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I. Introduction

The preceding issue of the *Dickinson Law Review* carries an article by Gardner Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, on the hotly contested question of the amounts that local governments may charge telecommunications providers for use of the public rights-of-way.[1] His article is constructed around a central premise that local governments historically have not had the right to recover compensation based on fair market value (FMV) for telephone companies' use of the public rights-of-way and that, therefore, section 253 of the Telecommunications Act of 1996,[2] which, according to Mr. Gillespie, preempts franchise fees in excess of cost-recovery, merely restores the *status quo ante*.[3] Both Mr. Gillespie's historical premise and his reading of section 253 are highly controversial, and court decisions both accept and reject his contentions.[4] Mr. Gillespie concludes his article by observing that "the issues

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1. Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 DICK. L. REV. 209 (2002).

2. 47 U.S.C. § 253 (2002). The Telecommunications Act added section 253 to the Communications Act of 1934. *See id.*

3. Gillespie, *supra* note 1, at 251.

4. *Id.* at 211 ("[L]itigation continues to dispense wildly inconsistent judicial decisions."). Even decisions of a single appellate panel may be disparate. *See* City of Auburn v. Qwest Corp., 247 F.3d 966 (9th Cir. 2001), *amended by* 260 F.3d 1160 (9th Cir. 2001) (making eight significant changes through amending order), *cert. denied*, 534 U.S. 1079 (2002).

surrounding municipal wireline fees are likely to remain on boil until the judicial decisions reach equipoise, as they largely did a century ago regarding municipal effort to exact 'pole fees' from telegraph and telephone companies."[5]

On the specific question of FMV compensation, the Second Circuit in *T.C.G. New York, Inc.* v. *City of White Plains*[6] found the statutory language of section 253 to be "not dispositive"[7] and, characterizing the question as a "difficult" one, declined to reach the issue.[8] Indeed, of the Telecommunications Act generally, Justice Scalia, writing for the Court in *AT&T v. Iowa Utilities Board*,[9] observed that "[i]t would be a gross understatement to say that the 1996 Act is not a model of clarity."[10] Circuit courts have also noted the difficulty of parsing the language of section 253.[11]

The purpose of this article is to qualify Mr. Gillespie's historical premise and to reanalyze the conflicting interpretations of section 253. This article will generally follow Mr. Gillespie's outline.

II. On Rights of Way Redux: A Critique

A. On the Necessity for Action

Mr. Gillespie states that policy-makers and courts should be concerned by "fees," "taxes," and "rents" that local governments are charging wireline telecommunications providers for the providers' use of local rights-of-way as economic inputs or factors of production for their profit-making businesses.[12] He cites a February 2002 resolution by the National Association of Regulatory Utility Commissioners (NARUC) as evidence of the need for more reasonable rates.[13] Subsequently, however, in July 2002, NARUC's board of directors refused to endorse any of the options (including one for cost-based franchise fees) for accomplishing that end that had been produced by its Rights-of-Way

5. Gillespie, *supra* note 1, at 250-51.
6. 305 F.3d 67 (2001), *petition for cert. filed*, 71 U.S.L.W. 3489 (U.S. Jan. 10, 2003) (No. 02-1062).
7. *Id.* at 77.
8. *Id.* at 79.
9. 525 U.S. 366 (1999).
10. *Id.* at 397.
11. BellSouth Telecomms. v. Town of Palm Beach, 252 F.3d 1169, 1187 (11th Cir. 2001) (identifying "perceived inconsistencies within the structure of [section 253]"); City of Abilene v. FCC, 164 F.3d 49, 52 (D.C. Cir. 1999) (noting the "oddity of [section 253(a)'s] formulation").
12. Gillespie, *supra* note 1, at 209-10.
13. *Id.* at 210-11.

Study Committee.[14]

Access to rights-of-way is not high on a competitive local exchange carrier (CLEC) executive's list of obstacles to deployment of the carrier's network. Sometimes, in fact, it is not on the list at all.[15] Rather, there are other factors to which the present travails of the CLEC industry can be more readily attributed.[16]

B. On the Historical Perspective

The dual theses of Mr. Gillespie's article—that local governments never had the right to compensation for providers' uses of the public rights-of-way in their private businesses for profit and that the current controversy will reach a stasis centered on cost-based fees[17]—are analytically difficult, because there are probably as many lines of legal authority as there are bodies of property and municipal law in the various domestic jurisdictions. In many states there are no controlling statutes or judicial precedents. Leaving *Erie Railroad Co. v. Tompkins*[18] to one side, the definition of property rights is quintessentially a state-law function. Indeed, Mr. Gillespie argues strenuously[19]—in the context of what he considers the pivotal case of *City of St. Louis v. Western Union Telegraph Co.*[20]—that, even in the pre-*Erie* era of *Swift v. Tyson*,[21] the United States Supreme Court implicitly acknowledged the controlling effect of state law when it assumed, in its opinion on rehearing in *City of St. Louis v. Western Union Telegraph Co.*, that Missouri law controlled.[22] But certainly, in any event, property rights are uniquely and quintessentially determined by state law.[23]

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14. STUDY COMM. ON PUB. RIGHTS OF WAY, NAT'L ASS'N OF REGULATORY UTIL. COMM'RS, PROMOTING BROADBAND ACCESS THROUGH PUBLIC RIGHTS-OF-WAY AND PUBLIC LANDS 177 (2002), *available at* http://www.naruc.org/Committees/telecom/row.pdf.

15. *See* JOSEPH S. KRAEMER & RANDOLPH J. MAY, LOCAL EXCHANGE COMPETITION: PROGRESS IN MARYLAND (Progress & Freedom Found., Progress on Point Release 9.16, 2002), *available at* http://www.pff.org/Publications/POP9.16MarylandCompetitionStudy.pdf.

16. *See* MARTIN F. MCDERMOTT, CLEC: TELECOM ACT 1996: AN INSIDER'S LOOK AT THE RISE AND FALL OF LOCAL EXCHANGE COMPETITION 222, 241, 304 (2002); LARRY F. DARBY, JEFFREY A. EISENACH & JOSEPH S. KRAEMER, THE CLEC EXPERIMENT: ANATOMY OF A MELTDOWN (Progress & Freedom Found., Progress on Point Release 9.23, 2002), *available at* http://www.pff.org/Publications/POP9.23CLEC.pdf.

17. Gillespie, *supra* note 1, at 212.

18. 304 U.S. 64 (1935).

19. Gillespie, *supra* note 1, at 219-20.

20. 148 U.S. 92, *reh'g denied*, 149 U.S. 465 (1893).

21. 41 U.S. (16 Pet.) 1 (1842).

22. *City of St. Louis*, 149 U.S. at 467; *see also City of St. Louis*, 148 U.S. at 100.

23. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980); Williams v. North Carolina, 317 U.S.

From this large universe of cases, Mr. Gillespie cites cases reflecting the law in far fewer than fifty-one jurisdictions.[24] These cases would not themselves support any conclusion as to the majority rule.

Moreover, the first thing one notices about the statutes and cases cited by Mr. Gillespie is their age. They wane in frequency very quickly after 1910.[25] There is a historical reason for this. The problem at the time of the Civil War was bringing telegraph service to remote areas of the country—connecting the two coasts by something more nearly "real time" than the Pony Express.[26] Congress responded in the railroad acts of the mid-nineteenth century by requiring the land-grant railroads to carry public telegraph traffic on the pole lines paralleling their tracks.[27] Next, Congress enacted the Post Roads Act of 1866[28] to give telegraph companies the authority to run pole lines along postal routes.[29] It was on the basis of the Post Roads Act that Western Union sought judicial relief from St. Louis's per-pole franchise fee in the *City of St. Louis v. Western Union Telegraph Co.* cases,[30] to which Mr. Gillespie devotes nearly seven pages.[31] The Act merely gave Western Union, which was chartered in New York, the same authority in states other than New York that the land-grant railroads enjoyed in multiple states by virtue of their federal charters.[32] The Supreme Court unmistakably held that the Post Roads Act did not carry with it a power to take property—with or without compensation.[33] Viewed in the context of nineteenth century corporate law, the Post Roads Act did not address a real estate problem; it addressed a "foreign" corporation problem—the need to extend Western Union's charter power pertaining to rights-of-way beyond its state of incorporation.[34]

287, 294 n.5 (1942) ("[T]he state where land is located is 'sole mistress' of its rules of real property."); Hood v. McGhehee, 237 U.S. 611, 615 (1915).

24. *See, e.g.*, Gillespie, *supra* note 1, at 222 n.83.

25. *See id.*

26. Alexander J. Field, *The Regulatory History of a New Technology: Electromagnetic Telegraphy*, 2001 L. REV. MICH. ST. U. DETROIT C.L. 245, 245-46 (2001).

27. *See* Pacific Railroad Act of 1862, ch. 120, 12 Stat. 489.

28. Post Roads Act of 1866, ch. 230, 14 Stat. 221, *repealed by* Act of July 16, 1947, ch. 256, 61 Stat. 327.

29. *Id.*

30. City of St. Louis v. W. Union Tel. Co., 148 U.S. 92 (1893), *reh'g denied*, 149 U.S. 465 (1893).

31. *See* Gillespie, *supra* note 1, at 217-24.

32. *City of St. Louis*, 148 U.S. at 101.

33. *Id.*

34. *See id.* at 100-01 ("No one would suppose that a franchise from the federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation."); *cf.* AT&T v. Sec'y

The dominant public policy issue in the 1880s was getting telephone service to the people. Many states legislatively offered a *quid pro quo* to the telephone companies: the states would give a territorial monopoly to the companies in return for the companies' commitment to provide universal service in the service area covered by the certificate of public convenience and necessity.[35]

The deals for universal service struck between state legislatures and private companies were quintessential "regulatory compacts." It is generally recognized that "[s]tate public utility regulation . . . of local telephony[] represents a contract between the state and the regulated company."[36] The state's role is that of negotiating and administering a contract that governs the continuing relationship with the utility on behalf of its body of customers and of adjusting that contract to changing situations.[37] It is no less a contract because it arises by statute:

> In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State. In addition, statutes governing the interpretation and enforcement of contracts may be regarded as forming part of the obligation of contracts made under their aegis.[38]

The concept of public utility regulation as an implied two-party contract can be found in the jurisprudence of the Supreme Court as far back as *Charles River Bridge v. Warren Bridge*.[39] Writing for the Court, Chief Justice Taney framed the issue as whether the subsequent authorization to construct the Warren Bridge was an impairment of the obligations of Massachusetts under its contract with the proprietors of the Charles River Bridge.[40]

By the turn of the last century, the concept of public utility regulation as a regulatory compact was well established:

> Franchises are based in this country upon contracts between the

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of State, 123 N.W. 568, 568 (Mich. 1909) (denying AT&T, a New York corporation with the power to provide both telephone and telegraph service, the authority to do business in Michigan as a foreign corporation because it could qualify in Michigan only under the 1851 telegraph act or under the 1883 telephone act but not under both simultaneously).

35. *See generally* William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426 (1979).

36. J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 879 (1996).

37. Victor P. Goldberg, *Regulation and Administered Contracts*, 7 BELL J. ECON. 426, 427-29 (1976).

38. United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977) (citations omitted).

39. 36 U.S. (11 Pet.) 420 (1837).

40. *See id.* at 549.

> sovereign power and a private citizen, made upon a valuable consideration for purposes of public benefit as well as for individual advance; and it is said by Chancellor Kent that franchises "contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant."[41]

One of the key components to such regulatory compacts is the utility service obligations—that is, the obligation to serve.[42] "[I]t is axiomatic in public utility law that it is the duty of a public utility, in response to valuable rights and considerations granted to it, to provide adequate . . . service to the public."[43]

But a distinguishing feature of regulatory compacts is that they are modified over time as the situation changes.[44] The point here is simply that the policy decisions in an era in which making telephone services available in all geographic areas was the dominant policy consideration centered on the basis of the *quid pro quo* between the regulators and the regulatees. So-called "universal service" was certainly a consideration as late as the enactment of the Communications Act of 1934,[45] which provides for "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[46] Non-federal authority "to preserve and advance universal service" was expressly preserved more recently in section 253(b) of the Act, added in 1996.[47]

But the focus of the regulatory *quid pro quo* shifted in the 1996 Act, which substituted more explicit subsidies for implicit subsidies of universal service and the introduction of competition.[48] The Universal

41. JOSEPH ASBURY JOYCE, A TREATISE ON FRANCHISES 12 (1909); *see also* Warren G. Lavey, *Making and Keeping Regulatory Promises*, 55 FED. COMM. L.J. 1 (2002).

42. Sidak & Spulber, *supra* note 36, at 907; Wolff Packing Co. v. Kansas, 262 U.S. 522, 535-36 (1923) (classifying utilities as businesses that "are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service").

43. Balt. Steam Co., 89 Md. P.S.C. 1 (1998) (quoting Chicago & Northwestern Ry. Co., 75 Wyo. P.U.R.3d 408, 416 (1968)), *rev'd sub nom.* Balt. Steam Co. v. Balt. Gas & Elec. Co., 716 A.2d 1042 (Md. Ct. Spec. App. 1998), *vacated*, 725 A.2d 549 (Md. 1999).

44. Goldberg, *supra* note 37, at 427-28.

45. 47 U.S.C. §§ 151-573 (2002).

46. *Id.* § 151.

47. *Id.* § 253(b).

48. *See id.* § 214(e) (applying to the provision of universal service); *id.* § 254 (applying to universal service); PETER H. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW § 6.3.3.1 (2d ed. 1999).

Service Fund, created by section 254 of the Communications Act,[49] was intended to bring transparency to the provision of universal service through patent, rather than latent, monetary subsidies in the high-cost areas.[50] More importantly, the telephone business, rather than being a fenced-in natural monopoly, became competitive, so that the regulators—federal and state—could no longer move subsidies within a closed system.

Universal service had, in fact, been largely achieved even before the passage of the 1996 Act.[51] No longer was there a need, if there ever had been, to prompt telephone companies' extension of telephone service by giving them a "free ride" in the public rights-of-way. Section 254 stands as evidence that Congress rejected such implicit subsidies in favor of explicit subsidies. Consistent with that view, telephone companies competing for profit in a competitive market should no longer expect an implicit right-of-way subsidy.

In fact, failure of consideration on both sides of the regulatory compact was built into the 1996 Act. Because of section 253(b),[52] not only were the telephone companies shorn of their monopolies, but the introduction of competition brought with it the phasing out of the obligation to serve. For example, Verizon's (then-Bell Atlantic's) lawyers told a Maryland regulatory commission in 2000 that its obligation to serve in Maryland's deregulated local service environment was limited to switched voice.[53] Similarly, the FCC provided for ease of entry and exit for non-dominant carriers.[54]

In some states the early rights-of-way decisions cited by Mr. Gillespie were effectively reversed by state legislative action. In Maryland, for example, the legislature—as part of its reorganization of the Maryland State Roads Commission—enacted local public laws explicitly transferring title to roads to a local county.[55] In other states it has always been recognized that municipalities have the rights of

49. 47 U.S.C. § 254.

50. *See id.*

51. *See* ALEXANDER BELIFANTE, TELEPHONE SUBSCRIBERSHIP IN THE UNITED STATES (Indus. Analysis & Tech. Div., Fed. Communications Comm'n, 2002), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/subs0302.pdf.

52. Section 253(a) of the Communications Act, 47 U.S.C. § 253(a), as amended by the 1996 Act, preempted state certificates of public convenience and necessity that allocated monopoly territories, and section 10, *id.* § 160 (applying to competition in provision of telecommunications service), did likewise with respect to the FCC's certificates of public convenience and necessity under section 214(a), *id.* § 214(a).

53. *See* Letter from Bell Atlantic-Maryland, Inc. to Maryland Public Service Commission, Office of External Relations (Oct. 4, 2000) (on file with author).

54. *See* 47 C.F.R. §§ 63.01, 63.71 (2000).

55. Act of Apr. 12, 1904, ch. 591, 1904 Md. Laws 1006.

owners.[56]

But there is a far more potent and universal reason why the older cases are no longer predictive of present-day state law. As the United States became more urbanized, municipal home rule statutes were adopted. Typically, these statutes implicitly or explicitly[57] repealed Dillon's rule,[58] on which Mr. Gillespie relies.[59] Statutes such as these represented a watershed, such that pre-home rule cases on municipal property rights are no longer unconditionally authoritative.[60] Indeed, in one Indiana case, the court held that Indiana's Home Rule Act of 1980 validated a city's power to charge rent under a 1903 statute that the company argued had limited municipal franchise fees.[61] The statement that Mr. Gillespie attributes to Judge Dillon[62]—that municipalities' property rights rest "entirely upon their charters or the legislative enactments applicable to them"—is obviously too broad.[63]

1. On Municipal Ownership and Control of the Streets

In Part II.A of his article, Mr. Gillespie recites various cases for the proposition that municipalities do not have the right to charge rent for private uses of their streets for profit. Again, the authority on which he relies is largely dated.[64] To the extent that these cases rely on Dillon's rule, that rule has been effectively repealed in most states by municipal home rule legislation.[65] Even in states where Dillon's rule remains in force, it does not apply to municipal "limitations of powers" charters as

56. City of Detroit v. Mich. Bell Tel. Co., 132 N.W.2d 660, 665 (Mich. 1965) ("These streets and alleys . . . the city already owned."); Long v. N.Y. Cent. R.R. Co., 227 N.W. 739, 740 (Mich. 1929) (quoting People v. Harris, 67 N.E. 785, 788 (Ill. 1903) ("[I]n incorporated cities, the title to the streets is vested in the municipality . . . .")).

57. *E.g.*, IND. CODE § 36-1-3-4 (2002) (repealing Dillon's rule).

58. "Dillon's rule" holds that municipal powers are limited to those powers that are expressly or impliedly conferred by the legislature and "those [that are] essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable." JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-49 (5th ed. 1911).

59. Gillespie, *supra* note 1, at 212-13.

60. *See* City of Gary v. Ind. Bell Tel. Co., 732 N.E.2d 149, 153 (Ind. 2000) ("The Home Rule Act abrogated the traditional rule . . . .").

61. *Id.* at 154.

62. Gillespie, *supra* note 1, at 213 n.16.

63. *See, e.g.*, City of Detroit v. Detroit & Howell Plank Road Co., 5 N.W. 275, 280 (Mich. 1880) (stating that cities "are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it"); People v. Hurlbut, 24 Mich. 44, 104-05 (1871) (citing cases for the proposition that the legislature is not competent to take away the private property of the city).

64. *See* Gillespie, *supra* note 1, at 213-15 nn.14-34.

65. 2A SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.01 (2d ed. 1998).

distinguished from municipal "grants of powers" charters.[66] Cases like *United States v. City of New York*[67] are often cited for the proposition that municipal property is not subject to fair-market valuation upon condemnation. But that case antedates *United States v. 50 Acres of Land*,[68] which holds, to the contrary, that the Fifth Amendment protects property of local governments on a FMV basis.[69]

Mr. Gillespie seems to argue that, because in some states streets are held by municipalities in trust for the public ("*publici juris*"), those municipalities are deprived of the ability to charge rent.[70] Such a result, of course, would contradict the common principle that a trustee must manage property held in trust so as to maximize the return.[71] Twenty-six states have constitutional or statutory provisions (so-called "anti-donation clauses") limiting the ability to give away public property without receiving adequate compensation.[72]

There is a body of law, derived from Justinian, called the "public trust" doctrine.[73] In general terms this doctrine, which has recently been brought back into vogue, provides that property held in trust for the public cannot be sold or otherwise disposed of.[74] Obviously, such a

66. *In re* Lincoln Elec. Sys., 655 N.W.2d 363, 374 (Neb. 2003).

67. 168 F.2d 387 (2d Cir. 1948).

68. 469 U.S. 24 (1984).

69. *Id.* at 31.

70. Gillespie, *supra* note 1, at 213.

71. *See* Daly v. Ga. S. & Fla. R.R. Co., 7 S.E. 146, 150 (Ga. 1888); People *ex rel.* Lapice v. Wolper, 183 N.E. 451, 454 (Ill. 1932); Slocum v. Borough of Belmar, 569 A.2d 312, 317 (N.J. Super. Ct. Law Div. 1989); Roger D. Colton & Michael F. Sheehan, *Raising Local Government Revenue Through Utility Franchise Charges: If the Fee Fits, Foot It*, 21 URB. LAW. 55, 66 (1989); Jennifer L. Worstell, Note, *Section 253 of Telecommunications Act of 1996: A Permanent Physical Appropriation of Private Property That Must Be Justly Compensated*, 50 FED. COMM. L.J. 441, 445 (1998).

72. ALASKA CONST. art. IX, § 6; ARIZ. CONST. art. IX, § 7; CAL. CONST. art. XVI, § 6; CONN. CONST. art. I, § 1; FLA. CONST. art. VII, § 10; HAW. CONST. art. VII, § 4; HAW. REV. STAT. § 46-1.5(10) (2002); IDAHO CONST. art. VIII, § 4; *id.* art. XII, § 4; ILL. CONST. art. VIII, § 1(a); IOWA CODE § 721.2 (2002); KY. CONST. §§ 6, 177, 179; LA. CONST. art. VII, § 14(A); MD. CONST. art. III, §§ 34, 54; MICH. CONST. art. VII, § 26; NEV. CONST. art. VIII, § 9; N.H. CONST. pt. 2, art. 5; N.J. CONST. art. VIII, § 3, para. 2; *id.* art. VIII, § 3, para. 3; N.M. CONST. art. IX, § 14; N.Y. CONST. art. VIII, §§ 1, 8; N.C. CONST. art. I, § 32; OKLA. CONST. art. 10, §§ 15, 17; TEX. CONST. art. 3, §§ 50, 51, 52; WASH. CONST. art. 8, §§ 5, 7.

73. *See* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987).

74. *See, e.g.*, Frona M. Powell, *The Public Trust Doctrine: Implications for Property Owners and the Environment*, 25 REAL EST. L.J. 255 (1997); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Donna Jalbert Patalano, Note, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683 (2001); Susan D. Baer, Comment, *The Public Trust Doctrine—A Tool To Make Federal Administrative Agencies Increase Protection of Public Lands and Its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385 (1988).

proposition, if applied unconditionally to right-of-way franchising, would prove too much, for it would not permit investor-owned utilities to obtain usage of public rights-of-way on any basis. A more sensible application of the public use doctrine, however, would allow disposal of sticks from the bundle of rights that are not used by or useful to the public. For example, if the public is using the surface of a road, the public use should not inhibit the municipal trustee's maximizing the return to the public through a vertical division of the rights-of-way that does not impair the public use.[75] This division is sometimes known at the "public purposes" exception.[76]

2. On Municipal Regulatory Fees and the Concept of Street Rentals

In Part II.B of his article, Mr. Gillespie contends that municipal right-of-way fees are limited to recovery of the municipalities' costs of regulation.[77] His contention, as a general proposition, is subject to many types of limitations centering on the question of what costs are allowable under that test. Indeed, that was not seen as much of a limitation at all in *City of St. Louis v. Western Union Telegraph Co.*, in which, as Mr. Gillespie notes in a subsequent section,[78] the Court construed the City's charter power to "regulate . . . telegraph companies" as encompassing "the power to require payment of some reasonable sum . . . [for use of the streets to be] within the grant of power to regulate the use."[79] In context, the Court's opinion is not an abandonment of the earlier rent rationale, as Mr. Gillespie argues in Part II.B, but an affirmation of the City's power under state law to charge rent.

3. On Municipal Franchise Fees

Mr. Gillespie analyzes "franchise fees" separately from "rents" in Part II.D of his article. This analysis is not very satisfying and is not a distinction that is universally accepted. In *City of Dallas v. FCC*,[80] the Fifth Circuit upheld a cable franchise fee on same basis as had the Supreme Court in *City of St. Louis v. Western Union Telegraph Co.*, stating that "[f]ranchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways."[81]

75. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482-83 (1988).
76. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 466 (1892).
77. Gillespie, *supra* note 1, at 215-17.
78. *Id.* Part II.C.
79. City of St. Louis v. Western Union Tel. Co., 149 U.S. 465, 468-70 (1893).
80. 118 F.3d 393 (1997).
81. *Id.* at 397.

The conceptual problem with such a separation arises from an analytical failure to take into account cumulatively the differing governmental and proprietary bases for franchising. Even within a given state, courts have not always been able to maintain a consistent rationale.[82] In some states franchises are denominated "incorporeal hereditament[s]."[83]

Part of the seeming confusion results from a failure to differentiate among four meanings of "franchises": corporate franchises, right-of-way franchises, business franchises, and franchises based on ownership of intellectual property, such as trademarks. The corporate franchise gives legal rights to a non-natural entity—a legal fiction—that would have no corporate existence or powers in the absence of a grant from the state.[84] The second type of franchise gives legal rights based on control or ownership of real property.[85] The third is an occupational license founded on the governmental right to exclude from a line of business under the police power.[86] The fourth is founded on the right to exclude under common or statutory law.[87] The common element of these four usages of "franchise" is that they rest on the exercise of governmental power, although in the cases of the second and fourth categories the civil rights cases teach that the courts' vindication of property rights is not state action.[88]

There are conceptual differences among right-of-way authorizations—franchises, licenses, and permits—that are not material to this discussion and are often conflated by the courts.[89] The third type of franchise is conceptually somewhat akin to a royal warrant, although its modern function partakes more of a tax.[90] An obvious difference between an occupational license and a right-of-way franchise is that the latter does not extend geographically beyond the metes and bounds of the

82. *Compare* Vill. of Jonesville v. S. Mich. Tel. Co., 118 N.W. 736, 738 (Mich. 1908) (employing right-of-entry rationale), *with* City of Lansing v. Mich. Power Co., 150 N.W. 250, 253 (Mich. 1914) (employing easement rationale).

83. Gue v. Tide Water Canal Co., 65 U.S. 257, 263 (1860) (stating that under Maryland law a franchise is an incorporeal hereditament).

84. BLACK'S LAW DICTIONARY 339 (6th ed. 1990).

85. 36 AM. JUR. 2D *Franchises from Public Entities* § 1 (1968 & Supp. 2002) (pertaining to right-of-way franchises).

86. *See* 62B AM. JUR. 2D *Private Franchise Contracts* § 2 (1990 & Supp. 2002) (pertaining to business franchises and trademark franchising).

87. *See id.*

88. Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (holding that judicial enforcement of state trespass laws are not state action within meaning of the Civil Rights Act).

89. *See supra* notes 82-84 and accompanying text.

90. *See* 62B AM. JUR. 2D *Private Franchise Contracts* § 2 (1990 & Supp. 2002) (pertaining to business franchises and trademark franchising).

rights-of-way, while an occupational franchise is geographically bounded by the jurisdictional boundaries of the governmental unit, irrespective of ownership of property.[91]

4. On Municipal Taxes

In Part II.E, Mr. Gillespie argues that "[s]eldom . . . can municipal wireline fees be justified under state law as 'taxes.'"[92] A state-by-state analysis would probably show him right in many cases in a literal sense, save where expressly authorized by statute. However, *City of Gary v. Indiana Bell Telephone Co.*[93] is instructive on the degree of care necessary in sourcing the municipal franchising power. Indiana's home rule act very carefully limited the City's occupational licensing authority and its ability to collect non-cost-based franchise fees.[94] The trial court struck down the City franchise fee on the ground that it was not a cost-based regulatory fee and hence was a "tax" for which authority was expressly withheld by the home rule act.[95] A 3-2 majority of the Indiana Supreme Court rejected the lower court's invalidation of the fee and upheld the tax as rent indistinguishable from concession fees charged by municipal owners of airports.[96] The classification of a franchise fee as a "tax" was similarly rejected under South Carolina law in *BellSouth Telecommunications v. City of Orangeburg*.[97]

Mr. Gillespie concludes Part II.E by discussing the effect of the Tax Anti-Injunction Act of 1937[98] on the enforcement of section 253 in the federal courts. The point recognized by Judge Edgar in his opinion in *City of Chattanooga v. BellSouth Telecommunications, Inc.*[99] is that charges that are not "taxes" under state law may be taxes for the purposes of the Tax Anti-Injunction Act.[100] If for no other reason than that the Tax Anti-Injunction Act is jurisdictional, one should not accept without qualification Mr. Gillespie's statement: "Where the issue involves an unlawful denial of access to the rights-of-way, the Tax Injunction Act should not preclude the exercise of federal

91. *See* 36 AM. JUR. 2D *Franchises from Public Entities* § 1 (1968 & Supp. 2002) (pertaining to right-of-way franchises); 62B AM. JUR. 2D *Private Franchise Contracts* § 2 (1990 & Supp. 2002) (pertaining to business franchises and trademark franchising).

92. Gillespie, *supra* note 1, at 226.

93. 732 N.E.2d 149 (Ind. 2000).

94. IND. CODE § 36-1-3-8(a)(4) (2002).

95. *City of Gary*, 732 N.E.2d at 157-58.

96. *Id.*

97. 522 S.E.2d 804 (S.C. 1999).

98. 28 U.S.C. § 1341 (2002).

99. 1 F. Supp. 2d 809, 812 (E.D. Tenn. 1998).

100. *See* 17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4237 n.17 (2d ed. 1988).

jurisdiction."[101]

A further and fundamental objection to Mr. Gillespie's argument on the enforceability of section 253—and one that is not forum dependent—is the state-tax savings provision in section 601(c)(2) of the 1996 Act.[102] The anti-preemption language here—"any State or local law pertaining to taxation"[103]—is certainly broader than the language of the Tax Anti-Injunction Act—"any tax under State law."[104]

C. *On the Preemptive Effect of Current Federal Statutes*

Section 253 should not be interpreted as an attempt by Congress to impair municipal rights under state law. A proper construction of section 253 would avoid any implication of a taking by Congress. The Supreme Court in *City of St. Louis v. Western Union Telegraph Co.*[105] said that municipal property could not be taken under federal regulatory authority.[106] The accuracy of Mr. Gillespie's inference that the decision is no longer good law[107] is put in doubt by the Supreme Court's more recent holding that municipal property is protected by the Fifth Amendment Takings Clause no less than privately owned property.[108] In section 253 Congress did not use sufficiently clear language to overcome a presumption against such a construction.[109] Moreover, had Congress intended such a result, the bill would have been subject to a point of order under the Unfunded Mandates Reform Act of 1995.[110]

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101. Gillespie, *supra* note 1, at 230.

102. This section provides, in pertinent part, as follows:

> (c) Federal, State, and local law.—
>
> . . . .
>
> (2) State tax savings provision.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 [sections 542 and 573(c) of this title],and section 602 of this Act [set out as a note under this section].

Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(2), 110 Stat. 56, 143.

103. *Id.*

104. 28 U.S.C. § 1341 (2002).

105. 148 U.S. 92 (1893), *reh'g denied*, 149 U.S. 465 (1893).

106. *Id.* at 100-01.

107. Gillespie, *supra* note 1, at 251.

108. *See* United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

109. Medtronic, Inc. v. Lohr, 518 U.S. 470, 471 (1996) ("[T]he historic police powers of the States were not to be superseded by [federal regulation] unless that was the clear and manifest purpose of Congress.") (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); Schwartz v. Texas, 344 U.S. 199, 203 (1952) ("The exercise of federal supremacy is not lightly to be presumed."), *overruled on other grounds by* Lee v. Florida, 392 U.S. 378 (1968).

110. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48

Congressman Stupak was standing by to make such an objection, had the House of Representatives veered in that direction.[111]

Mr. Gillespie's premise under Part III.A—that any municipal requirement that a carrier have a franchise before entering the public rights-of-way "is itself a prohibition that clearly triggers section 253(a)"[112]—is not supported by judicial authority. As Mr. Gillespie notes in a later footnote,[113] that argument was made to the Sixth Circuit by T.C.G. Detroit in *T.C.G. Detroit v. City of Dearborn*[114] and rejected as "sophistry."[115] His quotation of language[116] from the revised opinion for the panel in *City of Auburn v. Qwest Corp.*[117] to the effect that the municipality's ability to revoke a wireline franchise and to remove the company's cable as a penalty for violation "triggers subsection (a)" is at best dictum, since the holding of that case dealt only with wireless providers.[118] The wireline issues had been disposed of earlier under state law.[119]

Mr. Gillespie devotes Part III.B of his article to questioning the legality of gross-receipts-based franchise fees.[120] In the most recent judicial treatment of that issue in *T.C.G. New York, Inc. v. City of White Plains*,[121] the Second Circuit Court of Appeals devoted a large segment of its opinion overturning the City's ordinance to the propriety of the five-percent fee. Concluding that the legality *vel non* of a gross-receipts-based fee was "difficult,"[122] the court elected to decide the case on the question of alleged discrimination between the incumbent local exchange carriers (ILECs) and the CLECs.[123]

Contrary to Mr. Gillespie's analysis under Part III.C, this is a case where the debates on the House floor show unambiguously that Congress wrote subsection (c) in contemplation of gross-receipts-based fees.[124] Congress, of course, had before it the model of section 622 of the Cable

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(codified at 2 U.S.C. § 1501 (2002)).

111. 141 CONG. REC. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Stupak).

112. Gillespie, *supra* note 1, at 232.

113. *Id.* at 232 n.146.

114. 206 F.3d 618, 624 (6th Cir. 2000).

115. *Id.* at 624.

116. Gillespie, *supra* note 1, at 232 n.146.

117. 260 F.3d 1160 (2001), *amending* 247 F.3d 966 (2001), *cert. denied*, 534 U.S. 1079 (2002).

118. *City of Auburn*, 260 F.3d at 1176 & n.11.

119. *Id.* at 1167.

120. Gillespie, *supra* note 1, Part III.B.

121. 305 F.3d 67 (2d Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3489 (U.S. Jan. 10, 2003) (No. 02-1062).

122. *Id.* at 79.

123. *Id.* at 80-81.

124. *See* 141 CONG. REC. H8477 (daily ed. Aug. 4, 1995); *see also infra* notes 127-29 and accompanying text.

Act of 1984,[125] which Mr. Gillespie discusses under Part III.E, dealing with limitations imposed by the Cable Act.[126] Section 622, as amended by the 1996 Act, reads, in pertinent part:

> (b) For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period [for the provision of] cable services.[127]

A version of subsection (c) far more restrictive than that passed by the Senate had been reported out by the House committee, but the manager's version was defeated by a roll call vote of 338-86.[128] Both the proponents and opponents of the House committee's version agreed that the language adopted would permit gross-receipts-based fees even in excess of those allowed under section 622.[129]

In the latter part of his discussion, Mr. Gillespie asserts that "'revenue-based' fees . . . are inappropriate" because they are not proportional to the carriers' uses of the public rights-of-way.[130] His argument overlooks the fact that gross receipts are a practical proxy for intensity of use of the public rights-of-way. The business of the telephone companies is transporting bytes of information,[131] and charges—to the first approximation, at any rate—tend to increase as more information is transported. Whether the load is transported in the rail carrier's own boxcars or in truck trailers piggy-backed on flatcars does not destroy the proportionality. Mr. Gillespie quotes the government's amicus brief to the Second Circuit in *City of White Plains* as terming the gross-receipts-based fee as "problematic."[132] But, after oral argument, the court clerk sent several questions to the FCC, and the FCC declined in its supplemental brief, filed March 12, 2002, to elaborate on its earlier brief.[133] In the end, the Second Circuit found the

125. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

126. Gillespie, *supra* note 1, Part III.E.

127. 47 U.S.C. § 542 (2002). Subsection (g)(1) further provides that "the term 'franchise fee' includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." *Id.* § 542(g)(1).

128. 141 CONG. REC. H8477 (daily ed. Aug. 4, 1995).

129. *Id.*

130. Gillespie, *supra* note 1, at 242.

131. Through a set of interlocking definitions in section 153(43)-(46) of the Communications Act, as amended in 1996, 47 U.S.C. § 153(43)-(46), it is clear that essence of telecommunications services is the transport of information "between or among [geographic] points specified by the user." *Id.* § 153(43).

132. Gillespie, *supra* note 1, at 242 (quoting Brief of Amici Curiae Federal Communications Commission and United States, T.C.G. N.Y., Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002) (No. 01-7255)).

133. Supplemental Brief of Amici Curiae Federal Communications Commission and

FCC's decisions to be "not controlling."[134] It is certainly unmistakable from the legislative history that Congress consciously eliminated any FCC role with respect to such issues.

III. Conclusion

The overarching lesson to be learned from the rising volume of litigation between wireline companies and municipalities to which Mr. Gillespie alludes[135] is that mankind continues to suffer from the common failing of trying to get something for nothing. Certainly, the recent financial busts of various "dot-coms" and telephone companies confirm that greed is still with this society. Carriers never have been immune from paying one way or another for what economists call the factors of production used in their businesses for profit.

With respect to the historical survey in Part II of Mr. Gillespie's article, it is often said that municipalities are creatures of the state. Be that as it may, their governmental and proprietary roles and rights have been substantially augmented by the home rule statutes passed in a vast majority states as the country has become more urbanized.[136]

With respect to the preemptive effect of section 253 of the 1996 Act, there is no evidence in its legislative history that Congress intended the scope of federal preemption to stray beyond limitations on regulation[137] to takings of municipal property recognized by the Fifth Amendment and the Unfunded Mandates Reform Act. It is perhaps unrealistic to attribute to the legislative process the prescience to anticipate the trend of judicial decisions from *Garcia v. San Antonio Metropolitan Transit Authority*,[138] to *Gregory v. Ashcroft*,[139] to *United States v. Lopez*,[140] but the text of section 253 permits, if not intends, a reading that avoids these profound constitutional and political issues.

United States, *City of White Plains*, 305 F.3d 67 (No. 01-7255).

134. *City of White Plains*, 305 F.3d at 76.

135. Gillespie, *supra* note 1, at 212.

136. *See supra* notes 43-50 and accompanying text.

137. In section 253(a), Congress may properly be assumed to have focused on statutes, regulations, and legal requirements, as distinguished from property rights, and subsection (c) is, as Mr. Gillespie seems to argue under Part III.A, only a "safe harbor" and not a substantive limitation on them. Gillespie, *supra* note 1, at 231-35.

138. 469 U.S. 528 (1985).

139. 501 U.S. 452 (1991).

140. 514 U.S. 549 (1995).