State Preemption of Cable Television Regulation — Whatever Happened to the Sanctity of Contract?

William M. Marticorena

Lynda E. Marticorena

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State Preemption of Cable Television Regulation — Whatever Happened to the Sanctity of Contract?

California Government Code section 53066.1 as recently amended gives cable television operators the right to obtain rate increases even in the face of the city or county franchisor opposition. Since most cable franchise agreements allow the franchisor to control rates for the cable service, there is a conflict between the statute and the franchise contracts. This article examines the issue of whether the statute violates the constitutional provisions against the impairment of contracts and whether the franchisor or a subscriber of the service has the necessary standing to assert the constitutional argument.

I. INTRODUCTION

Cable operators have always viewed municipal rate regulations as a tragedy equal in degree only to the Great Flood. Even though the Federal Communication Commission has, for a number of years, preempted the local regulation of premium or pay cable television rates, cable operators have viewed municip-
pal authority to regulate basic service rates as both unnecessary and counter-productive. Claiming that local governments having acquired the contractual power to regulate rates are often ill-equipped to exercise it, and more often than not abuse their authority, cable operators throughout this country implored their legislators for some form of statutory rate relief in the absence of federal preemption over basic services. At least in California, these cries fell upon receptive ears.

II. HISTORICAL PERSPECTIVE

The history of state preemption of cable television regulation in California began with the introduction of Senate Bill 1757 (S.B. 1757) in 1978. This bill, as ultimately passed by the California Legislature but vetoed by the Governor, required a local government body to, upon receipt of any request for rate changes, schedule within thirty days a public hearing on the matter, and to consummate a final action upon the proposed rate increase within 120 days of the receipt thereof. If final action was not taken within the 120-day period, the proposed rate changes became effective by operation of law. If the local government entity disapproved the rate changes, it was required to set forth in writing its reasons for the denial, including, if applicable, a specific delineation of the information which was claimed to be lacking in the rate increase application. In addition, in one of the most contro-

and transmits their own shows rather than just transmitting shows from other stations. The companies also allow the local private production of shows to be transmitted over their cable system through leased access channels. The programs involve an extra charge to the customer as they are not normally a part of a basic cable television package. See Brookhaven Cable T.V. v. Kelly, 428 F. Supp. 1216, 1218-19 (N.D.N.Y. 1977).


3. It should be noted that until 1976, the Rules and Regulations of the FCC required some form of local rate regulation as a condition for the issuance of the Certificate of Compliance, a procedure since abandoned. (47 C.F.R. § 76.31(a)(4), deleted by 41 Fed. Reg. 34963, 34968 (1976)).

4. The FCC has never, in any formal document, defined the term "basic service" for the purposes of federal rate preemption. In most cases, the definition of this term is left to an interpretation of the franchise agreement. By broadly defining this term in the franchise contract, the local government entity can expand the purview of its rate regulation authority. The FCC allows the local regulation of rates for basic services. Cable Television Report and Order, Docket Nos. 18397 et al. 36 F.C.C.2d 143, 209 (Feb. 3, 1972).


versial portions of the bill, the franchisee was specifically authorized to bring actions based upon breach of contract and inverse condemnation to challenge the denial of the rate increase. The extension of this contractual remedy to an aggrieved cable operator was clearly a change in existing law and reversed California precedent that a grant or denial of a rate increase constitutes a legislative act challengeable only by the ordinary mandamus remedies. Although some cable operators have maintained for years that the denial of a rate increase can predicate a cause of action for breach of contract, no California court has accepted this theory.

Quickly recovering from the trauma of Governor Brown's veto of SB 1757, the cable industry, this time through Assemblyman

7. Orange County Cable Communications Co. v. City of San Clemente, 59 Cal. App. 3d 165, 130 Cal. Rptr. 429 (1976) This case involved a challenge by cable company to a denial of a rate increase by a city council. The court held that a cable franchise was not a public utility. Accordingly, inverse condemnation was not permitted as a cause of action. The cable company also failed their burden of proof to show lack of good faith.

8. It has been argued by several cable operators, without success, that the denial of a rate increase by a municipality can constitute a breach of contract even where the cable television franchise does not expressly provide for any contractual right to rate increases. The premise of the argument is that the implied covenant of good faith and fair dealing requires the municipality to approve all requested rate increases if they are reasonable. Further, the argument suggests that the burden falls on the municipality to show the unreasonableness of the requested rate increase. The fallacy in the argument lies in the fact that the grant or denial of a rate increase, at least in California, constitutes a legislative act judged solely by the criteria of Code of Civil Procedure section 1085. See Orange County Cable Communications Co. v. City of San Clemente, 59 Cal. App. 3d 165, 130 Cal. Rptr. 429 (1976). Under Agins v. City of Tiberon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) (challenge to zoning restrictions as inverse condemnation), the exclusive remedy of one attacking a legislative action is mandamus, as opposed to an action for monetary damages. Thus, absent an express duty in the contract to approve requested rate changes, which would transform a legislative action into a ministerial or executive one, a cable operator cannot sue a local governmental entity for monetary damages because of a denial of requested rate changes under either the theory of breach of contract or inverse condemnation.

An application of the "government/proprietary" dichotomy does not disturb this result. Regardless of the character of these regulatory actions, be they "legislative" or "proprietary," the exclusive remedy is mandamus. Because of the doctrine of separation of powers, a court should not, and cannot, look behind the legislative body's actions, but must judge the actions pursuant to the standards contained in Code of Civil Procedure section 1085 or 1094.5. It should also be noted that the characterization of a legislative body's action as "proprietary" does not necessarily deny the legislative nature of the action. Therefore, even a wholesale acceptance of the "governmental/proprietary" dichotomy does not lend any support to the breach of contract theory.
Bruce Young, paraded Assembly Bill 699\(^9\) (AB 699) in front of the weary eyes of the California Legislature. Though not as vigorously opposed by California municipalities as SB 1757, this Bill certainly did not receive the praise of local government. Despite this fact, AB 699 was passed in 1979 and codified at Government Code section 53066.1. This bill unilaterally amended existing franchise agreements between cable operators and local government entities to allow the cable operator the option of rate deregulation or rate adjustment if they comply with the statutory conditions.

Government Code section 53066.1 (section 53066.1) allows a cable television system to deregulate its basic service if (1) it provides twenty or more channels to the cable television subscriber, (2) it receives or has contracted to receive satellite television signals by an earth receiving station, (3) it has a subscriber penetration ratio of less than seventy percent of the franchise area, (4) it is located in a county or a portion of a county having three significantly viewed stations or two significantly viewed stations and an educational station, and (5) it participates in a community channel service program as defined by the statute.\(^{10}\) If a cable television system meets all of the criteria stated above, but possesses a penetration ratio in excess of seventy percent, it is entitled to "rate adjustment" as opposed to "rate regulation."\(^{11}\) Under the terms of the statute, a rate adjusting system may increase its rates no more than seventy-five percent of increases in the Consumer Price Index, except when that system rebuilds from twelve to twenty or more channels, in which case it may increase its rates to the state-wide average for those cable television systems providing twenty or more channels.\(^{12}\) The statute provides an exception to the conditions of rate deregulation or adjustment for those systems with under 35,000 subscribers in communities of under 20,000 people. "Small systems" may increase their rates up to seventy-five percent of the Consumer Price Index upon the provision of twelve or more channels, including a community channel service program\(^3\) as defined in the statute.\(^{14}\) Although

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9. See infra notes 10-19 and accompanying text for a description of the contents of the statute.
11. CAL. GOV'T CODE § 53066.1(b) (West Supp. 1982).
12. Id.
13. Id.
14. A community service channel exists if all the following are met:
(1) one channel is dedicated for local community, public access, education and government access purposes. More than one channel may be required for systems with over 24 channels;
(2) participates in a statewide program that provides instruction and guidelines
not required to meet the other conditions for rate deregulation or adjustment, small systems must be located in a county or portions of a county having three significantly viewed stations or two significantly viewed stations and an educational station.\textsuperscript{15}

In order to provide a community service channel program within the meaning of the statute, the cable operator is required to dedicate at least one equivalent channel for these purposes if the system's channel capacity is between twelve and twenty channels, one regular channel and one equivalent channel if the channel capacity is between twenty-one and twenty-four channels, two regular channels if channel capacity falls between twenty-five and thirty channels, and three regular channels if the system possesses more than thirty channels of programming. The additional channels need only be provided upon the fulfillment of a utilization formula.\textsuperscript{16} In addition, the cable operator must provide certain funding and equipment dedications to state and local public access programs.\textsuperscript{17} The remainder of the statute defines, in somewhat confusing terms, the other conditions for rate deregulation or adjustment\textsuperscript{18} and expressly provides that the

\begin{itemize}
  \item for use of the channel as well as creating a foundation of independent persons to promote and encourage the use of the channel;
  \item (3) pays 50 cents to the foundation for each subscriber;
  \item (4) provides technical advice and facilities to the local users;
  \item (5) cooperates in educational courses on the use of the channels;
  \item (6) provides free tape playback facilities;
  \item (7) informs the public of available access to the system;
  \item (8) consults with the franchisor about the use of the channel;
  \item (9) provides government and educational access to ground receiving facilities; and
  \item (10) provides information on availability of system and system management.
\end{itemize}

\textsc{Cal. Gov't Code} § 53066.1(d) (West Supp. 1982).

\textsuperscript{15} \textsc{Cal. Gov't Code} § 53066.1(b) (West Supp. 1982).

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{See supra} note 14.

\textsuperscript{18} There are numerous items in the statute which are not defined. For example, the statute does not indicate whether the channel requirement relates to the provision of actual channels of programming, or merely refers to the "capacity" to deliver a certain number of video channels irrespective of the programming actually carried. In addition, the statute never specifies the nature of the "Declaration" which must be filed with the local entity prior to rate deregulation or adjustment and whether the document must comply with the procedural requirement of Civil Procedure Code section 2015.5. Both of these statutory omissions, among others, have led to litigation. \textit{See, e.g.,} City of San Luis Obispo v. Sonic Cable T.V., Inc. (County of San Luis Obispo—Case No. 55408) 1982; City of Pittsburgh v. Viacom International, (Contra Costa County - Case Nos. 230-568 231-497), 1982.
statute will expire on January 1, 1984 unless extended.\(^{19}\)

In 1982, the California Legislature clarified, extended, and modified Government Code section 53066.1 and added Government Code section 53066.2 through Assembly Bill 3685.\(^{20}\) In extremely confusing and disjointed language, this statute goes far beyond the limitations on municipal rate control contained in section 53066.1 and declares complete state preemption of cable television rate regulation and preempts any form of municipal control inconsistent with statutory directives.\(^{21}\) The statute, then, in extremely pro-industry language, resolves many of the ambiguities contained in AB 699.\(^{22}\) The statute delineates a procedure for judging factual compliance with the conditions of rate deregulation or adjustment, and imposes a strict statute of limitations upon the municipality in contesting a cable operator's deregulation election.\(^{23}\) Finally, and perhaps most importantly, the statute expressly recognizes the ability of local government entities to regulate in areas outside of rate control subject to proper limits of the police power, but seems to impose a contractual standard of review upon local regulatory action,\(^ {24}\) as opposed to the legislative standard.\(^ {25}\) Finally, in a stroke of legislative creativity and fiction, the statute expressly and specifically bars both a local government entity and a cable operator from raising the defense of impairment of contract in any case "where the due and proper exercise of police power, or the limits thereof, is at issue. . . ."\(^{26}\) Section 53066.1 as expanded by AB 3685 has effectively stripped local government of its ability to regulate basic service rates.

The authority to regulate cable television rates was, in most cases, granted to the municipality through the franchise agreement between the municipality and the cable operator. In most

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19. CAL. GOV'T CODE § 53066.1(c) (2) (West Supp. 1982).
20. AB 3685, 1982 Statutes, Chapter 679.
21. See CAL. GOV'T CODE § 53066.1(q) (West Supp. 1982) which provides: This section as amended by the Statutes of 1982, shall establish the state's preemption, under the terms and conditions prescribed herein, of the control and regulation of cable television subscriber rates, charges, and rate structure heretofore or hereinafter established by any franchisor pursuant to section 53066, to the extent that such control or regulation is inconsistent with this section.
1982 Cal. Legis. Serv. § 53066.1(q) (West Supp.).
22. For example, AB 3685 expressly defines the channel requirement in terms of "capacity" as opposed to programming. See 1982 Cal. Legis. Serv. § 53066.1(m)(3) (West Supp.). The "declaration" requirement is, however, given a surprisingly strict interpretation in that the document must comply with the directives of Code of Civil Procedure § 2015.5. 1982 Cal. Legis. Serv. § 53066.1(d) (West Supp.).
23. 1982 Cal. Legis. Serv. § 53066.1(g) (West Supp.).
25. See supra note 8.
cases, those contractual franchise agreements, knowingly and intelli-
gently entered into by both the municipality and the cable op-
erator, contained express language sanctioning municipal rate
control for the period of the franchise. Despite the sanctity of
contract in American society, the California Legislature has felt
justified in paying no heed to the reasonable expectation of the
parties to the contract and trampled upon the municipality's con-
tractual rights without hesitation. Does a franchise agreement be-
tween a local government and its cable operator bear any
defERENCE under the law, or can the state freely and with immu-
nity discard the vested contractual protections and ultimately re-
egate the right of a local government and its citizens to an inferior
status?

The problem of state interference with local regulation of cable
Television is not limited to California. Although few states have
adopted comprehensive state regulatory statutes, many have in-
troduced bills which affect cable programming. For example, in
1979, over 135 bills were introduced in state legislatures through-
out the country which affected cable television, and, of these,
thirty-six bills proposed some form of state regulation. Of these
thirty-six bills, several, which were ultimately adopted, provide
for some form of state deregulation. A few states have adopted
legislation which has declared cable television to be a public util-
ity completely under the purview of state control. In 1982, the

27. National Cable Television Association, Interaction, 5 (July 1980). For ex-
ample, Alaska passed a rate deregulation bill in 1980 which deregulated twelve
of the state's fourteen systems. Massachusetts recently issued an order which sus-
pended rate regulation in 75% of the state's system. Florida passed a rate deregu-
lation bill last year which tied rate increases to the Consumer Price Index. That
bill was ultimately vetoed by the Governor. 21 URBAN L. REV. 179, 221-21 n.237

28. Id.

29. The district court in Nevada upheld a state statute that granted the Ne-
veda Public Service Commission authority over cable operations. The United
States Supreme Court affirmed the court's decision. T.V. Pix, Inc., v. Taylor, 304 F.
power to regulate public utilities in most states. States that regulate cable televi-
sion pursuant to these statutes define cable as a public utility. See, e.g., White v.
Ann Arbor, 406 Mich. 554, 281 N.W.2d 283 (1979). The Michigan Subdivision Con-
tral Act of 1967 defined a public utility as: "all persons, firms, corporations, copart-
nerships, or municipal or other public authority providing gas, electricity, water,
steam, telephone, sewer or other services of a similar nature." Mich. COMP. LAWS
ANN. § 560.102(1) (1980). The Michigan court held that the state had authority over
cable television because it was similar to television service and thus a public util-
ity under the Act. White v. Ann Arbor, 406 Mich. at 554, 281 N.W.2d at 283. One
California Legislature considered and rejected such a statute.\textsuperscript{30}

The recent trend of state intervention in cable television regulation should be alarming to both local government entities and subscribers. State regulatory legislation, as well as other forms of state preemption, denies the municipality important regulatory rights under the franchise contract. Although many assume that wholesale state intrusion into municipal regulation of cable is permissible, such a conclusion is far from clear. The purpose of this article is to examine the relationship among the municipality, the cable operator, and the state, to determine whether any limitations exist upon the state's ability to impair the rights of a local government under a franchise agreement. Although the analysis herein will center upon the viability of California Government Code section 53066.1, since it constitutes one of the first statutes of its type in the country, the conclusions derived from analysis of that statute, and its interplay with the impairment clauses of the United States\textsuperscript{31} and California Constitutions,\textsuperscript{32} will obviously be relevant in judging the validity of any form of state preemption of cable television regulation.

III. CALIFORNIA MUNICIPALITIES POSSESS THE CONSTITUTIONAL, STATUTORY, AND CONTRACTUAL AUTHORITY TO REGULATE CABLE TELEVISION RATES

Municipalities in California possess the direct constitutional authority to franchise and regulate cable television systems which utilize public streets and highways, and to prescribe rules and

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judge went further: "[s]ince cable television is truly a public utility, state wide regulation would certainly enhance the likelihood that the benefits of cable television would adhere to all the public." 406 Mich. at 558, 281 N.W.2d at 291 (Moody, J., concurring). Cf. City of Issaquah v. Teleprompter Corp., 93 Wash. 2d 567, 611 P.2d 741 (1980) (Supreme Court of Washington held that cable television was not a "public utility" within meaning of state statute; statute did not define "public utility" and gave cities regulatory powers over utilities).


31. U.S. CONST. art. I, § 10, cl. 1 reads:
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 siver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

\textit{Id.} (emphasis added).
32. A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed. CAL. CONST. art. I, § 9.

\end{quote}
regulations for the operation thereof. Former California Constitution Article XI, section 19, granted constitutional status to municipal corporations when they provide light, water, power, heat, transportation, telephone service, or other means of communication to their inhabitants, or provide for the franchising of those activities. In 1970, that provision was slightly modified and re-numbered as Article XI, section 9. The report of the Law Revision Commission indicates that the two provisions are substantially identical in intent and effect. Thus, a municipal corporation has the constitutional authority to franchise systems providing communications services subject to reasonable regulation by the host jurisdiction, including the power to regulate rates. The attachment of reasonable conditions to this grant is incident to the municipality's constitutional power to regulate its streets and highways in the public interest. A municipality may grant or withhold the franchise privileges for the use of its public

34. CAL. CONST. art. XI, § 19 (repealed June 2, 1970) states:
   Any municipal corporation may establish and operate public works for supplying its inhabitants with lights, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish works for supplying the inhabitants with such services upon such condition and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries, provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants without the consent of such other municipality, expressed by ordinance.

Id.

35. CAL. CONST. art. XI, § 9 states:
   (a) a municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.
   (b) Persons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the City may prescribe under its organic law.

Id.

36. See Colgrove Water Co. v. City of Hollywood, 151 Cal. 425, 90 P. 1053 (1907) (city can place reasonable restrictions on use of roads and area above and below so that travel is not inhibited; city may not regulate a non-interfering use by fee owner of land); Hayes v. Handley, 182 Cal. 273, 187 P. 952 (1920) (mandamus issued against city to compel the construction of tunnel which placed no burden on adjoining land owners since it was valid use by city of public roads).
streets or rights-of-way for public or private uses.\textsuperscript{37}

Local government entities also possess the statutory authority to regulate cable television rates within their jurisdictional boundaries pursuant to Government Code section 53066.\textsuperscript{38} Cities are specifically empowered to "prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system."\textsuperscript{39} Cities are to consider the rates charged for cable television services in the award of a franchise, and prescribe rules and regulations to govern it.\textsuperscript{40} Although the California Legislature has seen fit to statutorily authorize municipal franchising and regulation of cable television systems, statutory authorization is not necessary given the parameters of the constitutional grant. The California Attorney General has specifically and expressly stated that a cable television system is a "public work" within the meaning of Article XI, section 9 of the California Constitution.\textsuperscript{41} Cable television is thus a "means of communication" within the meaning of the Article.\textsuperscript{42} California municipalities possess a full range of con-

\textsuperscript{37} Altpeter v. Postal Telegraph Cable Co., 32 Cal. App. 738, 154 P. 35 (1917) (franchise granted to telegraph company to run wire over streets; company could remove any obstruction of transmission (i.e., trees) if the city would have been able to do so, when it interferes with public use of roads).

\textsuperscript{38} The statute provides:

\begin{quote}
Community antenna television system; franchise or license; rules and regulations.

Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. The maximum franchise fee for any franchise or license hereafter awarded pursuant to this section or pursuant to any ordinance adopted under authority of this section by any city or county or city and county shall be 5 percent of the grantee's gross receipts from its operations within such city or county or city and county. Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever.
\end{quote}

\textsuperscript{39} Id.

\textsuperscript{40} Id.


\textsuperscript{42} See supra note 34 for text of the article.
stitutional powers in relation to cable television systems which cannot be abridged or modified by legislation. In addition, the mandates of Article XI, section 9 are self-executing and require no implementing legislation.43

Finally, California municipalities possess the contractual right, to the extent the franchise agreement so provides, to approve the rates charged by a cable television operator for the provision of basic services, and any modification of those rates without approval by the governing body constitutes a breach of contract. It is well established in California that franchises in general,44 and cable television franchises in particular,45 are contracts.46

It is beyond question that contracts entered into between municipalities and private parties, including franchise agreements, are governed by the ordinary law of contracts,47 and California

44. Tulare County v. Dinuba, 188 Cal. 664, 669, 206 P. 983, 985 (1922) (court held fees payable under franchise agreement is contractual debt not a tax).
46. In United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) the United States Supreme Court explained: “In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.” Id. at 17, n.14. The contractual nature of the relationship between a city and a cable company was a prerequisite to the injunction entered by the district court in Community Communications Co. v. Boulder, 405 F. Supp. 1035 (D. Colo. 1980) because the district judge found that the contract requirement of section 1 of the Sherman Act was met by the agreement between the cable company and the city. In finding that antitrust liability could be imposed on the city, the Supreme Court must have accepted this analysis; in fact, Justice Rhenquist’s dissent criticized the “ease with which the ordinance in the instant case has been labeled a ‘contract’. . . .” Community Com. Co. v. City of Boulder, 455 U.S. 40, 65, n.1 (1982) (Rhenquist, J., dissenting).
47. See Mayor of Baltimore v. Ohio Casualty Ins. Co., 438 A.2d 933 (Md. 1982) (arbitration clause of contract with city requires more than letter containing notice of default, some oral modification permitted despite requirement of writing); Anne Arundel County v. Crofton Corp., 286 Md. 666, 410 A.2d 228 (1980) (contract for special sewage fees held not to be affected by subsequent legislation increasing fees); Ketterer v. Independent School Dist. #1, 248 Minn. 212, 79 N.W.2d 428 (1956) (statutorily authorized sale of property valid absent fraud, collusion, bad faith or inadequate consideration despite governing board’s specific authorization); Burger v. City of Springfield, 323 S.W.2d 777 (Mo. 1959) (city resolution authorizing employment of water works negotiator at reasonable compensation and
courts treat municipal contracts in no unique fashion. 48

IV. STATE DEREGULATORY LEGISLATION CAN CONSTITUTE AN UNLAWFUL IMPAIRMENT OF MUNICIPAL CONTRACTS

When the California Legislature adopted section 53066.1,49 which gave cable television companies the right to exempt themselves from local rate regulation, it created the potential for the unconstitutional impairment of existing contracts. Without a doubt, the franchise agreements between municipalities and cable operators are contracts imbued with all normal contractual characteristics.50 This form of franchise contract is protected

written acceptance by party constitutes valid contract); Beverly Sewerage Auth. v. Delano Sewerage Auth., 65 N.J. Super. 86, 167 A.2d 46 (1961) (contractual authority valid when challenged as means to achieve rescission or modification of a sewage disposal contract); Greenberg v. City of New York, 152 Misc. 488, 274 N.Y.S. 4 (1934) (city bus franchises could not be invalidated or revoked without sufficient justification); Jones v. City of Middletown, 96 N.E.2d 799 (Ohio 1950) (city contract for engineering services breached when city enters contract with another engineer for same work and prohibiting original firm to perform); Scott Paper Co., v. City of Anacortes, 90 Wash. 2d 19, 578 P.2d 1292 (1978) (city contract to deliver water at below market price held valid despite subsequent constitutional amendment requiring adequate compensation for water service).


49. See supra notes 10-19 and accompanying text for a discussion of the statute.

50. As the court states in Orange County Cable Communications Co. v. City of San Clemente:

Accordingly, if the appellant is not a public utility, the only possible relationship of the parties is one based on contract. Appellant itself conceded as much by citing cases which characterized the relationship as such (e.g., Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 242 [92 P.490]), including two
against state impairment. Although little can be said with certainty, a reasonable argument could be made for the proposition that statutes such as section 53066.1 unreasonably impair a municipality's obligation of contract in violation of both federal and state constitutional protections.

Both the United States and California constitutions prohibit the adoption of any law which impairs any obligation of contract. As stated in Home Building and Loan Association v. Blaisdell, the United States constitutional provision, read literally, proscribed "any" impairment of contract. However, it is "not an absolute one and is not to be read with literal exactness like a mathematical formula." Thus, in El Paso v. Simmons, the Court held that "[i]t is not every modification of contractual promise that impairs the obligation of the contract under federal law . . . ." According to the Court, the state "has the sovereign right . . . to protect the . . . general welfare of the people [and] we must respect the 'wide discretion on the part of the Legislature in determining what is and what is not necessary.'"

However, the authority of the state to impair contracts based on the exercise of its police power is not absolute. The United States Supreme Court in Blaisdell delineated four factors warranting legislative impairment of vested contractual rights. First, the enactment must serve to protect basic interests of society. Second, there must be an emergency justification for the enactment. The enactment must be appropriate for the emergency. Finally, the enactment must be designed as a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief period.

The Blaisdell decision involved a Minnesota mortgage moratorium statute designed to provide relief to land owners whose

out-of-state cases which actually involved cable television franchises (City of Owensboro v. Top Visions Cable Co. of Ky. (Ky. 1972) 487 S.W.2d 283; Bush v. Upper Valley Telecable Co., 96 Idaho 83 [524 P.2d 1055]).

52. See supra notes 30-31.
54. Id. at 428.
56. Id. at 506-07.
57. Id. at 508-09.
58. 290 U.S. 398, 444-47.
59. Id.
property was foreclosed during the Great Depression. The statute extended the period of redemption from foreclosure for two years. The United States Supreme Court had no problem finding an emergency situation justifying the impairment. Also, according to the Court, the legislation served to protect the basic interest of society rather than providing an advantage for particular individuals. Finally, given the extent of the emergency, the Supreme Court ruled that the statute in question was reasonable in terms of its parameters and impact. The temporary duration of the statute was also a determining factor in finding the statute's validity when challenged on impairment grounds.

The factors itemized in *Blaisdell* have been applied to subsequent cases decided by the United States Supreme Court and, on the basis of these factors, statutes have been held invalid when challenged as a violation of the contract clause. For example, in *Treigle v. Acme Homestead Association*, a statute modifying existing rules covering withdrawals from building and loan associations was held invalid on the grounds that it did not purport to deal with an existing emergency. Furthermore, it was neither temporary or conditional and deprived withdrawing members' existing contractual rights in order to benefit those who remained. In *W.P. Worthen Company v. Kavanaugh*, a statute similar to that in *Blaisdell*, which diluted the rights of mortgage brokers was found to be "an oppressive and unnecessary destruction of nearly all interests that gave attractiveness and value to collateral security." The Court distinguished *Blaisdell* on the ground that the statute involved there was less restrictive. And in *W.B. Worthen Company v. Thomas*, a law which exempted the proceeds of life insurance policies from judgment creditor collection was held invalid because the exemption was not temporary or conditional. The statute also failed to contain limitations as to time, amount, circumstances, or need.

Existing case law makes it apparent that police power legislation that does not meet all of the listed criteria of *Blaisdell* stands a strong likelihood of being found contrary to the contract clause. Furthermore, the courts have established a sliding scale test to evaluate the reasonableness of the impairing legislation. In other

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62. Id. at 62.
63. The statute in *Worthen* precluded any foreclosure activity for six and one-half years after default, did not provide for the payment of the rental value during this period if the mortgagee retained possession, and provided no incentive for the mortgagee to pay the debt. The two-year period in *Blaisdell* plus the incentive and rent features in that statute aided the court in its justification.
words, the greater the impairment to the contract, the greater the burden on the state to show the reasonableness of its actions. In *Allied Structural Steel Co. v. Spannaus*, the Court ruled that although a minimal alteration of contractual obligations would call for a lesser standard of inquiry, a severe impairment "will push the inquiry to a careful examination of the nature and purpose of the state legislation." In that case, a statute was invalidated because it imposed a substantial liability on corporations and was not a temporary alteration of contractual terms, but a severe and permanent change in those conditions. The Court also found that the legislation was not necessary to meet an important general societal problem and that it was not in response to nearly the sort of economic emergency that prompted the legislation in *Blaisdell*. Because the statute involved such a severe impairment of the complainant's rights, the Court said that the height of the hurdle the state legislation must clear is elevated and a careful examination of its nature and purpose is required.

If the impairment challenge is asserted against legislation that modifies a contract in which the government itself is a party, the test used by the Court is whether the legislation is reasonable and necessary to serve an important public purpose. In *United States Trust Co. v. New Jersey*, the government adopted legislation impairing obligations entered into between itself and a private party. In order to further the program of mass transit, the legislation repealed a covenant in a bi-state contract involving the New York Port Authority. The Court found this legislation to be an unconstitutional impairment of contract because the destruction of the important security provision for the protection of bondholders was neither reasonable nor necessary to serve the important state interest.

The California Supreme Court, in *Sonoma County Organization of Public Employees v. County of Sonoma*, was faced with a challenge to a statute that was contrary to contractual provisions pending between the local government and private individuals. In that case, the California Legislature enacted Government Code

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66. *Id.* at 245.
67. *Id.*
section 16280, which prohibited the distribution of state surplus or loan funds to any local agency granting its employees a cost-of-living, wage, or salary increase for the 1978-1979 fiscal year which exceeded the cost-of-living increase provided for state employees. The statute also declared null and void any agreement by a local agency to pay a cost of living increase in excess of that granted to state employees. The statute was attacked by several organizations representing employees of local government agencies. In deciding whether or not there was an unconstitutional impairment of contract, the California Supreme Court reviewed the major cases involving impairments of contract, including most of those noted herein. Although the court acknowledged that the California Legislature enacted an emergency clause in response to the passage of Proposition 13\textsuperscript{71} by the voters of California,\textsuperscript{72} the court held that the state did not meet its burden in establishing that a crisis truly existed. Relying upon out-of-state authority,\textsuperscript{73} the California Supreme Court held that the impairment of a contract was unjustified unless the state could show an economic emergency of broad scope, and then, only on “rare occasions and extreme circumstances do rights fixed by the terms of a contract . . . give way to a greater public need.”\textsuperscript{74} However, in the absence of emergency justification, the sanctity of private contract cannot be unreasonably disturbed.\textsuperscript{75}

\textsuperscript{70.} \textsc{Cal. Gov't Code} § 16280 basically provides that any local government that gives a greater wage increase than is given to state employees will be precluded from receiving surplus or loan funds from the state. The statute declares any existing contractual clause that is contrary to be void. The statute specifically exempts increases due to merit, position transfers (unless the purpose is to avoid the statute), and fringe benefits. See \textsc{Cal. Gov't Code} § 16280 (West 1980).

\textsuperscript{71.} \textsc{Cal. Const. art. XIIIA.} The article basically limits the amount of tax that can be assessed on property to one percent of the full cash value of the real property. See \textsc{Cal. Const. art. XIII § 1} (West Supp. 1982).

\textsuperscript{72.} The asserted “emergency” was the fiscal difficulties that arose after the adoption of the amendment. 23 Cal. 3d at 309, 591 P.2d at 7, 152 Cal. Rptr. at 909 (1979).

\textsuperscript{73.} Health Ins. Ass'n of Am. v. Hannett, 44 N.Y.2d 302, 376 N.E.2d 1280, 405 N.Y.S.2d 634 (1978). The New York Court of Appeals held invalid as contrary to the contract clause a statute requiring health and accident insurance policies to provide for maternity coverage. The challengers to the statute were insurance companies with existing policies and those renewable at the sole option of the insured.


\textsuperscript{75.} The Supreme Court noted in \textit{Blaisdell} that an emergency situation does not give rise to new powers, but rather only provides an opportunity for the exercise of existing powers. Emergency conditions would not allow a state to change the specific limitations found in the constitution, but when the provision is broad (such as the impairment clause), then judicial construction would be appropriate.
Under the contract clause, it is immaterial whether the obligation of contract is impaired by acting on the remedy or directly upon the contract—impairment in either case is prohibited.\(^{76}\) A statute impairs the obligations of a contract if it prevents enforcement, tends to postpone enforcement, or seriously interferes with the enforcement of the contract.\(^{77}\) More importantly, a law may be within the constitutional inhibition of the contract clause by implication, as well as expression.\(^{78}\) "There is no difference in principle between a law which directly and in terms impairs the obligation of contract and one which produces the same effect in its plain construction and practical operation."\(^{79}\)

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Footnote 19 to the United States Trust case expressly stated that the Court was retracting the requirements of an emergency situation and legislation of a limited duration as indicated by the cases of Veix v. Sixth Ward Building & Loan Ass'n, 310 U.S. 32 (1940) (no requirement of emergency or temporary relief) and East New York Savings Bank v. Hahn, 326 U.S. 230 (1945) (permitting the tenth extension of a one year moratorium). The United States Trust case applied only the contract clause of the United States Constitution. State constitutions may still hold these requirements to be necessary, as do courts in California. See Olson v. Cory, 27 Cal. 3d 532, 609 P.2d 991, 164 Cal. Rptr. 217 (1980).

76. Hendrickson v. Apperson, 245 U.S. 105 (1917) (statute allowing county not to collect certain tax assessments delegated to retiring bonds held an impairment of the creditors' contracts); McGahey v. Virginia, 135 U.S. 662 (1890) (prohibition against the redemption of state bonds for tax debts owed is an impairment of contract); Penniman's Case, 103 U.S. 714 (1880) (statutory abolition of imprisonment for debts does not constitute an impairment of any pre-existing contracts).

77. See International Steel and Iron Co. v. National Surety Co., 297 U.S. 657 (1936) (retroactive substitution of sureties in construction contracts held an impairment); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1903) (modification of available remedies is not an impairment if provision for enforcement is present); Barnitz v. Beverly, 163 U.S. 118 (1896) (creation of a right of redemption in mortgage foreclosures cannot apply to a pre-existing mortgage); Shreveport v. Cole, 129 U.S. 36 (1899) (state constitutional amendment was valid as it only applied to prospective contracts); Seibert v. Lewis, 122 U.S. 284 (1887) (repeal and replacement of statute providing collection methods for bonds not applicable to existing debts); Louisiana v. New Orleans, 102 U.S. 203 (1880) (modification of collection procedures requiring additional action is an invalid impairment when applied to existing judgments); Brine v. Insurance Co., 96 U.S. 627 (1877) (laws in existence at time contract is entered control the transaction); Gunn v. Barry, 82 U.S. 610 (15 Wall.) (1872) (post-Civil War forced constitutional change destroying an existing lien is an unconstitutional impairment); Von Hoffman v. City of Quincy, 71 U.S. 535 (4 Wall.) (1866) (provision for tax assessment to redeem bonds held to be contract and cannot be avoided); Bronson v. Kinzie, 42 U.S. 311 (1 How.) (1843) (imposition of period of redemption invalid if applied to pre-existing mortgages).

78. White v. Barker, 116 Iowa 96, 89 N.W. 204 (1902) (state cannot take away municipalities' right to obtain services for its own citizens).

Under California law, the discretion of the legislature to impair contracts which confer substantive rights is severely limited. Any modification of the contract which results in a substantial disadvantage to the impaired party must be accompanied by a concomitant advantage. In weighing the impairment against the benefit of a contract modification, the court must give credence to the importance given the impaired right by the complaining party. The validity of the attempted contract modification depends upon the advantage or disadvantage to the complaining party whose rights are involved. Benefits to third parties cannot offset detriments imposed upon those whose contractual rights have been relegated. In short, this comparative analysis of costs versus gains must focus upon the particular party whose contract rights are involved.

The ratemaking power is viewed by most local governments and their elected officials as an essential ingredient of any franchise contract and a right which the local government enjoys for its own benefit and the benefit of its citizens. From the viewpoint of the city or county providing the judging criteria, the meager and paltry benefits in terms of public access facilities provided by section 53066.1 do not compensate the municipality or its residents for the dramatically escalating rates.

Although the results are far from clear, it could be persuasively argued that the State of California, through section 53066.1, causes the direct impairment of contracts between local governments and private parties. Just as in the County of Sonoma case, the

80. Abbott v. City of Los Angeles, 50 Cal. 2d 438, 326 P.2d 484 (1958) (modification of pension and unlawful impairment when applied to vested party); Allen v. City of Long Beach, 45 Cal. 2d 128, 287 P.2d 765 (1955) (vested pension rights are contractual and can only be modified to participants' detriment if benefit is given in its place); Stork v. California, 62 Cal. App. 3d 465, 133 Cal. Rptr. 207 (1976) (reclassification in pension program destroys expectation and is an invalid impairment); City of Downey v. Board of Admin., 47 Cal. App. 3d 621, 121 Cal. Rptr. 295 (1975) (modification requiring statewide pooling of pension funds valid as benefits are increased); Frazier v. Tulare County Bd. of Retirement, 42 Cal. App. 3d 1046, 117 Cal. Rptr. 388 (1974) (county retirement policy allowing named beneficiaries cannot be modified by statute after death of insured).

81. Wisley v. City of San Diego, 188 Cal. App. 2d 482, 10 Cal. Rptr. 765 (1961) (police and fire pension plans contribution requirements modification held an invalid impairment of a contract that vested upon employment).

82. Betts v. Board of Admin., 21 Cal. 3d 859, 562 P.2d 614, 148 Cal. Rptr. 158 (1978) (pensioner entitled to plan in effect upon retirement rather than a modification if the modification fails to provide additional benefits to companies for the rights given up).

83. See supra notes 10-19 and accompanying text for a discussion of the statute.

84. Sonoma County Org. of Pub. Employees v. County of Sonoma, 23 Cal. 3d

708
impairment in issue cannot be justified on the basis of the four requirements set forth in the Blaisdell\textsuperscript{85} decision. First, section 53066.1 was not adopted, or legislatively justified, as a result of an emergency situation. The statute is not by its terms emergency legislation, nor does it purport to specify the emergency situation which predicated its passage. In fact, no public purpose findings were made by the legislature. Second, section 53066.1 was not enacted for the protection of a basic interest of society, but rather was adopted and intended to provide special rights and privileges to cable television operators. Thirdly, section 53066.1 was not an appropriate response to an emergency situation and the conditions imposed upon existing contracts were not reasonable or necessary under the circumstances. If the California Legislature was concerned about municipal abuses of rate regulation, it could have set standards or criteria governing the exercise thereof, as opposed to allowing the total abolition of municipal rate regulation.

Given the fact that municipal regulation of cable television centers around rate regulation in many cases, section 53066.1 substantially destroys the ability of California municipalities and counties to protect its citizens from monopolistic abuses of market power. There is not a single situation in this state where there exists true competition within the cable television market.\textsuperscript{86}

\textsuperscript{85.} Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). See supra notes 52-58 and accompanying text.


As one commentator recently stated:

\textit{Cable television appears to meet this definition of a natural monopoly. The largest portion of a cable company's expenses, such as the headend and distribution system, are fixed costs. These costs are both extremely high and independent of the number of subscribers to the cable system. Additionally, having competing cable companies is economically ineffi-
Absent municipal rate control, cable television operators are literally able to excise horrendous rates from vulnerable subscribers, especially in those areas of poor off-the-air reception. In many cases, the rate regulation provisions of franchise agreements were the most hotly debated and negotiated sections, in light of the city’s fear of price abuse. To strip municipalities of their ability to regulate the prices of cable television services within their jurisdictional boundaries constitutes an unreasonable impairment of the municipality’s contractual benefits. The question of whether statutes such as section 53066.1 unlawfully impair contracts is a question of fact which can only be determined by the trial court, following a thorough sifting and weighing of all relevant evidence. Certainly, credible arguments could be made in support of the proposition that the benefits conferred by the statute more than offset the losses.

The finding that a statute impairs an obligation of contract does not end, but rather begins the inquiry. The court must weigh the magnitude of the impairment against any benefits conferred, giving at all times due deference to the significance of the public policy served by the enactment. Obligations of contract must yield to a proper exercise of the state’s police powers, provided the power is exercised for a public purpose and the means adopted are reasonably designed to accomplish that purpose. As compensation for the loss of rate regulation powers, cable operators could point to the fact that section 53066.1 requires, as a condition of rate deregulation or adjustment, (1) a rebuilding of the cable television system in order to provide the requisite channels of sufficient since each company would have to duplicate the cables and equipment of the others.

Cable television has indeed developed as a monopoly industry throughout the country. Of the 4,200 cable television systems currently operating, there are an estimated eight instances of so-called “overbuilds” - two cable companies competing for the same subscribers. Historically, overbuilds have been eliminated by one company buying out the other, though occasionally other agreements are reached, such as dividing the locality among the competing cable companies with the understanding that no company will go into another’s “priority service area” unless that company has clearly failed to meet its commitments in its priority area.


programming, 90 (2) the construction of a satellite earth receiving station allowing subscribers to enjoy satellite programming, 91 (3) a significant commitment to public access in terms of channel capacity, equipment, and funding, 92 and (4) improved subscriber complaint procedures with the ability to enforce monetary penalties for inadequate or substandard service. 93 Cable operators have successfully argued, that statutes such as section 53066.1 encourage cable systems to expend considerable capital to rebuild their plant and thereby provide subscribers with state-of-the-art services.

Although cable operators may argue that benefits are conferred upon the public as a result of rate deregulation, the facts simply do not support this. In reality, the expansion of plant capacity which has occurred in this country over the past several years is not a function of rate deregulation, but rather the increased programming which is now available via satellite. Without plant capacity in excess of twelve channels, cable operators are unable to share in the fruits of premium programming which now constitutes a significant portion of cable revenues. The decision to increase plant capacity is a complex business decision based upon a multiplicity of factors, including, but not limited to, the ability to charge higher rates. 94 Neither the quality, quantity, nor diversity of programming has improved measurably as a result of rate deregulation. 95 Public access programming has stagnated under...

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91. Id. at § 53066.1(a)(2).
92. Id. at § 53066.1(a)(3).
93. Id. at § 53066.1(g)(3).
94. The California Public Broadcasting Commission (CPBC) was mandated under Government Code § 53066.1 to perform a study upon the effects of the statute. In the Executive Summary to the Report, they discuss the correlation between plant capacity and rate deregulation:

Increased channel capacity is associated with several factors, including the age of existing cable plant, the availability of cash from the parent company, the market for pay services, the number of "must-carry" stations, demand for community service, and a rate structure which makes increasing channel capacity a financially viable decision. Although the channel upgrades in the AB 699 group cannot be attributed entirely to the enactment of AB 699 they may not have been so common in the AB 699 communities had the bill not been adopted.

CPBC, Executive Summary to the Report on AB 699, at viii (1981) [hereinafter cited as CPBC].
95. "With respect to enhancement of service, the overall trend toward more channels, satellite-delivered services, and diversity of channel service does not appear to substantively differ in AB 699 Systems as compared to other systems." CPBC, supra note 93, at vi.

711
the reign of section 53066.1 except in those jurisdictions where municipalities were able to require meaningful public access and local origination commitments through a franchising process.96 Whatever the paltry benefits bestowed upon local governments and their citizens through section 53066.1, the cost in terms of sizable rate increases97 are more than offsetting.98 In United States Trust Co. v. New Jersey,99 the United States Supreme Court held that even the social significance of mass transit did not justify intrusion into the sanctity of contract.100 Certainly, cable operators who knowingly and intelligently entered into franchise agreements which contained rate regulation clauses merit no greater deference from the courts.

V. LOCAL GOVERNMENT ENTITIES HAVE STANDING TO ATTACK THE CONSTITUTIONALITY OF STATE Deregulatory STATUTES UNDER THE IMPAIRMENT CLAUSE

Assuming that statutes such as Government Code section 53066.1, under the balancing tests of Blaisdell and Sonoma, con-

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96. "Even where the provisions of AB 699 have been implemented, local government, community organizations, and educational organizations perceived no increased service benefits or measurable changes in community service programming as a result of AB 699.

The Foundation for Community Service Television — established as a resource for statewide community service cable, for educating local organizations about cable, and for grant programs to deliver programming — has received trivial funding via AB 699 and has been stymied in trying to serve both statewide and local community service objectives.

Data from cable companies and cities show that most cable systems in California have some form of community service channel availability regardless of their relationship to AB 699, but limited use is being made of these channels. Rate regulation or deregulation in a particular franchise area seems to be unrelated to channel availability or use. Thus, the Commission believes that the attempt to link community service cable to rates or rate deregulation will not work.

CPBC, supra note 93, at vi.

97. In several cities where cable operations were deregulated under section 53066.1, rate increases of between 50%-100% were imposed upon subscribers. The California cities of Pittsburgh, Antioch, Pleasant Hill, Milpitas, and San Luis Obispo are glaring examples of these excesses. All of these municipalities instituted litigation against their cable operators challenging the deregulation.

98. Despite the horror stories of excessive rate increases as a result of section 53066.1, the California Public Broadcasting Commission found, on balance, "that rate deregulation has an innocuous effect upon rates. . . ." CPBC, supra note 93, at iii.


100. The Court noted the importance of the legitimate goals of reducing traffic congestion. Their decision, however, was based on the determination that the repeal was not necessary to achieve the goal because there existed less intrusive alternatives than complete destruction. In addition, the Court noted the historical financial problems involved in mass transit. The covenant that was repealed was intended to prevent the Port Authority from destroying its creditors' interests. As such, the effects of the covenant and its repeal were not unforeseeable events at the time it was adopted. Id. at 28-32.
stinate unlawful impairments of contract, the difficult question re-
mains of whether a municipality possesses standing to assert the
impairment claim against the state. It has been repeatedly held
that federal and state constitutional limits on the impairment of
contracts do not apply to a contractual right in favor of a munici-
pal corporation. These rules regarding the substantive rights of
local government, or more specifically the lack thereof, to com-
plain that any legislation has impaired a right or privilege accru-
ing by contract have often been stated as rules of standing.
However, the power of the state to modify and infringe upon the
contractual rights of one of its political entities is not absolute. A
distinction must be made between the property and contractual
rights held by a municipality in its public and governmental ca-
pacity, and those contractual and property rights held by a city in
its private or proprietary capacity. The case of New Orleans v.
New Orleans Water Works Co. held that a municipal corpora-
tion, with respect to its private or proprietary rights, might be en-
titled to constitutional protection. In that case, the United States
Supreme Court stated that in its governmental capacity, the mu-
nicipality “being a mere agent of the state, stands in its govern-
mental or public character in no contract relation with its
sovereign, at whose pleasure its charter may be amended,
changed or revoked, without the impairment of any constitutional

101. Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933) (state grant of tax
exempt status binding on cities); Trenton v. New Jersey, 262 U.S. 182, 187-88 (1923)
(state imposed penalty on city for diversion of water upheld); Hunter v. City of
Pittsburgh, 207 U.S. 161, 178-79 (1907) (revocation of city charter valid); City of
lease of railroads duty to repair streets in cities valid); New Orleans v. New Orle-
ans Water Works Co., 142 U.S. 79, 88-92 (1891) (state revocation of tax free status
require a city to pay for its own water); San Diego Unified Port Dist. v. Giantu-
denied, 455 U.S. 100 (1982) (state curfew on airline flights enjoined); Mallon v.
City of Long Beach, 44 Cal. 2d 199, 209, 282 P.2d 481, 187 (1955) (revocation of con-
voyance of land to city by state valid); County of Alameda v. Janssen, 16 Cal. 2d
276, 284, 106 P.2d 11, 15 (1940) (cancellation of a public assistance lien); County of
Tulare v. City of Dinuba, 188 Cal. 664, 669, 206 P. 983, 985 (1922) (county franchise
fee for electrical wire easement).

1978); 13 C. WRIGHT, A. MILLER & F. COOPER, FEDERAL PRACTICE AND PROCEDURE:
Jurisdiction § 3531 (1975); 5 WITHIN, SUMMARY OF CALIFORNIA LAW: Constitutional
Law § 619 (8th ed. 1974). Thus, as stated in Federal Practice & Procedure
(supra), “[p]olitical subdivisions of states have been held to lack constitutional
rights against the creating state, a conclusion that is at times translated into a lack
of standing to challenge state policies.” Id. at 234 (footnotes omitted).

obligation." But, the Court went on to say, that "with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection."

In *City of Worcester v. Worcester Consolidated Street Railway Co.*, it was stated that:

In general, it may be conceded that it [a municipal corporation] can own private property, not of a public or governmental nature, and that such property may be entitled, as is said "to constitutional protection." Property which is held by these corporations upon conditions and terms contained in a grant and for a special use, may not be diverted by the Legislature.

The Court has been careful to distinguish the capacity in which a municipal corporation operates so that the Court may properly apply the restraints of the federal contracts clause.

104. *Id.* at 91.
105. *Id.*
106. 196 U.S. 537 (1905).
107. *Id.* at 551.
108. See Hunter v. Pittsburgh, 207 U.S. 161 (1907). Activities of the municipality that involve a power delegated to it by the state are subject to the absolute powers and control of the state. States can change, destroy, or combine any such activity without federal constitutional interference or interference from its own citizens. Where property is being held in the same manner and used as though the municipality was a private organization, then state power will be limited. *Id.* at 178-79.
109. It appears that the governmental/proprietary dichotomy, at least as it relates to federal constitutional claims, has been rejected by the United States Supreme Court. In *Trenton v. New Jersey*, 282 U.S. 182 (1923), the Supreme Court rejected the City of Trenton's contention that the State could not impair the city's rights under the contract even though they may be proprietary in nature. The Supreme Court acknowledged the references in earlier decisions to a distinction between acts of a municipality in a proprietary as opposed to a governmental capacity, *id.* at 189-91, but rejected that distinction in the context of a claim concerning impairment of contract under the federal Constitution. The Court ruled:

The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class.... Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the government character of such corporations. But such distinction furnishes no ground of the application of the constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. *Id.* at 191-92.

110. Of course, *Trenton* does not speak to the application of the proprietary/governmental distinction as applied to state constitutions. More recently, in *City of Los Angeles v. City of Artesia*, 73 Cal. App. 3d 450, 457, 140 Cal. Rptr. 684, 688 (1977), the court held that a statute did not impair existing contracts because the contracting parties were public entities. The court held that public entities are simply not entitled to claim impairment of contract or violation of due process as against the state. *Id.* at 457, 140 Cal. Rptr. at 688. In *San Diego Unified Port Dist. v. Gianturco*, 457 F. Supp. 283 (S.D. Cal. 1978), the court reiterated the rule: "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Id.* at 289 (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)).

*See also* *Creighton v. Board of Supervisors of San Francisco*, 42 Cal. 446, 451 (1871) (holding that the city's contract did not limit or take away constitutional
California courts have also implied the legitimacy of distinguishing acts consummated by a municipality in its governmental capacity versus those acts performed in the municipality’s proprietary capacity. In fact, the majority of cases involving a municipality’s claim of impairment of contract are careful to limit the inapplicability of the impairment clause of the California Constitution to governmental functions of the municipality.110 In fact, the court in McGinn v. State Board of Harbor Commissioners111 that “[t]he State may not impair the obligation of its contract entered into in its proprietary capacity.”112 The weight of judicial decision in the servile state supports the view that the constitutional guarantees which are applicable to the property rights of private persons extend to property owned by municipalities in their private or proprietary capacity. Although the question has not been extensively litigated, the courts of last resort in a number of states outside of California, have held that such constitutional limitations do apply.113

110. San Francisco Bay Comm’n v. Emeryville, 69 Cal. 2d 533, 446 P.2d 779, 72 Cal. Rptr. 790 (1968) (state permit required for ongoing reclamation projects around San Francisco Bay); Mallon v. City of Long Beach, 44 Cal. 2d 199, 282 P.2d 481 (1955) (state revocation of tidelands grant includes profits earned); County of Alameda v. Janssen, 16 Cal. 2d 276, 106 P.2d 11 (1940) (state cancellation of county-imposed lien held valid); Mines v. Del Valle, 201 Cal. 273, 257 P. 530 (1927) (proprietary functions are given broad authority but not to exceed charter limits by using revenues to publicize a bond election); County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983 (1922) (franchise fee imposed by county is not limited by state tax amendment); Marin Water and Power Co. v. Sausalito, 168 Cal. 587, 143 P. 767 (1914) (city operating own water system can do so without state rate interference).

111. McGinn v. Board of Harbor Comm’rs, 113 Cal. App. 695, 299 P. 100 (1931) (state acting as proprietor in sale of land according to a plot map cannot impair contract by revoking the map).

112. Id. at 704, 299 P. at 104.

113. San Francisco v. Canavan, 42 Cal. 541 (1872) (state has authority to compel use of public land in city); Linton v. Ashbury, 41 Cal. 525 (1871) (state can compel city expenditure for streets); Grogan v. San Francisco, 18 Cal. 590 (1861) (state cannot compel sale of municipal property after state authorizes city to hold such property); Dubuque v. Illinois Cent. R.R., 39 Iowa 56 (1874) (assessed city taxes cannot be released by state); Ellerman v. McMains, 30 La. Ann. 190 (1878) (right to collect wharf user fees cannot be abrogated by subsequent state action); New Orleans, M & C, R.R. Co. v. New Orleans, 26 La. Ann. 517 (1874) (state can grant right
Further, although the California Legislature possesses significant plenary power over its municipalities, it is not totally free to relegate or destroy the totality of a municipality's rights and obligations, and must adhere to fundamental constitutional guarantees. A subdivision of the state, such as a municipality or county, possesses standing to challenge certain forms of constitutional violations committed by the state.114

Even considering the application of the governmental/proprietary dichotomy, a successful impairment challenge still requires the demonstration that the franchising and regulation of cable television constitutes a "proprietary" act. It is well established that when a municipality obtains for its residents such services as water, light, or communications, whether by franchise or through direct provision, it is acting in its proprietary or business capacity and not exercising governmental functions.115 Likewise, it has been specifically held, at least by one court, that the

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of way over city streets); Opinion of the Justices to the Senate, 234 Mass. 612, 127 N.E. 635 (1920) (state allocation of bridge construction expenses placing heavy burden on some municipalities held valid); Woods v. City of Woburn, 220 Mass. 416, 107 N.E. 985 (1915) (state maximum hour day law held not to interfere with contract between municipality and private party); Mt. Hope Cemetery v. Boston, 158 Mass. 509, 33 N.E. 695 (1893) (state law compelling transfer of city owned property as a proprietor is invalid); Portland & Willamette Valley R.R. v. Portland, 14 Or. 188, 12 P. 417 (1886) (property used by city for public purpose may be controlled by state); Spaulding v. Andover, 54 N.H. 38 (1873) (state bonds assigned to municipality cannot be impaired by subsequent state action); Webb v. Mayor of N.Y., 64 How. Pr. 10 (1882) (state cannot change use of land granted city in charter); Milam County v. Bateman, 54 Tex. 153 (1880) (state grant of land for school purpose cannot later be revoked); Board of Educ. v. Haben, 22 Wis. 97 (1867) (state compulsion of board of education funds spending); Town of Milwaukee v City of Milwaukee, 12 Wis. 103 (1860) (state cannot divest title to property from town to adjoining city). For a discussion of some of these cases, see McGain, The Rights of Municipal Corporations Under the Contract Clause of the Federal Constitution, 3 NAT. MUN. REV. 284 (1914); McBain, Due Process of Law and the Power of the Legislature to Compel a Municipal Corporation to Levy a Tax or Incur Debt for a Strictly Local Purpose, 14 COLUM. L. REV. 407 (1914).

114. Zee Toys, Inc. v. County of Los Angeles, 85 Cal. App. 3d 763, 149 Cal. Rptr. 750 (1978) (county could object to state taxation statute as violation of interstate commerce); San Carlos School Dist. v. Board of Educ., 258 Cal. App. 2d 317, 65 Cal. Rptr. 711 (1968) (school district can challenge unlawful state redistricting of borders); Grogan v. San Francisco, 18 Cal. 590 (1861) (city can object to unlawful state statute compelling transfer of property); Beverly Hills v. Los Angeles, 175 Cal. 311, 315 P. 924 (1917) (state grant of right of way through unincorporated area binding after incorporation).

115. Wichita Water Co. v. City of Wichita, 234 F. 415 (D. Kan. 1916) (obtaining water supply for citizens and city's own use is proprietary function); Minnesota Gas Co. v. Public Serv. Comm'n, 394 F. Supp. 327 (D. Minn. 1974) (gas utility franchise is proprietary activity); Kenton Water Co. v. City of Covington, 156 Ky. 569, 161 S.W. 988 (1913) (city cannot be forced to purchase water plant in area to be annexed); Trottis, Inc. v. City of New York, 261 A.D. 1059, 26 N.Y.S.2d 609 (1941) (city responsible for damage caused by broken water main as would any business proprietor); Akron v. Public Util. Comm'n, 149 Ohio St. 347, 78 N.E.2d 890 (1948) (franchise for gas utility is proprietary function of city); State ex rel. Froehlich v.
regulation of cable television, if done by contract, constitutes a proprietary function of a governmental entity. 116


116. Community Communications Co., v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980) (injunction granted against city to allow franchisee to seek new customers). The use of this case as authority on this point is somewhat questionable, see infra this note. It has been established that in entering into franchise agreements of any kind including cable television, municipalities are acting in their legislative capacities. E.g., City of Worcester v. Worcester Consol. Street Ry. Co., 196 U.S. 539 (1905) (state can release obligation imposed in city right of way grant); Pacific Telephone v. Department of Pub. Serv., 19 Wash. 2d 300, 142 P.2d 498 (1943) (state has authority to determine rates for telephone services); City of Lafayette v. American Television and Communication Corp., 98 Cal. App. 3d 27, 159 Cal. Rptr. 271 (1979) (areas incorporated after franchise for cable television was granted have power to regulate rates); Orange County Cable Communications Co. v. City of San Clemente, 59 Cal. App. 3d 165, 130 Cal. Rptr. 429 (1976) (city denies rate increase to cable franchisee); Byers v. Board of Supervisors, 262 Cal. App. 2d 148, 68 Cal. Rptr. 549 (1968) (county invalidly created television service district contrary to charter); Monarch Cablevision, Inc. v. City of Pacific Grove, 239 Cal. App. 2d 206, 48 Cal. Rptr. 550 (1966) (discretion permitted in awarding cable franchise); Saint Helena v. Ewen, 26 Cal. App. 19, 146 P. 191 (1914) (franchise requirement not authorized by constitution are invalid).

In Monarch Cablevision, Inc. v. City of Pacific Grove, 239 Cal. App. 2d 206, 48 Cal. Rptr. 550 (1966), the court, in holding that the plaintiff's request for certiorari was improper, stated: "[I]t is entirely clear that the action of the Council in granting the intervenor a CATV franchise was a legislative act not a judicial one." Id. at 210, 48 Cal. Rptr. at 553. Similarly, in Orange County Cable Communications Co. v. City of San Clemente, 59 Cal. App. 3d 165, 130 Cal. Rptr 429 (1976), the court held that: "the city council, in choosing to award a franchise, was clearly acting in a legislative capacity... Having once granted the franchise, the city council, in [denying] a request for a rate increase, continued to act in its legislative capacity." Id. at 171, 130 Cal. Rptr. at 433 (citations omitted).

Again, in City of Lafayette v. American Television and Communications Corp, 98 Cal. App. 3d 27, 159 Cal. Rptr. 271 (1979), the court stated: "we could conclude that the county's rate-regulation function is in pure theory neither a right nor a duty but simply a power which the county, by delegation of the people through the Legislature [Gov't Code § 53066], is entitled to exercise." Id. at 34, 159 Cal. Rptr at 276 (emphasis in original). The court continued:

Absent such a provision [Gov't Code § 53066], regulatory control of CATV would, under general principles, have remained in the state. Hence, as between the state and its counties and cities, the counties and cities have, by statutory delegation, acquired the right to regulate CATV within their respective geographic confines.

Id. at 32, 159 Cal. Rptr at 274 (emphasis in original) (citations omitted).

Since franchise regulation constitutes a legislative activity, the proprietary label applied by the court in Boulder is questionable. The district court's opinion on this issue was reversed on appeal. Community Communications Co. v. City of Boulder, 630 F.2d 704, 707 (10th Cir. 1980). This issue was not discussed by the United States Supreme Court when it reviewed and reversed the Tenth Circuit opinion. Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982). Indeed, the Tenth Circuit opinion is quite specific. "The City is not in the television business in any way, and whether by contract or police power the action is an
Although a contract case involving the proprietary function of a local governmental entity has not yet been decided by California courts, the governmental/proprietary dichotomy detailed in the cases above show that a municipality would have standing to assert a contract impairment claim in relation to its proprietary functions. Since local governments have chosen to enter into private contractual relationships with their cable operators, the state should not, and arguably cannot, utilize its police power to usurp these contractual obligations.

In addition, the cable operator who has voluntarily and intelligently accepted the provisions of a contractual agreement should not subsequently be allowed to invoke state law to the detriment of the contracting municipal authority.

Finally, it should be noted that California courts have taken a particularly liberal stance on standing, especially when questioning legislative enactments under the California Constitution. For example, although it is relatively clear that a municipality, acting in a governmental capacity, cannot challenge a state statute under the fourteenth amendment to the Federal Constitution, this is clearly not the case under California state law. In *Williams v.*

exercise of governmental authority. There is no element of proprietary interest of the City." 630 F.2d at 707.

It should also be noted that these holdings do not necessarily preclude the application of the proprietary label. Some types of legislative activities can be proprietary in nature since not all acts of government are governmental. In fact, a close reading of Orange County Cable Communications Co. v. City of San Clemente, 69 Cal. App. 3d 165, 130 Cal. Rptr. 429 (1976), would suggest that if any label is to be applied, it is the proprietary one. That case conclusively holds that the relationship between a cable operator and its host municipality is contractual. The trial court’s findings of fact on the contract issue are even discussed with approval by the appellate court. 59 Cal App. 3d 165, 173, 130 Cal Rptr. 429, 434-35. At no time in either court was jurisdiction on the contract claim challenged. The only analysis other than normal contract review in the *Orange County Cable* case was the issue of which standards applied, those in CAL. CIV. PROC. CODE § 1085 or those in § 1094.5. The court decided that § 1085 applied.

117. Home Telephone & Telegraph Co. v. City of Los Angeles, 211 U.S. 265 (1908) (city can regulate local telephone rates during period of city granted franchise); Plant City v. Mayo, 337 So. 2d 966 (1976) (city objection to franchise billing procedure upheld); Pacific Telephone v. Department Pub. Serv., 19 Wash. 2d 200, 142 P.2d 498 (1943) (state agency can set rates without preclusion under franchise agreements).

118. City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973) (objection to welfare program by city requires a three judge court); Zee Toys, Inc. v. County of Los Angeles, 85 Cal. App. 3d 763, 149 Cal. Rptr. 750 (1978) (state cannot tax items in interstate commerce).

the United States Supreme Court expressly held that the standing of a municipality to raise constitutional questions under the state constitution is a question of state law.121

In California, a local governmental entity can challenge the validity of a state statute under the California Constitution in certain circumstances. Additionally, in many cases, the California constitutional guarantees are broader in scope and protection than similar federal guarantees.122 One such "independent protection" offered by the California Constitution goes further than the fourteenth amendment of the United States Constitution.123 There are numerous California cases in which the cities' elected or appointed officials, in their official capacity, were allowed to challenge a state statute as unconstitutional.124

VI. REPRESENTATIVE STANDING

It is time honored that a franchise granted by a municipality to provide some form of service to its citizens, not only constitutes a contract between the franchisor and franchisee, but also grants third-party beneficiary rights to the citizens of that governmental entity who benefit from the provision of services. In addition, the municipality, as a trustee or representative of its citizens, may bring an action to enforce or protect its citizens' rights and privileges under the contract. Thus, even if it is determined that a California municipality lacks standing to challenge the constitutionality of state deregulatory legislation, it may be able to utilize the "representative standing" doctrine to assert the contractual rights of its citizens. In Market Street Railroad Co. v. Railroad

121. Id. at 47-48.
122. Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965) (California Constitution similar but independent of United States Constitution).
Commission, the California Supreme Court specifically held that a franchise granted by the City and County of San Francisco to a private railroad company to provide transportation services to its citizens and residents constituted a third party beneficiary contract. The city sued the State of California to enforce those third party beneficiary rights on behalf of its citizens as a trustee or representative. The California Supreme Court ruled that the franchise constituted a third party contract with the citizens of the governmental entity who were the creditor beneficiaries of the contract. The court also ruled that the municipality had standing, even in an action against the State, to assert and protect those third party beneficiary rights. Numerous other forms of contracts entered into between a municipality and a private party have been held to create contractual obligations which can be asserted by the municipality as a representative of its citizens. The fact that the contract benefits both the governmental entity and its citizens simultaneously does not preclude the assertion of contractual rights by citizens.

Perhaps the most relevant case is Olson v. County of Sacra-

126. Id. The court stated:
It is also contended that inasmuch as the people of the city paid the excess fares they are the natural beneficiaries thereof. It is urged that the deposition of the unclaimed portion of the fund to the city will effect in substance its return to those who collectively are charged with the maintenance of the railway property, namely the people of the city, for the benefit of all who may avail themselves of the transportation service; and that this will more nearly fulfill the intendment of the statutory provisions for refund. Tables are presented showing that but 12.82 percent of all of the passengers carried on the street railway lines in San Francisco are assumed not to be residents of the city. With an unimportant exception the city operates all of the street railway lines in the city. Since the city is charged with the duty to operate the system for all of its patrons it must maintain it for outsiders as well as for the inhabitants of the city, all of whom are the beneficiaries of the transportation service. It thus appears that the showing of equity in favor of the city is particularly persuasive in view of the fact that the people of the city, who were for the most part the contributors to the fund, have now acquired the properties furnishing the service and are now responsible to the public for their operation. They are now interested in those properties in a proprietary as well as in a consumer capacity. In this respect they are doubly affected by the disposition of the unrefunded excess fares.

Id. at 371-72.
127. City of Oakland v. California Constr. Co., 15 Cal. 2d 573, 104 P.2d 30 (1940) (city objects to contract entered into by council one of whose members was also an employee of the private company involved); City of Oakland v. De Guarda, 95 Cal. App. 270, 272 P. 779, modified, 273 P. 819 (1928) (adjoining landowners are beneficiaries to bond issued for street improvements).
There, the County of Sacramento had issued an exclusive franchise for garbage collection, which is similar to the cable television franchises granted throughout this country. The county cross complained, *inter alia*, as a representative and trustee of those residents who paid service rates for garbage collection disposal. The court of appeals expressly found that a garbage franchise constituted a third-party beneficiary contract for the benefit of citizens residing within the service area and that the governmental entity granting the franchise has standing to sue on behalf of its citizens. The court stated:

Section 369 of the code of Civil Procedure, provides in pertinent part that a "trustee of an express trust . . . may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section." Here the county is the "person" who made the contract for the benefit of its residents.

In both of the cases cited by the court, it was the property owners in the districts who had suffered the damage, yet it was held that the City could bring the action as trustee for them, if for no other reason than to prevent a multiplicity of actions. The situation in the instant case is similar. Cable television franchises should be treated as third-party beneficiary contracts much the same as franchises for water, electricity, sewage, street improvements, and refuse collection. Certainly, the benefits which citizens receive under cable television franchises equal or exceed the rights enumerated to them under the franchises delineated above. It should be the citizens who constitute the ultimate beneficiaries of franchise negotiations between municipalities and their cable

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130. Id. at 324-25, 79 Cal. Rptr. at 144-45.

131. Id. See City of Oakland v. California Constr. Co., 15 Cal. 2d 573, 104 P.2d 30 (1940), where it was held that a complaint brought by the city as trustee for the property owners to recover the proceeds of a street improvement contract obtained under the Improvement Act of 1911 on collusive bids states a cause of action; City of Oakland v. De Guarda, 95 Cal. App. 270, 272 P. 779 (1928), where the court upheld an action by the city as trustee for property owners for damages for breach of a bond given under the same Street Improvement Act, resulting in damages to property owners.

132. It should be noted that one state has held that a cable television franchise constitutes a third party beneficiary contract between the cable operator and its subscribers. Bush v. Upper Valley Telecable Co., 96 Idaho 83, 524 P.2d 1055 (1974) (television subscriber could bring an action based on franchise agreement between franchisee and city as third party beneficiary).
operators, and those individuals should have some mechanism through which to assert their rights in an economical and efficient manner.

The rationale for representative standing is compelling. There exists a developing doctrine in the federal courts, as well as numerous state courts, that a governmental entity has standing to litigate matters which vitally affect its citizens or land within its jurisdictional boundaries. In order for a municipality to assert a claim under the representative standing doctrine, the plaintiff must allege and prove that the challenged action has caused "injury in fact, economic or otherwise," and that the interest it seeks to protect must be "arguably within the zone of interest to be protected or regulated by the state or constitutional guarantee in question."133

Although semantically this test is the same as one for direct standing, it is applied in a far more flexible and public policy oriented manner when the claim is made in a representative capacity.

The rules of standing are not static and fixed, but are lenient in order to allow the courts to address issues of crucial public importance. For example, in Beverly Glen, Inc. v. City of Los Angeles,134 the court held that a nonprofit civic corporation could bring an action to contest the issuance of a use permit. The court stated: "[i]n recent years there has been a marked accommodation of formerly strict procedural requirements of standing to sue . . . and even of capacity to sue . . . where matters relating to the 'social and economic realities of the present-day organization of society' . . . are concerned."135

In following the rule in Beverly Glen, the court in Stocks v. City of Irvine136 stated:

In addition to conforming to California general standing principles, our holding is reinforced by the trend in this state to apply less stringent rules to cases litigating issues in the public interest. One court has noted the "marked accommodations of formerly strict procedural requirements of standing to sue . . . where matters relating to social and economic realities of the present-day organization of society" are concerned.137

133. Association of Data Processing Serv. Org., Inc. v. Camp., 397 U.S. 150 (1970) (data processing organization had standing to object to national banks providing data processing services to other banks and their customers).
134. Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973) (residents of an area have standing to object to area development even though representative organization holds no property in the area).
135. Id. at 122, 109 Cal. Rptr. at 727.
137. Id. at 533, 170 Cal. Rptr. at 731. See also Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981) (organization of
The cases extending the representative standing doctrine to municipalities protecting the public interest are numerous. In the case of City of Davis v. Coleman, the court held that the City of Davis had standing under the National Environmental Policy Act in both a direct and representative capacity. The potential deterioration of the quality of life of its citizens was sufficient “injury in fact” to satisfy the first tier of the standing test. In addition, the fact that the interest of its citizens are protected by the National Environmental Policy Act place the City of Davis within the “zone of protected interest” giving it standing as a plaintiff. Under similar reasoning, the court held that the City of Davis had standing under the California Environmental Quality Act to act in a representative capacity on behalf of its citizens.

There are numerous instances in which municipalities and other governmental entities have been allowed to litigate the claims of its citizens in a representative capacity. In Barcelo v. Brown actions were brought by the mayor of a local municipality and the Governor of Puerto Rico in their official capacities and on behalf of the residents, visitors, and environment of the Puerto Rican island. The court held that the mayor of the municipality involved had standing to prosecute the action in his “official capacity” and that the appearance of the Governor of Puerto Rico was “at least indicative of an ‘official’ stake and interest in the controversy that justify his invocation, as Chief Executive of the Commonwealth.

A case which expressly relies on City of Davis is Conservation Council of North Carolina v. Froehlke. There, several North townhouse owners sued developer for defects in individual units and common areas; Del Mar Beach Club Owners Ass’n, Inc. v. Imperial Contracting, 123 Cal. App. 3d 896, 176 Cal. Rptr. 886 (1981) (owners of individual units of a planned unit development sued contractors and construction company after erosion caused damages); Simons v. City of Los Angeles, 100 Cal. App. 3d 496, 161 Cal. Rptr. 67 (1979) (neighbors sued city for allowing portable classrooms to be located on former parking lot adjoining police academy).

138. City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975) (city had standing to bring claims under Environmental Policy Act from proposed construction of freeway interchange).
139. Id. at 672.
140. CAL. PUB. RES. CODE § 21000 (West 1977).
141. 521 F.2d at 672.
143. Id. at 533.
Carolina municipalities were ruled to have standing under the National Environmental Policy Act to challenge the validity of certain actions of the Army Corps of Engineers. The court held, based upon *Davis*, that the potential for incurring expense on the part of the municipality from the challenged action constitutes a sufficient "injury in fact" to give the city standing to litigate the claim. The fact that the municipality had a "geographic nexus" also seemed important to the court in deriving its decision.

Not every court agrees that city officials or the city itself have standing to assert all claims of its residents. The United States District Court, in *City of Hartford v. Hills*,[^145] held that city officials lacked standing to object to grants given by the Secretary of Housing and Urban Development. The court, however, found that the city and named residents had met the standing requirements. On rehearing *en banc* before the Second Circuit Court of Appeals, the district court's opinion was reversed.[^146] The Supreme Court let this decision stand.[^147] The case of a city asserting a claim under a cable franchise agreement differs. The city (or other local government unit) is a party to the contract. There was no direct city involvement in the *Hartford* case. The citizens would also meet the standing requirements as an increased service fee would cause an added expense to the consumer citizen. The requirements set forth in the Second Circuit's opinion in *Hartford*[^148] would therefore be met.

The liberal view of a municipality's standing to initiate claims affecting the interests of citizens was again expanded in *City and County of San Francisco v. United States*.[^149] In that case, District Judge Williams was asked to review the standing of the City and County of San Francisco to challenge the actions of the Secretary of the Navy in the leasing of property in the vicinity of Hunters Point Naval Shipyard. The city's only evidence to show standing was based on the alleged misuse of natural resources within its jurisdictions and the potential impact of the project upon the city and its residents. The court expressly held that the

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[^146]: City of Hartford v. Towns of Glastonbury, 561 F.2d 1032 (2d Cir. 1977) (rehearing en banc).
[^148]: See 561 F.2d at 1037-41.
[^149]: San Francisco v. United States, 443 F. Supp. 1116 (N.D. Cal. 1977), aff'd, 615 F.2d 498 (9th Cir. 1980) (city objected to Navy rejection of bid offer for leasehold in excess property).
potential misuse of natural resources within the jurisdiction of the plaintiffs constituted sufficient "injury in fact" and placed the plaintiffs within the "zone of interest to be protected" to meet the requirements of standing.150

From a public policy viewpoint, the "representative standing" is wholly consistent with the now recognized policies of protecting individual constitutional rights. A policy which precludes a municipality from litigating claims which significantly affect the quality of life within its jurisdiction will result in the forebearance of these causes of action and thus deny its citizens invaluable rights to which they are entitled. Because of the massive cost of litigation, it is unlikely that any individual citizen could financially bear the burden of litigating the validity of state deregulatory statutes.

Certainly these costs would, at the minimum, have a chilling effect upon the assertion of citizen's first amendment rights. Even if an individual plaintiff could, and would, shoulder a constitutional attack on statutes such as section 53066.1, it does not seem equitable to allocate the total costs of such a lawsuit upon any one individual or small group of individuals, since all of the citizens of the municipality have a significant stake in the outcome. There is no question that a lawsuit initiated by a municipality, in its official capacity, on its own behalf and on the behalf of its citizens, constitutes the most rational, efficient, and equitable method to litigate issues of vital social importance. Utilization of such a format allows both the benefits and burdens of the lawsuit to be progressively and fairly allocated among the members of the community.

The "third party beneficiary representative standing" argument is not without flaw. For example, the third party beneficiary nature of a franchise contract is subject to dispute. In Martinez v. Socoma Companies, Inc.,151 the California Supreme Court expressly held that a general intent to benefit a third party is insufficient to establish third party beneficiary rights under a contract with a municipality.152 Relying upon section 145 of the Restate-

151. Martinez v. Socoma Co., 11 Cal. 3d 394, 521 P.2d 841, 113 Cal. Rptr. 585 (1974) (contract between United States government and private companies to provide job training programs; court held that plaintiffs were only incidental beneficiaries since purpose of contract was to improve neighborhoods).
152. Id. at 400-402, 521 P.2d at 845-46, 113 Cal Rptr. at 589-90.
ment of Contracts,153 the court refused to allow a resident to assert contractual rights in relation to a contract between the United States Government and a private contractor. As the court stated: "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested."154

Cases such as Martinez are unpersuasive. First, the nature of the contracts in Martinez were substantially different than the franchise agreements addressed in Olson,155 Market Street,156 City of Oakland,157 and Bush.158 Martinez's contracts were essentially public works contracts between a private party and the United States. The primary purpose of the contracts was the general improvement of the East Los Angeles neighborhood, as opposed to the specific training and employment of disadvantaged persons residing in that sector.159 Upon careful scrutiny, it is clear that Martinez constitutes a case of contract interpretation, as opposed to legal dogma. Not every public works contract will be interpreted in this manner. Even though not every public works contract will constitute a third party beneficiary contract, cable television franchise contracts providing for a vital public service fall within those parameters.

Second, the "third party beneficiary representative standing" issue can be attacked by arguing that third party beneficiaries can possess no greater rights under franchise agreements than the municipality itself.160 Although superficially appealing, the argu-

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153. The Restatement of Contracts § 145 (1932) reads:
A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
(a) An intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences, or
(b) the promisor's contract is with a municipality to render services the non-performance of which would subject the municipality to a duty to pay damages to those injured thereby.

Id.

154. 11 Cal. 3d 394, 403 n.3, 521 P.2d 841, 846 n.3, 113 Cal. Rptr. 585, 590 n.3.
160. In Fruitvale Canning Co. v. Cotton, 115 Cal. App. 2d 622, 252 P.2d 953,
ment is misdirected for two reasons. First, one must not confuse the issue of whether a municipality possesses the substantive right to claim contract infringement with the doctrine of standing. Indeed, the general doctrine that a municipality cannot assert an impairment claim against the state is not a doctrine of substantive law at all, but rather a notion of standing. It has been generally recognized that state statutes can have the effect of impairing or materially altering a municipality’s substantive right under a contract. However, in most cases, the municipality does not possess standing to assert those claims against its parent state.161

(1953), the court held that “a third party beneficiary cannot gain any greater rights than those of the promisee.” Id. at 625, 252 P.2d at 955. Language in the Fruitvale Canning case was later disapproved by the California Supreme Court. “Clearly manifested intent” is no longer required as long as the promisor understood that the promisee has such intent. Lucas v. Hamm, 56 Cal. 2d 583, 591, 364 P.2d 683, 689, 15 Cal Rptr. 621, 625 (1961) (lawyer not liable to intended beneficiaries when he drafts a will that violates the Rule against Perpetuities). In Zahn v. Canadian Indemnity Co., 57 Cal. App. 3d 509, 129 Cal. Rptr. 286 (1976), the court ruled that “a third party beneficiary can gain no greater rights under the contract than the contracting parties.” Id. at 513, 129 Cal. Rptr. at 288. See also Skylawn v. Superior Court, 88 Cal. App. 3d 316, 152 Cal. Rptr. 793 (1979) (third party beneficiary’s claim can be barred by statute of limitations even if they did not have knowledge of the agreement until after period ran); Sanders v. American Casualty Co., 269 Cal. App. 2d 306, 74 Cal. Rptr. 634 (1969) (non-party to suretyship agreement is bound by one year limitation period contained in contract if he sues as third party beneficiary); Watkins v. Clemmer, 129 Cal. App. 567, 19 P.2d 303 (1933) (father’s oral statement to his ex-wife to pay for medical services for their son cannot be enforced by doctor).

Section 140 of the Restatement of Contracts is also pertinent here:

There can be no donee beneficiary or creditor beneficiary unless a contract has been formed between a promisor and promisee, and if a contract is conditional, voidable, or unenforceable at the time of its formation, or subsequently ceases to be binding in whole or in part because of impossibility, illegality or the present or prospective failure of the promisee to perform a return promise which was the consideration for the promisor’s promise, the right of a donee beneficiary or creditor beneficiary under the contract is subject to the same limitation.

Restatement of Contracts § 140 (1932).

161. Williams v. Mayor of Baltimore, 289 U.S. 36 (1933) (city has no standing to object to state granted tax exempt status for railroad property); City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir.), cert. denied, 449 U.S. 1039 (1980) (city had no standing to contest regional agency’s land use and transportation plans); Aguyro v. Richardson, 473 F.2d 1090 (9th Cir. 1973), cert. denied, 414 U.S. 1146 (1974) (city had standing to object to welfare program’s requirement that recipients receive job training); City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973), cert. denied, 412 U.S. 950 (1973) (city could not object to state welfare statute). The California courts have also recognized the issue to be that of standing. Community Television of Southern California v. County of Los Angeles, 44 Cal. App. 3d 990, 119 Cal. Rptr. 276 (1975) (tax agency lacks standing to object to constitutionality of allowing businesses welfare exemp-
Thus, even if a municipality is barred from bringing a direct action to attack the constitutionality of state deregulatory law, it is not barred because its substantive rights under the contract remain unabridged. The question is solely that of the municipality's inability to show standing to assert the claim.

Even considering the problems of standing involved when a municipality attacks state deregulatory statutes, the rule that a beneficiary under a third party beneficiary contract can possess no greater substantive rights than the promisee, assuming the validity of that proposition, has no application. The citizens of a municipality are not claiming a greater substantive right than the host jurisdiction. The substantive right impaired, that being the right of local rate setting, is impaired both as to the cities as well as to their citizens. However, assuming, arguendo, that municipalities cannot assert those rights, the citizens can assert their own rights against the state.

The notion that a third party beneficiary can possess no greater rights under a contract than the promisor or promisee is legally fallacious. Third party beneficiaries to a contract may assert rights which could not be asserted by a party to the contract. In *Donnellan v. Rocks*, the contract to purchase real estate imposed the obligation to pay the broker's commission upon the seller. When the buyer unlawfully breached the contract, however, the court permitted the broker to recover his commission from the buyer on the grounds that the broker was a third party beneficiary of the sales contract. The court had no difficulty with the fact that the seller could not have recovered the commission from the broker, thus elevating the third party's rights beyond those of the original party to the contract.

In *Pearsall v. Townsend*, the defendant assumed the debts incurred by a promise made in connection with a subdivision project. In exchange, the promisee conveyed his interest in the project to the defendant. The court later held that the contract was negated by fraud. Nevertheless, the plaintiff, a contractor on the property, was permitted to recover against the defendant as a third party beneficiary of the contract. The court specifically rejected the theory that the plaintiff could not recover because the

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162. *Donnellan v. Rocks*, 22 Cal. App. 3d 925, 99 Cal. Rptr. 692 (1972) (buyers obligated to pay broker's commission on breached contract to purchase real estate even though agreement called for seller to pay had transaction occurred).

163. *Pearsall v. Townsend*, 7 Cal. App. 2d 162, 45 P.2d 824 (1935) (third party beneficiary may enforce a contract that has not been rescinded even if it cannot be enforced by one of parties to agreement because of fraud).
promisee could not have recovered based upon the facts.\textsuperscript{164} These decisions naturally follow from the principle that the promise to a third party beneficiary “is treated as having been made directly to the third party.”\textsuperscript{165} Thus, a defect in the original promisee’s position does not inherently destroy the third party beneficiary’s rights under the contract. This doctrine is consistent with the position of the Second Restatement of Contracts.\textsuperscript{166} Under the position taken by the Restatement, the lack of standing for the original promisee is not included among the the defenses maintainable against the third party beneficiary. Thus, any deficiency in standing of a municipality does not relegate the standing of individual citizens to an inferior status.

\textbf{VII. Conclusion}

Although it has been generally assumed that a state can freely interfere with the contractual rights of its political subdivisions

\textsuperscript{164} Id. at 166, 45 P.2d at 826. Accord Griffin v. Williamson, 137 Cal. App. 2d. 308, 290 P.2d 361 (1955) (security holder in property has no claim against subsequently formed partnership if the partnership contains no express intent to be obligated for the debt); Silveyra v. Harper, 82 Cal App. 2d 761, 187 P.2d 83 (1947) (beneficiaries’ reliance on contract is enforceable even if contract is rescinded before beneficiary files suit but after his performance).


\textsuperscript{166} The Restatement (Second) of Contracts indicates the extent of this doctrine:

\begin{quote}
Section 309. Defenses against the beneficiary.
(1) The promise creates no duty to a beneficiary unless a contract is formed between the promisor and promisee; and if a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.
(2) If a contract ceases to be binding in whole or in part because of impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.
(3) Except as stated in subsections (1) and (2) and in § 311, or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims of defenses against the promisee or to the promisee's claims or defenses against the beneficiary.
(4) A beneficiary's right against the promisor is subject to any claim or defense arising from his own conduct or agreement.
\end{quote}

Restatement (Second) of Contracts § 309 (1979).
under cable television franchises,\textsuperscript{167} perhaps such a conclusion is premature. State deregulatory legislation, even adopted with the best of motives, can be contrary to the best interest of both local government and its citizens by feeding the ravaging appetites for profit of monopolistic cable operators. By giving its approval to regressive legislation such as Government Code section 53066.1, legislatures are choosing profit over human rights by impairing not only the vested contractual rights of its local subdivisions and their residents, but also heeding the cable operator's quest for profits over the individual's ability to communicate and receive communication with the outside world. The contracts between cable operators and local governments should be afforded the same degree of sanctity afforded contracts in business and commercial settings. When a governmental entity, regardless of the level, enters into a binding contract with a cable operator, it should be able to have the reasonable expectation that the terms and conditions of that contract will be honored by the parties thereto for the term of the contract. The cable operator should not be able to utilize the political process to circumvent its obligations under the franchise contract or receive benefits of the contract beyond the scope of contractual negotiations or bargains. To treat cable television franchise contracts as "second class citizens" in the hierarchy of constitutional and contractual law would be a serious mistake and act as a disservice to cable television subscribers throughout this country.

\textsuperscript{167} Barnett, \textit{State, Federal and Local Regulation of Cable Television}, 47 Notre Dame Law 684 (1972), wherein it is concluded "[H]ence, it appears that a state government does have legal power, the constitutional provision notwithstanding, to establish for cable a regulatory scheme unfettered by the terms of existing franchises . . . ." Id. at 708.