations" and the licensee had "substantially met the problems, needs, and interests of the residents of its service area." *Id. See* 129 CONG. REC. 1290 (daily ed. Feb. 17, 1983).

150 PRELIMINARY STAFF DRAFT OF H.R. 4103, 98th Cong., 1st Sess. (1983). The draft renewal provision provided that, "[a]n incumbent cable operator shall be entitled to a reasonable expectancy that its franchise will be renewed." PRELIMINARY STAFF DRAFT, Section 635(a).

151 The bill, as introduced, may be found in the *Cable Option Hearings*, *supra* note 2, at 669-702.

152 SENATE REPORT, *supra* note 149, § 609(b)(2), at 40.

153 *Id.* § 609(d), at 40-41.

on the Senate floor to eliminate the prohibition on accepting or considering other franchise applications. Senator Goldwater explained that as a result of the omission it was intended that "the renewal applicant could be subject to comparative challenges."[154] Further:

> With this amendment, a franchising authority will be able to consider all of the evidence as to what is reasonable or unreasonable. If it wished to do that by looking at what another cable operator promises to do, it would be free to do so.[155]

By the time the bill passed through the House, the "good faith" negotiation provision had also been dropped.

To be sure, the House Report on H.R. 4103 still states that:

> The Committee does not intend that the reasonableness of the operator's proposal for future service be based on a comparative process. Alternative proposals may be introduced into the administrative process as evidence related to the availability and cost of the services, facilities and equipment proposed by the incumbent cable operator. However, the franchisor may not declare the operator's proposal unreasonable and deny renewal due to another party indicating its willingness to provide more, and community needs and interests may not be established on the basis of such alternative proposals.[156]

But this language prohibits comparisons in only a limited way. Cities may not be able to discharge their duties under the Act merely by comparing what one company and the incumbent company are willing to promise to provide. The operator's proposal must be evaluated on its own merits. The fact that one entity may provide more would not necessarily be evidence that the community had a need or interest in more, and therefore would not provide a basis for determining whether the incumbent's proposal is reasonable in light of community needs.[157] However, as suggested by Senator Goldwater's statement quoted above, although a competing applicant is willing to provide more does not prove a community needs more, a competing applicant may be able to submit objective evidence showing why more ought to be required. Similarly, cities should be able to use competing proposals to evaluate whether the

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154 129 CONG. REC. S8324 (daily ed. June 14, 1983) (statement of Sen. Goldwater).

155 *Id.*

156 HOUSE REPORT, *supra* note 6, at 4711.

157 In other respects, comparisons should be permitted. Other operators may be able to provide specific information on community needs and interests and may also be able to provide alternative proposals which demonstrate that the incumbent's proposal is inadequate to satisfy those needs and interests.

incumbent's proposal fully and adequately responds to community needs (once those needs are established).

Thus, explicit language providing for renewal expectancy and language which gave the incumbent substantial advantages by eliminating competition were dropped from the bill. The missing provisions are strong signals that Congress did not mean to create a renewal expectancy.

3. The Renewal Provisions of Section 626

a. The first stage: focusing the franchise authority on local interests

The first step of the formal renewal process "is a proceeding to review the operator's past performance and to identify future cable-related community needs and interests."[158] The proceedings must afford the public appropriate notice and participation.[159] The first stage requirements establish a procedure which requires the franchising authority to focus on the cable operator's performance and the community's needs and interests.[160]

This procedure, if activated, provides a substantial shield against an arbitrary denial of a request for renewal. However, this first-stage proceeding must begin during the six month period beginning with the thirty-sixth month prior to franchise expiration.[161] If the franchising authority is not requested to begin proceedings by the operator, or does not begin proceedings on its own initiative during this thirty-six to thirty month "window," none of the requirements of Sections 626(a)-(g) apply.[162] Unlike

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158 HOUSE REPORT, *supra* note 6, at 4709. Cable Act § 626(a), 47 U.S.C. § 546(a) (Supp. III 1985).

159 Cable Act § 626(a), 47 U.S.C. § 546(a) (Supp. III 1985).

160 This was a central concern of Congress in establishing the renewal provisions. HOUSE REPORT, *supra* note 6, at 4662-63, 4709.

161 Cable Act § 626(a), 47 U.S.C. § 546(a) (Supp. III 1985). Interestingly, the Act does not state when the first stage proceeding must end. Presumably, the "first stage" may actually consist of a number of separate hearings to review aspects of past performance or future community related needs and interests.

162 At least one court has already so held. Madison Cablevision, Inc. v. City of Morganton, No. SH-C-85-5 slip op. (W.D.N.C. July 3, 1986). This interpretation is supported by the plain language of the bill, which establishes specific timetables. *See* Cable Act § 626(a), 47 U.S.C. § 546(a) (Supp. III 1985). Section 626(a) of the Act makes every subsequent step dependent on these timetables, *see* Cable Act § 626(b)(1), 47 U.S.C. § 546(b)(1) (Supp. III 1985), and contemplates that renewals may be granted or denied even where communities do not follow procedures established by Sections 626(a)-(g). *See* Cable Act § 626(h), 47 U.S.C. § 546(h) (Supp. III 1985).

The legislative history also supports this interpretation. It notes that the initial proceeding is the "first step in the procedural and substantive protections afforded by this section." HOUSE REPORT, *supra* note 6, at 4709. Finally, earlier versions of the bill had included provisions which allowed operators, under certain circumstances, to avail themselves of some of the protections of the section even if initial deadlines for initiat-

some other provisions of the Cable Act, the protection afforded by the renewal section of the Cable Act can be waived,[163] either involuntarily[164] or voluntarily.[165] This is another strong indication that Congress did not intend to guarantee renewal to operators.

b. The request for proposals: affirming local control over cable

After the completion of the first stage of proceedings, a franchising authority has four months[166] to make a preliminary determination as to whether to grant or deny renewal. During the interim period the cable operator may submit a proposal for renewal on its own initiative or upon the request of the franchising authority.[167] The proposal "shall contain such material as the franchising authority may require,"[168] including proposals to upgrade the cable system.[169] The proposal must then be submitted by a date to be specified by the franchising authority.[170]

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ing proceedings were missed. *Cable Options Hearings*, *supra* note 2, at 692. By contrast, the Cable Act, as passed, contains "no transitional provisions." HOUSE REPORT, *supra* note 6, at 4709. Unlike earlier versions of the bill, there is no way to afford the protection of Sections 626(a)-(g) if proceedings are not initiated on schedule.

163 Provisions such as the leased access provision cannot be waived. Cable Act § 612, 47 U.S.C. § 532 (Supp. III 1985). Some courts have held that the rate regulation provisions of the Act cannot be waived. *See* City of Dubuque v. Group W Cable, Inc., No. C85-1046 slip op. (N.D. Iowa, June 18, 1986).

164 Since the franchise expires less than 30 months after the effective date of the Cable Act, it is not possible to initiate first stage proceedings. *See* Cable Act § 626, 47 U.S.C. § 546 (Supp. III 1985).

165 The operator chooses not to initiate the proceedings, but instead chooses only to initiate informal proceedings under Cable Act § 626(h), 47 U.S.C. § 546(h) (Supp. III 1985).

166 Cable Act § 626(c), 47 U.S.C. § 546(c)(1) (Supp. III 1985). One commentator has suggested that this may require a community to make a "preliminary assessment" applying the same standards that would apply during formal third stage administrative hearings—that is, a city cannot decide to deny renewal on a ground which would be insufficient to support denial after formal hearing. Meyerson, *supra* note 141, at 581. However, in most communities, much of the four month period may be taken up while the city prepares, and the operator responds, to a request for proposals. During the time between the completion of the proceedings and the date by which the community must make a prelimiary assessment, the city may not have had full opportunity to carefully analyze any proposal submitted by the operator, or to investigate fully, questions raised by the proposals. Hence, a better interpretation is probably that the Cable Act does *not* require that a preliminary assessment be based on particular findings—although a franchising authority which can make specific findings would probably find it advisable to do so.

167 Cable Act § 626(b)(1), 47 U.S.C. § 546(b)(1) (Supp. III 1985).

168 Cable Act § 626(b)(2), 47 U.S.C. § 546(b)(2) (Supp. III 1985).

169 *See* Meyerson, *supra* note 141, at 581.

170 Cable Act § 626(b)(3), 47 U.S.C. § 546(b)(3) (Supp. III 1985). This provision and Section 626(b)(2) raise questions as to whether the operator's request for renewal can be denied for failure to submit a timely proposal, or to include provisions required by the local government. An operator's failure to meet procedural timetables established

At least one cable company has argued that the franchising authority has no right under the Act to demand the operator include provisions in its proposal for specific facilities, equipment, and access channels. In *Birmingham Cable Communications, Inc. v. City of Birmingham*, Birmingham Cable filed a Complaint asserting that, *inter alia*, "[a]t most, Section 626(b)(1), 47 U.S.C. § 546(b)(1) permits the City to 'request' that [the cable company] submit its proposal . . . ." While the Act states the proposal must contain such material as the franchising authority may require "in this context, 'material' means information and not substantive requirements."[171] Hence, Birmingham Cable argues that the renewal provision gives the operator full freedom to frame its proposal as it sees fit. However, the renewal provisions indicate that the city's authority to establish requirements for a renewal proposal are governed by Section 624.[172] While Section 624 limits its local authority to establish programming requirements, it grants franchising authorities with broad powers to establish requirements for "facilities and equipment" in their requests for renewal proposals subject to Section 626. The House Report explains that Section 624 "specifies that for new franchises, and renewals of existing franchises, the franchise authority may establish requirements in its request for proposals for cable-related facilities and equipment."[173]

c. Operator protection and franchising authority discretion in the formal administrative proceeding

After making the preliminary assessment to grant or deny renewal, the franchising authority may commence a formal administrative proceeding. It must commence the proceeding if requested to do so by the cable operator.[174] The purpose of the administrative hearing is to consider whether: (1) the cable oper-

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by the Act or by the franchising authority should have the effect of cutting off the protection afforded by Sections 626(a)-(g). *See infra* note 205 and accompanying text. The more difficult question of the two is whether a proposal may be summarily rejected for failure to include provisions required by the franchising authority. Even if summary rejection is not appropriate, an operator that fails to offer what is required by the community, should bear the burden of convincingly demonstrating that the requirements were not reasonable. *See infra* notes 205-06 and accompanying text.

171 Complaint, No. 87-L-0755S (filed May 7, 1987), at 14.

172 "Subject to section 624, any [renewal] proposal shall contain such material as the franchising authority may require . . . ." Cable Act § 626(b)(2), 47 U.S.C. § 546(b)(2) (Supp. III 1985).

173 HOUSE REPORT, *supra* note 6, at 4705; Cable Act § 624(b)(1), 47 U.S.C. § 544(b)(1) (Supp. III 1985).

174 Cable Act § 626(c)(1), 47 U.S.C. § 546(c)(1) (Supp. III 1985). The franchising authority must give prompt public notice of the proceeding. *Id.*

ator has substantially complied with the material terms of the franchise and with applicable law;[175] (2) the quality of the operator's service has been reasonable in light of community needs;[176] (3) the operator has the financial, legal and technical ability to provide the services, facilities, and equipment set forth in its proposal;[177] and (4) the operator's proposal is reasonable to meet future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.[178]

A decision to deny renewal must be based on an adverse finding with respect to at least one of the four factors listed above.[179] Under these standards, for example, a franchising authority can deny renewal merely if it finds the quality of service provided has not been reasonable or consumer protection measures deficient,[180] regardless of whether the cable operator has complied with the existing franchise terms in all other respects.[181] Moreover, because the franchising authority's assessment of past performance may be based on performance over

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175 Cable Act § 626(c)(1)(A), 47 U.S.C. § 546(c)(1)(A) (Supp. III 1985).

176 Cable Act § 626(c)(1)(B), 47 U.S.C. § 546(c)(1)(B) (Supp. III 1985). In making this determination, a city cannot consider the mix, quality, or level of the programming services provided by the cable operator, but can consider whether the operator has adequately responded to customer complaints, provided a technically good signal, and so forth. *Id.* However, even though a city cannot consider mix, quality, and level of cable service under Section 626(c)(1)(B), it appears free to consider, as part of its investigation under Section 626(c)(1)(A), whether the operator has complied with enforceable terms of the franchise which require the operator to maintain a certain mix, quality, and level of cable service. This is consistent with the limitations on local authority to establish requirements for video programming. Section 624 prohibits a franchising authority from establishing requirements for video programming (or other information services) in a request for proposals, including renewal proposals. However, the same section permits a city to enforce promises made by the cable operator and incorporated in a franchise which establish requirements for broad categories of video programming or other services.

177 Cable Act § 626(c)(1)(C), 47 U.S.C. § 546(c)(1)(C) (Supp. III 1985).

178 Cable Act § 626(c)(1)(D), 47 U.S.C. § 546(c)(1)(D) (Supp. III 1985).

179 Cable Act § 626(d), 47 U.S.C. § 546(d) (Supp. III 1985)—assuming the operator has activated and otherwise complied with the provisions of the section. *See supra* notes 139-44 and *infra* note 205 and accompanying texts.

180 Thus, for example, even if the franchise is silent on consumer protection measures, a city might be able to find that the operator's past performance was not reasonable because the operator had failed to respond quickly to consumer billing complaints, or had engaged in misleading business practices. *See infra* notes 187-89 and accompanying text. A franchising authority cannot base denial on alleged failure to provide reasonable customer service (after Dec. 1984), unless it has previously notified the company that its performance was deficient and given the company an opportunity to cure the flaws in its performance.

181 Earlier versions of the bill support this interpretation. As originally reported out of committee, S.66 permitted a city to deny renewal based on past performance only if the operator had failed to substantially comply with the terms of the franchise, or if its signal had not met technical standards established by the FCC. SENATE REPORT, *supra* note 149, at 40. H.R. 4105, as originally introduced, contained similar limitations. *Cable Options Hearings*, *supra* note 2, at 691-92.

"the life of the franchise," an operator which corrects problems toward the end of the franchise term with hopes of renewal, could still be denied renewal.[182] Similarly, even if past performance has been satisfactory, the operator must be willing and able to meet community needs and future interests.

Section 626(c), however, establishes significant procedural protections for the cable system operator. The goal, as the legislative history explains, is to require the proceeding to be held in a manner which affords the cable operator and the franchising authority due process protection.[183] The protections include the right to introduce evidence and to question witnesses.[184] The community must base a decision on the record developed at the hearing,[185] and must issue a written decision.[186] Further, cities cannot base a decision to deny renewal on past acts and omissions occurring after the effective date of the Act[187] unless the operator has been provided notice and an opportunity to cure the defects, or in any case where it is documented that the franchising authority has "waived its right to object" or "effectively acquiesced" to the operator's practices.[188] It is not clear whether a city's failure to enforce a franchise over its terms would amount to "effective acquiescence" in the acts or omissions of the operator, but this is certainly a possibility.[189]

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182 HOUSE REPORT, *supra* note 6, at 4711.

183 *Id.* at 4710. While the Act requires prompt public notice of the formal administrative proceeding, Cable Act § 626(c)(1), 47 U.S.C. § 546(c)(1) (Supp. III 1985), there is some question as to whether members of the public can intervene in the proceedings. The legislative history states that:

> [o]nly the cable operator and the franchising authority (or its designee) may participate in the hearing. If state law prohibits the franchising authority from serving as a judge and an advocate and establishes an intervenor process . . . then that intervenor may serve as the franchising authority's "designees" in the administrative proceeding.

HOUSE REPORT, *supra* note 6, at 4710. While the language in the House Report could be read to prohibit intervention where the franchising authority participates in the proceeding on its own behalf, the language of the Cable Act itself does not go nearly so far. It only requires that "the cable operator and the franchise authority . . . shall be afforded fair opportunity for full participation." Cable Act § 626(c)(2), 47 U.S.C. § 546(c)(2) (Supp. III 1985). Intervention is not normally considered a block to a fair administrative hearing. *See, e.g.*, 3 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 14.15-14.16 (2d ed. 1980). Moreover, given the substantial interests (including first amendment interests) of other potential speakers, *see supra* text accompanying notes 35-39, there is a very good reason to read the Act so as to permit intervention and to read the legislative history very narrowly to mean that the city and the cable operator are to be the primary parties, but permitting intervention.

184 Cable Act § 626(c)(2), 47 U.S.C. § 546(c)(2) (Supp. III 1985).

185 Cable Act § 626(c)(3), 47 U.S.C. § 546(c)(3) (Supp. III 1985).

186 *Id.*

187 The effective date of the Act is December 30, 1984.

188 Cable Act § 626(d), 47 U.S.C. § 546(d) (Supp. III 1985).

189 Franchise agreements may contain explicit terms which provide that failure to en-

However, while the procedural protections are significant, the central question in renewal proceedings remains whether the operator's past and proposed performance are reasonable within the meaning of the Cable Act. A critical issue for cities and cable systems will therefore be deciding who is the primary arbiter of whether the operator's proposal satisfies the standards in Section 626. As presented below, the provisions of the Cable Act, read together with the judicial review provisions of Section 626, indicate that the primary arbiter is the city.[190]

d. The judicial role: deference to community determinations

As reported out of committee, S.66 explicitly provided for *de novo* review of the decision of the franchising authority by any court of competent jurisdiction.[191] The requirement for *de novo* review was dropped from the Cable Act by the House.

The review provision as enacted permits a court to set aside the final decision of the franchising authority only if the city's actions are not in compliance with the Cable Act's procedural requirements or if the cable operator demonstrates that the adverse finding with respect to each of the factors on which denial is based is not supported by a "preponderance of the evidence, based on the record of the proceeding" conducted by the franchise authority.[192] The term "preponderance of the evidence" is often linked to a "*de novo*" review of a case, and in a *de novo* review a court or agency typically has the freedom to hear additional evidence.[193] But this is not the review contemplated by the Cable Act. The Act on its face states that the decision of a court must be based on the administrative record before the

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force is not a waiver of rights. In many cases, some of the operator's failures may be correctable (such as failures to provide proposed facilities). The renewal provisions may also place a premium on regulation of transfers. The legislative history states that in evaluating past performance, the operator's performance over the life of the franchise should be considered, "unless the franchise has been transferred with the franchising authority's consent." HOUSE REPORT, *supra* note 6, at 4711. In cases where there has been a transfer, the legislative history states, the applicable period of consideration is the period in which the franchise has been held by the operator seeking renewal. *Id.* No such limitation is apparent on the face of the Act. The limitation certainly does not appear sensible in the case of *pro forma* transfers where stock ownership may change, but the company otherwise remains the same. One solution might be for the franchising authority to deny transfers where the existing company's past performance would not (at the time of transfer) justify renewal, at least unless the proposed transferee agrees to correct all deficiencies in service.

190 *See infra* notes 191-95 and accompanying text.

191 SENATE REPORT, *supra* note 149, § 609(e), at 41.

192 Cable Act § 626(e)(2)(b), 47 U.S.C. § 546(e)(2)(b) (Supp. III 1985).

193 *See, e.g.*, 5 U.S.C. § 556(d) (1982); McDonough v. United States Postal Service, 666 F.2d 647, 648 (1st Cir. 1981).

franchising authority.[194]

The Act does not explicitly state how much deference a court should give a city's decision when reviewing the record of the administrative proceeding. However, since the court should not be permitted to hear additional testimony and, hence, cannot view the demeanor of witnesses, the court should at least give substantial deference to the determinations of the franchising authority with regard to the credibility and the weight to be given to the evidence presented.[195]

More importantly, the extensive procedural protection afforded the cable operator (which permits the operator to present its case and to require the franchising authority to consider that case), as well as the congressional determination that franchising should be controlled at the local level, suggest very strongly that the courts are not at liberty to substitute their own notions of what is "reasonable" to meet community needs for the determination of the franchising authority. *Board of Education v. Rowley*,[196] is instructive. In that case, the Supreme Court considered the permissible scope of judicial review under the Education of the Handicapped Act. The Act requires local governments to conduct hearings to develop plans enabling handicapped children to receive free appropriate public education.[197] A court reviewing a plan is directed to review the record of the administrative hearings, to hear additional evidence and, basing its decision on the "preponderance of the evidence," to grant appropriate relief.[198] Nonetheless, the Court rejected a contention that the courts had authority to review the state's educational plan *de novo*. The Court noted that Congress had primarily left it to local authorities to determine what standard of education would be appropriate for handicapped children.[199] The Court concluded that the detailed procedural requirements applying to local development of educational plans indicated that the preponderance of the evidence standard was

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194 Moreover, the absence of an explicit provision for *de novo* review is significant. In cases where Congress has provided for review, without setting forth the standards to be used, the Supreme Court has held that consideration is to be confined to the administrative record and no *de novo* proceeding may be held. United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963) (citation omitted).

195 *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 496-97 (1951).

196 458 U.S. 176 (1982).

197 *Id.* at 180-83.

198 *Id.* at 205. Since the review provision at issue in *Rowley* permits the court to hear additional evidence, it appears to grant reviewing courts greater authority than is granted by the Cable Act.

199 *Id.* at 207.

> by no means an invitation to the courts to substitute their own notions of sound . . . policy for those of the . . . authorities which they review.[200]

The Cable Act should likewise be read to contemplate substantial judicial deference to local decisions. Although Congress defined the factors which were to be considered in the cable renewal proceeding in Section 626, it did not attempt to define what quantum of performance would be "reasonable" for the past or the future in the renewal provisions of the Act. Congress intended to permit franchising authorities to demand that cable operators provide modern systems.[201] Congress required only that the determination of the reasonableness of the operator's proposal for future service be based on a careful analysis of community needs and interests.[202] The franchising authority must also take into account the cost of meeting community needs and interests in evaluating the operator's proposal for future service.[203] This may mean that an operator cannot be required to offer to build a system which would cost so much as to be clearly unprofitable for any operator,[204] but the requirement should not be a very significant practical limitation on local authority. Section 626 thus suggests the franchising authority is to be the primary arbiter of what is and is not reasonable for the community.[205] The "substantive" standards of Sections

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200 *Id.* at 206.

201 Indeed, that authority was specifically granted by the Cable Act. HOUSE REPORT, *supra* note 6, at 4659-60, 4709.

202 The factual investigation may include analysis of "subscriber surveys" and other such data to the extent they shed light on community needs and interests. *Id.* at 4711.

203 The legislative history states that in assessing the cost of meeting community needs and interests under this criterion, "the operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations." *Id.* However, while the "impact on subscriber rates" *might* be important in a community which can regulate rates, it is less relevant in communities which cannot regulate rates; a lower cost system will not necessarily mean lower rates. In a system which is not rate regulated, a more appropriate question is: If the operator charged a just and reasonable rate given the facilities and equipment required by the franchise, would the community be willing to pay that rate?

204 The HOUSE REPORT, *supra* note 6, at 4709 states that alternative proposals from other cable operators can be introduced as evidence of the availability and costs of meeting community needs and interests. Hence, if the evidence shows other operators are willing and able to meet community needs and interests where the incumbent cannot, a city should be able to deny renewal.

205 To be "reasonable," an incumbent operator's proposal apparently must satisfy at least two general criteria. First, under Section 626(b)(2) of the Cable Act, the proposal "shall" contain such material as the franchising authority may require. This section could be interpreted to mean that a proposal which fails to contain material required by the franchising authority is *per se* unreasonable; by the same token, Section 626(c)(1)(D) could be read to mean that the operator's proposal passes muster if it is "reasonable," notwithstanding whether it contains the material required by the franchising authority. Given the deference to local franchising decisions, the former is the more likely interpretation of the two. A possible synthesis of the two sections might be as follows: just as

626(c)(1)(A)-(D) limit, but do not usurp, local control over the franchising process.

Judicial deference is in fact entirely consistent with the general structure of the Cable Act. At renewal, a city may be faced with a proposal to upgrade facilities to thirty-six-channel capacity, but decide the community is better served by a fifty-four channel system. The question of whether a community "needs" or is "interested" in fifty-four instead of thirty-six channels is not likely to be answered sharply.[206] The decision may well come down to a judgment as to the future role of cable in the community. This is precisely the sort of judgment Congress intended local governments to make through the franchising process. A court therefore should not view the review provisions as an opportunity to second-guess such judgments as to what is "reasonable" for the community.[207]

The protections set forth in Section 626 should not be slighted: they establish a complex road for a franchising authority which is considering denying renewal. However, the standards hardly guarantee renewal and, indeed, leave the franchising authority substantial authority to deny renewal where the operator's proposal is deemed insufficient to meet community needs and interests.

The provisions may be characterized as giving the operator a "basic floor of opportunity" without being guaranteed to produce any particular outcome.[208] Moreover, as suggested above, the Cable Act can and should be read to avoid impossible measurements and comparisons.[209] If the franchising authority has followed

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the Cable Act permits franchise modification where the requirements are commercially impractical, it may also permit pre-renewal modifications—but the operator carries a heavy burden of justifying the departure from standards established by the local government. Second, the proposal must address demonstrated community needs and interests, whether or not addressed in the franchising authority's requests for proposals. This includes a response to the needs and interests of the community developed through the initial proceedings under Section 626(a) of the Cable Act. HOUSE REPORT, *supra* note 6, at 4709. While the operator need not respond to "every person or group" that expresses interest in a particular capability, the operator does have the responsiblity to "provide those facilities and services which can be shown to be in the interests of the community to receive in view of the costs thereof." HOUSE REPORT, *supra* note 6, at 4711.

206 This is due, in part, because the community will not have experience as to the advantage of a fifty-four versus a thirty-six channel system, and, in part, because the evidence may be conflicting.

207 It has been suggested that the proper standard for review under the Cable Act may be closely analogized to a "substantial evidence" test. *See* C. POLS, N. SINEL & R. RYERSON, CABLE FRANCHISING AND REGULATION: A LOCAL GOVERNMENT GUIDE TO THE NEW LAW, at III-J-23-26 (1985).

208 *Cf.* Board of Educ. v. Rowley, 458 U.S. at 201 (court anticipates that state educational programs would indeed confer educational benefits upon such children).

209 *See supra* notes 201-07 and accompanying text.

the standards in the Act, then its decision—including a decision to deny—should be affirmed.

V. Conclusion

Both the Cable Act and the first amendment afford cable operators significant protections. Arbitrary decisions to deny renewal are not likely to withstand scrutiny. However, the rights of way used by the operator are public property. The operator has no right to take over that property to pursue purely private interests; renewal can be denied to advance the public's interest in that public property.