

BLACKMUN, J., dissenting

458 U. S.

This Court now reaches back in time for a *per se* rule that disrupts that legislative determination.<sup>12</sup> Like Justice Black, I believe that "the solution of the problems precipitated by . . . technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." *United States v. Causby*, 328 U. S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

<sup>12</sup> Happily, the Court leaves open the question whether § 828 provides landlords like appellant sufficient compensation for their actual losses. See *ante*, at 441. Since the State Cable Television Commission's regulations permit higher than nominal awards if a landlord makes "a special showing of greater damages," App. 52, the concurring opinion in the New York Court of Appeals found that the statute awards just compensation. See 53 N. Y. 2d, at 155, 423 N. E. 2d, at 336 ("[I]t is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury"). If, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional claim of little moment.

WASHI

APPEAL FROM

No. 81-9.

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ing of an individual with the commission of assaultive behavior does not in and of itself raise the issue of self-defense.

We find that the evidence adduced in this trial established only that an aggravated robbery was committed. There was no evidence raising the theory of assault or self-defense; thus, Malone's character trait for violence was not pertinent. Appellant's second point of error is overruled.

Accordingly, the judgment of the trial court is affirmed.



**MISSOURI-KANSAS-TEXAS  
RAILROAD COMPANY,**  
Appellant,

v.

**HERITAGE CABLEVISION OF  
DALLAS, INC., Appellee.**

No. 05-88-01469-CV.

Court of Appeals of Texas,  
Dallas.

Dec. 14, 1989.

Cable television franchisee sought to enjoin railroad's removal of or interference with cable lines located within public rights-of-way on railroad's property. The 298th District Court, Dallas County, Adolph Canales, J., granted injunction. Railroad appealed. The Court of Appeals, Rowe, J., held that: (1) private license agreements with railroad were not protected by grandfather clauses of Federal Cable Communications Policy Act; (2) Act granted to franchisee right of access to public rights-of-way on railroad property and did not require franchisee to compensate railroad; and (3) franchisee's renewal of license agreements allowing installation of lines along or across railroad track beds did

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not result in waiver of right of access to public rights-of-way.

Affirmed.

**1. Telecommunications ⇐449.5(1)**

Railroad had no enforceable rights under expired license agreements permitting cable television lines along or across public rights-of-way over railroad property, and, thus, removal of lines and restoration of rights-of-way were only benefits that could be protected by grandfather clauses of Federal Cable Telecommunications Policy Act. Communications Act of 1934, §§ 624(c), 637(a), as amended, 47 U.S.C.A. §§ 544(c), 557(a).

**2. Telecommunications ⇐449.5(1)**

Railroad that had granted licenses to cable television franchisee for installation of lines along or across railroad track beds and public rights-of-way was not "franchising authority" within meaning of grandfathering statute which permits franchising authority to enforce requirements contained within the franchise; rather, franchisor, city, was franchising authority. Communications Act of 1934, §§ 602(9), 642(c), as amended, 47 U.S.C.A. §§ 522(9), 544(c).

See publication Words and Phrases for other judicial constructions and definitions.

**3. Telecommunications ⇐449.5(1)**

Private license agreements permitting cable television franchisee to install cable television lines along or across public rights-of-way on railroad property were not "requirements contained within the franchise" within the meaning of grandfathering statute which permits franchising authority to enforce requirements contained within the franchise. Communications Act of 1934, § 624(c), as amended, 47 U.S.C.A. § 544(c).

See publication Words and Phrases for other judicial constructions and definitions.

**4. Telecommunications ⇐449.5(1)**

Private license agreements which permitted cable television franchisee to install lines along or across public rights-of-way

on railroad property were not "provisions of a franchise" within the meaning of grandfathering statute maintaining enforceability of provisions of any franchise in effect on effective date of subchapter. Communications Act of 1934, § 637(a), as amended, 47 U.S.C.A. § 557(a).

See publication Words and Phrases for other judicial constructions and definitions.

**5. Telecommunications** ⇨449.5(1)

Federal Cable Communications Policy Act granted to franchisee right of access to public rights-of-way on railroad property and did not require franchisee to compensate railroad. Communications Act of 1934, § 621(a), (a)(2), (a)(2)(A-C), as amended, 47 U.S.C.A. § 541(a), (a)(2), (a)(2)(A-C).

**6. Telecommunications** ⇨449(2)

Cable television franchisee's renewal of license agreements allowing installation of lines along or across railroad track beds did not result in waiver of right of access to public rights-of-way without paying compensation to railroad; renewed agreements did not involve public rights-of-way. Communications Act of 1934, §§ 621, 621(a)(2), as amended, 47 U.S.C.A. §§ 541, 541(a)(2).

**7. Estoppel** ⇨52.10(2)

Waiver takes place when one dispenses with performance of something that he or she has right to exact or when one in possession of any right, whether conferred by law or contract, with full knowledge of material facts, does or forbears to do something, doing or forbearing of which is inconsistent with right.

**8. Estoppel** ⇨52.10(2, 3)

Elements of waiver include existing right, benefit, or advantage; actual or constructive knowledge of its existence; and actual intent to relinquish right, which can be inferred from conduct.

**9. Estoppel** ⇨52.10(4)

Right or privilege granted by statute may be waived or surrendered by party to whom or for whose benefit it is given.

**10. Telecommunications** ⇨449.5(1)

Requiring cable television franchisee to remove lines from public rights-of-way

after expiration of license agreements with railroad would serve no useful purpose and would not be granted by court of equity in that Federal Cable Communications Policy Act entitled franchisee immediately to re-install lines. Communications Act of 1934, §§ 621, 621(a)(2), as amended, 47 U.S.C.A. §§ 541, 541(a)(2).

John B. Kyle, Susan Stoler, Dallas, for appellant.

Mark M. Donheiser, Terri M. Anigian, Dallas, for appellee.

Before HOWELL, ROWE and KINKEADE, JJ.

OPINION

ROWE, Justice.

Heritage Cablevision of Dallas, Inc. sued Missouri-Kansas-Texas Railroad Company under the Federal Cable Communications Policy Act of 1984 (the Act) seeking injunctive and declaratory relief. After a bench trial, judgment was entered in favor of Heritage, and a permanent injunction was ordered enjoining MKT from removing or interfering with Heritage's cable lines located within public rights-of-way on MKT's property. In five points of error, MKT asserts that certain licenses it granted to Heritage's predecessor still obligate Heritage to pay compensation for the privilege of crossing MKT's trackbeds, and that the Act, even if applicable to these licenses, does not abolish Heritage's obligation to compensate for this right. We overrule all points of error and affirm the trial court's judgment.

The City of Dallas, as franchising authority, granted a cable franchise to Warner Amex Cable Communication, Inc. in 1980. Between 1981 and 1983, MKT and Warner Amex executed approximately forty-four communication line license agreements allowing Warner Amex to install aerial and underground cable television lines along or across MKT railroad trackbeds and public rights-of-way. Warner Amex paid MKT \$2,500 under each license agreement. Each agreement had a five year term and a

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renewal option. If any license was not renewed, the agreement required Warner Amex to remove all cable lines and restore the right-of-way to its prior condition.

In 1985, Heritage Communications, Inc. purchased Warner Amex's cable franchise. In addition, Warner Amex assigned the license agreements to Heritage Communications. Later that year, Heritage Communications transferred the cable franchise and license agreements to Heritage Cablevision Associates of Dallas, L.P., of which Heritage is the sole general partner.

In 1986 and 1987, Heritage renewed sixteen of the license agreements with MKT. In 1988, Heritage allowed twelve license agreements to expire. When MKT sought to have the cable lines removed, Heritage filed suit seeking injunctive and declaratory relief based on rights claimed under the Act. 47 U.S.C.A. § 541 (West Supp.1989). The parties stipulated that ten of the agreements involved public rights-of-way.

The trial court held that, under the Act, Heritage was entitled to utilize without charge the cable crossings within those ten crossings stipulated to be public rights-of-way.

The court permanently enjoined MKT from removing or interfering with Heritage's cable lines at those crossings for so long as Heritage complied with the reciprocal obligations imposed upon it by the Act.

#### GRANDFATHERING EFFECT

[1] In its second point of error, MKT contends that the Act is not applicable to cable systems already in place at the time of its enactment, basing this contention on a broad interpretation of two sections of the Act. See 47 U.S.C.A. §§ 544(c), 557(a) (West Supp.1989). MKT reads sections 544(c) and 557(a) as grandfathering not only preexisting franchises but also private agreements made by the franchisees such as the licenses granted to Heritage by MKT. We disagree.

MKT reasons that the original franchise to Warner Amex and its assignee Heritage predated the Act; therefore, the franchise became subject to the grandfather provi-

sions, allowing all of its terms to remain in effect after the Act took effect. MKT applies the same analysis to the license agreements since they were executed in favor of Warner before the Act and were later transferred by Warner to Heritage. Even accepting this interpretation of the Act's grandfathering provisions, this analysis fails because the ten license agreements in this case have expired. Except for the right to enforce the removal of the cable lines and restoration of the rights-of-way to their previous condition, MKT has no enforceable rights under the expired agreements. Consequently, the only benefit to MKT grandfathered under this interpretation would be removal of the lines and restoration of the rights-of-way to their previous condition.

Heritage had the contractual right to allow each license to expire. Once terminated under this provision of the agreement, the licenses themselves can no longer be enforced either by contract or by statute. Even if some portions of the license agreements remain enforceable after expiration, MKT's reliance on the grandfather provisions in sections 544(c) and 557(a) is misplaced.

[2] Section 544(c) states that "[i]n the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, ... enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of the cable system." 47 U.S.C.A. § 544(c). Franchising authority is defined in section 522(9) as "any governmental entity empowered by federal, state, or local law to grant a franchise." 47 U.S.C.A. § 522(9) (West Supp. 1989). While section 544(c) does have the grandfathering effect of enforcing requirements contained within franchises preexisting the effective date of the Act, enforcement of the grandfathering is expressly limited to the franchising authority. The City of Dallas is the franchising authority, not MKT. Therefore, MKT cannot enforce the license agreements under section 544(c).

[3] Furthermore, section 544(c) limits enforcement to "requirements contained within the franchise." 47 U.S.C.A. § 544(c). The private license agreements between Heritage's predecessor, Warner Amex, and MKT were not a part of the franchise which Dallas granted to Warner Amex in 1980. Instead, Warner Amex entered into these contracts with MKT between 1981 and 1983. As private contracts between the cable operator and a railroad, the licenses do not fall within the category of "requirements contained within the franchise."

[4] Section 557(a) states that "[t]he provisions of (1) any franchise in effect on the effective date of this subchapter, including any such provisions which relate to the designation, use, or support for the use of channel capacity for public, educational, or governmental use, and (2) any law of any state . . . or any regulation promulgated pursuant to such law, which relates to such designation, use or support of such channel capacity, shall remain in effect, subject to the express provisions of this subchapter, and for not longer than the then current remaining term of the franchise as such franchise existed on such effective date." 47 U.S.C.A. § 557(a). In other words, section 557(a) authorizes the grandfathering of the provisions in a franchise including those relating to public, educational, and governmental use of cable capacity and state laws and regulations relating to channel capacity. Like section 544(c), section 557(a) addresses franchise provisions. This section expressly grandfathers "[t]he provisions of a franchise." 47 U.S.C.A. § 557(a). Again, the private license agreements were not a provision of Heritage's franchise. Therefore, the licenses are not enforceable under section 557(a).

Legislative history supports the interpretation that only franchise provisions and state laws or regulations are subject to the Act's grandfathering provisions. In explaining section 557, the House Report states that this section "grandfathers the terms of any franchise." H.R. REP. NO. 934, 98th Cong., 2d Sess. 94, reprinted in

1984 U.S.CODE CONG. & ADMIN.NEWS 4655, 4731.

In discussing the issue of federal preemption of state cable regulation, a federal district court also addressed section 557(a), concluding that it was created as a transition mechanism to provide continuing effectiveness to existing franchise terms and existing state laws that do not conflict with the express provisions of the Act. *Housatonic Cable Vision Co. v. Department of Public Utility Control*, 622 F.Supp. 798, 809 (D.Conn.1985). Congressional intent, according to the court, was not to displace with the enactment of the Act all existing regulatory arrangements between cable operators and franchising authorities. *Id.* MKT does not seek to enforce an existing franchise term, state law, or state regulation; therefore, section 557(a) is inapplicable.

The House Report also specifically addressed the use of public rights-of-way. Congress considered private arrangements restricting a cable operator's use of rights-of-way or compatible easements to violate the provisions of the Act authorizing the construction of cable systems on public rights-of-way. See 47 U.S.C.A. § 541(a)(2). The Report further states that such restrictive arrangements would be unenforceable. H.R.REP. NO. 934, 98th Cong., 2d Sess. 59, reprinted in 1984 U.S.CODE CONG. & ADMIN.NEWS 4655, 4696. As previously noted, the licenses at issue in this case are private arrangements between MKT and Heritage and are not within the terms of Heritage's franchise.

To support its contention that the license agreements should be grandfathered, MKT relies on the decisions by two courts that grandfathered line extension requirements mandated by state law and a two-year rate freeze provision required by the franchising authority in the original franchise. *Housatonic*, 622 F.Supp. 798; *Town of Norwood v. Adams-Russell Co.*, 401 Mass. 677, 519 N.E.2d 253 (1988).

In the *Town of Norwood*, the franchising authority sought to enforce a two-year rate freeze provision contained in the franchise. *Town of Norwood*, 401 Mass. at 648, 519

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## RIGHT OF ACCESS

N.E.2d at 257. The court rejected the cable operator's argument that the Act preempted the rate freeze because the rate freeze did not exceed the extent of rate regulation permitted by the Act. *Id.* Pursuant to section 543(a) which provides that "[a]ny franchising authority may regulate the rates for the provision of cable service . . . to the extent provided under this section," the court held that the franchising authority could still enforce the rate freeze. *Id.* at 683-84, 519 N.E.2d at 256-57. The franchising authority had statutory authority under section 543(a) to enforce the rate freeze. In contrast, MKT does not have statutory authority to enforce the license agreements.

The *Housatonic* court concluded from an analysis of section 544(c) and similar provisions in the Act that Congress did not remove the state's power, as franchising authority, to legislate and enforce line extension requirements. *Housatonic*, 622 F.Supp. at 807. Contrary to MKT's assertion that the line extension requirements and the license agreements should be similarly grandfathered by the Act, the license agreements cannot be grandfathered. The line extension provision was required by state law, and the party in court seeking to enforce the provision was the franchising authority. The license agreements between MKT and Heritage are private contracts. Furthermore, the City of Dallas, as the franchising authority, is not seeking to enforce the license agreements. As a result of these differences, the license agreements are not subject to being grandfathered on the same basis as were the line extension requirements in the *Housatonic* case.

MKT does not have the statutory authority under the Act to invoke the grandfather clauses. In addition, the grandfather benefit is limited to franchise terms, state laws and regulations, and does not extend to private agreements such as the licenses granted to Heritage by MKT. We conclude, therefore, that the license agreements between MKT and Heritage cannot be grandfathered under the Act and overrule MKT's second point of error.

[5] In three points of error, MKT contends generally that it is due compensation for Heritage's right of access to the public rights-of-way. Specifically, in its first point of error, MKT argues that the Act as a matter of law does not abolish Heritage's obligations to pay compensation pursuant to the licenses or to remove its cables upon expiration of the licenses. MKT's fourth point of error states that the Act does not prohibit or excuse the payment of compensation by Heritage for the privilege of crossing MKT's public rights-of-way. In its fifth point of error, MKT alleges that the trial court's conclusion that the Act excused Heritage's performance pursuant to the licenses was an unconstitutional application of the Act because it effected a taking of MKT's property without just compensation. At oral argument, however, we understood MKT to concede that the use by Heritage does not rise to the level of a constitutional taking. Consequently, we do not consider MKT's fifth point of error. We consider the merits on MKT's first and fourth points of error, and, for reasons given below, we conclude that the Act does grant Heritage the right of access to MKT's public rights-of-way without compensation for that right.

The primary function of courts in construing legislation is to effectuate legislative intent. *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). Legislative intent may be ascertained from the clear language of the statute itself or from available legislative materials which clearly reveal this intent. *Arnett v. Security Mut. Fin. Corp.*, 731 F.2d 358, 361 (6th Cir.1984). Absent a clearly expressed legislative intent to the contrary, the plain language must ordinarily be regarded as conclusive. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

The United States Congress enacted the Act in 1984 to provide a national policy clarifying the system of local, state, and federal regulation of cable television. H.R.

REP. NO. 934, 98th Cong., 2d Sess. 19, reprinted in 1984 U.S.CODE CONG. & ADMIN. NEWS 4655, 4656. Congress intended for the Act to encourage the growth and development of cable systems. *Id.* Accordingly, section 541(a)(2) grants cable franchisees the authority to construct cable systems over public rights-of-way and through easements dedicated to compatible uses. 47 U.S.C.A. § 541(a)(2). Section 541(a)(2) further requires the cable operator to guarantee the safety, functioning, and appearance of the property and to pay costs and damages related to the installation, construction, operation, and removal of all cable facilities within the rights-of-way and easements. *Id.* Specifically, the Act provides:

**§ 541. General franchise requirements**

**(a) Authority to award franchises; construction of cable systems over rights-of-way and through easements; conditions for use of easements; equal access to service**

....

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

47 U.S.C.A. § 541(a)(2) (West Supp.1989).

The Act expressly authorizes a franchised cable operator to construct its cable

lines over public rights-of-way and easements dedicated to compatible uses. 47 U.S.C.A. § 541(a)(2). Heritage is a franchised cable operator seeking to maintain cable lines located within public rights-of-way. We agree with MKT's concession that the Act does grant Heritage a statutory right of access across that portion of MKT's property which is within a public right-of-way. We cannot agree, however, that under the Act a special compensation must be paid by Heritage to MKT for such right.

Although the express language of this statute provides for a right of access, there is no express language requiring compensation for that right. Even though the statute is silent as to the cable operator's obligation to pay compensation for the right of access, the statute does obligate the cable operator to compensate for damage caused to the property by the placement of the cable systems. 47 U.S.C.A. § 541(a)(2)(C). Section 541(a) further requires the cable franchisee to guarantee the safety, functioning, and appearance of the property and to pay costs related to the installation, construction, operation, or removal of the cable facilities. 47 U.S.C.A. § 541(a)(2)(A)-(B). Congress could have required cable operators to pay compensation for access, but it did not. This failure is persuasive evidence that Congress did not intend cable operators to pay for the right of access.

A complete review of the legislative history discloses that Congress had initially considered a broader compensation scheme for this Act. The House Bill listed a fourth obligation requiring compensation for the value of the property taken from multi-unit dwelling owners to the extent such owners were subjected to a mandatory access provision. H.R.REP. NO. 934, 98th Cong., 2d Sess. 80-81, reprinted in 1984 U.S.CODE CONG. & ADMIN.NEWS 4655, 4717-18. Congress deleted the requirement for mandatory access to multi-unit dwellings out of concern for the United States Supreme Court decision striking down, on constitu-

Cite as 783 S.W.2d 273 (Tex.App.—Dallas 1989)

tional grounds, a New York State cable television statute that required landlords to give cable operators access to their property without compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). When the mandatory access requirement was deleted, Congress also deleted the section providing compensation for the value of the property. *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 158 (3rd Cir.1989).

Several courts have recently addressed the question of compensation for right of access with regard to easements dedicated to compatible uses. The Third Circuit concluded that the requirement in section 541(a)(2)(C) that owners be "justly compensated" by the cable operator for any damages was unrelated to the compensation for right of access, basing this conclusion on the deletion of the multi-unit dwelling section. *Id.* Although cable operators had been granted access to easements dedicated for compatible uses, the *Woolley* court noted that this access alone would not give the cable operator complete access to tenants of multi-unit dwellings since at some point the cable lines must cross the owner's property outside of any easements. *Id.* at 155. Therefore, the court held that the access provisions in section 541 did not grant access to private property outside of the easements; otherwise, Congress would have provided for compensation. *Id.* at 159.

The Georgia Court of Appeals, in affirming a condemnation award for a utility easement which did not include any payment for right of access by the local television cable operator, stated that, under the Act, "a cable television franchise [sic] has a free ride to attach to existing easements with compatible uses." *Montgomery v. City of Sylvania*, 189 Ga.App. 515, 376 S.E.2d 403, 405 (1988). The court held, therefore, that a cable operator could continue without charge to maintain cable lines within the easement because the condemnee had not contested the amount of the condemnation award. *Montgomery*, 376 S.E.2d at 405.

MKT's reliance on two federal district court decisions is misplaced because these courts did not require compensation for the right of access to compatible easements and public rights-of-way. See *Greater Worcester Cable Vision, Inc. v. Carabetta Enterprises, Inc.*, 682 F.Supp. 1244, 1259 (D.Mass.1985); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI Ltd., Inc.*, 678 F.Supp. 871 (N.D.Ga.1986). The *Greater Worcester* court concluded that section 541(a)(2)(C), which provides just compensation for damages, would include compensation for value if the cable operator's use of the easement or public right-of-way amounted to "an additional servitude on the underlying property." *Greater Worcester*, 682 F.Supp. at 1259. According to the court, "[i]f no additional burden is imposed, no taking of property will occur." *Id.* The court concluded that the present damages section would insure that the property owners were compensated for any taking that occurs. *Id.*

MKT interprets *Greater Worcester* to hold that the damages provision compensates for any use of the public right-of-way or easement. However, the court explicitly stated that there would not be a taking without a burden additional to or incompatible with the public right-of-way or easement imposed on the property. The court in *Cable Holdings* agreed with *Greater Worcester* that the compensation for damages section would provide compensation for any taking that occurs. *Cable Holdings*, 678 F.Supp. at 874.

We conclude that the Act grants Heritage the right of access to MKT's public rights-of-ways without compensation; and, accordingly, we overrule MKT's first and fourth points of error.

#### WAIVER

[6] MKT also seeks to enforce the license agreements by waiver. According to MKT's third point of error, Heritage waived its right to rely on the benefits of the Act with regard to the ten license agreements at issue by renewing sixteen other license agreements in 1986 and 1987 after Congress passed the Act in 1984.

[7-9] A waiver takes place when one dispenses with the performance of something that he has a right to exact, or when one in possession of any right, whether conferred by law or contract, with full knowledge of the material facts, does or forbears to do something, the doing or forbearing of which is inconsistent with the right. *Ford v. Culbertson*, 158 TEX. 124, 138-39, 308 S.W.2d 855, 865 (1958). Waiver is defined generally as the intentional relinquishment of a known right or conduct which warrants the inference of relinquishment of a known right. *FDIC v. Attayi*, 745 S.W.2d 939, 946 (Tex.App.—Houston [1st Dist.] 1988, no writ). The elements of waiver include: (1) an existing right, benefit, or advantage; (2) knowledge, actual or constructive, of its existence; and (3) actual intent to relinquish the right, which can be inferred from conduct. *Id.* The right or privilege granted by statute may also be waived or surrendered by the party to whom or for whose benefit it is given. *United Benefit Fire Ins. Co. v. Metropolitan Plumbing Co.*, 363 S.W.2d 843, 847 (Tex.Civ.App.—El Paso 1962, no writ).

In support of its position, MKT relies on a case holding that any complaint of defect in a promissory note was waived by acts taken by a subsequent purchaser with respect to the property securing the note, including taking possession, claiming ownership, mortgaging the property, and obtaining a partial release of a lien on the property. *Rosestone Properties, Inc. v. Schliemann*, 662 S.W.2d 49, 53 (Tex.App.—San Antonio 1983, writ ref'd n.r.e.). In *Rosestone*, the subsequent purchaser sought to invalidate the same promissory note under which possession of the property was claimed. *Id.* In contrast, MKT would have us extrapolate the rights it held under ten license agreements because of action which Heritage had taken with regard to sixteen different license agreements. We decline to do so. Each agreement, while similar in nature and content, grants a discrete right with respect to a unique property. Thus, each license is enforceable independently of the other licenses. Accordingly, as to the ten licenses at issue in this case, we hold that Heritage did

not lose its right to rely on benefits of the Act by its renewal of the sixteen other license agreements.

#### CONCLUSION

[10] MKT opposed the granting of injunctive and declaratory relief for Heritage on the basis that the ten license agreements at issue were still needed to cover the obligations of the parties. As discussed, this Court concludes that MKT can no longer require the charge for right of access which these license agreements exact from Heritage. Accordingly, the injunctive and declaratory relief sought by Heritage was properly granted. MKT also sought to recover those costs it would incur in removing Heritage's cable line from its rights-of-way. We agree that by contract MKT is entitled to the removal of the cable lines and restoration of the rights-of-way to their previous condition and that the cost of removal and restoration is to be borne by Heritage. For this Court to grant the relief contractually owed to MKT, however, the cable lines would be removed only to be immediately reinstalled pursuant to the rights granted to Heritage by the Act. "A court of equity will not require the doing of a useless thing, nor will it lend its powers to accomplish a useless purpose." *Boman v. Gibbs*, 443 S.W.2d 267, 272 (Tex.Civ.App.—Amarillo 1969, writ ref'd n.r.e.); *Davis v. Carothers*, 335 S.W.2d 631, 642 (Tex.Civ.App.—Waco 1960, writ dismiss'd by agr.). Under the circumstances appearing in this record, to order Heritage to remove its presently installed lines would serve no useful purpose. Instead, it would likely inconvenience many innocent cable customers who were intended to be benefitted under the Act. For these reasons, we affirm the trial court's injunction prohibiting removal of the lines.

The judgment of the trial court is affirmed.



**GREATER WORCESTER  
CABLEVISION, INC.,  
Plaintiff,**

v.

**CARABETTA ENTERPRISES, INC., Jo-  
seph F. Carabetta, and Lincoln Street  
Realty Company, Defendants.**

Civ. A. No. 85-2022-MA.

United States District Court,  
D. Massachusetts.

Nov. 20, 1985.

Cable television operator filed superior court suit seeking an injunction ordering a landlord to permit access to install cable equipment. The landlord removed the action to federal court. Landlord then filed a motion to dismiss for failure to state a claim. The District Court, Mazzone, J., held that: (1) the Massachusetts statute requiring a landlord to permit a cable television operator to install its equipment on the landlord's property, if the tenant has asked for cable service, does not provide just compensation for the taking of property and, thus, is unconstitutional; (2) the statute did not violate the landlord's First Amendment rights; (3) the landlord did not have standing to assert an equal protection challenge on behalf of alternative television service providers; and (4) the federal Cable Communications Policy Act does provide just compensation for takings incident to the installation of cable equipment.

Complaint dismissed.

**1. Federal Courts ⇐47**

Massachusetts statute requiring landlord to permit cable television operator to install its equipment on landlord's property if tenant has asked for cable service was not "fairly subject" to interpretation that it provides for just compensation when cable operators take private property by installing cable equipment and, therefore, it was not appropriate for district court to abstain from federal constitutional adjudication.

M.G.L.A. c. 166, § 35; c. 166A, § 22; U.S. C.A. Const.Amends. 5, 14.

**2. Federal Courts ⇐392**

Although unsettled questions of Massachusetts law could be certified directly to Supreme Judicial Court, certification was not appropriate on issue of constitutionality of Massachusetts statute requiring landlord to permit cable television operator to install its equipment on landlord's property if tenant has asked for cable service; statute was not susceptible to construction that would avoid determination that statute effected taking of property without just compensation, neither party requested certification of issue, and action had been removed from superior court to district court. M.G.L.A. c. 166, § 35; c. 166A, § 22; U.S. C.A. Const.Amends. 5, 14; Mass.S.J.C. Rule 1:08.

**3. Eminent Domain ⇐2(1.1)**

Massachusetts statute requiring landlord to permit cable television operator to install its equipment on landlord's property if tenant has asked for cable service could not reasonably be construed to require payment to landlord of just compensation for taking of property and, therefore, statute violated takings clause. M.G.L.A. c. 166, § 35; c. 166A, § 22; U.S.C.A. Const. Amends. 5, 14.

**4. Eminent Domain ⇐2(1.1)**

Requirement that cable television operators indemnify landlord for damage arising from installation of cable television equipment did not provide just compensation to landlord for taking of property that occurred under Massachusetts statute requiring landlord to permit cable television operator to install its equipment on landlord's property if tenant has asked for cable service; legislature's neglect of readily available eminent domain procedure strongly indicated that it did not recognize that it was authorizing cable operators to take private property. M.G.L.A. c. 166, § 29; c. 166A, §§ 1 et seq., 22; U.S.C.A. Const. Amends. 5, 14.

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GREATER WORCESTER CABLEVISION v. CARABETTA ENT. 1245

Cite as 682 F.Supp. 1244 (D.Mass. 1985)

5. Constitutional Law ⇐82(6)

Telecommunications ⇐449(2)

Massachusetts statute requiring landlord to permit cable television operator to install its equipment on landlord's property if tenant has asked for cable service did not force landlord into cable television business as operator's contractual partner, even though landlord claimed that forcing it into cable television business violated First Amendment. M.G.L.A. c. 166, § 35; c. 166A, § 22; U.S.C.A. Const.Amend. 1.

6. Constitutional Law ⇐82(6)

Telecommunications ⇐449(2)

Massachusetts statute requiring landlord to permit cable television operator to install its equipment on landlord's property if tenant has asked for cable service did not violate any putative First Amendment right landlord may have had to choose how to use its property; landlord did not have right to make choices about what television messages its tenants would receive and could not use ownership of apartment complex to act as editor on behalf of tenants, landlord chose to invite public onto its property by leasing rights to possess its property to its tenants, and there was no reason to believe that tenants would assume that landlord endorsed messages transmitted into tenants' apartments. M.G.L.A. c. 166, § 35; c. 166A, § 22; U.S.C.A. Const. Amend. 1.

7. Constitutional Law ⇐42.2(1)

Landlord did not have standing to litigate equal protection claims of alternative television services which did not enjoy enforced access right enjoyed by cable television operators under Massachusetts statute requiring landlord to permit cable television operator to install its equipment on landlord's property if tenant has asked for cable service; landlord made no showing that alternative television services were injured by statute, landlord did not show that its interest in challenging statute was same interest as that of alternative television services, and there was no legal impediment to alternative services' litigating their

1. The City of Worcester originally granted a license to install and operate a community antenna television system on January 7, 1972 to

own constitutional objections. U.S.C.A. Const. Art. 3, § 1 et seq.; Amendments. 1, 14; M.G.L.A. c. 166A, § 22.

8. Eminent Domain ⇐85

Federal Cable Communications Policy Act providing that cable franchise is construed to authorize construction of cable system over public rights-of-way, and through easements which have been dedicated for compatible uses, provides for just compensation of property owners for whatever taking of their property occurs when cable facilities are installed, even though unenacted provision may have contained more complicated compensation scheme. Communications Act of 1934, §§ 621(a)(2), 633, as amended, 47 U.S.C.A. §§ 541(a)(2), 553; U.S.C.A. Const.Amend. 5.

Michael P. Angelini, Barry A. Bachrach, Bowditch & Dewey, Worcester, Mass., for plaintiff.

Joanne E. Romanow, Schlesinger and Buchbinder, Newton, Mass., Christine S. Vertefeulle, Andrew R. Lubin, Susman & Duffy, P.C., New Haven, Conn., for defendants.

MEMORANDUM AND ORDER

MAZZONE, District Judge.

This is an action for an injunction enforcing rights under Massachusetts' community antenna television system statute, Mass. Gen.Laws Ann. ch. 166A, § 22 (West 1976 & Supp.1985), and under section 621(a)(2) of the Federal Cable Communications Policy Act of 1984, 47 U.S.C.A. § 541(a)(2) (West Supp.1985). Plaintiff Greater Worcester Cablevision, Inc. (Cablevision) holds a non-exclusive license from the City of Worcester to provide cable television service to Worcester residents.<sup>1</sup> Defendant Lincoln Street Realty Company (Lincoln), is a limited partnership which owns Lincoln Village Apartments, a 1200-unit apartment complex in Worcester. Defendants Carabetta Enterprises, Inc. and Jo-

Parker Industries d/b/a Parker Cablevision. This license was later assigned to Greater Worcester Cablevision, Inc.

seph F. Carabetta are Lincoln's general partners.

### I.

In March 1985, Cablevision sought access to Lincoln's property in order to install cable television, at the request of several Lincoln tenants.<sup>2</sup> Lincoln refused access. Lincoln has recently permitted American Satellite Cable Corporation, a Cablevision competitor, to install a satellite master antenna television system which will offer the same television services to Lincoln tenants as Cablevision seeks to provide. Affidavit of Salvatore Carabetta; Affidavit of Carole T. Kissel.

Cablevision originally sought a preliminary injunction, as well as a permanent injunction, ordering Lincoln to permit Cablevision access to install its cable equipment. Cablevision contends that under the terms of its license, it is duty bound to provide cable television service to every Worcester resident who requests such service. Further, Cablevision argues that section 22 obliges owners of multi-dwelling property such as Lincoln to afford it access so that it can do so. Under the Massachusetts statute, a property owner is deemed to have consented to access once the cable operator furnishes him with a copy of the statute and a statement agreeing to be bound by its terms; Cablevision did so. Cablevision also contends that the newly-enacted federal Cable Communications Pol-

2. On March 21, 1985, Cablevision sent by certified mail a letter to a Worcester attorney, Joseph Cariglia, Lincoln Street Realty Company's lawful agent, requesting access to Lincoln Village in order to install community antenna television equipment, enclosing a copy of the Massachusetts statute, and promising to be bound by its terms. This letter was delivered on March 22, 1985. On the same day, Cablevision sent the same letter by certified mail to Lincoln Street Realty Company at its office in Meriden, Connecticut. This letter was delivered on March 25, 1985.

3. Mass.Gen.Laws Ann. ch. 166A, § 22 (West 1976 & Supp.1985) provides that:

No operator shall enter into any agreement with persons owning, leasing, controlling or managing buildings served by a CATV system, or perform any act, that would directly or indirectly diminish or interfere with existing rights of any tenant or other occupant of such a build-

ing to use of master or individual antenna equipment.

icy Act of 1984 creates a similar right of access for licensed cable operators by its provision that cable operators can use easements a property owner has already granted to public utilities.

Cablevision filed its complaint in state court in April, 1985. Lincoln removed the case to this Court in May, 1985. This Court's subject matter jurisdiction is based on diversity of citizenship. Cablevision is a Massachusetts corporation with its principal place of business in Worcester. Carabetta Enterprises, Inc. is a Connecticut corporation with its principal place of business in Meriden, Connecticut. Joseph Carabetta is a Connecticut citizen. Lincoln, the limited partnership, has 119 limited partners, none of whom are Massachusetts citizens.

After a hearing in Worcester on August 20, 1985, this Court denied Cablevision's preliminary injunction motion, concluding in part that damages were calculable and available. This matter is now before the Court on Lincoln's motion to dismiss for failure to state a claim on which relief can be granted.

### II.

Lincoln does not dispute that the Massachusetts statute, Mass.Gen.Laws Ann. ch. 166A, § 22 (West 1976 & Supp.1985), gives Cablevision an enforceable right of access to Lincoln's apartment complex.<sup>3</sup> Lincoln

ing to use of master or individual antenna equipment.

An operator who affixes, or causes to be affixed, CATV system facilities to the dwelling of a tenant shall do so at no cost to the landlord of such dwelling, shall indemnify the landlord of such dwelling for any damage arising out of such actions, and shall not interfere with the safety, functioning, appearance or use of such dwelling.

The consent required by section thirty-five of chapter one hundred and sixty-six shall be deemed to have been granted to an operator upon his delivery to the owner or lawful agent of the owner of property upon which he proposes to affix CATV system facilities of a copy of this section, and a signed statement that he agrees to be bound by the terms of this section.

An owner of property, or his lawful agent, may sue in contract to enforce the provisions of an operator's agreement under this section.

also concedes that Cablevision has followed the statutory procedure which required Cablevision to deliver to Lincoln a copy of the statute and a signed statement agreeing to be bound by its terms.<sup>4</sup> Lincoln, however, attacks the statute's constitutionality.

Lincoln alleges three constitutional defects: (1) the statute authorizes a taking of private property without just compensation, in violation of the Fifth and Fourteenth Amendments; (2) the statute violates Lincoln's First Amendment free speech rights by requiring Lincoln to permit Cablevision, a state-licensed speaker, to use its property as a platform; and (3) the statute gives mandatory access only to licensed community antenna television (CATV) operators, discriminating against competing television providers in violation of the Equal Protection Clause of the Fourteenth Amendment.

Lincoln also contends that section 621(a)(2) of the newly-enacted Cable Communications Policy Act, on which Cablevision relies in seeking an order permitting it to use utility easements and public rights-of-way at Lincoln Village, is unconstitutional and, in any event, will not have the broad practical effect that Cablevision claims. These contentions are addressed *seriatim*.

#### A. THE MASSACHUSETTS CATV STATUTE

##### 1. UNCOMPENSATED TAKING

Section 22 of the Massachusetts CATV statute, Mass.Gen.Laws Ann. ch. 166A, § 22 (West 1976 & Supp.1985), provides that a landlord must permit a cable opera-

No person owning, leasing, controlling or managing buildings served by a CATV system shall discriminate in rental or other charges between tenants who subscribe to such CATV services, and those who do not or demand or accept payment, in any form, for the affixing of CATV system equipment to such buildings, except that to which he is entitled under the provisions of this section.

4. Mass.Gen.Laws Ann. ch. 166, § 35 (West 1976) provides that:

A corporation or person maintaining or operating telephone, telegraph, television or other electric wires or any other person who in any manner affixes or causes to be affixed to the property of another any pole, structure, fixture,

tor to install its cable television equipment on his property if a tenant has asked for cable service. Installation of Cablevision's facilities will require physical attachment of conduit or wire molding to the buildings and the installation of some 25,000 feet of cable wire. Affidavit of Salvatore Carabetta. This, Lincoln asserts, will be a permanent physical occupation of its property, and thus a taking for which compensation is due under the Fifth and Fourteenth Amendments. Lincoln contends that section 22 must be struck down because it nowhere provides for such compensation. Moreover, the statute explicitly prohibits a property owner from "demand[ing] or accept[ing] payment, in any form, for the affixing of CATV system equipment...." Lincoln also argues that section 22 does not provide any mechanism by which it can seek just compensation. When the Massachusetts Legislature has intended to compensate property owners for takings, it has fashioned elaborate procedures. Its failure to do so when it enacted section 22, Lincoln asserts, means the Legislature did not intend for landlords to receive compensation for the installation of cable on their property.

Cablevision agrees that installation of its cable facilities will work a taking of Lincoln's property. But it insists that section 22 obliges cable operators to compensate property owners for any taking that results. Cablevision urges a broad reading of its duty under section 22 to indemnify Lincoln for "any damage" caused when it affixes its cable equipment. "Any dam-

wire or other apparatus for telephonic, telegraphic, television or other electrical communication, or who enters upon the property of another for the purpose of affixing the same, without first obtaining the consent of the owner or lawful agent of the owner of such property, shall, on complaint of such owner or his tenant, be punished by a fine of not more than one hundred dollars.

Chapter 166A, § 22 provides that the owner's consent is "deemed to have been granted" when a cable operator delivers to the "owner of property upon which he proposes to affix CATV system facilities ... a copy of [§ 22], and a signed statement that he agrees to be bound by the terms of [§ 22]."

age," Cablevision contends, should be construed as damage caused by the permanent physical occupation of Lincoln's real property, as well as actual physical damage to Lincoln's buildings, fixtures or land. Section 22 does not prohibit such payments Cablevision argues; only payments in excess of payments for damage caused by installation of cable facilities are prohibited. Finally, Cablevision contends that section 22 does provide a mechanism by which Lincoln can obtain compensation. Cablevision must agree to be contractually bound by its obligations under section 22. Lincoln's remedy for just compensation is a contract action that will determine how much Cablevision must pay for any actual damage it causes, as well as for the property it takes.

Unquestionably, section 22 authorizes a taking of property compensable under the Fifth and Fourteenth Amendments by obliging landlords to permit cable operators to install cable equipment on their property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). The Supreme Court in *Loretto* defined a taking as any "permanent physical occupation" of property by a third party. *Id.* at 426, 102 S.Ct. at 3171. *Loretto* involved a New York statute providing that a landlord must permit a cable operator to install cable facilities on the landlord's property and may not demand payment from the operator in excess of the amount determined by a state commission to be reasonable. The Court ruled that installation—the "direct physical attachment of plates, boxes, wires, bolts and screws to the building," *id.* at 438, 102 S.Ct. at 3177—was a permanent physical occupation of the building that destroyed the building owner's rights to possess, use and dispose of her property. *Id.* at 435-37, 102 S.Ct. at 3175-77.

The *Loretto* court did not strike down the New York statute, but remanded to the state courts to determine the amount of compensation due. Cable operators, under the New York statute, cannot be forced to pay a landlord "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine rea-

sonable." *Id.* at 423 n. 3, 102 S.Ct. at 3169 n. 3. The state commission has ruled that a one-time \$1 payment is the normal fee to which a landlord is entitled for the installation of cable equipment, though the commission's regulations permit higher than nominal awards if a landlord makes a special showing of greater damages. *Id.* at 424-25, 456 n. 12, 102 S.Ct. at 3169-70, 3176 n. 12.

Lincoln contends that the absence of language like that of the New York statute, providing for nominal compensation determined by a state agency with the possibility for higher awards, renders the Massachusetts statute constitutionally invalid. Lincoln relies on two Florida cases striking down a statute which required that landlords allow franchised cable operators access to apartment buildings but held the cable operator "responsible for paying to the landlord any costs, expenses or property damage that are incurred by the landlord during installation, repair, or removal of the cable," holding that this amounted to a taking that did not require payment of just compensation. *Beattie v. Shelter Properties IV*, 457 So.2d 1110 (Fla. Dist. Ct. App.1984); *Storer Cable T.V. v. Summerwinds Apartments*, 451 So.2d 1084 (Fla. Dist. Ct. App.1984).

The *Beattie* court refused to construe the statute's requirement that cable operators pay for property damage as a provision for payment of just compensation "in view of the strong, direct prohibition" elsewhere in the statute that no cable operator would be forced to "pay anything of value in order to obtain or provide" cable television service. Fla. Stat. Ann. § 83.66(1) (West Supp.1984). Lincoln argues that this language in the Florida statute is no different from language in the Massachusetts statute prohibiting property owners from demanding or accepting payment in any form for the installation of cable television equipment on their property, and concludes that the requirement that cable operators indemnify property owners for damages caused by the installation of cable facilities cannot be read as requiring compensation.

GREATER WORCESTER CABLEVISION v. CARABETTA ENT. 1249

Cite as 682 F.Supp. 1244 (D.Mass. 1985)

Cablevision concedes that *Loretto* is controlling and that section 22 authorizes takings of private property by cable operators. Cablevision insists, however, that the statute can be read to require payment of just compensation. Cablevision relies on *Princeton Cablevision, Inc. v. Union Valley Corp.*, 195 N.J.Super. 257, 478 A.2d 1234 (N.J.Ch.1983) which upheld a New Jersey statute giving cable operators a right of access to private property over objections that the statute authorized a taking without just compensation. The challenged statute prohibits an "owner from demanding or accepting payment in any form as a condition of permitting installation of cable service" *Princeton Cablevision*, 195 N.J.Super. at 262, 478 A.2d at 1240, but also requires the cable operator to indemnify the property owner for "any damage caused by the installation, operation or removal" of cable facilities. The court ruled that the prohibition on payments meant only that a landlord could not force his tenants to pay him in exchange for allowing cable facilities to be installed, holding that the later language meant cable television operators were obliged to pay landlords just compensation for property taken when cable facilities were installed. Cablevision urges a similar reading of section 22.

The issue before this Court is whether section 22 can be read to include an obligation on the part of Cablevision to pay just compensation for the taking of Lincoln's property involved in installing Cablevision's cable television equipment. If not, section 22 is constitutionally invalid because it authorizes a taking of private property without just compensation. Although the mandatory access provisions of section 22 were added by amendment in 1977, no Massachusetts court has had the opportunity to consider these statutory provisions. At this point, I digress briefly to consider the issues of abstention and certification in view of the absence of Massachusetts law.

[1] This case presents a novel question of Massachusetts statutory law which, if answered as Cablevision urges, avoids the

necessity for federal constitutional adjudication. If section 22 does provide for just compensation when cable operators take private property by installing cable equipment, then the federal constitutional issue is avoided. Abstention in this situation is not unthinkable. See, e.g., *Bellotti v. Baird*, 428 U.S. 132, 146-47, 96 S.Ct. 2857, 2865-66, 49 L.Ed.2d 844 (1976); *Harrison v. NAACP*, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959). But abstention from "the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). An exception to this principle has been recognized where a challenged state statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Harman v. Forssenius*, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965). But the challenged statute must be ambiguous and uncertain, as well as unconstrued by the state courts. It is not enough that state courts have yet to consider the statute. There must be more than a "bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984). While the construction of section 22 urged by Cablevision is not outlandish, I cannot agree that section 22 is "fairly subject" to Cablevision's interpretation, and this Court will not, therefore subject the parties to "the delay and expense to which application of the abstention doctrine inevitably gives rise." *Bellotti*, 428 U.S. at 150, 96 S.Ct. at 2886 (quoting *Lake Carriers Assn. v. McMullan*, 406 U.S. 498, 509, 92 S.Ct. 1749, 1757, 32 L.Ed.2d 257 (1972)).

[2] I am aware that unsettled questions of Massachusetts state law may be certified from the federal courts directly to the Supreme Judicial Court. Mass. Rules of Court, Sup.Jud.Ct.Rule 1:03 (West 1985). Certification has been endorsed since its use can "save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416

U.S. 386, 390-91, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974); see also *Bellotti v. Baird*, 428 U.S. at 146-47, 96 S.Ct. at 2866-67. Nonetheless, I am persuaded that this case is not an appropriate one for certification.

First, the availability of certification, by itself, cannot justify abstention where abstention is not otherwise appropriate. Certification makes more palatable a federal court's inclination to abstain by reducing the delay and expense to the parties that abstention usually entails. See *Lake Carriers Assn. v. MacMullan*, 406 U.S. 498, 509, 92 S.Ct. 1749, 1756, 32 L.Ed.2d 257 (1972). Here, however, this Court has already decided that abstention is inappropriate because section 22 is not susceptible to a construction that avoids the federal constitutional questions. My abstention decision turned on the legal issue involved—the statutory language—and not on the equitable considerations of delay and expense. Thus, the availability of Massachusetts' certification procedure does nothing to change that analysis. Second, neither of the parties has asked me to certify this or any other question to the Supreme Judicial Court. I could, of course, send this question or questions to the Supreme Judicial Court on my own. Given this Court's determination that section 22 is not fairly susceptible to the reading urged by Cablevision, however, I think that the delay and expense that would be imposed on the parties if I certified this question or questions would be unwarranted. Before I certified a question or questions to the Supreme Judicial Court, I would feel compelled to ask the parties to consider and argue the matter. Then, of course, the Supreme Judicial Court would have to consider the matter and could very well request the parties to amplify the record on this point. Even the expedited certification process would mean further delay and cost to the parties. Finally, the procedural posture of the case also leads me to conclude that certification is inappropriate. This case originated in state court. On the ground of diversity of citizenship, Lincoln successfully petitioned for removal to this Court. 28 U.S.C. § 1441. Lincoln's choice

of forum is deserving of some respect. For whatever reason, Lincoln chose to defend itself in a federal, and not a state, court. It would be unfair to Lincoln, and contrary to the policy underlying removal and diversity jurisdiction, see *Brown v. Flowers Industries, Inc.*, 688 F.2d 328, 330 n. 1 (5th Cir.1982), cert. denied, 460 U.S. 1023, 103 S.Ct. 1275, 75 L.Ed.2d 496 (1983), for this Court to send the parties back to state court to litigate what has emerged as a key issue in their dispute. Having considered these issues, then, and declining to employ those processes, I turn back to the issue at hand.

[3] I am mindful of the principle of statutory construction urging me to construe section 22 consistently with constitutional requirements if possible. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 104 S.Ct. 8348, 82 L.Ed.2d 632 (1984). Legislatures are presumed knowledgeable of constitutional requirements and it is also presumed that they intend to be guided by them. Still, this Court must conclude that section 22 cannot fairly be read to require cable operators to compensate property owners for the taking of property it authorizes.

The starting point in deciding whether section 22 provides for adequate compensation is the statutory language itself. *American Tobacco Co. v. Patterson*, 456 U.S. 68, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982); *Lane v. United States*, 727 F.2d 18, 20 (1st Cir.1984). Section 22 provides that "[n]o person owning, leasing, controlling or managing buildings served by a CATV system shall . . . demand or accept payment, in any form, for the affixing of CATV system equipment to such buildings, except that to which he is entitled under the provisions of this section." I do not agree with Lincoln that this provision, by itself, bars cable operators from paying compensation for property taken when they install cable television equipment pursuant to section 22. Arguably it applies only to additional payments from tenants, and not to payments from cable operators. The immediately preceding por-

tion of the sentence quoted above prohibits landlords from charging tenants who subscribe to cable service higher rent "or other charges." See *Princeton Cablevision*, 195 N.J.Super. at 270, 478 A.2d at 1247. But see *Beattie*, 457 So.2d at 1113. Even if it does refer to payments from cable operators to landlords, this provision is not an absolute bar to such payments; it still allows landlords to receive those payments "to which he is entitled" by other provisions of section 22. If Cablevision were correct that other provisions of section 22 oblige cable operators to pay just compensation, this language would not nullify such payments. Such a reading would make this final clause surplusage.

[4] The provision that cable operators must "indemnify the landlord" of a building in which the cable operator wants to install cable equipment "for any damage arising out of such actions" does not, however, satisfy the constitutional requirement for compensation. While it is true that in takings cases, Massachusetts courts have used "compensation" and "damages" interchangeably, see, e.g., *Verrochi v. Commonwealth*, 394 Mass. 633, 477 N.E.2d 366 (1985); *Opinion of the Justices*, 365 Mass. 681, 692, 313 N.E.2d 561 (1974), it is notable that nowhere does section 22 refer to installation of cable equipment as a taking. Though this choice of language is not, by itself, conclusive, it strongly suggests that the Legislature did not believe it was authorizing cable operators to exercise the power of eminent domain when it enacted section 22.

There is a marked contrast between section 22 with its ambiguous choice of the word "damage" and its private contract action to enforce a cable operator's promises, and other Massachusetts statutes governing similar situations involving public utilities.

Massachusetts' obligation to compensate property owners for land seized through its power of eminent domain is constitutionally compelled by art. 10 of the Massachusetts Declaration of Rights. See *Bromfield v. Treasurer & Receiver-General*, 390 Mass. 665, 668, 459 N.E.2d 445 (1983). For that

reason when the Commonwealth exercises its right of eminent domain—as it did when the Legislature enacted section 22 and authorized franchised cable operators to take land—"the act granting the power must provide for compensation, and a ready means of ascertaining the amount." *Id.* (quoting *Haverhill Bridge Proprietors v. County Comm'rs of Essex*, 103 Mass. 120, 124-25 (1869)). Other similar delegations of eminent domain power typically follow the statutory procedure enacted in Mass. Gen.Laws Ann. ch. 79, which "embodies rights guaranteed under art. 10 of the Declaration of Rights," *Bromfield*, 390 Mass. at 671 n. 11, 459 N.E.2d 445, and provides a procedure for petitioning for assessment of damages. Gas and electric utilities, for example, are authorized to take private property, Mass.Gen.Laws Ann. ch. 164 §§ 69R and 72, but compensation is determined by the procedure established in chapter 79. Telephone and telegraph companies are authorized to use public ways and to build transmission lines, including poles, conduits and wires, Mass.Gen.Laws Ann. ch. 166, § 21, but adjoining landowners along a public way are expressly entitled to pursue damages for any taking that occurs, Mass.Gen.Laws Ann. ch. 166, § 29. Cablevision's argument that the Legislature recognized that section 22 authorized takings of private property—i.e., exercises of eminent domain—but chose to leave property owners to a contract action rather than the chapter 79 petition process is implausible.

Cablevision is correct that courts are capable of determining what compensation is due. See *Correia v. New Bedford Redevelopment Authority*, 375 Mass. 360, 361-62, 377 N.E.2d 909 (1978). The question, however, is not whether the contract action created by section 22 is procedurally adequate as a means of determining just compensation. Rather, the question is did the Legislature, when it enacted section 22, recognize that it was authorizing cable operators to take private property or not. The Legislature's neglect of the readily available chapter 79 eminent domain proce-

ture, while not necessarily conclusive, is strongly indicative that it did not.<sup>5</sup>

*Loretto* is of no help to Cablevision. The statute upheld by implication in *Loretto*, New York Exec. Law § 828 (McKinney Supp.1981-1982), provides that cable operators will "agree to indemnify the landlord for any damage caused by the installation, operation or removal of [cable] facilities." § 828(1)(a)(iii). It separately provides that no landlord shall demand payment from any cable operator for permitting installation of cable equipment "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine reasonable." § 828(1)(b). The Commission ruled later that a nominal \$1 fee would be sufficient to satisfy constitutional requirements "in the absence of a special showing of greater damages attributable to the taking." *Loretto*, 458 U.S. at 424, 102 S.Ct. at 3170. Landlords are compensated pursuant to the language in section 828(1)(b) directing the state commission to determine just compensation for takings of property authorized by section 828, not pursuant to the "any damage" language in section 828(1)(a)(iii).

Cablevision also relies on *Board of Health of Franklin v. Hass*, 342 Mass. 421, 173 N.E.2d 808 (1961), arguing that Massachusetts courts have read the word "damage" broadly in order to satisfy constitutional requirements. There the court upheld a statute permitting a board of health

5. The Legislature has before it H.B. 4033, a proposed amendment to chapter 166A modeled after the New York statute impliedly upheld in *Loretto*. The bill would allow a property owner to demand "reasonable compensation to be paid" by a cable operator in exchange for "permitting the installation of CATV system equipment on" his property. Compensation would, in most cases, be limited to a \$1 payment. However, a property owner could seek more than the \$1 payment by bringing an action before the Community Antenna Television Commission; the property owner would have to show that he has a "specific alternative use for the space occupied by CATV facilities or equipment" or that installation of the CATV facilities would cause a "decrease in the resale or rental value" of the property.

Cablevision argues that subsequent legislative history cannot be used to discern original legislative intent. See *Commissioner v. Engle*, 464 U.S. 206, 223 n. 21, 104 S.Ct. 597, 607 n. 21, 78

to regulate and prohibit piggeries, holding that statute adequately compensated the owner of a piggery forced to shut down who succeeded in persuading a reviewing court to annul the board's order. The statute provided the owner could "recover damages and costs," Mass.Gen.Laws Ann. ch. 111, § 150, and the court concluded that this was adequate assurance that piggery owners would be compensated for the temporary and wrongful interruption of their business. *Board of Health of Franklin* is not applicable here. There the only possible damage contemplated by the statute was the interruption of the owner's piggery. By contrast, here it is a strained and generous construction to read the "any damage" language of section 22 to include compensation for the permanent physical occupation of the property.

Accordingly, I conclude that section 22 is unconstitutional because it does not provide for compensation to landlords for the installation of cable on their property. While this conclusion is dispositive of this case, in the interests of completeness, I address the further contentions.

## 2. FREE SPEECH VIOLATION

Lincoln contends that section 22 violates its First Amendment free speech rights because it compels Lincoln to go into the cable television business with Cablevision,

L.Ed.2d 420 (1984) ("deliberations in subsequent sessions of Congress that never culminated in legislation" are of little help in determining legislative intent). Certainly H.B. 4033's introduction, by itself, is not conclusive that the earlier Legislature which enacted section 22 did not intend for cable operators to pay just compensation. First, H.B. 4033 has not been adopted and so cannot be interpreted as evidence of the current Legislature's feelings about the constitutional adequacy of section 22. Second, it is possible that H.B. 4033's sponsors are satisfied that section 22 is constitutional, but simply wish to avoid litigation similar to that here by clarifying the Legislature's intent and furnishing a more precise method for determining compensation.

Still, it is notable that legislators feel the need, after *Loretto*, to refine section 22 and it is instructive to contrast section 22 with the carefully crafted compensation mechanism elaborated in H.B. 4033.

and forces Lincoln to allow a government-licensed speaker onto its property.

There is no small irony in Lincoln invoking putative First Amendment free speech rights in its effort to exclude Cablevision. One of Congress' concerns in fashioning a federal cable policy was to keep landlords from blocking cable operators' access to their property so that they can arrange for an alternate satellite master antenna television system (SMATV) to serve their property and receive payments from the SMATV operator for delivering a captive audience.<sup>6</sup> The House Committee on Energy and Commerce report noted

that it is unfortunate that around the country with increasing frequency citizens are being denied the ability to gain access to cable service because of refusals of landlords or property owners to permit cable operators to wire the premises. These actions permit landlords and property owners in the position of being information gatekeepers, deciding which electronic information will pass into the home and which will not, enabling real estate property interests to be the ultimate electronic editors. The threat these practices pose to the goal of information diversity in the electronic age is very clear and present.

H.R.Rep. No. 934, 98th Cong., 2d Sess. 79-80 (1984), reprinted in 1984 U.S.Code Cong. & Ad.News 4655, 4716-17. Later, the Committee explained that

one of the root causes for landlords denying their residents access to cable service has been the incentive building and mobile home park owners presently have to enter into financial relationships with the providers of satellite master antenna television systems (SMATV's). Since traditional SMATV systems are not franchised and do not pay a franchise fee, building and home park owners have found SMATV operators willing to enter into arrangements which provide landlords the ability to share some of the

6. It is not clear from the pleadings whether Lincoln and American Satellite Cable Corporation—the SMATV operator who has installed its television system at Lincoln Village with Lincoln's permission—have agreed to a revenue

revenues derived from the provision of SMATV service to the property's residents.

*Id.* at 82, U.S.Code Cong. & Ad.News 4655 at 4719.

The challenged statute must be struck down, Lincoln argues, because it serves the "narrow and parochial" interests of cable operators and not a compelling state interest, and it is not the least intrusive means of promoting the state interests it does serve. Defendants' Memorandum at 22.

Relying on *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir.), cert. granted, 474 U.S. 979, 106 S.Ct. 380, 88 L.Ed.2d 333 (1985), Lincoln first argues that cable television enjoys First Amendment protection. For that reason, Lincoln says, it can't be required to go into the cable television business. But section 22, Lincoln concludes, does just that: by compelling Lincoln to permit Cablevision access to its property to install cable television equipment, Lincoln has been forced to "engage in a communications venture" with Cablevision. Defendants' Memorandum at 20. Lincoln construes the provision in section 22 providing that a property owner can enforce a cable operator's promise to be bound by the terms of section 22 in a contract action to mean that Lincoln and Cablevision will be contractually-bound partners in the cable television business. The result, Lincoln urges, is a serious infringement on its "fundamental First Amendment right to choose how to use [its] property for speech purposes." Defendants' Memorandum at 21.

Lincoln really makes two separate arguments. The first, based on *Preferred Communications*, is that section 22 forces it into the cable television business. The second, based on *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2085, 64 L.Ed.2d 741 (1980), is that section 22 forces Lincoln to permit someone else to

splitting arrangement. Moreover, even if they have there is certainly nothing wrong in doing so. Still, the First Amendment interests that are important here are those of Lincoln Village residents and not those belonging to their landlord.

use its property for speech purposes. Neither argument is persuasive.

[5] It is true that cable television enjoys some First Amendment protections. See, e.g., *Preferred Communications*, 754 F.2d at 1403. The concern, however, has been government regulation of content and the franchising process whereby local governments regulate access to cable television markets, not the novel claim Lincoln raises here—that it is constitutionally protected from being forced against its wishes into the cable television business. It is not necessary to reach this claim, however.

Section 22 does not, as Lincoln contends it does, force Lincoln into the cable television business as Cablevision's contractual partner. Cablevision is obliged under section 22 to promise Lincoln that Cablevision will be bound by the terms of section 22, including principally the requirements that Cablevision indemnify Lincoln for any property damage caused by installing cable equipment, and not interfere with the "safety, functioning and appearance" of Lincoln's property. Cablevision's promise is enforceable in a contract action. This contractual enforcement provision, however, does not mean that Cablevision and Lincoln are business partners in the cable television business. It merely specifies how a property owner should enforce the terms of section 22; Lincoln would have had rights enforceable against Cablevision even if the Legislature had deleted the contractual enforcement language. The arrangement between Cablevision and Lincoln is no different than that between Lincoln and a public utility to whom Lincoln grants an easement. If the public utility overburdens the easement, or abandons it, Lincoln can enforce its terms in a contract action. That does not mean that Lincoln and the public utility are in business together.

[6] Lincoln also challenges section 22 on the ground that it forces Lincoln to allow a government-licensed speaker—Cablevision—to use Lincoln's property for speech purposes, violating Lincoln's right to choose how to use its property. Lincoln relies on three Supreme Court cases involv-

ing state regulation of speech on private property. *PruneYard Shopping Center*, 447 U.S. at 74, 100 S.Ct. at 2035; *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

In *Wooley*, the Court concluded that a state could not compel a motorist to display the state's motto which was printed on its license plates and could not bar him from taking measures to cover up the motto. *Tornillo* struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in the newspaper. Lincoln urges this Court to focus on Justice Powell's concurring opinion in *PruneYard* where he declared that "First Amendment interests are affected by state action that forces a property owner to admit third-party speakers", concluding that "even when no particular message is mandated" the compelled access can be unconstitutionally intrusive. *Id.* 447 U.S. at 98, 100 S.Ct. at 2049 (Powell, J., concurring). From these precedents, Lincoln concludes that it has a "fundamental First Amendment right to choose how to use [its] property for speech purposes." Defendants' Memorandum at 21.

*Wooley*, *Tornillo* and *PruneYard* do not, however, support Lincoln's contention. *Wooley* turned on the fact that "the government itself prescribed the message" and required it to be displayed on personal property that was used as "part of [appellee's] daily life." *PruneYard*, 447 U.S. at 87, 100 S.Ct. at 2044. *Tornillo* rested on the First Amendment principle that the state can't tell newspapers what to publish, and the related danger that the statute would "damp[e]n the vigor and limi[t] the variety of public debate" because editors would be fearful that controversial news stories and editorials might trigger application of the statute. *Id.* at 257. Nothing in section 22 dictates the content of the television signals that will be transmitted to Lincoln Village tenants. As a landlord, Lincoln is in no way similar to the newspaper editors in *Tornillo*; Lincoln cannot, by refusing to permit access to its property,

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make choices about what television messages its tenants receive and it cannot use its ownership of the apartment complex, and the putative First Amendment rights that involves, to act as an editor on behalf of its tenants.

It is *PruneYard* which is most instructive in this case, not *Wooley* and *Tornillo*. *PruneYard* involved California's power under its state constitution to permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited. The Court rejected the shopping center's contention that this was a violation of its First Amendment right to control use of its property for speech purposes. Distinguishing *Wooley* the Court found that the property owner invited the public onto his property; that the state did not dictate the messages displayed; and, that the views expressed by persons passing out pamphlets and gathering petition signatures would not be "identified with those of the owner." *Id.* at 87, 100 S.Ct. at 2044. All three are present here. Lincoln has chosen not only to invite the public onto its property, it leases rights to possess its property to its tenants. There is no dictation by the Commonwealth of the messages to be transmitted by Cablevision to its subscribers. The Commonwealth's franchising process is not, as Lincoln contends, analagous to the auction struck down in *Preferred Communications*, 754 F.2d at 1409. Finally, there is no reason to believe that Lincoln's tenants will assume that Lincoln endorses messages transmitted into tenants' apartments at their request. See *Direct Satellite Communications, Inc. v. Board of Public Utilities*, 615 F.Supp. 1558, 1568, No. 84-4990, slip op. at 14-17 (D.N.J.1985). As far as this argument is concerned, then, Lincoln cannot prevail.

3. EQUAL PROTECTION

[7] Lincoln contends that the Massachusetts statute is contrary to the Equal Protection Clause of the Fourteenth Amendment because it discriminates between licensed cable operators who enjoy a statutorily-enforced right of access, and competing television companies which can be de-

nied access to apartment complexes such as Lincoln Village and must negotiate with property owners. Because the discriminatory effect of section 22 unfairly restricts First Amendment free speech rights of alternative television services, Lincoln argues, section 22 must be shown to be the least restrictive means to achieve a compelling state interest to be constitutional.

There is no need to reach the merits of Lincoln's equal protection claim because Lincoln fails to establish its standing to litigate those claims on behalf of alternative television services who do not enjoy the enforced access right enjoyed by franchised cable operators under section 22.

Beyond the constitutional requirements of Article III which limit the judicial power of federal courts to "cases" and "controversies," the Supreme Court has also fashioned a "set of prudential principles that bear on the question of standing," including the principle that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge College v. Americans United*, 454 U.S. 464, 474, 102 S.Ct. 752, 760, 70 L.Ed.2d 700 (1982), (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 348 (1975)). Lincoln argues that it fits within the exception to this rule that "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S. 190, 195, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976).

Lincoln must first show that it itself is injured by section 22, before it can raise constitutional claims belonging to alternative television services who might seek access to Lincoln Village. *Id.* at 194-95, 97 S.Ct. at 455; *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826 (1976); *Warth*, 422 U.S. at 498-500, 95 S.Ct. at 2204-05; *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 498, 87 L.Ed. 603 (1944). Lincoln is "injured" in the narrow sense that section 22 imposes on it a legal duty to

permit Cablevision to install cable facilities on its property. Lincoln's refusal to permit access forced it to appear here as a defendant in Cablevision's enforcement proceeding.

Lincoln argues that it is also harmed by section 22 because it is forced to give up its property rights in whatever space will be taken up by Cablevision's equipment in what amounts to a forced sale. With other competing television services, Lincoln is free to negotiate whether to sell at all and under what terms. This alleged harm is ameliorated, however, by the just compensation Lincoln rightfully contends it must receive from Cablevision. The forced sale to Cablevision is harmful only if Lincoln doesn't receive a fair price for whatever property rights it is obliged to transfer to Cablevision.

More difficult is the question of what claims Lincoln may press in challenging section 22. Lincoln claims that it has standing to assert the equal protection claims of alternative television services who do not enjoy the statutory right of access section 22 grants to licensed cable operators such as Cablevision. I disagree, and conclude that Lincoln does not have standing to assert those claims.

First, Lincoln makes no showing that alternative television services are injured by section 22. The challenged statute does not prevent alternative television services from trying to gain access to Lincoln Village to compete with Cablevision. Lincoln admits that it has already negotiated an agreement with an alternative television service, American Satellite Cable Corporation, under which that company will install a satellite master antenna television system at Lincoln Village. Subscribing tenants will pay 20-25% less than they will be charged by Cablevision and will receive at least equal service. Affidavit of Salvatore Carabetta. Under section 22, Cablevision and Lincoln are barred from "directly or indirectly diminish[ing] or interfer[ing] with existing rights of any tenant or other occupant of [Lincoln Village] to use of master or individual antenna equipment." It is true that Cablevision will compete with

American Satellite to enlist Lincoln Village tenants as subscribers. But any firm that offered television service to Lincoln Village tenants would compete with American Satellite, whether it secured its access through negotiated agreement with Lincoln or through section 22. Thus, this alleged injury has nothing to do with discrimination against unfranchised alternative television services. See *Direct Satellite Communications, Inc. v. Board of Public Utilities*, 615 F.Supp. 1558 (D.N.J.1985) (satellite master antenna television company providing service to condominium developments lacks standing to raise equal protection challenge to mandatory access statute because competition from a franchised cable operator is not a "colorable injury related to the State's alleged denial of equal protection of the laws").

Second, Lincoln fails to show that it is a "proper proponent of the particular legal rights on which [it] bases [its] suit." *Singleton*, 428 U.S. at 112, 96 S.Ct. at 2873. A party who seeks to assert constitutional rights of third-parties must be an appropriate advocate of those rights who can be "expected properly to frame the issues and present them with the necessary adversarial zeal." *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 104 S.Ct. 2839, 2847, 81 L.Ed.2d 786 (1984). "[T]hird parties themselves usually will be the best proponents of their own rights," and courts prefer "to construe legal rights only when the most effective advocates of those rights are before them." *Singleton*, 428 U.S. at 114, 96 S.Ct. at 2874. By recognizing this fact, courts ensure that they approach cases from the point of view of those whose rights are at stake and avoid needless and perhaps counterproductive litigation. *Friedman v. Harold*, 638 F.2d 262, 267 (1st Cir.1981) (citation omitted).

Lincoln, relying on *Craig*, argues that its potential vendor-purchaser relationships with alternative television services qualifies it to assert their equal protection objections to section 22. Lincoln's reliance on *Craig* is misplaced.

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*Craig* involved an Oklahoma statute which prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. *Id.* 429 U.S. at 193-94, 97 S.Ct. at 454-55. The standing question was whether a licensed beer vendor could challenge the statute on her own behalf, and whether she could rely on the equal protection objections of males 18-20 years of age. The Court held the vendor suffered injury in fact because her only choice was to obey the statute and suffer a "direct economic injury through the constriction of her buyers' market," *id.* at 194, 97 S.Ct. at 455, or disobey the statute and jeopardize her license. The vendor could effectively litigate the equal protection claims of males 18-20 years of age because it was threatened governmental sanctions against beer vendors that deterred young males from purchasing 3.2% beer; the Oklahoma statute did not make it unlawful for minors to purchase 3.2% beer. The beer vendor and the young males had identical interests in challenging the statute. "[V]endors and those in like positions," the Court concluded, "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Id.* at 195, 97 S.Ct. at 456.

All the vendor-purchaser cases involve close professional relationships or statutes that directly restrict a vendor's right to sell or distribute. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Planned Parenthood officer and licensed physician who dispense contraceptives have standing to assert privacy rights of married couples in challenging state statute making unlawful the use of contraceptives); *Singleton*, 428 U.S. at 106, 96 S.Ct. at 2868 (physicians challenging state statute excluding most abortions from Medicaid coverage can assert equal protection objections of women patients seeking abortions); *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (mail-order contraceptive distributor has standing to assert privacy rights of potential customers in challenging state statute restricting sale, distri-

bution and advertising of contraceptives). The interests of the litigant and the rights of the third party must be "mutually interdependent" so that the rights of the third party will be "diluted or adversely affected" if the litigant's constitutional challenge fails, *Craig*, 429 U.S. at 195, 97 S.Ct. at 455, or there must be a close, strong relationship between the litigant and the person whose rights he asserts. *Singleton*, 428 U.S. at 114, 96 S.Ct. at 2874; *Eisenstadt v. Baird*, 405 U.S. 438, 445, 92 S.Ct. 1029, 1034, 31 L.Ed.2d 349 (1972).

Here section 22 does not restrict Lincoln's ability to sell access to its apartment complex to anyone, including alternative television services. As a practical matter, of course, Lincoln has already sold access to an alternative television service. But even if Lincoln had not already permitted a satellite master antenna television service to install its equipment at Lincoln Village, there is nothing in section 22 that would restrict its ability to do so, even after Cablevision installed its facilities. Nor is there any showing that the installation of Cablevision's equipment will make that right to sell access to other, competing television services a hollow one. This is simply not a case where a legislature sought to restrict vendors or suppliers of objectionable products or services, and where the vendors were thus entitled to press the constitutional claims of their potential purchasers. The right of alternative television services to compete for subscribers and seek access to apartment buildings is not affected by the requirement that Lincoln permit access to a licensed cable operator who seeks to install cable facilities. More important, Lincoln's interest in toppling section 22 and the equal protection rights of alternative television services are not congruent. Lincoln asserts that it is harmed by section 22 because it loses the ability to sell access to its apartment complex to whomever it chooses and, perhaps more important, because it loses the ability to refuse to sell access. Alternative television services, however, might very well take a different view of section 22. Their interest in challenging

the statute might be to secure for themselves the same statutory right of access the franchised cable operators now enjoy.

Alternative television services who feel aggrieved by section 22 can challenge it on their own behalf. Lincoln makes no showing that alternative television services are prevented by some obstacle or burden from litigating their constitutional objections to section 22. There is no concern, for example, that alternative television services might be dissuaded by embarrassment from pressing their rights as in the birth control and abortion cases. *See, e.g., Singleton*, 428 U.S. at 115-16, 96 S.Ct. at 2874-75. Nor is the statute challenged in this case similar to that in *Craig* which penalized not use but sale and was directed at beer sellers not underage males, and thus made would-be vendors the "least awkward challenger[s]." *Id.* 429 U.S. at 197, 97 S.Ct. at 456; *see also Eisenstadt*, 405 U.S. at 446, 92 S.Ct. at 1034. Whatever the merits of the equal protection objections to section 22, Lincoln lacks standing to litigate them.

#### B. CABLE COMMUNICATIONS POLICY ACT OF 1984, § 621(a)(2)

[8] Cablevision also seeks an injunction ordering Lincoln to allow it to make full use of easements Lincoln has granted to public utilities at Lincoln Village. Cablevision relies on the recently-enacted Cable Communications Policy Act of 1984, 47 U.S.C.A. §§ 521-559 (West Supp.1985). Section 621(a)(2) of the Act, 47 U.S.C.A. § 541(a)(2), provides that a cable franchise is "construed to authorize the construction of a cable system over public rights-of-way, and

7. Section 621(a), 47 U.S.C.A. § 541(a) provides:

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

through easements ... which have been dedicated for compatible uses...."7 Cablevision contends that Lincoln's property is encumbered by easements for the use of both public and private utilities, including easements for telephone service, natural gas and electricity. Urging that the easements extend into each individual apartment, section 621(a)(2) authorizes the same broad right of access provided by the Massachusetts CATV statute.

Lincoln concedes that section 621(a)(2) permits Cablevision to make use of whatever easements and public rights-of-way there might be on its property (so long as such use is compatible), but argues that this does not mean that Cablevision can install a complete CATV system using those easements alone. First, Lincoln argues, as a factual matter, that the utility easements at Lincoln Village do not extend into each apartment; at some point in order to wire Lincoln Village, Cablevision's equipment will leave the easements and pass onto Lincoln's property. Second, Lincoln asserts that the result Cablevision urges is inconsistent with Congress' intent in enacting the Act. Congress wanted to solve the problem of recalcitrant utilities unwilling to share their easements with cable operators. Congress specifically retreated, Lincoln insists, from adopting such a broad right of access; an early version of the Act contained language that forced landlords to permit cable operators to install cable equipment on their property, but these provisions were deleted. Finally, Lincoln asserts that to the extent section 621(a)(2) does permit Cablevision access to Lincoln's

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

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property against Lincoln's wishes, it authorizes an unconstitutional taking of property without compensation; Lincoln also raises the free speech and equal protection claims it raised against the Massachusetts statute.

Lincoln's constitutional challenges are without merit. Section 621(a)(2) does ensure that property owners will be fully compensated for whatever taking of their property occurs when cable facilities are installed, by providing that "the owner of the property [shall] be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of [cable] facilities by the cable operator." Lincoln's claim that because an unenacted provision contained a more complicated compensation scheme that Congress changed its mind and did not, finally, intend for property owners to be compensated is not persuasive. The legislative history explicitly refers to the Supreme Court's decision in *Loretto*, and notes that section 633 was drafted to comply with the constitutional requirements set forth in that decision. H.R.Rep. No. 934, 98th Cong., 2d Sess. 80-81 (1984), reprinted in 1984 U.S.Code Cong. & Ad.News 4655, 4717-18. Except for the provision detailing a method for determining what constitutes just compensation, section 621(a)(2) fully incorporates the compensation provisions of the unenacted section 633. Even if the language of section 621(a)(2) were ambiguous, which it is not, there is simply no basis on which Lincoln can argue that Congress did not intend that property owners be fully compensated for whatever takings might occur from the installation of cable facilities.

Finally, it is unclear just what property Lincoln suggests will be taken without compensation. Section 621(a)(2) gives Cablevision the right to use easements or public rights-of-way dedicated for electric, gas, telephone or other such utility transmissions. Whether Cablevision's exercise of this new right will constitute a taking of property will depend on whether Cablevision's use of a given easement or right-of-way amounts to an additional servitude on the underlying property. If no additional burden is imposed, no taking of property

will occur. Lincoln does not contend that Cablevision's cable facilities, if installed, would not be a compatible use with the existing easements, though it vigorously disagrees with Cablevision's assertion that it can install a complete CATV system at Lincoln Village using only existing utility easements and public rights-of-way.

Lincoln's other constitutional objections are identical to those it raised against the Massachusetts CATV statute; they are not persuasive here, either.

Without reaching the issue of Congress' purpose in discarding section 633, there remains the question whether Cablevision can install a complete CATV system at Lincoln Village using nothing but existing utility easements and public rights-of-way. See Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 Ga.L.Rev. 543, 610-12 (1985). Because this Court is not persuaded that Cablevision can do so, there is no purpose to be served at this point in enjoining Lincoln from barring Cablevision's use of the easements. Given Lincoln's refusal to permit Cablevision to install its cable facilities at Lincoln Village, Cablevision must rely on the access provision of the Massachusetts CATV statute.

#### Conclusion

Obviously, this case presents a close and difficult question. Section 22 can be read several ways. This Court's task in construing this statutory provision, however, is to ascertain the Legislature's intent and I am convinced from the language the Legislature chose to express its intent, that in drafting section 22, the Legislature did not contemplate a compensated taking of private property as a consequence of the mandatory access provisions. Having arrived at that conclusion, I am not prepared to indulge in remedial legislating by revising section 22 to comport with the constitutional guidelines. Rewriting a defective statute is not the province of the judiciary. Rather than supplement or strain the Legislature's language to avoid the constitutional challenge, I believe the sounder approach is to leave to the Legislature the