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REGULATION OF CABLE TELEVISION: A MULTI-TIERED GOVERNMENTAL APPROACH

Capital Cities Cable, Inc. v. Crisp
104 S. Ct. 2694 (1984)

In March 1980, the Oklahoma Attorney General issued an opinion that "the prohibition of advertising alcoholic beverages and advertising the sale of alcoholic beverages via regularly broadcast television applies similarly to advertising by cable television companies."¹ The opinion warned of criminal prosecution for any violation.² Thereafter, the director of the Oklahoma Alcoholic Beverage Control Board cautioned cable operators that they would be criminally prosecuted if they continued to carry out-of-state liquor advertisements over their system.³ Oklahoma cable companies brought suit⁴ for declaratory and injunctive relief to prohibit the director from enforcing the Oklahoma ban on liquor advertising against cable operators.⁵ The cable operators contended that the state policy violated the commerce and supremacy clauses, the first and fourteenth amendments, and the equal protection clause of the fourteenth amendment. The United States District Court for the Western District of Oklahoma,⁶ found "that the power to regu-

1. 79-334 Okla. Op. Att'y Gen. 550 (1980).

2. The opinion noted that enforcement of the advertising ban was both a criminal and civil matter. Violation of the statute would result in license revocation or suspension. *Id.* at 553.

3. *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694, 2698 (1984).

4. Separate suits were filed by various holders of cable franchises and by an association of television broadcasters.

5. OKLA. CONST. art. XXVII § 5. The article forbids advertising "the sale of an alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" Additionally, the Oklahoma Alcoholic Beverage Control Act states:

It shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store,' or any combination of such words or any of them and no letter in any such sign shall be more than four (4) inches in height or more than three (3) inches in width, and if more than one (1) line is used the lines shall not be more than one (1) inch apart.

OKLA. STAT. tit. 37, § 516 (1971).

6. *Cablecom General, Inc. v. Crisp*, No. Civ-81-290 W (W.D. Okla. Feb. 10, 1982), *rev'd sub nom.* *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir.) *cert. granted sub nom.* *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984).

late liquor granted to the states by the twenty-first amendment to the United States Constitution did not override the first amendment rights of telecasters and the cable operators.⁷ On appeal, the United States Court of Appeals for the Tenth Circuit⁸ reversed, holding that while advertising of alcoholic beverages is commercial speech entitled to protection under the first and fourteenth amendments, the state prohibitions were valid restrictions on commercial speech.⁹ On certiorari, the Supreme Court of the United States *held*, reversed: (1) The Supreme Court would decide the question of federal preemption of the Oklahoma ban, even though the Court of Appeals had not addressed it.¹⁰ The conflict between Oklahoma and federal law was plainly raised in the complaint and acknowledged by both lower courts. The district court made findings on all factual issues necessary to resolve the question, and the parties had briefed and argued the question pursuant to the Supreme Court's order. (2) Oklahoma's alcoholic beverages advertising ban to out-of-state signals carried by cable operators is preempted by federal law of cable signal carriage. Here, the power delegated to the Federal Communications Commission (FCC) under the Communications Act of 1934 plainly comprises all regulatory actions necessary to ensure the accomplishment of the FCC's statutory responsibilities. The result of compliance with the ban is wholly at odds with the FCC's regulatory goal of making available the benefits of cable communications on a nationwide basis. The ban also conflicts with specific federal regulations. Federal regulations, like federal statutes, can preempt state law. (3) The twenty-first amendment does not save the advertising ban from preemption. The state regulation conflicts with the accomplishment and execution of the federal regulatory scheme and the state's power to regulate the sale or use of liquor is not directly

7. *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 493 (10th Cir. 1983) (noting *Cablecom General Inc. v. Crisp*, No. Civ.-81-290-W. (W.D. Okla. 1982)).

8. The appellate court decision consolidated *Oklahoma Telecasters Ass'n v. Crisp*, with *Cablecom General Inc. v. Crisp*, No. Civ. 81-290 (W.D. Okla. 1981), *rev'd sub nom. Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983).

9. The appellate court applied the test for the validity of regulation of commercial speech as articulated in *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). The four prongs of the test are: (1) whether the expression is protected by the first amendment, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the asserted governmental interest, and (4) whether the regulation is not more extensive than is necessary to serve that interest.

10. While petitioners' petition for certiorari was pending, the Solicitor General, appearing as amicus curiae on behalf of the FCC intervened. He argued the ban on the retransmission of out-of-state signals significantly interfered with the existing federal framework. *Capital Cities*, 104 S. Ct. at 2699.

implicated. The state's interest is not of the same stature as the FCC's goals and interest in ensuring the widespread availability of diverse cable services throughout the United States. Additionally, enforcement of the state statute is barred by the supremacy clause. *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984).

This note examines the historical and legal development of government regulation of the cable industry and the development of a multi-tiered regulatory scheme. It is necessary to consider the historical precedent leading to the Court's holding that the FCC has unambiguously expressed its intent to preempt any state or local regulation of the array of cable signals. The note concludes with an analysis of the Court's findings and use of administrative law principles.

The cable industry has rapidly expanded in the past three decades¹¹ from a community antenna television (CATV) system carrying only broadcast signals to a high capacity communication system. This expansion led to the development of significant policy and legal issues concerning governmental regulation of cable broadcasting. During the infancy of cable television services,¹² broadcast television informed and entertained nationwide viewers. The FCC,¹³ although aware of the adverse impact cable expansion could have upon the broadcast television industry, found that impact insignificant and declined to assert jurisdiction over cable television.¹⁴

The FCC's initial reluctance to regulate cable television abruptly changed in the mid 1960's. Television broadcasters faced with the economic threat posed by cable systems urged the FCC to assert jurisdiction over the cable industry. The Commission began its regulation of cable communications with the promulgation of

11. The first cable television system commenced service in Oregon in 1949 and the first commercial system began operation in 1950 in Lansford, Pennsylvania. These systems were designed to meet the needs of viewers where television reception was impossible or inadequate. For more information on this subject see generally, Besen & Crandell, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (1981); see also Stern, *The Evolution of Cable Television Regulation*, 21 URB. L. ANN. 179 (1981).

12. By the end of the 1950's there were 640 systems serving 650,000 subscribers. Besen, *supra* note 11, at 81.

13. The FCC was established by the Communications Act of 1934. The scope of the Commission's authority has been interpreted broadly to allow the agency to handle new developments in the communications media. For more information on this subject see generally, Note, *The FCC's Cable Television Jurisdiction: Deregulation by Judicial Fiat*, 30 U. FLA. L. REV. 718 (1978).

14. Since the Communications Act of 1934 was passed long before the advent of cable television and because its terms are specifically applicable only to common carriers and broadcasters, the FCC was initially reluctant to regulate cable television. *Id.* at 730.

rules concerning microwave-served CATV in the 1960's. The FCC asserted broad jurisdiction over cable television at this time¹⁵ and continued to expand its regulation over cable services throughout the decade.¹⁶

In *United States v. Southwestern Cable Co.*,¹⁷ the FCC issued an order restricting the expansion of a cable company service into a major broadcasting market. The Ninth Circuit Court of Appeals held that the Commission lacked authority under the Communications Act of 1934,¹⁸ to issue such an order. The Supreme Court reversed and remanded, holding that the FCC's "authority over all 'interstate. . . communication by wire or radio' permits the regulation of CATV system."¹⁹ While the Court did not specify the limitations of the Commission's regulatory authority, it did restrict jurisdiction to "that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."²⁰

A cable operator subject to the Commission's requirement to originate programming and to make available facilities for local production of programs,²¹ challenged the FCC's authority to formulate that rule in *United States v. Midwest Video Corp.*²² The Supreme Court applied the "reasonably ancillary" test²³ and found the regulation preserved and augmented "the integrity of broadcast signals" and therefore, was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."²⁴

Southwestern Cable and *Midwest Video* offered guidance to

15. "We have determined . . . that the Communications Act vests in this agency appropriate rulemaking authority over all CATV systems, including those which do not use microwave relay service. . ." Rules re Microwave-Served CATV, 38 FCC 683, 685 (1965).

16. See generally Note, *supra* note 13, at 730 and n. 83.

17. 392 U.S. 167 (1968).

18. 47 U.S.C. § 151 (1976).

19. The court acknowledged the FCC's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934. *Southwestern*, 392 U.S. at 167.

20. *Id.* at 178.

21. The rule provided that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." *United States v. Midwest Video Corp.*, 406 U.S. 650, 654 (1972) (quoting 47 CFR § 76.201(a) (1972)).

22. 406 U.S. 649 (1972).

23. The Court found the FCC's asserted regulatory authority as sustained by the Court in *Southwestern* sufficient to regulate cable systems so as to promote the objectives associated with jurisdiction over broadcasting, not merely to protect cable. *Id.* at 667.

24. *Id.* at 667.

the courts in settling regulatory disputes. In *American Civil Liberties Union v. FCC*,²⁵ the ACLU challenged the Commission's failure to impose carrier obligations on cable television access channels and to limit cablecasting to one owner. The Second Circuit used both decisions as "markers" indicative of the breadth of the FCC's authority to regulate CATV,²⁶ and held the rules to be reasonably ancillary.²⁷ The appellate court acknowledged that flexibility was needed in dealing with CATV and that the FCC's "jurisdiction should not be 'rigidly departmentalized into licensing and public utility functions.'"²⁸

By the 1970's, the cable industry had developed nationwide. The FCC retreated from federal regulation to encourage experimentation and diversity.²⁹

In *FCC v. Midwest Video Corp.*,³⁰ (*Midwest II*), a cable operator initiated a jurisdictional challenge to the FCC's 1976 promulgated rules requiring cable operators to establish channels for public use.³¹ The Supreme Court distinguished *United States v. Midwest Video Corp.*, (*Midwest I*), and invalidated the access rules, holding that the 1976 rules were "not reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," and therefore, were not within the FCC's statutory authority. The access rules had imposed common carrier obligations on cable operators. The Court ruled that by imposing such obligations the Commission had exceeded its jurisdictional limits.³² It also expressed concern for the regulatory burdens of cable operators and recognized the "interests of the cable industry in addition to restricting the scope of the FCC's authority."³³

25. 523 F.2d 1344 (9th Cir. 1975).

26. *Id.* at 1351.

27. The court stated "to hold otherwise would ignore the history of the Commission's efforts to regulate CATV, be contrary to the unmistakable teaching of the Supreme Court, and indicate a conviction on our part that the ACLU is right in insisting on common carrier status now which we do not possess." *Id.* at 1351.

28. *Id.* at 1351.

29. Besen, *supra* note 11, at 102.

30. 440 U.S. 689 (1979).

31. Rules required cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop a 20 channel capacity by 1986 and to provide access by third parties. Report and Order in Docket No. 20508, 59 FCC 2d 294 (1976), *questioned in* *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

32. The Court noted Chief Justice Burger's concurring opinion in *United States v. Midwest Corp.*, characterizing "the outer limits" of the Commission's jurisdiction. *FCC v. Midwest*, 440 U.S. at 708.

33. Stern, *supra* note 11, at 201 (*construing* *FCC v. Midwest Video Corp.*, 440 U.S.

Following *Midwest II*,³⁴ the barriers limiting state participation in such areas as cable applicant selection and nonbroadcast channel supervision were removed.³⁵ Mandatory rules governing the local franchising process were removed to allow "local authorities and marketplace forces to determine" the cable industry's development.³⁶ This deregulatory trend has continued into the 1980's. In June 1981, the court in *Malrite TV v. FCC*,³⁷ affirmed the Commission's decision to deregulate cable television by rescinding the distant signal and syndicated program exclusivity rules.³⁸ The court reasoned that the policy concerning deregulation was "best left to agencies the that were created, in large part, to resolve them."³⁹

Much of the recent litigation concerning regulation of the cable industry has involved the extent to which a regulation can be challenged by asserting the first amendment rights of cable operators. The focal point of this controversy has been the debate over whether cable systems should be treated in the same manner and with the same freedom as newspapers.⁴⁰ The district court, in *Cablecom*,⁴¹ held that enforcement of Oklahoma's advertising ban would violate the plaintiff's first amendment rights, and issued

689 (1979)).

34. 440 U.S. 689 (1979).

35. Concerned about the unmanageable burden on the FCC that conventional licensing would bring, the Commission gave responsibility to the state and/or local governing bodies for conducting the cable franchising process. See generally Le Duc, *Control of Cable Television: The Senseless Assault On States' Rights*, 24 CATH. U. L. REV. 795 (1975).

36. FCC rules required the franchising authority to guarantee a public proceeding for review and selection of cable operation applications, to formulate construction timetables for future compliance by the cable operator, and to make provisions for local service complaint procedures. For more information see Stern, *supra* note 11, at 197-98.

37. 652 F.2d 1140 (2nd Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

38.

Distant signal rules limited the number of signals from distant stations that a cable system could retransmit to its subscribers, in order to protect local stations. Syndicated program exclusivity rules authorized local television stations, which had purchased exclusive exhibition rights to a program, to demand that local cable systems delete that program from distant signals.

Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U. L. REV. 592, 582 (1983).

39. *Malrite*, 652 F.2d at 1147.

40. Other issues being debated are: (i) which functions performed by cable raise issues of first amendment rights, (ii) precluding cable operators' first amendment rights by federal, state and local regulation of content, as in the fairness doctrine, and of structure, as in access requirements, and (iii) effect of contractual agreements on first amendment rights of cable operators. For more information on this subject see generally, Golberg, Ross & Spector, *Cable Television, Government Regulation, and the First Amendment*, 3 COM./ENT. L. J. 577 (1981).

41. No. Civ. 81-290 (W.D. Okla. 1892).

permanent injunctions against the Alcoholic Beverage Control Board and its director, Crisp. The appellate court⁴² reversed the district court's summary judgments and dissolved the permanent injunctions. The court relied upon an interpretation of a summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*,⁴³ as controlling precedent. The court also examined the merits of the case and applied the *Central Hudson* test for determining the validity of regulation and commercial speech.⁴⁴ The Tenth Circuit held the advertising to be reasonably related to reducing the sale and consumption of alcoholic beverages⁴⁵ and no more extensive than necessary to serve the state's asserted interest.⁴⁶

The Supreme Court chose not to consider the question of the validity of the restriction on protected commercial speech.⁴⁷ Instead, the Court declared that there exists a generalized federal preemption of state regulation of cable.⁴⁸ The Court found that the advertising ban was not within the public interest, conflicted with specific federal regulation and was not a permitted police power under the circumstances.⁴⁹ Not even the broad powers of the state under the twenty-first amendment saved the regulation from preemption.⁵⁰

First, the supremacy clause of the Constitution⁵¹ provides for preemption by federal law of a state regulation.⁵² In support of this

42. *Oklahoma Telecasters*, 699 F.2d 490.

43. Ohio Supreme Court had upheld a state regulation prohibiting retail liquor permit holders from advertising the retail price of alcoholic beverages against a first amendment challenge. *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio 1982) *appeal dismissed*, 103 S. Ct. 31 (1982).

44. *See supra* note 9.

45. The court balanced the interests of the state under its police power and the twenty-first amendment against the lesser protected interests of commercial speech and concluded that the scales tipped in the state's favor. *Oklahoma Telecasters*, 699 F.2d at 502.

46. *Id.* at 502.

47. *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. at 2709 n. 16. By avoiding this issue, the Court has left it to the lower courts to wrestle with the extent of first amendment protection afforded commercial speech such as advertising. On one side of this controversial issue are the interests of the cable operators suggesting that cable is entitled to the same protection as the printed press. On the other side are government interests in diversity and public access.

48. *Id.* at 2703.

49. *Id.*

50. *Id.* at 2707.

51. U.S. CONST. art. VI, cl. 2.

52. A three-step analysis relevant to assessing if such a conflict exists examines: (1) if Congress in enacting a federal statute has clearly expressed an intent to preempt state law; (2) if the scheme of federal regulation is so comprehensive as to infer that Congress left no room for the states to supplement it; and (3) if the enforcement of state law conflicts with

proposition the Court referred to *Fidelity Federal Savings and Loan Assn. v. De La Cuesta*⁵³ and *United States v. Shimer*.⁵⁴

In *Fidelity Federal*, the Court declared that federal regulations "have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily."⁵⁵ The *Shimer* Court stated that an administrator's choice is not to be disturbed if it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" unless the statute or its legislative history makes it clear "that the accommodation is not one that Congress would have sanctioned."⁵⁶ Based on these considerations, the *Capital Cities* Court declared a generalized federal preemption of state regulation of cable signal carriage.⁵⁷

Capital Cities stated that preemption was necessary because operators would be subject to criminal prosecution under the ban for actions taken in compliance with specific federal regulations. The Court identified three areas of conflict: (1) the FCC "must carry" rules requiring the transmission of broadcast signals in full without deleting or altering any part, located within a specified 35 mile zone; (2) FCC rulings permitting and encouraging the importation and retransmission of out-of-state television broadcast signals to subscribers; and (3) interference with the transmission of specialized non-broadcast cable services (pay cable), an area under the exclusive jurisdiction of the Commission.⁵⁸

The Court also noted that the Copyright Revision Act,⁵⁹ providing for payment of royalties via a compulsory licensing system, requires a cable operator to refrain from deleting or altering commercial advertising on the broadcast signal it transmits.⁶⁰ Therefore, enforcement of the ban was "wholly at odds with the regulatory goals contemplated by the FCC,"⁶¹ and specifically prohibited

federal law and stands as an obstacle to Congress's purpose and objectives. *Capital Cities*, 104 S. Ct. at 2700.

53. 458 U.S. 141 (1982).

54. 367 U.S. 374 (1961).

55. *Fidelity Federal*, 458 U.S. at 153-54.

56. *Shimer*, 367 U.S. at 383.

57. *Capital Cities*, 104 S. Ct. at 2703.

58. *Id.* at 2703-04.

59. 17 U.S.C. § 111 (1976).

60. *Id.* at 2706.

61. The goal was "to make available as far as possible, to all the people of the United States a rapid, efficient, nationwide and world-wide wire and radio communications ser-

cable's growth and diversity.⁶²

The Court also held that federal preemption was not overridden by the broad powers granted to the states by section 2 of the twenty-first amendment⁶³ to regulate the importation and sale of alcoholic beverages. As elsewhere, the state's twenty-first amendment powers are to be determined by examining its conflict with the regulation.⁶⁴ The federal government retains substantial authority under the commerce clause⁶⁵ and the first⁶⁶ and fourteenth amendments,⁶⁷ despite the state's broad twenty-first amendment power.

The Court referred to *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*,⁶⁸ to support its contention that a state's indirect attempt to regulate the sale or use of liquor within its borders can be overridden by federal law⁶⁹ and the supremacy clause, where the "unsubstantiated state concerns" were "not of the same

vice. . . ." 47 U.S.C. § 151 (1976).

62. *Capital Cities*, 104 S. Ct. at 2697.

63. U.S. CONST. amend. XXI:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

See Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) (state liquor regulation upheld under broad police authority of twenty-first amendment that would otherwise be invalid under the Commerce Clause); *see also Craig v. Boren*, 429 U.S. 190 (1976) (constitutionality of gender discriminatory statute questioned with Court noting the twenty-first amendment "created an exception to the normal operation of the Commerce Clause.")

64. *See e.g., Hostetter v. Idewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (statute regulating liquor for use outside the state invalidated with Court stressing that the Commerce Clause and the Amendment "each must be considered in light of the other, and in context of the issues and interests at stake in any concrete case.")

65. U.S. CONST. art. 1 § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

66. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech. . ." The first amendment was made applicable to the States through the due process clause of the fourteenth amendment.

67. For more information on the subject *see generally Preempting State Action Taken Pursuant to the Twenty-First Amendment*, 53 TEMP. L. Q. 590 (1980); Note, *The Constitutionality of Oklahoma's Prohibition On Liquor Advertising*, 16 TULSA L. J. 734 (1981).

68. 445 U.S. 97 (1980).

69. In *Midcal*, the Court declared that the twenty-first amendment did not bar application of the Sherman Antitrust Act to California's wine pricing system. 445 U.S. at 113-114.

stature as the goals of the Sherman Act.”⁷⁰ The *Capital Cities* Court applied *Midcal*, and made a “‘pragmatic effort to harmonize state and federal powers’ within the context of the issues and interests at stake.”⁷¹ Noting the “modest nature” of Oklahoma’s interest in furthering temperance via the advertising restrictions,⁷² the Court concluded that the balance of power tipped “decisively in favor of the federal law.”

In reaching this conclusion, the Court assumes that the FCC can define its own jurisdictional boundaries. The reasoning is not conclusive. The source of analysis is particularly questionable since the FCC’s cable jurisdiction is a judicial creation rather than a congressional delegation.⁷³ After *Southwestern*, many authorities argued that Congress should clarify these jurisdictional lines and enact legislation establishing a regulatory program with state and federal cooperation.⁷⁴ Congress has not yet acted and in *Capital Cities* the Court was faced with the question of analyzing the proper relationship between the FCC and the states. The Court held that where the FCC has acted, states are preempted. Thus, the assumption that the FCC has preempted the regulatory field. The *Capital Cities* ruling unequivocally indicates that even in an era of deregulation, the Court will expand the FCC’s jurisdiction against potential regulatory partners. In effect, the Court has presupposed the precise question at issue in the case.

In its acquiescence to the FCC’s preemption of cable, *Capital Cities* did not provide the substantial review that the question required. As one commentator noted: “The Commission’s authority under *Southwestern* cannot reasonably be argued to extend to restrictions on the type or nature of nonfederal cable regulation. Were the FCC’s jurisdiction over cable plenary, perhaps the argument could be made.”⁷⁵

When a court grants power to an administrative agency, it es-

70. *Capital Cities*, 104 S. Ct. at 2709.

71. *Id.* at 2708.

72. The Court noted that Oklahoma permits both print and broadcast commercials for beer. The State also allows alcoholic beverage advertisements in publications printed outside the state and sold within its borders. *Id.* at 2709.

73. Judicial creativity includes the court’s construction of statutes granting substantial power to administrative agencies. For a thorough discussion of this topic as applied to administrative law see, J. Mallamud, *Courts, Statutes and Administrative Agency Jurisdiction: A Consideration of Limits on Judicial Creativity*, 35 S. C. L. Rev. 192 (1984).

74. See generally Mahoney, *Cable Television’s Jurisdictional Dispute*, 24 CATH. U. L. REV. 872 (1975).

75. *Id.* at 878.

establishes law and by-passes the legislature.⁷⁶ As a result, the FCC has obtained and utilized "substantial power, no less effectively than if the legislature had directed the agency to act 'in the public interest.'"⁷⁷ At issue here are constraints on this power. Since this judicially created power leaves the agency without the policy guidelines that normally follow a Congressional delegation, "[o]nce the court grants jurisdiction to the agency, the question of whether the court or the agency will make specific policy arises."⁷⁸

In a political system based on separation of powers it is essential that the judiciary and administrative agencies do not usurp the powers of Congress. In the cable regulatory arena, it is the FCC that has encroached on the congressional powers. The Court's review should have been more than an acquiescence to the administrative agency's ruling on the matter.

Capital Cities relied on *Fidelity Federal*⁷⁹ as precedent for the proposition that federal regulations have the same preemptive power as federal statutes.⁸⁰ The Court applied the *Shimer* test of "reasonable accommodation of conflicting policies"⁸¹ to the federal regulation at issue. The Court reasoned that since the FCC had resolved to preempt an area of cable regulation and that determination represented a "reasonable accommodation of conflicting policies" within the agency's domain, then all conflicting state regulations were precluded.⁸²

The underlying tensions evident in *Shimer* are a sharp contrast to those in the instant case. In *Shimer*, the Veterans Administration was seeking subrogation and indemnification from an individual for an amount paid as guarantor on a defaulted loan. The Court held the United States was entitled to be indemnified by the veteran pursuant to Veterans Administration regulations which were reasonable, even though the applicable Pennsylvania statute released the guarantor under certain conditions. The regulations were held to be a valid exercise of the authority granted to the

76. Mallamud states that as a general rule, courts, including the United States Supreme Court, should not grant jurisdiction to administrative agencies. Mallamud, *supra* note 73, at 292.

77. *Id.* at 267.

78. *Id.* at 267.

79. *Fidelity Federal*, 458 U.S. 141 (1982).

80. *Capital Cities*, 104 S. Ct. at 2700.

81. "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Shimer*, 367 U.S. at 383.

82. *Capital Cities*, 104 S. Ct. at 2701.

administrator.⁸³

While *Shimer* dealt with the interest of a private individual, in *Capital Cities* a significant state interest is at issue; the will of the citizens of the state as articulated by a representative body. The prohibition at issue in *Capital Cities* was enacted by duly elected representatives of Oklahoma citizens. The state legislators passed the statute, which was supported by the majority of their constituents, in an attempt to control intrastate affairs. It is not clear why the Court in *Capital Cities* should apply the *Shimer* rule and adhere to the urgings of the FCC over the legislative mandate of the people of the state.

The *Capital Cities* Court also relied on a portion of the test articulated in *Florida Lime and Avocado Growers, Inc. v. Paul*.⁸⁴ The test is applied when there is preemption of a state regulation by a federal regulation. The *Florida Lime* Court held:

The principle to be derived from our decision is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.⁸⁵

The fact that Congress has as yet failed to establish a cable television policy and to have specifically delegated power to the FCC, precludes analysis via the congressional delegation prong.⁸⁶ The Court's opinion leads one to believe that such an analysis is applicable in the instant case. The Court analyzed the Copyright Revision Act of 1976⁸⁷ and accorded great deference to the accompanying legislative history.⁸⁸

The Court referred to legislative intent in the Copyright Act in determining that a clear conflict existed between the state action and the congressional delegation. The respondent's brief argued this point,⁸⁹ noting that "Congress has not intentionally pre-

83. *Shimer*, 367 U.S. at 385.

84. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

85. *Id.* at 142.

86. As one commentator stated: "the Commission's assumption of jurisdiction over cable has resulted from judicial interpretation of the Act, rather than from express congressional directive. It is the judiciary which has ultimately determined the critical issues in the broadcast cable dispute." Mallamud, *supra* note 73, at 266.

87. 17 U.S.C. § 101 (1976).

88. *Capital Cities*, 104 S. Ct. at 2706.

89. Respondent's Brief in Opposition at 50, *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984).

empted this field so as to forbid states from exercising their twenty-first amendment powers.⁹⁰ The language of the 1976 Copyright Act is evidence of Congress' intent to only preempt state laws creating the same rights as those created by the Copyright Act, not to totally occupy the field.⁹¹ Since Oklahoma's law did not create any right identical to those found in the Copyright Act it should not be preempted where a state is empowered to regulate for the public health and safety of its citizens.⁹²

The use of a copyright legislative history as a rationale for preemption in the instant case is unfounded. Where Congress has not directly made known its intent, it is insufficient to seek out indirectly related statutes to serve as congressional approval. While deciding whether to impose a rule of evidence on state courts, the Court in *Schwartz v. State of Texas*,⁹³ stated: "It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal preemption is not lightly to be presumed."⁹⁴

Had *Capital Cities* applied the complete *Florida Lime* test, the Court probably would not have preempted the state regulation. Under the *Florida Lime* test for preemption, the subject matter must be "a subject by its very nature admitting only of national supervision."⁹⁵ The subject must demand exclusive federal regulation in order to achieve uniformity vital to national interests,⁹⁶ or there must be evidence of congressional intent to exclusively occupy the field,⁹⁷ or it must be shown as a practical matter that both regulations cannot be enforced "without impairing the federal superintendence of the field."⁹⁸

Insightful here is *Head v. New Mexico Board of Examiners in Optometry*.⁹⁹ In *Head*, the state enacted an advertising prohibition to assure a high standard of professional competence. The regula-

90. *Id.* at 54.

91. *Id.* at 54.

92. *Id.* at 59.

93. 344 U.S. 199 (1952).

94. *Id.* at 202-03. *Accord Reid v. State of Colorado*, 187 U.S. 137 (1902). "It should never be held that Congress intends to supercede or by its legislation suspend, the exercise of the police powers of the states, even when it may do so unless its purpose to effect that result is clearly manifested."

95. *Florida Lime*, 373 U.S. at 143.

96. *Id.* at 144.

97. *Id.*

98. *Id.*

99. 374 U.S. 424 (1963).

tion prohibited the advertising of prices connected with the practice of optometry.¹⁰⁰ The Supreme Court upheld the state regulation as a valid enactment designed to protect the health and welfare of its citizens. The Court rejected the appellant's claim that the regulation of radio advertising had been preempted by the Communications Act of 1934. As noted by respondent's brief in *Capital Cities*,¹⁰¹ the Court concluded "the Communications Act had plainly evidenced no congressional intention to totally oust state regulatory authority in areas also regulated under the Act."¹⁰²

The *Capital Cities* Court distinguished *Head*. The *Head* Court stated: "no specific federal regulation even remotely in conflict with the New Mexico law has been called to our attention. Here, by contrast, the FCC's preemptive intent could not be more explicit or unambiguous."¹⁰³ The issue in *Capital Cities*, however, was not whether there was a specific regulation on point; but whether the subject matter requires preemption. Justice Brennan, in his concurring opinion in *Head*,¹⁰⁴ applied the *Florida Lime* test.¹⁰⁵ He stated that the "subject matter, here radio and television broadcasting, is not one 'by its very nature admitting only of national supervision.' Nothing in our decisions which have required particular state regulations to yield to the Communications Act, suggest such a view of the regulatory field."¹⁰⁶

In assessing the exclusivity of federal regulation to control the field and, to achieve uniformity, Brennan asserted:

that language should not be read as construing the Communications Act to mandate the ouster of all local regulation the application of which might in any way prevent national uniformity. . . . Rather than mandate ouster of state regulations, several

100. The statute at issue in *Head* prohibits:

(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import.

The purpose of this provision according to the Supreme Court of New Mexico, is to "protect * * * citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes." *New Mexico Bd. of Examiners in Optometry v. Roberts*, 70 N.M. 90, 94, 370 P.2d 811, 813 (1962).

101. *Supra* note 88, at 50.

102. *Id.* at 50.

103. *Capital Cities*, 104 S. Ct. at 2694 n. 10.

104. *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 443 (1963) (Brennan, J., concurring).

105. *Id.* at 442.

106. *Id.*

provisions of the Communications Act suggest a congressional design to leave standing various forms of state regulation. . . .¹⁰⁷

While discussing the detailed regulation of some broadcasting practices, he additionally noted that "the failure expressly to regulate non-deceptive advertising surely does not deprive the FCC of all such jurisdiction, that failure argues against a congressional design that state regulation was to be ousted."¹⁰⁸

Questioning whether "both regulations can be enforced without impairing the federal superintendence of the field,"¹⁰⁹ Brennan noted that the legislation of the nature and subject matter dealt with in *Head* and *Capital Cities*, specifically, the health and safety of citizens, "embodies a traditional state interest of the sort which our decisions have consistently respected. Nor is such legislation required to yield simply because it may in some degree restrict the activities of one who holds a federal license."¹¹⁰

Where the agency acts on the basis of a congressional delegation, a "court retains the power to review agency decision-making along a continuum of deference, from superficial review to close scrutiny."¹¹¹ The *Capital Cities* Court, in determining the standard of judicial review, chose the superficial standard as articulated in *Shimer*. It used the "arbitrary and capricious" standard to determine whether the administrator exceeded his statutory authority in exercising his discretion.¹¹² While the Court proclaimed to adhere to the "arbitrary and capricious" standard, a simple factual analysis will not support the Court's decision. The FCC's decision to defeat the legislative mandate of Oklahoma citizens based on a vague standard such as furthering the development of cable in the public interest,¹¹³ was arbitrary and capricious. Even under the very limited review provided for by the Court in the instant case, it is clear the administrator's rules do not represent "a reasonable

107. *Id.* at 443.

108. *Id.*

109. *See supra* note 97.

110. *Head*, 374 U.S. at 445.

111. *Supra* note 73, at 267.

112. Where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong.

Id. at 382.

113. *Capital Cities*, 104 S. Ct. 2702 n. 8.

accommodation of conflicting policies."¹¹⁴

The rationale of the earlier courts in establishing jurisdiction "reasonably ancillary to the Commission's various responsibilities for the regulation of television broadcasting"¹¹⁵ does not support the extent of judicial deference used in *Capital Cities*. A primary purpose of the FCC's assertion of jurisdiction over the cable industry was the protection of local broadcast television services.¹¹⁶ Television broadcasters, fearful of the economic threat posed by cable operators, sought refuge under the jurisdictional arm of the FCC. While earlier rules reflected this protectionist policy,¹¹⁷ the *Capital Cities* decision is directly opposed to this rationale. While the Court struck the advertising ban as it pertained to cable broadcast signals, it allowed the prohibition to stand as applied to television broadcast signals. The ruling has imposed an economic burden upon television broadcasters competing for the same advertisers as cable broadcasters.

Cable, a technological development labelled as "ancillary" to television broadcast, has now assumed the predominant position. This decision implies that protection of broadcast services is not of the concern in the 1980's that it was in the 1960's.¹¹⁸ Preemption is intended to foster diversity in satellite delivered program services by freeing cable systems from burdensome regulations.¹¹⁹ The Court clearly indicates its support of the FCC's design to allow "breathing space necessary to expand vigorously" nationwide cable services.¹²⁰

The Court makes no mention of the effect of expansion on regular broadcast services. The Court is implicitly making a choice between cable and broadcast services by deferring to the FCC's judgment. If marketplace forces are to determine the future expan-

114. Shimer, 367 U.S. at 383.

115. 392 U.S. at 178.

116. For example, a major objective of the broadcast carriage rule was to: insure at least a minimum of service in undeserved areas, set limits to the impact of cable distant signal carriage on over-the-air broadcasting, and eliminate certain elements of competitive unfairness resulting from the fact that cable systems are not required under existing copyright laws to pay for the television broadcast programming they pick up and distribute . . . and to promote service attuned to the needs and interests of the cable community.

Notes, *The FCC's Cable Television Jurisdiction: Deregulation by Judicial Fiat*, 30 U. FLA. L. REV. 718, 726 (1978).

117. The FCC enacted rules to protect local broadcast television while fostering the development of cable systems.

118. 104 S. Ct. at 2703.

119. 104 S. Ct. at 2702 n. 9.

120. 104 S. Ct. at 2705.

sion of competition between cable and broadcast services, it is important that this choice is not predetermined by any previous inclination of the FCC.

The Court implies with its holding, that given the nature of the subject matter, partnership in this area is impossible. The decision can be read as a warning to states that the current relaxation of federal controls is not to be read as an invitation for states to step into the regulatory scheme.¹²¹ The Court narrows the localism policy¹²² previously developed to include only state regulation of local aspects such as franchisee selection and construction oversight.¹²³

Congress is speaking to this issue in the current session and does not join in the FCC's determination of allocation of regulatory power. Congress' intent to establish a regulatory sharing¹²⁴ at federal and nonfederal levels in the cable area is evidenced by the Senate's passage of the proposed Cable Telecommunications Act of 1983.¹²⁵ The Act amends the Communications Act of 1934 to specifically establish a national policy concerning cable television and to establish guidelines for the exercise of regulatory authority.¹²⁶ To encourage a more competitive environment for cable systems, the Senate bill calls for a definitive jurisdictional framework. Within the framework, "local government will be given the authority over areas of local concern and authorizes them to protect local needs."¹²⁷ Section 2(c) of the Act states: ". . .any State or political subdivision or agency thereof, or franchising authority, may exer-

121. FCC policy as articulated by Mark Fowler, the current chairman of the FCC, calls for marketplace forces to "spur on innovation, experimentation, and risk-taking," while protecting the public interest. He calls for "unregulation" so that "the marketplace rather than the myths of trusteeship approach determines what programming the American people receive." Fowler, *Foreward*, 32 *CATH. U. L. REV.* 523, 527 (1983).

122. For a discussion of other policy themes in the FCC's regulation of cable television with no direct bearing on this discussion see NOTES, *supra* note 115, at 718.

123. 104 S. Ct. at 2702.

124. Cooperative regulatory schemes have developed in other regulated areas. The state-federal partnership concepts have arisen to balance the needs of local concern while protecting the federal interest. One such example that may have bearing on the cable industry is OSHA's approach to state option programs, offering financial assistance for development and enforcement at the state level of articulated national objectives. States are encouraged to assume full responsibility for implementing state-national objectives in the occupational safety and health field. The FCC's cable television jurisdiction could likewise be supplanted by state implementation of national objectives as articulated by Congress. The Act, however, does not provide for total displacement of federal authority, although it is substantial. Mahoney, *supra* note 74 at 892 n. 111.

125. S. 66, 98th Cong., 1st Sess., 129 *CONG. REC. S.* 8325 (June 14, 1983).

126. S. REP. NO. 98-67, 98th Cong., 1st Sess. (1983).

127. *Id.* at 11.

cise jurisdiction over matters which are reasonably necessary for the reasons of public health, safety, and welfare."¹²⁸ A similar bill is awaiting passage in the House.¹²⁹

As suggested by the legislative intent of the pending law, the Court's application of preemption by the federal government via a regulatory agency is not the only answer. States must be afforded the opportunity of becoming a nonfederal regulatory partner. Maximum participation by the states in the regulatory process on the local level will assure that cable programming truly reflects community needs and desires. State action in a dual regulatory scheme "will curb abuses at the local level and foster growth of cable systems in the public interest."¹³⁰

CONCLUSION

Although the Supreme Court's decision in *Capital Cities* has created certainty in the area of the scope of the FCC's regulation, it will be a cause for concern in the area of regulatory administrative law. The Court's failure to limit the FCC's open ended ancillary jurisdiction will frustrate the effectuation of a dual regulatory scheme with the state as an active participant. The FCC's policy making as prescribed by an overextension of a judicially creative interpretation is not likely to produce the best cable regulation policy.

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128. S. 66, 98th Cong., 1st Sess., 129 CONG. REC. S 8325 (June 14, 1983).

129. H.R. REP. No. 4103, 98th Cong., 1st Sess. (1983).

130. Stern, *supra* note 11, at 215.