

**CONSTITUTIONAL ISSUES UNDER OHIO'S NEW
REGULATORY FRAMEWORK FOR VIDEO SERVICE
PROVIDERS**

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I. INTRODUCTION TO VIDEO FRANCHISING

The 127th Ohio General Assembly recently passed Amended Substitute Senate Bill 117 (Senate Bill 117), legislation that replaces the former local cable television franchising process with a state video franchising process.¹ State Senator Jeff Jacobson was the bill's primary sponsor.² The bill passed in the Ohio Senate by a twenty-nine to four vote on May 9, 2007,³ and then an amended version of the bill passed in the Ohio House of Representatives by a ninety-four to two vote on June 14, 2007.⁴ The Senate concurred with the House's amendments on June 19, 2007.⁵ Governor Strickland then signed the bill on June 25, 2007, and the bill became law on September 24, 2007.⁶

Under previous law, cable television providers were required to negotiate separate franchise agreements with every locality where they

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¹ Amend. Substitute S.B. 117, 127th Gen. Assemb. (Ohio 2007) (enacted). Senate Bill 117 can be found on the Ohio Senate web site at http://www.legislature.state.oh.us/BillText127/127_SB_117_EN_N.pdf.

² See OHIO SENATE J., 127th Gen. Assemb., at 341 (Ohio 2007), available at <http://www.legislature.state.oh.us/JournalText127/SJ-05-09-07.pdf>.

³ *Id.* at 343.

⁴ OHIO HOUSE REPRESENTATIVES J., 127th Gen. Assemb., at 472-74 (June 14, 2007), available at <http://www.legislature.state.oh.us/JournalText127/HJ-06-14-07.pdf>.

⁵ Ohio Legislative Service Commission, Senate Bills—Status Report of Legislation—127th Gen. Assemb., S.B. 117, <http://lsc.state.oh.us/coderev/sen127.nsf/Senate+Bill+Number/0117?OpenDocument>.

⁶ *Id.*

wished to offer cable services.⁷ Senate Bill 117 eliminates the requirement for companies to negotiate independent franchise agreements with each local government,⁸ and replaces it with a state authorization process administered by the Ohio Department of Commerce.⁹ The law also recognizes that video services can now be provided over different types of networks using various technologies, such as internet protocol-based technology.¹⁰ The state video franchising process will provide a more streamlined avenue for companies to enter the Ohio video service market and compete for customers. In the past three years, similar legislation has been passed in at least nineteen other states.¹¹

⁷ See 47 U.S.C. § 541 (2000). The local communities began exercising authority as local franchising authorities (LFAs) under federal law without any direction or limitation from the General Assembly (except for the township provisions contained in sections 505.90, 505.91, and 505.92 of the Ohio Revised Code, which were subsequently repealed in section 2 of Senate Bill 117). However, direct broadcast satellite requires no local franchise. OHIO REV. CODE ANN. § 1332.21(J) (LexisNexis Supp. 2009).

⁸ § 1332.26(A) (“No political subdivision shall require a video service provider to obtain from it any authority to provide video service within its boundaries.”).

⁹ *Id.* § 1332.24(A).

¹⁰ *Id.* § 1332.21(J).

¹¹ See S.B. 807, 2008 Leg., Reg. Sess. (La. 2008) (signed on June 23, 2008); H.B. 1421, 105th Gen. Assemb., Reg. Sess. (Tenn. 2008) (signed on May 15, 2008); Assemb. B. 207, 2007 Leg. (Wis. 2007) (signed on Dec. 21, 2007); H.B. 7182, 2007 Gen. Assemb., Reg. Sess. (Conn. 2007) (signed on July 11, 2007); S.B. 678, 96th Gen. Assemb., Reg. Sess. (Ill. 2007) (signed on June 30, 2007); Assemb. B. 526, 74th Sess. (Nev. 2007) (signed on June 4, 2007); H.B. 227, 2007 Gen. Assemb., Reg. Sess. (Ga. 2007) (signed on May 30, 2007); S. File 554, 82d Gen. Assemb., Reg. Sess. (Iowa 2007) (signed on May 29, 2007); H.B. 529, 2007 Leg., Reg. Sess. (Fla. 2007) (signed on May 18, 2007); S.B. 284, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007) (signed on Mar. 22, 2007); H.B. 6456, 93rd Leg., Reg. Sess. (Mich. 2006) (signed on Dec. 21, 2006); Assemb. B. 2987, 2006 Sess. (Cal. 2006) (signed on Sept. 29, 2006); S.B. 192, 212th Leg., 2006 Sess. (N.J. 2006) (signed on Aug. 4, 2006); H.B. 2047, 2005 Sess. (N.C. 2005) (signed on July 20, 2006); H.B. 4428, 116th Gen. Assemb., Reg. Sess. (S.C. 2006) (signed on May 23, 2006); Substitute S.B. 449, 2006 Sess. (Kan. 2006) (signed on Apr. 7, 2006); H.B. 1279, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006) (signed on Mar. 14, 2006); S.B. 706, 2006 Sess. (Va. 2006) (signed on Mar. 10, 2006); S.B. 5, 79th Leg., 2d Called Sess. (Tex. 2005) (signed on Sept. 7, 2005).

A. The Purpose of Senate Bill 117

The Ohio General Assembly sets forth its purposes for enacting Senate Bill 117 in section 1332.22 of the Ohio Revised Code. The bill was enacted in order to increase competitive entry into the video service market by providing “a uniform regulatory framework.”¹² “[L]ocal franchise requirements” were viewed as “barriers to entry”¹³ and caused “delays for new entrants.”¹⁴ The Ohio legislature determined that the development of the “video service market” was a “statewide concern,” and used the “state’s police power”¹⁵ to set forth “a rule of conduct upon citizens generally.”¹⁶ These provisions address the potential issues under the Home Rule Amendment of the Ohio Constitution, discussed in Part IV of this article.¹⁷ Most importantly, the statute declared that “[m]aintaining an existing franchise in cases where new entrants obtain video service authorizations is not appropriate unless the incumbent chooses to maintain that franchise.”¹⁸

¹² § 1332.22(H) (“This state can and should provide a uniform regulatory framework by which persons can rapidly and expeditiously provide video service to residents of this state regardless of their jurisdictional locations, which framework will promote rapid competitive entry into the video service market and encourage additional, significant infrastructure investment.”).

¹³ *Id.* § 1332.22(D) (“To date, there has been only minimal competitive entry by telephone companies into the facilities-based video programming market in this state, in part, because local franchise requirements may present barriers to entry.”).

¹⁴ *Id.* § 1332.22(G) (“Local franchise and other requirements may present inordinate delays for new entrants.”).

¹⁵ *Id.* § 1332.22(J) (“The continued development of Ohio’s video service market and promotion of infrastructure investment are matters of statewide concern and are properly subject to exercises of this state’s police power.”).

¹⁶ *Id.* § 1332.22(K) (“By analogy to [*American Financial Services. Ass’n v. Cleveland*, 858 N.E.2d 776, 783 (Ohio 2006) (citing *City of Canton v. State*, 766 N.E.2d 963, 964 (Ohio 2002) (syllabus)], sections 1332.21 to 1332.34 of the Revised Code are intended as a comprehensive legislative enactment operating uniformly throughout this state, setting forth police regulations, and prescribing a rule of conduct upon citizens generally.”).

¹⁷ See *infra* Part IV.

¹⁸ § 1332.22(I).

B. The Issues

This article discusses and analyzes several constitutional issues that were raised during the consideration of, and debate on, Senate Bill 117. The first issue is whether existing cable franchise agreements between incumbent cable providers and local communities can properly be superseded by the new state system or whether to do so is an unconstitutional “impairment” of those contracts. Under the new law, incumbent video providers with current local franchise agreements will have the ability to opt-in to the state franchise when sufficient competition is demonstrated.¹⁹ Section 1332.23(B)(2) of the Ohio Revised Code thus allows the companies to opt out of their current local agreements. Several municipalities may argue that this provision is an impairment of contracts, thus violating the Contracts Clause of both the federal and state

¹⁹ *Id.* § 1332.23(B)(2). The statute provides that

[a] person that offers service under a franchise or competitive video service agreement pursuant to division (B)(1)(a) of this section *may apply*, under any of the following circumstances, under section 1332.25 of the Revised Code for a video service authorization to provide video service within an area served by its video service network on the effective date of this section under that franchise or agreement:

- (a) Not sooner than one hundred twenty days before the expiration or termination of the person’s franchise or competitive video service agreement for that area in accordance with its terms and conditions;
- (b) After any other person provides or sells video service in that area;
- (c) After receiving notice pursuant to division (A) of section 1332.27 of the Revised Code;
- (d) After a determination by the federal communications commission under 47 C.F.R. 76.907 that the person is subject in that area to effective competition as defined in 47 C.F.R. 76.905(b).

Upon the effective date of a video service authorization obtained by the person under division (B)(2) of this section, the franchise or competitive video service agreement terminates, and no provision of that franchise or agreement is enforceable.

Id. (emphasis added).

constitutions.²⁰ However, as will be shown, this particular provision of Senate Bill 117 is constitutional because it is a valid use of the state's police power, it is not a "substantial impairment" of those contracts, it has a "significant and legitimate public purpose," and it is reasonably related to achieving the state's goals. Moreover, the local communities' standing to assert such a challenge must first be questioned.

The second issue discussed and analyzed is whether Senate Bill 117 infringes upon municipalities' home-rule authority and prevents them from adopting or enforcing ordinances in order to regulate video service providers within their jurisdictions. During the consideration of the bill, several municipalities argued that it does.²¹ However, as will be discussed later, Senate Bill 117 does not violate municipalities' home-rule powers because the regulation of video service providers is not a matter of "local self-government," but rather an appropriate exercise of police power relating to a matter of statewide concern. Furthermore, Senate Bill 117 is

²⁰ The United States and Ohio Constitutions both contain language prohibiting passage of *state laws* that would impair contractual obligations. Article I, Section 10 of the United States Constitution provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or *Law impairing Obligation of Contracts*, or grant any Title of Nobility.

U.S. CONST. art. I, § 10 (emphasis added). The Ohio Constitution addresses state laws that impair contracts in article II, section 28:

The general assembly shall have no power to pass retroactive laws, or *laws impairing the obligation of contracts*; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

OHIO CONST. art II, § 28 (emphasis added).

²¹ For example, several municipalities passed ordinances stating the bill violated their home-rule rights. See Clayton, Ohio, Ordinance R-05-07-21 (May 3, 2007), available at <http://www.clayton.oh.us/Legislation/2007/Short%20Form/Short%20Form%2005-03-07.pdf>; Huron, Ohio, Ordinance 2007-37 (June 12, 2007), available at <http://www.cityofhuron.org/meetingnotes/Resolution%20No.%202007-37.pdf>.

considered a “general law,” and thus the enactment or enforcement of municipal ordinances that “conflict” with its provisions is precluded.

II. STANDING ANALYSIS

Before considering the merits of an impairment of contract claim or a home-rule challenge, it must first be determined whether Ohio municipalities even have standing to sue under the United States Constitution.²²

A. Decisions of Federal Courts

Although the question has not been definitively resolved, there is support for the proposition that a municipality would not have standing to bring suit against the state which created the municipality, especially concerning contracts between municipalities and third parties (such as video service providers). The United States Supreme Court has ruled that “[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the [F]ederal [C]onstitution which it may invoke in opposition to the will of its creator.”²³ As to Contracts Clause claims, the Court stated more directly (although through dicta) that “[b]eing but creatures of the State, municipal corporations have no standing to invoke the [C]ontract [C]ause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator [the State].”²⁴

The Sixth Circuit Court of Appeals also leans toward a rule denying standing, thus precluding a political subdivision of a state “from attacking the constitutionality of state legislation on the grounds that its own rights have been impaired.”²⁵ The Sixth Circuit has ruled that a political subdivision of the state receives its powers and privileges from the state and as such “receives no protection from the Equal Protection or Due Process clauses of the Fourteenth Amendment vis-à-vis its creating

²² This standing analysis is probably only applicable to a Contracts Clause challenge under the United States Constitution. An Ohio municipality appears to have standing to challenge an impairment of contract or a home-rule violation under the Ohio Constitution. OHIO CONST. art II, § 28.

²³ *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933).

²⁴ *Coleman v. Miller*, 307 U.S. 433, 441 (1939).

²⁵ *See S. Macomb Disposal Auth. v. Twp. of Wash.*, 790 F.2d 500, 504 (6th Cir. 1986).

state.”²⁶ It appears that a political subdivision cannot use the Contracts Clause to challenge the constitutionality of state legislation, as the Sixth Circuit later cited a law review article in support of its holding that “the [C]ontract, [D]ue [P]rocess, and [E]qual [P]rotection [C]lauses of the national Constitution afford no protection whatever to municipal corporations, *in their own right*, as against the power of the states to control them.”²⁷

B. Decisions of the Ohio Supreme Court

The Ohio Supreme Court has also considered the issue of whether a political subdivision can sue the state on Fourteenth Amendment equal protection or due process grounds.²⁸ Relying on the Sixth Circuit’s discussion in *Macomb*, the Ohio Supreme Court held that the political subdivision lacked standing to assert these claims.²⁹ The Ohio Supreme Court endorsed the proposition that “[m]unicipal corporations are political subdivisions” created for the convenience of the state, and therefore the powers and rights of such municipalities are subject to ultimate control by and the absolute discretion of the state.³⁰

²⁶ *Id.* at 505. The Sixth Circuit did acknowledge, however, that “[t]here may be occasions in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state legislation.” *Id.* at 504.

²⁷ *Id.* at 505 (citing and relying upon E.B. Schulz, *The Effect of the Contract Clause and the Fourteenth Amendment upon the Power of the States to Control Municipal Corporations*, 36 MICH. L. REV. 385, 396–97 (1938)).

²⁸ See *Springfield Local Bd. of Educ. v. Summit County Bd. of Revision*, 628 N.E.2d 1365, 1367 (Ohio 1994); *Avon Lake City Sch. Dist. v. Limbach*, 518 N.E.2d 1190, 1193 (Ohio 1988).

²⁹ *Avon Lake*, 518 N.E.2d at 1193. In *Springfield*, The Ohio Supreme Court relied on its *Avon Lake* decision. *Springfield*, 628 N.E.2d at 1367.

³⁰ *Avon Lake*, 518 N.E.2d at 1192 (citing *Hunter v. Pittsburgh*, 207 U.S. 161, 178–79 (1907)).

III. CONTRACTS CLAUSE ANALYSIS

A. *Valid Use of the State's Police Power*

1. *Decisions of the United States Supreme Court*

The United States Supreme Court long ago ruled that the government can interfere with existing contracts to achieve a valid police purpose, thus indicating that the Contracts Clause is not absolute.³¹ The Court later limited the power of the Contracts Clause when it interferes with a state's inalienable right to enact police-power legislation, even if such enactment impacts existing private contracts.³² Furthermore, the United States Supreme Court has deemed laws regulating the provision of cable service to be exercises of police power.³³ However, even though Senate Bill 117 may be considered a valid exercise of the State's police power, the analysis under the Contracts Clause does not end here.

2. *Decisions of Ohio's State Courts*

Ohio state courts have held that all contracts are subject to the police power of the state, and have further noted that contracts within an area subject to state regulatory power naturally include an implied term that contractual provisions are subject to the exercise of the state's regulatory power.³⁴ These holdings recognize "that when such contracts are entered into it is with the knowledge that the parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature."³⁵ In addition, the Ohio Supreme Court has concluded that "[i]t is within a municipality's power to protect the public health and welfare [by] regulating the establishment and maintenance of a [cable television provider's]

³¹ See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 422–24 (1934); *Stone v. Mississippi*, 101 U.S. 814, 817–18 (1879).

³² *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241–42 (1978).

³³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

³⁴ *City of Akron v. Pub. Utils. Comm'n*, 78 N.E.2d 890, 895 (Ohio 1948); *Cincinnati Gas & Elec. Co. v. Arnold*, 380 N.E.2d 763, 766 (Ohio Ct. App. 1978); *Allen v. Shaker Heights Sav. Ass'n*, 39 N.E.2d 747, 751 (Ohio Ct. App. 1941).

³⁵ *Pub. Utils. Comm'n*, 78 N.E.2d at 895.

distribution network” so long as the municipality is not in conflict with general laws of the state.³⁶

*B. The Test for Determining a Contracts Clause Violation*³⁷

The United States Supreme Court has recognized that “[i]f the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.”³⁸ Therefore, the Court adopted a test for the validity of police-power regulation under the Contracts Clause.³⁹ The

³⁶ *Vernon v. Warner Amex Cable Commc’ns, Inc.*, 495 N.E.2d 374, 375, 377 (Ohio 1986).

³⁷ The current law under the Contracts Clause distinguishes government interference with private contracts from government interference with its own contractual obligations. Government interference with private contracts is subjected to rational basis review. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22–23 (1977) (“[L]aws intended to regulate existing [private] contractual relationships must serve a legitimate public purpose . . . [and] courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.”). Governmental interference with government contracts, however, will be subjected to a different scrutiny. *See id.* (“This [reserved-powers] doctrine requires a determination of the State’s power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment.”). Ohio is not abrogating its own (state) contracts under Senate Bill 117, but rather the franchise agreements and video service agreements of local governments. In fact, the abrogation does not occur at the election of either the state or local government, but instead occurs at the election of the video service provider. *See OHIO REV. CODE ANN. § 1332.23(B)(1)(a)* (LexisNexis Supp. 2009) (“[A] person that offers service under a franchise or competitive video service agreement in effect on the effective date of this section *may continue on and after that date* to provide service within the franchise area or the respective municipal corporation or unincorporated area of a township *pursuant to the terms and conditions of the franchise or agreement.*”) (emphasis added); *see also id.* § 1332.22(I). Therefore, the impairment of the contract occurs as a result of the private party’s election to terminate the contract, and thus the reviewing court would not need to apply the different scrutiny necessary when governments abrogate their own contracts.

³⁸ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978).

³⁹ As long as federal minimum protections are imposed, Ohio courts are free to interpret the state constitution differently than the U.S. Constitution’s corresponding language. *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993). However, the Ohio Supreme Court has several times described the prohibition on contractual impairments

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current test concerning government interference with private contracts was set forth in *Energy Reserves Group, Inc. v. Kansas Power & Light*.⁴⁰ When a state or local government interferes with existing private contracts, a three-part test is used: (1) Is there “a substantial impairment of a contractual relationship”?⁴¹ (2) If so, does the impairment serve “a significant and legitimate public purpose”?⁴² (3) Finally, is the impairment reasonably related to achieving the goal?⁴³

1. Substantial Impairment of Contracts

a. The Standard

The first inquiry must be “whether the state law has, in fact, operated as a *substantial impairment* of a contractual relationship.”⁴⁴

The severity of impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at the first stage.⁴⁵ Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.⁴⁶

b. Providing Comparable Substitutes

Whether Senate Bill 117 would constitute a “substantial impairment” of existing franchises depends upon whether and to what extent the parties

contained in article II, section 28 as coextensive with that provided by the Contracts Clause of the U.S. Constitution. *See Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1261 (Ohio 2003) (holding that “[t]he Ohio constitutional protection of contracts is coextensive with that of the [F]ederal Constitution”); *c.f. State ex rel. Horvath v. State Teachers Ret. Bd.*, 697 N.E.2d 644, 653 (Ohio 1998) (The court analyzed the Federal and Ohio Constitutions simultaneously by applying the United States Supreme Court’s impairment-of-contracts analysis as stated in *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) and *Allied Structural Steel*, 438 U.S. at 244–45.).

⁴⁰ 459 U.S. 400, 411–13 (1983).

⁴¹ *Id.* at 411 (quoting *Allied Structural Steel*, 438 U.S. at 244).

⁴² *Id.* at 411–12 (citing *U.S. Trust Co. of N.Y.*, 431 U.S. at 22).

⁴³ *Id.* at 412 (citing *U.S. Trust Co. of N.Y.*, 431 U.S. at 22).

⁴⁴ *Id.* at 411 (quoting *Allied Structural Steel*, 438 U.S. at 244) (emphasis added).

⁴⁵ *Allied Structural Steel*, 438 U.S. at 245 (footnote omitted).

⁴⁶ *Id.*

relied upon the abridged contractual term.⁴⁷ However, even if a court finds that the parties relied upon the abridged term, the impairment will not be deemed substantial if that term is replaced by “an arguably comparable . . . provision.”⁴⁸ Therefore, Senate Bill 117 would only “substantially impair” existing contracts between municipalities and cable operators if the law is found to eliminate material contractual terms *without* providing comparable substitute provisions.

There is no question that Senate Bill 117 permits the termination of a franchise agreement; however, many provisions in Senate Bill 117 could be construed as being fairly comparable to “material” terms in the terminated franchise agreements.⁴⁹ These terms need not be exact, but merely “comparable.”⁵⁰ Moreover, not all provisions must have a comparable substitute, only those considered to be “material.”⁵¹

Senate Bill 117 does not “substantially impair” existing franchises or competitive video service agreements.⁵² First, the bill preserves local control over the public rights-of-way.⁵³ Second, almost all franchises require cable operators to pay a franchise fee of up to five percent of their gross revenue.⁵⁴ Senate Bill 117 does not impair this obligation because it

⁴⁷ See *id.* at 245–46 (finding one party “relied heavily, and reasonably, on [its] legitimate contractual expectation” and that the state law’s effect “on this contractual obligation was severe”). This article will refer to such contractual terms as “material.”

⁴⁸ See *U.S. Trust Co. of N.Y.*, 431 U.S. at 19.

⁴⁹ See, e.g., OHIO REV. CODE ANN. § 1332.32(A) (LexisNexis Supp. 2009) (providing the calculations necessary to determine the “video service provider fee”).

⁵⁰ *U.S. Trust Co. of N.Y.*, 431 U.S. at 19.

⁵¹ See *supra* note 47 and accompanying text.

⁵² Non-cable video service providers, such as AT&T, had been negotiating competitive video service agreements (CVSAs) with LFAs prior to the enactment of Senate Bill 117. See Andrew Emerson, Porter Wright Morris & Arthur LLP, Testimony in Support of S.B. 117, Before the Ohio Senate Energy & Public Utilities Committee (Apr. 17, 2007) (on file with author).

⁵³ Proposed amendments to Ohio Revised Code Chapter 4939 were removed from the “As Introduced” version of Senate Bill 117. Compare Amend. Substitute S.B. 117, 127th Gen. Assemb. (Ohio 2007) (enacted) with S.B. 117, 127th Gen. Assemb. (Ohio 2007) (as introduced), available at <http://www.lsc.state.oh.us/analyses127/s0117-i-127.pdf>.

⁵⁴ See the following franchise agreements: City of Bexley and Time Warner Commc’ns, § 4.3 (Oct. 26, 1999) [hereinafter Bexley] (on file with author) (indicating a then-current 3% franchise fee, but noting the franchise fee can go up to 5%); City of

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requires all video service providers to pay a municipality a franchise fee equal to that established in an existing local franchise, or at the rate set by the municipality for purposes of the state franchise.⁵⁵ In either case (whether the franchise is in effect or not), the local government continues to have some measure of control over the level of the franchise fee imposed on video service providers.⁵⁶ In addition, the legislation provides local governments with the option to include advertising revenue in the definition of gross revenue for purposes of determining the franchise fee.⁵⁷

Many municipalities will still argue that Senate Bill 117's definition of "gross revenue" is more restrictive than that contained in their local franchise agreements.⁵⁸ However, as an example, in Napoleon, Ohio, an outside law firm estimated the city would only lose between \$800 and \$1,200 in revenue a year under the new definition.⁵⁹ Napoleon's franchise fee was set at three percent, and the City Council was considering an increase to the maximum of five percent.⁶⁰ In 2007, the three percent franchise fee brought in \$41,198 to the city, but Napoleon would have received \$68,660 had the five percent fee been in place.⁶¹ Therefore, municipalities can choose to offset any minimal reduction in gross revenue receipts by increasing their franchise fee percentages to bring in substantially more money. For those municipalities that are already at the five percent level, they may still receive more money if satellite customers

Bowling Green and TW Fanch-one, § 8.1 (July 25, 2002) [hereinafter Bowling Green] (on file with author) (indicating a 5% franchise fee); City of Green and Marks Cablevision of Green, Inc., § 9 (May 16, 1995) [hereinafter Green] (on file with author) (indicating a 4% franchise fee); City of Ironton and Times Mirror Cable Television of Ohio, Inc., § 2(C) [hereinafter Ironton] (on file with author) (indicating a 3% franchise fee).

⁵⁵ OHIO REV. CODE ANN. § 1332.32(C)(1) (LexisNexis Supp. 2009).

⁵⁶ *Id.*

⁵⁷ *Id.* § 1332.32(B)(2)(g) ("Gross revenue shall not include . . . [a]dvertising revenue, *unless* a municipal corporation enacts an ordinance or a board of township trustees adopts a resolution that uniformly applies to all video service providers.") (emphasis added).

⁵⁸ See *id.* § 1332.32(B)(1)–(2) for the definition of "gross revenue."

⁵⁹ See Brian Koeller, *City is a Step Away from Cable Tax Hike*, NORTHWEST SIGNAL (Napoleon, Ohio), Nov. 23, 2007, at 1 (To avoid a loss of revenue, "[c]ity administration recommended [a] fee increase in anticipation of Time Warner opting out of its current franchise agreement, which may be allowed due to" the passage of Senate Bill 117.).

⁶⁰ *Id.*

⁶¹ *Id.*

end up switching service over to an incumbent cable provider or a new entrant providing video services.⁶² Moreover, customer selection of new and additional offerings from all video service providers, resulting from increased competition and improved technology, will also likely increase local revenues.⁶³ Therefore, Senate Bill 117's comparable definition of "gross revenue," plus the benefit of increased competition, better technology, and new products and services, in addition to the local franchising authority's ability to increase the franchise fee to five percent *at any time* (they do not have to wait until it is time for the franchise to be renewed),⁶⁴ could result in a net increase in revenue.

Third, video service providers are also required to carry public, educational, and governmental (PEG) channels⁶⁵ that were programmed as of January 1, 2007, and the bill sets up a process for local governments to obtain these channels if they do not currently have them.⁶⁶ Finally, Senate Bill 117 preserves PEG support revenues and institutional networks (I-Nets) until 2012 or the expiration of the local franchise agreement, whichever is earlier.⁶⁷ With regard to I-Nets, "[i]f the [former franchise agreement] included terms regarding the infrastructure of the institutional network upon the expiration of the [agreement], the video service provider [must] honor those terms."⁶⁸ With regard to PEG support revenues, this is a very generous provision since only a fraction of the 1,800 communities

⁶² See § 1332.21(J) ("Video service' means the provision of video programming *over wires or cables . . .*") (emphasis added). Under prior law, direct broadcast satellite providers did not have to pay a franchise fee and that continues under Senate Bill 117. *Id.* If satellite customers switch service because of the increased competition, then the total franchise fee payable by cable providers and new entrants will increase because of these providers' higher gross revenues. See *id.* § 1332.32(B).

⁶³ See *id.* § 1332.22(A)–(E).

⁶⁴ *Id.* § 1332.32(C)(1)(b).

⁶⁵ Senate Bill 117 defines a "PEG channel" as "a channel, for public, educational, and governmental programming, made available by a video service provider or cable operator for noncommercial use." *Id.* § 1332.21(G).

⁶⁶ *Id.* § 1332.30(A)–(B).

⁶⁷ *Id.* § 1332.30(C) (I-Nets); *id.* § 1332.30(E) (PEG support revenues).

⁶⁸ *Id.* § 1332.30(C).

served by Time Warner Cable even had provisions for PEG support in the local agreements.⁶⁹

c. Past Regulation

Furthermore, the level of scrutiny used to analyze a law depends upon the extent to which that industry has been regulated in the past.⁷⁰ If a field is extensively regulated, the parties to the contract cannot escape further regulation just by virtue of that contract.⁷¹

The parties involved here are also dealing in a previously regulated industry. The focus of this regulation, however, has shifted from local communities to the state under the new law, except for continued management of local rights-of-way by local communities.⁷² When the parties to a contract are aware that changes in state or federal law may alter their relationship, duties, and obligations, courts are less likely to find substantial impairment of their contractual expectations when that eventuality occurs.⁷³ Here, the parties to existing local cable franchises were clearly aware that they were operating in an industry subject to federal and state regulation. The Federal Communications Commission (FCC) first established rules for the cable industry in the mid-1960's.⁷⁴ Also, Congress enacted the Cable Communications Policy Act of 1984,⁷⁵ followed by the Cable Television Consumer Protection and Competition Act of 1992⁷⁶ and the Telecommunications Act of 1996.⁷⁷ In addition, at

⁶⁹ Interview with Edward Kozelek, Reg'l Vice President for Gov't Affairs: Midwest Region, Time Warner Cable (Jan. 26, 2008); see also PAUL OLIVIER, PEG ACCESS HISTORY AND TRENDS 7 ("Today many cities are funding PEG Access *with franchise fees [only]* and are successfully meeting their community requirements and needs.") (emphasis added).

⁷⁰ *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 n.13 (1978).

⁷¹ *Energy Reserves Group*, 459 U.S. at 411.

⁷² See *supra* note 53 and accompanying text.

⁷³ See *Energy Reserves Group*, 459 U.S. at 416 (Reasonable expectations of the contracting parties were not impaired because "the contracts expressly recognize[d] the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law.").

⁷⁴ *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 345 (5th Cir. 1999).

⁷⁵ Pub. L. No. 98-549, 98 Stat. 2780 (1984).

⁷⁶ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁷⁷ Pub. L. No. 104-104, 110 Stat. 56 (1996).

least nineteen other states have enacted legislation similar to Senate Bill 117 during the past three years.⁷⁸ Given this history of regulation, the parties to incumbent cable franchise agreements (or competitive video service agreements) in Ohio were clearly aware that the government could step in to exercise its police powers over the industry. Also, the presence of “preemption” provisions in franchises and agreements which acknowledge governing state and federal law serve as additional evidence of that awareness.⁷⁹ As in *Energy Reserves Group*, “the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law.”⁸⁰

d. Retroactive or Prospective Application

Another key issue on “substantial impairment” relates to whether the state legislation in question operates *retroactively* or merely prospectively. Whether the Contracts Clause has been impaired is irrelevant when the legislation at issue functions only prospectively.⁸¹ The framers of the Constitution intended the clause to prohibit only retroactive legislation.⁸² When entering a contract, the parties do so in light of existing law because the application of preexisting law can hardly unsettle reasonable expectations.⁸³ In Ohio, legislation is not retroactive unless the General Assembly so provides: “A statute is presumed to be prospective in its operation unless expressly made retrospective.”⁸⁴

Senate Bill 117 does not apply retroactively. The bill, by its terms, applies only to persons providing video services in Ohio “on or after the effective date of this section.”⁸⁵ Also, even though Senate Bill 117

⁷⁸ See sources cited *supra* note 11.

⁷⁹ See the following franchise agreements, *supra* note 54: Bexley, § 1.2; Bowling Green, § 21.1; Green, § 2; Ironton, § 10.

⁸⁰ *Energy Reserves Group Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 416 (1983).

⁸¹ See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 215 (1827).

⁸² See *id.* at 216–18.

⁸³ *Id.* at 219.

⁸⁴ OHIO REV. CODE ANN. § 1.48 (LexisNexis Supp. 2009); see also OHIO CONST. art II, § 28.

⁸⁵ § 1332.23(A). Any retroactive agreement still in effect as of Senate Bill 117’s effective date will remain valid but will not extend past their existing end date. *Id.* § 1332.23(B)(1)(a).

contains a standard, statewide definition of “gross revenues” that may differ from the various definitions of “gross revenues” appearing in existing franchise agreements or competitive video service agreements, it does not require the service providers under those existing agreements to go back in time, recalculate amounts payable under the “new” definition since the beginning of the franchise, and pay any shortfall to the municipality.⁸⁶ Nor does it require municipalities to “refund” to providers any amounts paid previously under existing franchise definitions that may (or may not) have been broader than the new statewide definition.⁸⁷ Further, while Senate Bill 117 expressly preempts and supersedes existing franchise terms related to the provision of PEG channels and I-Nets, it does so *prospectively* by prohibiting municipalities in *the future* from imposing any PEG/I-Net requirements that are more burdensome than those set forth in Senate Bill 117.⁸⁸

2. *Significant and Legitimate Public Purpose*

a. *The Standard*

Even a substantial impairment of contracts will not invalidate a state’s police-power regulation as long as the impairment has a “significant and legitimate public purpose.”⁸⁹

If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. Furthermore, . . . the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.⁹⁰

⁸⁶ *Id.* § 1332.32(A)–(C).

⁸⁷ *Id.* It does, however, limit the gross revenue payable to five percent. *Id.* § 1332.32(C)(1)(a).

⁸⁸ *Id.* § 1332.30(C) (I-Nets); *id.* § 1332.30(E) (PEG channels).

⁸⁹ *Energy Reserves Group Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983).

⁹⁰ *Id.* at 411–12 (citations omitted).

In addition, “[u]nless the State itself is a contracting party ‘[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.’”⁹¹ Therefore, even if Senate Bill 117 actually does substantially impair existing contracts, there still would be no Contracts Clause violation as long as the law—with proper deference to the General Assembly’s legislative judgment—addresses a significant and legitimate public purpose.

b. Application of the Significant and Legitimate Public Purpose Standard to Senate Bill 117

Senate Bill 117 promotes “significant and legitimate public purposes.” Local governments may argue that Senate Bill 117 caters to a special group by favoring video service providers through its impairment of franchise agreements. However, the statewide certification process is intended, among other things, to “provide a *uniform* regulatory framework” to “rapidly and expeditiously” bring competitive video service to the state, and enhance the state’s economy by augmenting its broadband infrastructure.⁹² As the United States Supreme Court directs, a court adjudicating any challenge to Senate Bill 117 would necessarily defer to these legislative judgments.⁹³

Additionally, the option to terminate existing franchises merely gives incumbents the same rights as that of new entrants under the new legislation in much the same manner as many “level playing field” statutes and franchise provisions.⁹⁴ Prohibiting incumbents from terminating existing franchises when faced with competition from a state-franchised competitor could violate equal protection principles by creating disparate treatment of similarly situated providers of cable and/or video services.⁹⁵

⁹¹ *Id.* at 412–13 (quoting *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22–23 (1977)) (citation omitted) (footnote omitted).

⁹² § 1332.22(H) (emphasis added).

⁹³ See *Energy Reserves Group Inc.*, 459 U.S. at 412–13 (quoting *U.S. Trust Co. of N.Y.*, 431 U.S. at 22–23).

⁹⁴ See discussion *infra* Part V.B.2.a concerning *Office of Consumer Counsel v. S. New England Tel. Co.*, 502 F. Supp. 2d 277 (D. Conn. 2007).

⁹⁵ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) (“I continue to believe that when Congress imposes a burden on one group, but leaves unaffected another that is similarly, though not identically, situated, ‘the Constitution
(continued)

In fact, incumbent cable companies have already presented similar arguments in at least two states, where they have challenged facially discriminatory state video franchising frameworks.⁹⁶ Allowing incumbents the option to terminate their existing franchises and enjoy the same benefits as new entrants obviates this problem.

Senate Bill 117 is also consistent with recent national regulatory initiatives aimed at reducing barriers to competition in the provision of video programming.⁹⁷ The FCC recently adopted rules and guidance to “facilitate and expedite entry of new cable competitors into the market for the delivery of video programming, and accelerate broadband deployment consistent with [the FCC’s] statutory responsibilities.”⁹⁸

3. Reasonably Related to Achieving the Goal

If the state regulation constitutes a substantial impairment, the regulation must also be reasonably related to achieving the state’s goals.⁹⁹ The test used is very similar to traditional rational basis review. Senate Bill 117 is reasonably related to achieving the state’s goals as outlined in section 1332.22 (A) through (K) of the Ohio Revised Code. As already argued, Senate Bill 117’s provisions are comparable to those provisions found in many of the local agreements.¹⁰⁰ Thus, the state’s new regulatory system is reasonably related to achieving the state’s goals. In addition, several provisions contained in many local franchise agreements support the proposition that the state regulatory framework is reasonably related to the state’s goals of increasing video competition and providing better technology and services to a greater number of Ohioans.

requires something more than merely a “conceivable” or “plausible” explanation for the unequal treatment.” (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring)).

⁹⁶ See *Tex. Cable Telecomms. Ass’n v. Hudson*, 458 F. Supp. 2d 309, 312 (W.D. Tex. 2006), *rev’d*, 265 F. App’x. 210 (5th Cir. 2008); *Office of Consumer Counsel*, 502 F. Supp. 2d at 281.

⁹⁷ See Implementation of Section 621(a)(1) of the Cable Commc’s Policy Act of 1984, 72 Fed. Reg. 13,189 (Mar. 21, 2007).

⁹⁸ *Id.* at 13,191.

⁹⁹ *Energy Reserves Group Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983) (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977)).

¹⁰⁰ See *supra* notes 47–69 and accompanying text.

a. Preemption Provisions Acknowledging Governing State and Federal Laws

First, existing “preemption” provisions in local franchise agreements which acknowledge governing state and federal laws are a strong indication that an impairment of local franchise agreements is reasonable in order to enact a state regulatory framework. Many of the local franchise agreements contain terms that require compliance with state and federal law.¹⁰¹ For example, one local franchise agreement states the obligation as follows:

The Grantee shall, at all times, comply with state and federal law and the rules and regulations of any federal administrative agency. If any state or federal law or rule or regulation of any federal administrative agency is in conflict with the terms and conditions of this franchise, the City Council shall, as soon as possible following knowledge thereof, amend this franchise in a manner to bring it into compliance with such law, rule or regulation.¹⁰²

Therefore, “preemption” provisions acknowledging governing state and federal law provide support for the proposition that state regulation of video service providers is reasonable, even when impairing the terms of local franchise agreements.

b. Severability Clauses

Second, the inclusion of severability clauses indicates that an impairment of local franchise agreements is reasonable in order to enact a state regulatory framework. Many local franchise agreements contain severability clauses.¹⁰³ One local franchise agreement’s severability clause, in part, reads:

¹⁰¹ See the following franchise agreements, *supra* note 54: Bexley, § 1.2; Bowling Green, § 21.1; Green, § 2; Ironton, § 10.

¹⁰² Ironton, *supra* note 54, at § 10.

¹⁰³ See the following franchise agreements, *supra* note 54: Bexley, § 10; Bowling Green, § 27.1; Green, § 18; Ironton, § 15.

If this Agreement or any material section thereof is determined by an appropriate government agency or judicial authority to be invalid or preempted by federal, state or local regulations or laws, all other provisions of this Agreement shall remain in effect and the City of Bexley shall have the right to modify such invalid or preempted section in a manner consistent with the remaining terms of the Agreement¹⁰⁴

Therefore, severability clauses provide support that state regulation of video service providers is reasonable, even when impairing the terms of local franchise agreements.

c. Police Power Authority

Finally, retention of police power authority shows that an impairment of local franchise agreements is reasonable in order to enact a state regulatory framework. Many of the local franchise agreements contain reservations of police power to the municipality.¹⁰⁵ One local franchise agreement's police power reservation, in part, states: "The City hereby reserves the right to adopt, in addition to the provisions contained herein and existing applicable regulations, such additional regulations as allowed by law as it shall find necessary in the exercise of its police power."¹⁰⁶

This provision is notable for two reasons. First, the municipality can adopt only those additional regulations that are "allowed by law," which more than likely is referring to federal or state law.¹⁰⁷ This demonstrates that state regulation of video service providers is reasonable, even when impairing the terms of local franchise agreements. Second, the retention of powers explicitly refers to exercising "its police power" as opposed to its power of "self-government."¹⁰⁸ This distinction will be very important during the analysis of the Home-Rule Amendment that follows.¹⁰⁹

¹⁰⁴ Bexley, *supra* note 54, § 10.

¹⁰⁵ See the following franchise agreements, *supra* note 54: Bexley, § 4.1; Bowling Green, § 20.1; Green, § 11; Ironton, § 13(B).

¹⁰⁶ Green, *supra* note 54, § 11.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See discussion *infra* Part IV.B.1.a.

C. Conclusion: Contracts Clause Analysis

Therefore, the provision of Senate Bill 117 allowing incumbent providers to terminate their local contracts is constitutional because it is a valid use of the state's police power, it is not a "substantial impairment" of those contracts, it has a "significant and legitimate public purpose," and it is reasonably related to achieving the state's goals.

IV. HOME RULE ANALYSIS

A. The Typical Home Rule Challenge

Ohio's municipalities have home-rule powers. The Ohio Constitution's Home Rule Amendment, which was adopted in 1912, grants municipalities the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."¹¹⁰ As a result, several municipalities have argued that Senate Bill 117 infringes upon municipalities' home-rule authority and prevents them from adopting or enforcing ordinances in order to regulate video service providers within their jurisdictions.¹¹¹

A home-rule challenge will most likely arise in one of two different scenarios, both involving declaratory-judgment actions. In the first scenario, one or more political subdivisions, or even a municipal association, could invoke the Home Rule Amendment against the State of Ohio.¹¹² Such a political entity would argue that the General Assembly unconstitutionally limited municipal authority over video service providers. Second, an entity such as a video service provider could challenge the validity of any conflicting ordinance when a municipality enacts or attempts to enforce one.¹¹³ Such a private entity would argue that the municipality's ordinance conflicts with Senate Bill 117 and thus violates the Home Rule Amendment.

¹¹⁰ OHIO CONST. art. XVIII, § 3.

¹¹¹ See *supra* note 21 and accompanying text.

¹¹² This was the procedure used in *City of Dublin v. State*, 118 Ohio Misc. 2d 18 (Ct. Com. Pl. 2002).

¹¹³ This was the procedure used in *American Financial Services Ass'n v. City of Cleveland*, 858 N.E.2d 776 (Ohio 2006).

B. The Test for Determining a Home Rule Violation

The Ohio Supreme Court has recently decided at least three cases restating the basic analytical framework to be used when assessing home-rule challenges.¹¹⁴ This framework consists of three parts: (1) whether the matter in question involves a municipality's exercise of "local self-government" or is instead an exercise of the "local police power"; (2) if the matter is not a power of local self-government, then a court must determine if the state statute qualifies as a "general law" which would prevent the enactment or enforcement of any conflicting municipal ordinances; and (3) whether a particular municipal ordinance actually "conflicts" with the general law.¹¹⁵

1. Exercise of Local Self-Government or Local Police Power?

a. The Standard

A court will first determine whether the matter in question involves a municipality's exercise of "local self-government" or is instead an exercise of the "local police power."¹¹⁶ The Ohio Supreme Court has described the powers of local self-government to be those whose nature and field of operation are "local and municipal in character"—"all matters of a purely local nature."¹¹⁷ Local self-government powers "relate[] solely to the government and administration of the internal affairs of the municipality."¹¹⁸ The legislation's result also must be considered when deciding if it falls within self-government; the subject is within a municipality's power of self-government if the result has no extraterritorial effects and affects only the municipality itself.¹¹⁹ The subject is appropriate for regulation solely by the General Assembly, however, if the result is not limited to such effects.¹²⁰ Precedent has provided examples of

¹¹⁴ See *Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906, 911 (Ohio 2008); *City of Cincinnati v. Baskin*, 859 N.E.2d 514, 516 (Ohio 2006); *American Financial Servs. Ass'n*, 858 N.E.2d at 780.

¹¹⁵ *American Financial Servs. Ass'n*, 858 N.E.2d at 780; see also *Baskin*, 859 N.E.2d at 516; *Marich*, 880 N.E.2d at 911.

¹¹⁶ *American Financial Servs. Ass'n*, 858 N.E.2d at 780.

¹¹⁷ *Britt v. City of Columbus*, 309 N.E.2d 412, 415 (Ohio 1974).

¹¹⁸ *Village of Beachwood v. Bd. of Elections*, 148 N.E.2d 921, 923 (Ohio 1958).

¹¹⁹ *Id.*

¹²⁰ *Id.*

what the Ohio Supreme Court considers to be matters of local interest and concern, and thus a valid exercise of local self-government. For example, municipal elections,¹²¹ municipal ordinances regarding employees' military leave,¹²² zoning ordinances,¹²³ and establishing and operating a police department¹²⁴ have all been upheld as valid exercises of local self-government. However, regulation of predatory lending practices¹²⁵ and traffic regulation¹²⁶ are not matters of local self-government, but instead involve the use of police powers.

b. Application of the Standard to Senate Bill 117

The regulation of video service providers is not a matter of "local self-government," but rather an exercise of police power relating to a matter of statewide concern. Therefore, Senate Bill 117 does not violate municipalities' home-rule powers involving matters of local self-government. "The continued development of Ohio's video service market and promotion of infrastructure investment are matters of statewide concern and are properly subject to exercises of [Ohio's] police power."¹²⁷ In addition, local franchise requirements were viewed as "barriers to entry"¹²⁸ and caused "delays for new entrants."¹²⁹ Most importantly, many local franchise agreements themselves refer to the regulation of video

¹²¹ *State ex rel. City of Toledo v. Lucas County Bd. of Elections*, 765 N.E.2d 854, 858 (Ohio 2002).

¹²² *State ex rel. FOP, Ohio Labor Council, Inc. v. City of Sidney*, 746 N.E.2d 597, 600 (Ohio 2001).

¹²³ *Rispo Realty & Dev. Co. v. City of Parma*, 564 N.E.2d 425, 427 (Ohio 1990).

¹²⁴ *State ex rel. Canada v. Phillips*, 151 N.E.2d 722, 729 (Ohio 1958).

¹²⁵ *Am. Fin. Servs. Ass'n v. City of Cleveland*, 858 N.E.2d 776, 786 (Ohio 2006) ("Ohio's predatory-lending statutes are general laws because they are part of a comprehensive and uniform statewide enactment setting forth a police regulation that prescribes a general rule of conduct for lending in Ohio.").

¹²⁶ *Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906, 912 (Ohio 2008) ("It is now clear that the regulation of traffic is an exercise of police power that relates to public health and safety as well as the general welfare of the public.").

¹²⁷ OHIO REV. CODE ANN. § 1332.22(J) (LexisNexis Supp. 2009).

¹²⁸ *Id.* § 1332.22(D).

¹²⁹ *Id.* § 1332.22(G).

providers as an exercise of its police power instead of a local self-government power.¹³⁰

As technology has advanced over the years, the regulation of video service providers has become a matter of statewide concern (and perhaps even national) that falls outside the sphere of local self-government. Regulation of providers clearly does not relate solely to the government and administration of the municipality's internal affairs because the result has extraterritorial effects. Local regulation produces a barrier to competition broader than the boundaries of the municipality itself by deterring new entrants from investing the time and money into local markets. For example, since November, 2005, under the local framework, AT&T had only been able to successfully negotiate twelve CVSA's with the 508 different political jurisdictions within its Ohio telecommunications network.¹³¹ Therefore, local regulation causes consumers to lose the benefits of competition in an area broader than a single municipality. In the absence of federal legislation creating a national franchising process, many states have begun to enact statewide regulatory frameworks in order to promote competitive entry and to enhance competition throughout the entire state.¹³²

The Ohio Supreme Court has also concluded that “[i]t is within a municipality's power to protect the public health and welfare [by] regulating the establishment and maintenance of a [cable television provider's] distribution network.”¹³³ This ruling is important because it establishes that the Ohio Supreme Court considered cable regulation to be a local police power (“protect the public health and welfare”) instead of the exercise of local self-government. Since this decision was made in 1986, when there was no state regulatory framework such as that enacted by Senate Bill 117, cable regulation fell to municipalities because the state was not using its “concurrent police power” in this area. However, now

¹³⁰ See the following franchise agreements, *supra* note 54: Bexley, § 4.1; Bowling Green, § 20.1; Green, § 11; Ironton, § 13(B).

¹³¹ *Hearing on S.B. 117 Before the S. Energy & Public Utilities Comm.*, 127th Gen. Assemb. (Ohio 2007) (statement of Andrew Emerson, Porter Wright Morris & Arthur LLP) (on file with author).

¹³² See sources cited *supra* note 11.

¹³³ *Vernon v. Warner Amex Cable Commc'ns, Inc.*, 495 N.E.2d 374, 375, 377 (Ohio 1986).

that the State of Ohio's police powers are being used to regulate video services, any ordinance that is in conflict must yield in the face of a general state law.

2. *Determination of a "General Law"*

a. *The Four-Part "Canton Test" Standard*

If the matter is not a power of local self-government, then a court must determine if the state statute qualifies as a "general law" that would prevent the enactment or enforcement of any conflicting municipal ordinances.¹³⁴ The Home Rule Amendment permits municipalities to adopt and enforce only those ordinances concerning police-power "as are not in conflict with general laws."¹³⁵ The Ohio Supreme Court's four-part "*Canton* test" is used to determine whether a state statute is a "general law" for purposes of home-rule analysis.¹³⁶ According to the *Canton* court,

a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth [such] regulations, and (4) prescribe a rule of conduct upon citizens generally.¹³⁷

b. *Applying the Four-Part "Canton Test" Standard to Senate Bill 117*

First, the state statute must "be part of a statewide and comprehensive legislative enactment."¹³⁸ There is precedent showing some of the statutory schemes that the Ohio Supreme Court considers to be examples of statewide and comprehensive legislative enactments. For instance,

¹³⁴ Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 780 (Ohio 2006); see also Marich v. Bob Bennett Constr. Co., 880 N.E.2d 906, 911 (Ohio 2008); City of Cincinnati v. Baskin, 859 N.E.2d 514, 516 (Ohio 2006); City of Canton v. State, 766 N.E.2d 963, 966 (Ohio 2002).

¹³⁵ OHIO CONST. art. XVIII, § 3.

¹³⁶ See *Canton*, 766 N.E.2d at 967–68.

¹³⁷ *Id.* at 968.

¹³⁸ *Id.*

regulating the: (1) disposal of hazardous wastes,¹³⁹ (2) registration and licensing of private investigators,¹⁴⁰ and (3) “dimensions of vehicles that may travel on public highways.”¹⁴¹ However, statutory provisions adopting federal construction and safety standards for manufactured homes was not part of a statewide and comprehensive legislative plan.¹⁴²

In addition, “[t]here is no requirement that a statute must be devoid of exceptions to remain statewide and comprehensive in effect. Permitting exceptions allows the General Assembly to specifically tailor the effect of laws to account for a wide range of situations.”¹⁴³ Therefore, the exception contained in section 1332.23(B) of the Ohio Revised Code does not alter Senate Bill 117’s statewide and comprehensive effect.¹⁴⁴

Senate Bill 117 clearly enacts a statewide and comprehensive framework for regulating video services and the providers of those services. The bill states as one of its findings that Ohio “can and should provide a uniform regulatory framework” so that providers can offer video service to Ohio’s residents “regardless of their jurisdictional locations.”¹⁴⁵ In addition, the bill was “intended as a comprehensive legislative enactment.”¹⁴⁶ Senate Bill 117 fulfills this intention by precluding political subdivisions from requiring video service providers to obtain the municipalities’ authority before providing services.¹⁴⁷ Furthermore, the director of commerce, a state officer, is the administrator of all video service authorizations and is now the “sole franchising authority” in Ohio.¹⁴⁸ Therefore, Senate Bill 117 enacted a comprehensive, statewide

¹³⁹ *Clermont Env'tl. Reclamation Co. v. Wiederhold*, 442 N.E.2d 1278, 1281 (Ohio 1982).

¹⁴⁰ *Ohio Ass'n of Private Detective Agencies, Inc. v. City of North Olmsted*, 602 N.E.2d 1147, 1150 (Ohio 1992).

¹⁴¹ *Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906, 913 (Ohio 2008).

¹⁴² *Canton*, 766 N.E.2d at 968.

¹⁴³ *Marich*, 880 N.E.2d at 913.

¹⁴⁴ This section allows incumbent providers to either continue to provide service pursuant to their existing franchises’ terms and conditions or to instead opt-out of their current local agreements when sufficient competition is demonstrated. OHIO REV. CODE ANN. § 1332.23(B) (LexisNexis Supp. 2009).

¹⁴⁵ *Id.* § 1332.22(H).

¹⁴⁶ *Id.* § 1332.22(K).

¹⁴⁷ *Id.* § 1332.26(A).

¹⁴⁸ *Id.* § 1332.24(A).

plan by granting the Department of Commerce regulatory powers over almost all video services.¹⁴⁹

Second, the state statute, in order to constitute a general law, needs to “apply to all parts of the state alike and operate uniformly throughout the state.”¹⁵⁰ This uniformity requirement “does not forbid different treatment of various classes or types of citizens, but does prohibit nonuniform classification if such be arbitrary, unreasonable or capricious.”¹⁵¹

Senate Bill 117 was intended to operate uniformly throughout Ohio.¹⁵² For the second prong, it is important to remember that Senate Bill 117’s purpose is the regulation of video services and the providers of those services. The bill provides, with certain exceptions, that “no person shall provide video service in this state . . . except pursuant to a video service authorization issued under section 1332.24 of the Revised Code.”¹⁵³ All video service providers, therefore, must submit to the new state regime. Thus, Senate Bill 117 operates uniformly throughout the state upon all video service providers.

In contrast, municipalities will argue that Senate Bill 117 neither applies to all parts of the state alike nor operates uniformly throughout the state. Their focus will be on the exception that allows incumbent providers to either continue to provide service pursuant to their existing franchises’ terms and conditions or to instead opt-out of their current local agreements when sufficient competition is demonstrated.¹⁵⁴ However, this nonuniform treatment of municipalities is only short-term in duration because “no such [local] franchise or agreement shall be renewed or extended beyond [its] existing term . . . or its earlier termination.”¹⁵⁵ As a result, all municipalities will eventually have their video service providers operating under the state standard. Any nonuniformity is the result of this short-term

¹⁴⁹ See *id.* § 1332.24. The statute sets the outer limits of the director of commerce’s power. *Id.* § 1332.24(B)(1) (“*Except as provided in this section*, the director has no authority to regulate video service in this state, including, but not limited to, the rates, terms, or conditions of that service.”) (emphasis added).

¹⁵⁰ *City of Canton v. State*, 766 N.E.2d 963, 968 (Ohio 2002).

¹⁵¹ *Id.* at 969 (quoting *Garcia v. Siffirin Residential Ass’n.*, 407 N.E.2d 1369, 1378 (Ohio 1980)).

¹⁵² § 1332.22(K).

¹⁵³ *Id.* § 1332.23(A). Section 1332.23(B) contains the exceptions. *Id.*

¹⁵⁴ *Id.* § 1332.23(B).

¹⁵⁵ *Id.* § 1332.23(B)(1)(a).

transition mechanism. Therefore, a court should dismiss such an argument under a home-rule analysis. In addition, this short-term, nonuniform treatment of municipalities is necessary in order to create a level-playing field among the incumbent providers and new entrants (the importance of which will be discussed later in the article).¹⁵⁶ Thus, for purposes of home-rule analysis, the second *Canton* prong is satisfied because Senate Bill 117 operates uniformly throughout the state upon all video service providers alike.

Third, the state statute must “set[] forth police, sanitary, or similar regulations,” instead of only granting or limiting a municipal corporation’s legislative power to adopt or enforce such regulations.¹⁵⁷ In addition, any statute that prohibits a municipality’s exercise “of its home rule powers without such statute serving an overriding statewide interest would directly contravene the constitutional grant of municipal power.”¹⁵⁸

Senate Bill 117’s provisions were intended to “set[] forth police regulations.”¹⁵⁹ In addition, “[t]he continued development of Ohio’s video service market and promotion infrastructure investment are matters of statewide concern and are properly subject to exercises of [Ohio’s] police power.”¹⁶⁰ Municipalities will argue that the bill was enacted solely to limit their ability to authorize and regulate competitive video service providers’ business activities.¹⁶¹ While the bill does limit a municipality’s power to adopt or enforce such regulations, it does so as part of a comprehensive and statewide approach for regulating such entities and their business activities. In addition to detailed state licensing requirements,¹⁶² the statutory scheme sets forth specific customer service standards¹⁶³ and other operating requirements on video service

¹⁵⁶ See discussion *infra* Part V.B.

¹⁵⁷ *City of Canton v. State*, 766 N.E.2d 963, 969 (Ohio 2002) (quoting *Vill. of W. Jefferson v. Robinson*, 205 N.E.2d 382, 384 (Ohio 1965)).

¹⁵⁸ *Id.* at 969–70 (quoting *Clermont Envtl. Reclamation Co. v. Wiederhold*, 442 N.E.2d 1278, 1282 (Ohio 1982)).

¹⁵⁹ § 1332.22(K).

¹⁶⁰ *Id.* § 1332.22(J).

¹⁶¹ See *id.* § 1332.26(A)–(B) (limiting the interaction municipalities can have with video service providers).

¹⁶² *Id.* §§ 1332.23–.25.

¹⁶³ See *id.* § 1332.26(D).

providers.¹⁶⁴ Therefore, Senate Bill 117 sets forth police regulations instead of only limiting a municipal corporation's legislative power.

Finally, in order to be considered a general law, the state statute needs to "prescribe a rule of conduct upon citizens generally."¹⁶⁵ The statute must apply to citizens generally and not solely to municipal legislative bodies.¹⁶⁶ When determining whether the fourth element of *Canton*'s test is satisfied, it is important to remember that "forbidding an act is just as much prescribing a rule of conduct as is permitting an act."¹⁶⁷

Senate Bill 117 was intended to "prescrib[e] a rule of conduct upon citizens generally."¹⁶⁸ The bill establishes a statewide and comprehensive framework for regulating and authorizing competitive video service providers; thus, it is not simply a limitation upon municipalities' lawmaking authority. In addition, Senate Bill 117 regulates all video service providers in the state much like the permissible predatory-lending regulatory scheme that included "all lenders in Ohio."¹⁶⁹ Therefore, the final *Canton* element is satisfied and Senate Bill 117 will be considered a "general law."

3. Conflict between a Municipal Ordinance and the State Statute?

a. The Standard

The third and final element to be analyzed when deciding a home-rule challenge is whether a particular municipal ordinance actually "conflicts" with the general law.¹⁷⁰ The test for determining if a conflict exists between the state's general law and a municipal ordinance "is 'whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.'"¹⁷¹ The local law and the state statute are in direct conflict when "incompatible" and "[a]dditional burdens are imposed by the local

¹⁶⁴ *Id.* §§ 1332.27–29.

¹⁶⁵ *City of Canton v. State*, 766 N.E.2d 963, 968 (Ohio 2002).

¹⁶⁶ *Id.* at 970.

¹⁶⁷ *City of Cincinnati v. Baskin*, 859 N.E.2d 514, 518 (Ohio 2006).

¹⁶⁸ § 1332.22(K).

¹⁶⁹ *See Am. Fin. Servs. Ass'n v. City of Cleveland*, 858 N.E.2d 776, 784 (Ohio 2006).

¹⁷⁰ *Id.* at 780; *see also Marich v. Bob Bennett Constr. Co.*, 880 N.E.2d 906, 911 (Ohio 2008); *Baskin*, 859 N.E.2d at 516; *Canton*, 766 N.E.2d at 966.

¹⁷¹ *Vill. of Sheffield v. Rowland*, 716 N.E.2d 1121, 1123 (Ohio 1999) (quoting *Vill. of Struthers v. Sokol*, 140 N.E. 519, 519–20 (Ohio 1923)).

ordinance that go far beyond what is permitted by the state statutory scheme.”¹⁷² In addition, a court will examine the state statute for “any limiting provision or declaration” indicating the General Assembly’s intent to preempt municipal activity.¹⁷³

b. Application of the “Conflict Standard” to Senate Bill 117

There are some provisions of Senate Bill 117 that will actually “conflict” with every local franchising agreement or competitive video service agreement. First, Senate Bill 117 precludes political subdivisions from requiring video service providers to obtain the municipalities’ authority before providing services, and it also limits the municipalities’ ability to regulate competitive video service providers’ business activities.¹⁷⁴ Second, Senate Bill 117 expressly preempts and supersedes existing franchise terms related to the provision of PEG channels and I-Nets by prohibiting municipalities from imposing any PEG or I-Net requirements that are more burdensome than those set forth in Senate Bill 117.¹⁷⁵ Finally, the most prevalent conflict would be the statutory provision allowing incumbent video providers with current local franchise agreements to opt into the state franchise when sufficient competition is demonstrated, and thus negate their local franchises.¹⁷⁶ However, there are several types of municipal ordinances that would not conflict with Senate Bill 117.¹⁷⁷

Therefore, Senate Bill 117 does not violate municipalities’ home-rule powers because the regulation of video service providers is not a matter of

¹⁷² *Rispo Realty & Dev. Co. v. City of Parma*, 564 N.E.2d 425, 428 (Ohio 1990).

¹⁷³ *Baskin*, 859 N.E.2d at 519.

¹⁷⁴ OHIO REV. CODE ANN. § 1332.26(A)–(B) (LexisNexis Supp. 2009).

¹⁷⁵ *Id.* § 1332.30(C) (I-Nets); *id.* § 1332.30(G) (PEG channels).

¹⁷⁶ *Id.* § 1332.23(B)(2)(d). Apparently, an incumbent video provider need not wait until sufficient competition can be demonstrated, but instead can opt into the state franchise “[a]fter any other person provides or sells video service in that area.” *See id.* § 1332.23(B)(2)(b).

¹⁷⁷ *See id.* § 1332.30(A)–(B) (subject to certain limitations, municipal ordinances can require video service providers to provide PEG channels for noncommercial use); *id.* § 1332.32(C) (subject to certain limitations, municipal ordinances can require the payment of a percentage of gross revenues to the municipality); *id.* § 1332.33(A) (municipal ordinances can authorize audits to verify the accuracy of fees paid by service providers to the municipality).

“local self-government,” but rather an exercise of police power relating to a matter of statewide concern. Furthermore, Senate Bill 117 would be considered a “general law,” and thus any municipal ordinances that “conflict” with its provisions would be precluded from being enacted or enforced.

V. RECENT TRENDS IN VIDEO FRANCHISING

A. *At the Federal Level*

The FCC, in its Report and Order and Further Notice of Proposed Rulemaking,¹⁷⁸ found that “the current operation of the local franchising process in many jurisdictions constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated Federal goals of enhanced cable competition and accelerated broadband deployment.”¹⁷⁹ In addition, local franchising “unreasonably delays and, in some cases, derails [new entrants’] efforts due to [local franchising authorities’] unreasonable demands on competitive applicants.”¹⁸⁰ The FCC further recognized that franchising at the local level “is a time-consuming and expensive process that has a chilling effect on competitors.”¹⁸¹ However, “State level reforms appear to offer promise in assisting new entrants to more quickly begin offering consumers a competitive choice among cable providers.”¹⁸² Therefore, the FCC has acknowledged that state level reforms are more likely to bring competition to the video services market than the current local process.

¹⁷⁸ A copy of the original Order is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-180A1.pdf. It has since been published in the Federal Register. See Implementation of Section 621(a)(1) of the Cable Commc’s Policy Act of 1984, 72 Fed. Reg. 13,189 (Mar. 21, 2007). On June 27, 2008, the Sixth Circuit Court of Appeals denied petitions to review this Order. *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 766–67 (6th Cir. 2008). The court found “that the FCC acted well within its statutorily delineated authority in enacting the Order and that there exists sufficient record evidence to indicate that the FCC did not engage in arbitrary-and-capricious rulemaking activity.” *Id.*

¹⁷⁹ Implementation of Section 621(a)(1) of the Cable Commc’s Policy Act of 1984, 72 Fed. Reg. at 13,190.

¹⁸⁰ *Id.* at 13,191.

¹⁸¹ *Id.* at 13,192.

¹⁸² *Id.* at 13,193.

Even Congress appears to have realized that the current video services market needs a regulatory framework that promotes competition. In the 109th Congress, Representative Joe Barton introduced House Bill 5252, entitled the “Communications Opportunity, Promotion, and Enhancement Act of 2006” (COPE).¹⁸³ The bill would have created a national cable franchising framework similar to the statewide franchising process established under Senate Bill 117. The COPE proposed amending the Communications Act of 1934¹⁸⁴ to allow “[a] person or group that is eligible under subsection (d) [to] elect to obtain a national franchise under this section as authority to provide cable service in a franchise area in lieu of any other authority under Federal, State, or local law to provide cable service in such franchise area.”¹⁸⁵ The House passed House Bill 5252 by a vote of 321 to 101.¹⁸⁶ However, the United States Senate never approved the bill. Therefore, in the absence of federal legislation, the states were left to create video franchising methods at the state level.

B. At the State Level

1. Texas

a. Summary of the Case

In 2005, Texas became the first state to pass a video franchising law when it enacted the “Act Relating to Furthering Competition in the Communications Industry.”¹⁸⁷ The “Texas Cable & Telecommunications Association (TCTA), a trade organization representing incumbent cable operators in Texas,” brought an action challenging the validity of the Texas legislation.¹⁸⁸ The TCTA challenged the Act on the grounds that it allows new entrants and overbuilders¹⁸⁹ “to obtain Texas Public Utility Commission (PUC)-issued franchises” (overbuilders can even renounce their municipal franchises), while at the same time “locks incumbent cable

¹⁸³ H.R. 5252, 109th Cong. § 1(a) (2006).

¹⁸⁴ *Id.* § 101.

¹⁸⁵ *Id.* § 630(a)(1).

¹⁸⁶ 152 CONG. REC. H3586–87 (2006).

¹⁸⁷ S.B. 5, 79th Leg., 2d Called Sess. (Tex. 2005) (enacted).

¹⁸⁸ *Tex. Cable & Telecomms. Ass’n v. Hudson*, 458 F. Supp. 2d 309, 312 (W.D. Tex. 2006) (internal quotes omitted), *rev’d*, 265 F. App’x. 210 (5th Cir. 2008).

¹⁸⁹ Overbuilders are “companies that build cable systems in areas that are already served by another cable operator.” *Hudson*, 265 F. App’x. at 212.

operators into existing municipal franchises.”¹⁹⁰ The TCTA brought challenges under the First Amendment, the Due Process Clause, the Equal Protection Clause, and the Supremacy Clause of the United States Constitution.¹⁹¹ However, the District Court ruled that the TCTA’s claims were not ripe for consideration and therefore dismissed the entire lawsuit as premature.¹⁹²

In so ruling, the District Court found that TCTA’s evidence did not establish that the Act would cause either inevitable or probable harm to members of the TCTA which were incumbent cable operators.¹⁹³ The TCTA even conceded at oral arguments that “it [was] too soon to tell what economic impact the Act will have and to what extent there is disparate treatment of incumbent cable providers.”¹⁹⁴ Absent any concrete cognizable harm suffered by any of the TCTA’s members, the District Court was not “ready to frustrate the expressed will of [the Texas] legislature.”¹⁹⁵

b. Impact on Ohio

Ohio municipalities bringing a Contracts Clause claim would also need to be able to demonstrate an actual harm created by the provisions of Senate Bill 117. Based on the District Court’s *Hudson* decision, this would be a very difficult burden for any municipality to carry for several reasons. First, as already discussed, many of the local franchising agreements’ material provisions have been replaced with similar, comparable requirements within Ohio’s new uniform statewide regulatory system. Second, some of Senate Bill 117’s effects will not be known for several years. For example, Senate Bill 117 preserves certain PEG support revenues and (I-Nets) until January 1, 2012, or the expiration of the local

¹⁹⁰ *Hudson*, 458 F. Supp. 2d at 312; *see also* TEX. UTIL. CODE ANN. § 66.004(b) (Vernon 2007) (renders incumbents ineligible for a state-issued franchise).

¹⁹¹ *Hudson*, 458 F. Supp. 2d at 312.

¹⁹² *Id.* at 314. On February 7, 2008, the United States Court of Appeals for the Fifth Circuit reversed and remanded this decision and held that “the TCTA’s complaint adequately alleges Article III standing to survive a Rule 12(b)(6) motion.” *Hudson*, 265 F. App’x. at 212.

¹⁹³ *Hudson*, 458 F. Supp. 2d at 313.

¹⁹⁴ *Id.* at 314.

¹⁹⁵ *Id.* at 313–14.

franchise agreement, whichever is earlier.¹⁹⁶ Therefore, it would be difficult for a municipality to identify any concrete cognizable harm that it has suffered, and any court adjudicating such a claim would likely not be willing to frustrate the Ohio legislature's expressed will if the harm is only speculative.

Senate Bill 117 also is not as restrictive as the Texas law because it allows incumbent cable operators to opt into the state franchise once a competitive "trigger" is met.¹⁹⁷ This provision, which eliminates the issue of disparate treatment of incumbent cable providers, is also the basis upon which municipalities may bring a Contracts Clause violation. However, the Texas litigation appears to show the Catch-22 faced by any state which wants to enact a statewide franchising process: either do not allow abrogation of existing franchises and face litigation from the incumbent cable companies, or allow the cable companies to opt-out and face litigation from municipalities. The latter position—the one chosen by Ohio—appears to be the more reasonable approach since it puts all providers on a relatively level playing field and enhances competition by eliminating any disparate treatment among providers.¹⁹⁸

c. Federal Appellate Court Review of Hudson

The United States Court of Appeals for the Fifth Circuit agreed with Ohio's approach when it reversed and remanded the *Hudson* decision and held "that the TCTA's complaint adequately alleges Article III standing to survive a Rule 12(b)(6) motion."¹⁹⁹ The Fifth Circuit recognized that the TCTA's standing was established by two types of injury: economic injury and constitutional injury.²⁰⁰ First, the TCTA suffered economic injury because "the Act allows competitors to the incumbent cable providers to enter municipal markets with no requirement for municipal licensing and pass these savings on to consumers, while incumbents remain burdened

¹⁹⁶ OHIO REV. CODE ANN. § 1332.30(C) (LexisNexis Supp. 2009) (I-Nets); *id.* § 1332.30(E) (PEG support revenues).

¹⁹⁷ *Id.* § 1332.23(B)(2)(a)–(d).

¹⁹⁸ Some incumbents may have additional, grandfathered obligations, but these will likely be minimal and temporary.

¹⁹⁹ *Tex. Cable & Telecomms. Ass'n v. Hudson*, 265 F. App'x. 210, 212 (5th Cir. 2008).

²⁰⁰ *Id.* at 214.

with licensing costs.²⁰¹ Second, the TCTA suffered constitutional injury because “the Act facially discriminates against the TCTA’s membership by extending the benefit of a state-wide license to its competitors while denying that same benefit to incumbent cable providers.”²⁰² Ohio’s Senate Bill 117 avoids this result because it created relatively equal treatment among Ohio’s video service providers.

2. Connecticut

a. Summary of the Case

The prior argument is strengthened by a series of decisions (all concerning the same parties) decided by the United States District Court, District of Connecticut.²⁰³ Connecticut did not have a state video franchising law when the Department of Public Utility Control of the State of Connecticut (DPUC) determined that a new television service proposed by AT&T (U-Verse) did not fall within the federal definition of “cable service” under the Cable Communications Policy Act of 1984 (Cable Act).²⁰⁴ Thus, AT&T was not required to obtain a legacy cable franchise in Connecticut.²⁰⁵ The plaintiffs²⁰⁶ argued that the DPUC’s decision

²⁰¹ *Id.* at 217.

²⁰² *Id.* at 218.

²⁰³ See *Office of Consumer Counsel v. S. New England Tel. Co.*, 502 F. Supp. 2d 277, 280 (D. Conn. 2007) [hereinafter *OCC I*] (ruling on defendants’ Motions to Dismiss); *Office of Consumer Counsel v. S. New England Tel. Co.*, 515 F. Supp. 2d 269, 270 (D. Conn.) [hereinafter *OCC II*] (ruling on cross-motions for summary judgment), *reconsideration denied*, 514 F. Supp. 2d 345 (D. Conn. 2007) [hereinafter *OCC III*]; *Office of Consumer Counsel v. S. New England Tel. Co.*, 565 F. Supp. 2d 384, 385 (D. Conn. 2008) [hereinafter *OCC IV*] (ruling on defendant’s Motion to Amend Entry of Final Judgment).

²⁰⁴ *OCC IV*, 565 F. Supp. 2d at 386, 388; see also *OCC I*, 502 F. Supp. 2d at 280–81. Connecticut subsequently enacted legislation, which became effective on October 1, 2007. *OCC IV*, 565 F. Supp. 2d at 387. A copy of the bill is available at <http://www.cga.ct.gov/2007/ACT/PA/2007PA-00253-R00HB-07182-PA.htm>.

²⁰⁵ See *OCC I*, 502 F. Supp. 2d at 281. Prior to the enactment of Connecticut’s video franchising bill, the cable authorization process went through the DPUC, as opposed to companies negotiating local franchise agreements. See *OCC IV*, 565 F. Supp. 2d at 391.

²⁰⁶ The plaintiffs were the Connecticut Office of Consumer Counsel, the New England Cable and Telecommunications Association, Inc. (“a nonprofit corporation and trade association that represents the interests of most cable operators holding franchises in

(continued)

provided AT&T with an unfair competitive advantage over existing cable companies by relieving AT&T from Congress's federal regulatory requirements for cable television.²⁰⁷ Therefore, the plaintiffs sought "equal application of cable franchising obligations."²⁰⁸

In *OCC I*, the district court first analyzed whether the plaintiffs had satisfied the standing requirement by demonstrating an injury in fact.²⁰⁹ The court found the plaintiffs' had satisfied their burden of proving an injury in fact:

Here, although plaintiffs do not allege that they have already suffered particularized economic injury, they allege a concrete injury in the form of unfair competition—they have alleged that they are being subjected to DPUC regulation pursuant to the Cable Act and concomitant state franchising and other regulations whereas their competitor, AT&T, is not subjected to the same regulation notwithstanding that it is also offering a "cable service" under the Act, resulting in an uneven playing field.²¹⁰

The district court also determined that the plaintiffs' injury could be "fairly trace[d] to the DPUC because the DPUC's decision itself caused the damage of an "unequal playing field and unfair competitive scenario."²¹¹ The district court distinguished this case from the original *Hudson* decision by stating that it was undisputed that the plaintiffs here were being treated differently than AT&T and that their harm was obvious since they had to comply with the franchising and other regulations whereas AT&T could elect not to.²¹²

As a result of these findings, the District Court of Connecticut noted that the plaintiffs' alleged injury would need to be redressed by "a decision

Connecticut"), and three different Cablevision entities. *OCC I*, 502 F. Supp. 2d at 279–80. The defendants were AT&T and the DPUC. *Id.*

²⁰⁷ *Id.* at 281.

²⁰⁸ *Id.* at 287 n.7.

²⁰⁹ *Id.* at 282–85.

²¹⁰ *Id.* at 283.

²¹¹ *Id.* at 284–85.

²¹² *Id.* at 286 n.6 (citing *Tex. Cable & Telecomms. Ass'n v. Hudson*, 458 F. Supp. 2d 309, 314 (W.D. Tex. 2006)).

declaring the DPUC's determination unlawful and preempted, and ordering AT&T to comply with DPUC franchising requirements."²¹³ Therefore, in *OCC I*, the court found that the record was undeveloped with respect to whether AT&T's video programming service constituted a "cable service" being offered by a "cable operator" within the meaning of the federal Cable Act and that the DPUC's contrary determination was therefore preempted by federal law.²¹⁴ As such, the court ruled against the defendants' Rule 12(b)(6) motion.²¹⁵

In *OCC II* (decided one day after *OCC I*), the District Court considered the parties' cross-motions for summary judgment.²¹⁶ The court

found that AT&T constitutes a "cable operator" providing a "cable service" over a "cable system," as those terms are defined in the Cable Act, . . . [and] that the DPUC's conclusions in its June 7, 2006 Decision to the contrary, and its related determination that AT&T need not comply with the [federal] franchising requirement . . . conflict with and are thus preempted by federal law.²¹⁷

On October 2, 2007, the District Court denied AT&T's subsequent motion for reconsideration.²¹⁸

b. Impact on Ohio

Although these decisions are based on a state agency's determination rather than a state video franchising law, the District Court of Connecticut's decisions are useful when analyzing a possible claim against Senate Bill 117. The main problem with the DPUC's determination was the disparate treatment between entrants with new technology (like AT&T) and incumbent cable providers. This disparate treatment created unfair competition and an uneven playing field. However, Senate Bill 117 has

²¹³ *Id.* at 285.

²¹⁴ *Id.* at 288–89.

²¹⁵ *Id.* at 289.

²¹⁶ *Office of Consumer Counsel v. S. New England Tel. Co.*, 515 F. Supp. 2d 269, 270 (D. Conn.), *reconsideration denied*, 514 F. Supp. 2d 345 (D. Conn. 2007).

²¹⁷ *Id.* at 282.

²¹⁸ *See OCC III*, 514 F. Supp. 2d at 351.

several provisions that seek to create fair competition and an even playing field among all providers of video services.

The first section demonstrating Ohio's intent to create equality among providers can be found in Senate Bill 117's definition of "video service" as "the provision of video programming over wires or cables . . . regardless of the technology used to deliver that programming."²¹⁹ This definition eliminates the issue dealt with in the *OCC* cases: how to treat entrants using new technology differing from that used by traditional cable providers.

In light of the Ohio General Assembly's finding that "local franchise requirements" were "barriers to entry"²²⁰ and caused "delays for new entrants,"²²¹ it was only fair to also allow incumbents to be relieved of these burdens and thus be allowed to compete under the same regulatory framework as new entrants once certain conditions are met. However, Senate Bill 117 provides several sections that ease the effect this decision has on municipalities. Most importantly, it declares that "[m]aintaining an existing franchise in cases where new entrants obtain video service authorizations is not appropriate *unless the incumbent chooses to maintain that franchise*."²²² Therefore, even if there is sufficient competition to immediately switch to the statewide standard under section 1332.23(B)(2) of the Ohio Revised Code, the incumbent provider can elect to abide by any existing local agreements until those agreements expire.²²³

In analyzing Senate Bill 117's effects, it is important to note that those municipalities affected by the termination of their local franchise agreements are not in competition with other municipalities. Therefore, the fact that some municipalities will remain under their local agreements until expiration and some will immediately fall under the statewide standard does not create disparate treatment among municipalities.

²¹⁹ OHIO REV. CODE ANN. § 1332.21(J) (LexisNexis Supp. 2009). However, it must be noted that direct broadcast satellite providers have been excluded from the requirements. *Id.*

²²⁰ *See id.* § 1332.22(D) ("To date, there has been only minimal competitive entry by telephone companies into the facilities-based video programming market in this state, in part, because local franchise requirements may present barriers to entry.").

²²¹ *See id.* § 1332.22(G) ("Local franchise and other requirements may present inordinate delays for new entrants.").

²²² *Id.* § 1332.22(I) (emphasis added).

²²³ *See id.* § 1332.23(B)(1)(a).

Eventually all municipalities will fall under Ohio's uniform regulatory framework, but the relatively short delay for some does not put them at a disadvantage vis-à-vis other municipalities. However, this is not the same for incumbent providers, who must be given the immediate chance to compete on an even playing field with new entrants under Ohio law.

VI. CONCLUSION

It is questionable whether Ohio municipalities would even have standing to bring suit under the United States Constitution against the state which created it, especially concerning contracts between municipalities and third parties (here, video service providers). Regardless, Senate Bill 117's provision allowing incumbent providers to terminate their local contracts is constitutional because it is a valid use of Ohio's police power, it is not a "substantial impairment" of those contracts, it has a "significant and legitimate public purpose," and it is reasonably related to achieving Ohio's goals. Furthermore, Senate Bill 117 does not violate municipalities' home-rule powers because the regulation of video service providers is not a matter of "local self-government," but rather an exercise of police power relating to a matter of statewide concern. Finally, Senate Bill 117 would be considered as a "general law," and thus any municipal ordinances that "conflict" with its provisions would be precluded from being enacted or enforced.

As the new trends in video franchising become more established through cases such as those in Texas and Connecticut, the constitutionality of the recently enacted state regulatory frameworks will become clearer. Unless either Congress decides to act through federal legislation or a court of competent jurisdiction declares the law unconstitutional, Senate Bill 117 and its regulatory framework are here to stay in Ohio.