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Cable Television Update-Capital Cities Cable, Inc. v. Crisp: Federalism and Frustration of Powers

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CABLE TELEVISION UPDATE—*CAPITAL CITIES CABLE, INC.*
V. *CRISP*: FEDERALISM AND FRUSTRATION OF POWERS

The Supreme Court of the United States recently stunned the cable television¹ industry with its decision in *Capital Cities Cable, Inc. v. Crisp*.² The immediate result of the ruling was to preempt a state statute prohibiting the advertisement of certain alcoholic beverages; however, the decision's potential impact could be much broader.³ The Court unanimously held cable television regulation to be the "exclusive domain" of the Federal Communications Commission (FCC) and an "area that the Commission has explicitly pre-empted."⁴ Thus, the decision extends broad regulatory authority to the FCC at the expense of local control.⁵

This comment presents an analysis of the recent *Capital Cities* decision and its impact upon local regulatory authority. More importantly, consideration is given to the effect of this broad judicial statement on both FCC and congressional power. It is suggested that the preemption based *Capital Cities* opinion raises questions more of separation of powers than of federalism.

A thorough presentation of the historical development of cable regulation⁶ is not within the scope of this comment.⁷ However, a short summary

1. A cable television (or CATV) system is defined by federal regulations as "[a] nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations. Cable Television Service, 47 C.F.R. § 76.5(a) (1983).

2. 104 S. Ct. 2694 (1984).

3. For initial public reaction to the decision, see Goodale & Bruce, *Ruling Stuns Cable Industry*, 192 N.Y.L.J., July 13, 1984, at 1, col. 1 (describing the opinion as "unanimous and far-reaching"); *Pols Cable Television is Federal Matter: Supreme Court Rules FCC Has Power to Regulate*, Nation's Cities Weekly, June 25, 1984, at 5, col. 2 (suggesting that the impact of the decision was much broader than the issue addressed).

4. 104 S. Ct. at 2703.

5. For the purposes of this comment, state and local regulation will be used interchangeably, as the *Capital Cities* decision is directed at and impacts upon both.

6. See generally G. CHRISTIANSEN, CURRENT DEVELOPMENTS IN CATV AND PAY TELEVISION (1977); M. HAMBERG, ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION (rev. ed. 1981); Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501 (1977); Barnett, *State, Federal and Local Regulation of Cable Television*, 47 NOTRE DAME LAW 685 (1972); Barnett & Greenberg, *A Proposal for Wired City Television*, 1968 WASH. U.L.Q. 1; Harmon, *Cable Television: A Changing Medium Raises New Legal Issues*, 13 GOLD. ST. U.L. REV. 123 (1983); Miller & Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85 (1981); Wheeler, *Cable Television: Where It's Been, Where It's Headed*, 56 FLA. B.J. 228 (1981); Comment, *The Collapse of Consensus: Effects of the Deregulation of Cable Television*, 81 COLUM. L. REV. 612 (1981); Comment, *FCC Regulation of Cable Television*, 54 N.Y.U. L. REV. 204 (1979); Note, *The FCC's Cable Television Juris-*

of that development is included for the purpose of clarifying the respective roles played by the FCC, Congress, and the courts.

I. BACKGROUND⁸

A. *The Commission's Jurisdiction*

The FCC initially denied that it possessed any regulatory authority over cable television.⁹ However, early concerns regarding the impact of unrestricted cable growth upon conventional television broadcasting¹⁰ prompted the Commission to assume jurisdiction during the 1960's.¹¹

diction: Deregulation by Judicial Fiat, 30 U. FLA. L. REV. 718 (1978). See also Mallamud, *Courts, Statutes and Administrative Agency Jurisdiction: A Consideration of Limits on Judicial Creativity*, 35 S.C.L. REV. 191, 267 n.424 (1984).

7. Similarly, certain tangential issues will be left to other commentators. See, e.g., G. SHAPIRO, "CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION" (1983); Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 U. CIN. L. REV. 427 (1975); Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. CAL. L. REV. 1001 (1981); Stern, Krasnow & Serkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U.L. REV. 529 (1983); Comment, *Affiliated Capital Corp. v. City of Houston: Local Governments and Antitrust Immunity*, 35 BAYLOR L. REV. 791 (1983); Note, *The FCC's Deregulation of Cable Television: The Problem of Unfair Competition and the 1976 Copyright Act*, 10 HOFSTRA L. REV. 591 (1982); Note, *The Universal Copyright Convention and the Problem of Community Antenna Television Systems*, 3 OHIO NUL. REV. 535 (1975). See also *Growth of Media Will Alter Regulatory Scheme*, 7 Legal Times, June 13, 1983, at 35 (summarizing the key issues arising in the 1980's: privacy, content regulation, and copyright considerations).

8. For an extensive and updated history of cable television regulation, see Herbst, Matz & Gibbs, *A Review of Federal, State and Local Regulation of Cable Television in the United States*, 10 WM. MITCHELL L. REV. 377 (1984). See also Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (Winter 1981); Shoenberger, *The FCC, Cable TV, and Visions of Valhalla: Judicial Scrutiny of Complex Rulemaking and Institutional Competence*, 14 U. RICH. L. REV. 113 (1979); Note, *The Collapse of Consensus: Effects of the Deregulation of Cable Television*, 81 COLUM. L. REV. 612 (1981).

9. See *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251, 255 (1958) (holding that neither Title II nor III of the Communications Act of 1934 applied to CATV, stating that "it appears doubtful to the Commission that any of those provisions may be fairly interpreted to reach CATV systems"); First Report and Order, *In re Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403, 431 (1959) (concluding that the FCC had "no present basis for asserting jurisdiction or authority over CATV's . . .") [hereinafter cited as *First Report and Order Inquiry*].

10. See, e.g., *First Report and Order Inquiry*, supra note 9 at 423; *In re Carter Mt. Transmission Corp.*, 32 F.C.C. 459, 464 (1962) (grant of CATV facilities would have negative impact upon existing TV station), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963); First Report and Order, 38 F.C.C. 683, 699-700 (1965) (expressing Commission policy of favoring local broadcast service over cable). *But see* *Intermountain Broadcasting & Television Corp. v. Idaho Microwave*, 196 F. Supp. 315 (S.D. Idaho 1961) (ruling in favor of a CATV system).

11. See *In re Carter Mt. Transmission Corp.*, 32 F.C.C. at 465, 321 F.2d at 366; First

This assumption of jurisdiction precipitated the view that cable was supplementary to basic broadcast service.¹² Only a few years after first exercising jurisdiction, the Commission promulgated an array of rules comprising a comprehensive regulatory scheme.¹³

B. *The Court's Standard of Review*

Judicial affirmation of FCC authority was soon to follow, most notably in *United States v. Southwestern Cable Co.*¹⁴ In that landmark decision, the Supreme Court acknowledged cable television's supplementary status by limiting the Commission's rulemaking authority to that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."¹⁵ This "reasonably ancillary" standard would be the judicial yardstick of FCC authority for the next fifteen years.¹⁶

C. *Recent Deregulation*

The 1970's witnessed an end to the regulatory freeze and a corresponding liberalization of the Commission's rules.¹⁷ FCC studies, which indicated that cable did not in fact harm local broadcasting, made heavy reg-

Report and Order, 38 F.C.C. 683 (1965) (first comprehensive regulatory scheme). See also Second Report and Order, 2 F.C.C.2d 725, 733-34 (1966) (concluding that "CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable," though admitting that the jurisdiction question is "subject to reasonable difference of opinion"); Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 563 (1965) (extending rules governing CATV systems using microwave to all CATV systems).

12. See First Report and Order, 38 F.C.C. at 706-07. See also Besen & Crandall, *Deregulation of Cable Television*, 44 LAW AND CONTEMP. PROBS. 77, 86 (Winter 1981).

13. See, e.g., Second Report and Order, 23 F.C.C.2d 816 (1970); First Report and Order, 20 F.C.C.2d 201 (1969); Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968); Second Report and Order, 2 F.C.C.2d 725 (1966); First Report and Order, 38 F.C.C. 683 (1965).

14. 392 U.S. 157 (1968).

15. *Id.* at 178.

16. See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649, 663 (1972); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 26 (D.C. Cir. 1977). See also Comment, *The FCC and Cable Information Services: An Analysis of the Scope and Mandate of the Communication Act*, 54 U. COLO. L. REV. 257, 261 (1983) (interpreting the decisions as recognizing FCC authority to regulate cable television "so long as the rules promote the objectives for which the FCC has been given jurisdiction over broadcasting").

17. See Cable Television Report and Order, 36 F.C.C.2d 143, 47 C.F.R. § 76.1-.617 (1983) (amended version currently regulates CATV). See also Report and Order, 66 F.C.C.2d 380 (1977); First Report and Order, 58 F.C.C.2d 442 (1976); Report and Order, 57 F.C.C.2d 68 (1976).

ulation appear unjustified.¹⁸ No sooner had the Commission announced its jurisdiction and escalated its regulation of cable, than a wide scale elimination of restrictive rules was underway.¹⁹

Expedited by judicial invalidation of some rules,²⁰ the FCC accomplished a rapid deregulation of cable television at the federal level. Currently, FCC regulations consist of a more limited set of rules and standards,²¹ leaving the cable industry with increased operational freedom and growth potential.²²

D. Congressional Silence

Congress had taken no direct action regarding cable television regulation when the *Capital Cities* opinion was handed down. Invitations for legislation had been extended by the FCC and implied by the courts. The Commission recommended legislative action²³ and requested clarification of its regulatory authority and jurisdictional responsibilities relative to those of the states and localities.²⁴ The judiciary had expressed concern over congressional inaction, suggesting that, given the "almost explosive development" of cable television, the fundamental policies associated with cable would be better addressed by Congress and not left entirely to the FCC and the courts.²⁵

18. See *In re Cable Television Syndicated Program Exclusivity Rules*, 71 F.C.C.2d 951, 966-67, 987-88 (1979).

19. See, e.g., Report and Order, 79 F.C.C.2d 663 (1980), *aff'd sub nom. Malrite TV of N.Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert denied*, 454 U.S. 1143 (1982); Notice of Proposed Rulemaking, 71 F.C.C.2d 1004 (1979).

20. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) (holding access rules not "reasonably ancillary"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 26 (1977) (holding "pay cable" rules not "reasonably ancillary").

21. See *Cable Television Services*, 47 C.F.R. §§ 76.1-617 (1983).

22. One commentator described the deregulatory trend this way: "The FCC seems more interested in eliminating rather than improving its rules, the courts appear reluctant to challenge the Commission's painstaking decisions, and parties that believe themselves aggrieved will probably have to persuade Congress that what is really needed is—more regulation." Note, *Recent Developments: FCC Eliminates Longstanding Cable TV Rules*, 31 AM. U.L. REV. 471, 475 (1982).

23. See *First Report and Order, Inquiry*, *supra* note 9, at 438, 441; *First Report and Order*, 38 F.C.C. 683, 685 (1965).

24. See *Second Report and Order*, 2 F.C.C.2d 725, 787 (1966). See also Besen & Crandall, *supra* note 12, at 79 (stating that the FCC invited "Congress to clarify its authority. Congress never accepted this invitation, but the Commission proceeded to place a regulatory yoke over cable operators nonetheless."); Note, *Regulated Industries—Federal Communications Commission—Supreme Court Invalidates Regulations Requiring Cable Broadcasters to Provide Public Access—FCC v. Midwest Video Corp.*, 13 CREIGHTON L. REV. 1023, 1023 (1980) (describing the cable television area as "a regulatory nightmare to which Congress has yet to respond.").

25. *United States v. Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (Burger, C.J., concurring). See also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 (1979) (authority to compel

With the exception of unsuccessful bills and committee reports which fell prey to the opposition of a strong cable lobby,²⁶ the only time prior to *Capital Cities* that Congress acted in a manner which affected cable television was in its revision of the Copyright Act of 1976.²⁷ While that act released cable operators from cumbersome negotiations with copyright owners,²⁸ it nevertheless constituted only an indirect legislative gesture regarding cable regulation.²⁹

In 1979, Congress responded to the deregulatory fever and the cry for a national policy.³⁰ However, the more recent legislative initiatives³¹ were seriously frustrated by the *Capital Cities* holding. Therefore, further mention of current legislative efforts will be made within the context of the *Capital Cities* decision.³²

One commentator, recognizing the future judicial uncertainty in the area of cable regulation, states that:

The problems, questions, and lack of predictability of the outcome of future cases . . . exist because of the inability of Congress to determine if, and to what extent, it wishes the cable industry to be regulated. This unwillingness to take some affirmative action continues to work constrictions on the courts, leaving them to base their decisions concerning the regulation of cable on the legislative intent of an antiquated Communications Act.³³

cable operators to provide common carriage of public originated transmissions "must come specifically from Congress"); *United States v. Southwestern Cable TV, Inc.*, 392 U.S. 157, 170 n.31 (1968) (noting the Commission's 1966 request for legislation to "confirm [its] jurisdiction").

26. See, e.g., H. R. REP. NO. 1635, 89th Cong., 2d Sess. (1966); S. REP. NO. 923, 86th Cong., 1st Sess. (1959); STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th CONG., 2d Sess. —, *CABLE TELEVISION PROMISE VERSUS REGULATORY PERFORMANCE* (Comm. Print 1976) (report generally hostile to 1972 rules). See also Herbst, Matz & Gibbs, *supra* note 8, at 382.

27. Copyright Revision Act of 1976, 17 U.S.C. §§ 101-810 (1982). See also Shoenberger, *supra* note 8, at 121 n.41.

28. 17 U.S.C. § 111(c) (1982).

29. See generally Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856 (1978); Hatfield & Garrett, *A Reexamination of Cable Television's Compulsory Licensing Royalty Rates: The Copyright Royalty Tribunal and the Marketplace*, 30 J. COPYRIGHT SOC'Y 433 (1983). For criticism of the Act's provision of a compulsory license to cable, see *Oversight of the Copyright Act of 1976, Cable Television: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 151 (1981).

30. S. 622, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979); H.R. 3333, 96th Cong., 1st Sess. (1979); *Amendments to the Communications Act of 1934: Hearings on S. 622 & 611 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. (1979); *Amendments to the Communications Act of 1934: Hearings on H.R. 3333 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. (1979).

31. S. 66, 98th Cong., 1st Sess. (1983); H.R. 4103, 98th Cong., 2d Sess. (1984).

32. See *infra* text accompanying notes 94-99.

33. Note, *FCC v. Midwest Video Corp.: Public Access Teetering on the Tightrope of FCC Jurisdiction Over Cable Television*, 16 IDAHO L. REV. 123, 139 (1979).

II. *Capital Cities Cable, Inc. v. Crisp*A. *Factual Setting*

In 1980, the Oklahoma Attorney General determined that the state's ban on alcoholic beverage advertisements applied to the retransmissions by cable operators of out-of-state signals containing such advertisements.³⁴ Responding to a warning by the Oklahoma Alcoholic Beverage Control Board, operators of several cable systems filed suit, alleging that the state ban violated the Supremacy Clause and the first amendment of the United States Constitution. A federal district court granted summary judgment for the cable operators on the grounds that the advertising prohibition was an unconstitutional restriction on commercial speech.³⁵ On appeal, that ruling was reversed.³⁶ The Supreme Court granted certiorari on the issue of whether application of the Oklahoma prohibition to out-of-state broadcast signals was valid, given existing federal regulation of cable television.³⁷

B. *The Unanimous Opinion*³⁸

After acknowledging that it does not "ordinarily consider questions not specifically passed upon by the lower court,"³⁹ the Supreme Court's opinion proceeds with an outline of the traditional Supremacy Clause framework of analysis.⁴⁰ The court cites authority to the effect that the pre-emption doctrine applies as much to federal regulations as to federal statutes.⁴¹

34. OKLA. CONST. art. XXVII, § 5; OKLA. STAT. ANN. tit. 37, § 516 (West Supp. 1984); Op. Okla. Att'y Gen. No. 79-334 (Mar. 19, 1980).

35. Oklahoma Telecasters Ass'n v. Crisp, No. 81-439 (W.D. Okla. 1981).

36. 699 F.2d 490 (10th Cir. 1983). It is interesting to note that the Court of Appeals did not discuss whether application of the Oklahoma law was preempted by federal regulations. The Court held the state ban to be a valid restriction on commercial speech in spite of the first amendment protection afforded such commercials.

37. 104 S. Ct. 66 (1983).

38. The opinion of the Court was delivered by Justice Brennan.

39. 104 S. Ct. 2694, 2699 (1984) (the Court adding that "this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts.").

40. Our consideration . . . is guided by familiar and well-established principles. Under the Supremacy Clause . . . the enforcement of a state regulation may be pre-empted by federal law in several circumstances: first, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law . . . second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby "left no room for the States to supplement" federal law . . . and, finally, when compliance with both state and federal law is impossible.

Id. at 2700 (citing *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); U.S. CONST. art. VI, cl. 2).

41. *Id.* (citing *Fidelity Federal Savings and Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982)).

Concerning the Commission's jurisdictional authority, the Court states that the "power delegated to the FCC plainly comprises [the] authority to regulate the signals carried by cable television systems."⁴² The Court then concludes that "if the FCC has resolved to preempt an area of cable television regulation . . . all conflicting state regulations have been precluded."⁴³ The Court summarizes the regulatory history which, in its view, demonstrates the Commission's preemptive intent.⁴⁴ In addition, the Court takes care to note that the recent deregulatory trend is designed to further the Commission's goal of "program diversity," and should not be interpreted as an abdication of regulatory power by the FCC.⁴⁵

The opinion makes the preemption of the challenged Oklahoma advertising law an easy judicial task, finding the law to be an invalid exercise of state authority on several grounds.⁴⁶ First, by asserting that the state ban would restrict the ability of cable operators to fulfill the FCC objective of program diversity, the Court concludes that "to the extent it has been invoked to control the distant broadcast and nonbroadcast signals imported by cable operators, the Oklahoma advertising ban plainly reaches beyond the regulatory authority reserved to local authorities by the Commission's rules, and trespasses into the exclusive domain of the FCC."⁴⁷ The Court takes a more direct stand when it finds that the Oklahoma advertising ban "plainly conflicts with specific federal regulations."⁴⁸ The

42. *Id.* at 2700-01 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Communications Act of 1934*, 47 U.S.C. § 152(a) (1982)).

43. *Id.* at 2701. At this point, the Court dispenses with the first amendment issue on the grounds that the Oklahoma Alcoholic Beverage Control Board lacked standing to raise such a claim. *Id.* at 2701 n.6.

44. *Id.* at 2701-02.

45. *Id.* at 2703.

46. The preemption doctrine had previously been applied to cable regulation by a lower court. *See Brookhaven Cable TV, Inc. v. Kelly*, 428 F. Supp. 1216 (N.D.N.Y. 1977), *aff'd*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979). *But see NARC v. FCC*, 533 F.2d 601, 615 (D.C. Cir. 1976) (invalidating the Commission's preemption of state regulation, holding that the Communications Act did not confer "blanket jurisdiction" on the FCC and that the nonbroadcast activities at issue were within the proper scope of local authority).

47. 104 S. Ct. at 2703.

48. *Id.* Here, the Court refers to the FCC's "must-carry" rules governing certain local broadcasting, as well as to its encouragement of the importation of out-of-state signals, all of which are required to be carried "in full, without deletion or alternation of any portion." *See* 47 C.F.R. §§ 76.55(b), 76.59(a)(1), 76.59(a)(1)(b) (1983). In addition, the Court finds a conflict between the Oklahoma law and "specialized nonbroadcast services" exemplified by such national programming as the Cable News Network (CNN) and the Entertainment Sports Programming Network (ESPN). Noting that such services are characterized by an absence of advanced notice concerning the content of commercials, the Court suggests that deleting advertisements prior to retransmission would be a "prohibitively burdensome task," and the consequences would be "wholly at odds" with the Commission's objective of program diversity. *Id.* at 2705.

preemption analysis concludes with the observation that Congress recognized the policy of encouraging the importation of out-of-state signals through its Copyright Revision Act of 1976.⁴⁹ The Court emphasized a provision of that act which requires cable operators to "refrain from deleting or altering commercial advertising . . ."⁵⁰

The final section of the opinion is devoted to overcoming the most formidable obstacle faced by the Court. The twenty-first amendment grants broad power to the states to regulate liquor traffic within their borders.⁵¹ Nevertheless, the Court reasons that "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution."⁵² Recognizing that "the Federal government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor,"⁵³ the Court proceeds to employ a test which balances the federal interest in providing a diversity of cable services to the public against the state's interest in discouraging the consumption of intoxicating liquor.⁵⁴ Noting that the Oklahoma law excludes the advertising of beer on television as well as in newspapers and magazines, the Court concludes that this "narrow" state ban "engages only indirectly the central power" reserved by the twenty-first amendment.⁵⁵ Thus, by finding the state's interest to be "limited" and the "federal objective of ensuring widespread availability of diverse cable services" to be significant,⁵⁶ the Court reaches the conclusion that not even the twenty-first amendment saves the Oklahoma ban from the fate of federal preemption.⁵⁷

III. THE COURT'S MESSAGE FOR MUNICIPAL AUTHORITY

A. *Broad Language*

The *Capital Cities* decision employs extremely broad language, refer-

49. *Id.* at 2705 (citing 17 U.S.C. §§ 101-810 (1982)).

50. *Id.* at 2706 (citing 17 U.S.C. § 111(c)(3) (1982)).

51. U.S. CONST. amend. XXI, § 2.

52. 104 S. Ct. at 2707.

53. *Id.*

54. *Id.* at 2708.

55. *Id.* at 2709. The Court considers this "central power" to include the importation or sale of liquor as well as the structure of the distribution system. *Id.*

56. *Id.*

57. [W]e hold that when, as here, a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the state's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause.

Id. See also *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (state wine pricing scheme constituted a restraint of trade in violation of the Sherman Act).

ring to the FCC's "general authority under the Communications Act to regulate cable television systems."⁵⁸ This represents an important departure from earlier decisions which had limited the Commission's authority to that "reasonably ancillary" to the regulation of television broadcasting.⁵⁹ As one commentator asserts:

[U]ntil *Capital Cities*, the FCC had to show that its regulation of cable was designed to protect or promote its objectives and policies with respect to broadcasting, as to which the Commission had undisputed authority. Suddenly, it seemed as if the 'ancillary to broadcasting' restriction on the FCC's jurisdiction to regulate cable had simply vanished.⁶⁰

The Court does not stop at mere expansion of FCC jurisdiction, but proceeds to strengthen the Commission's preemptive muscle. Indeed, the Court appears to leave FCC authority virtually unrestricted by local power when it finds that the Commission "has unambiguously expressed its intent to pre-empt any state or local regulation of this entire array of signals carried by cable television systems."⁶¹ Thus, the practical message of *Capital Cities* is that FCC regulatory authority has been completely unleashed at the expense of local control.⁶²

B. *Local Authority—Then and Now*

Traditionally, municipalities exercised control over the "local incidents" of cable through the process of granting franchises.⁶³ In fact, "cable's very technology—involving the laying of lines, conduits, and cables throughout a given community—in most cases automatically triggers the involvement of the local governmental entity."⁶⁴ Most states provide for local control through statutes authorizing franchise grants.⁶⁵

58. 104 S. Ct. at 2702. Elsewhere, the Court describes this authority as "comprehensive." *Id.* at 2701.

59. *See supra* notes 14-16.

60. Goodale & Bruce, *supra* note 3, at 4, col. 1.

61. 104 S. Ct. at 2701. *But see In re Community Cable TV, Inc.*, 95 F.C.C.2d 1204 (1983) (noting that a locality may, in certain instances, regulate the rates of local broadcasting signals).

62. *Capital Cities* is not the first decision in which local cable regulation experienced a setback. *See Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982) (holding that municipalities enjoy no immunity from federal antitrust laws). *See also Marticorena, Municipal Cable Television Regulation: Is There Life After Boulder?* 9 W. Sr. U.L. REV. (1982).

63. *See Note, The Evaluation of Cable Television Regulation: A Proposal For the Future*, 21 URB. L. ANN. 179, 204 (1981). *See also TV PIX, Inc. v. Taylor*, 304 F. Supp. 459, 463 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970) (upholding a state statute on the grounds that cable television was primarily a "local business"); Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685, 685-86 (1972).

64. Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501, 508 (1977).

65. *Id.* at 509.

Such statutes find their justification in the traditional local power to regulate streets and ways, as well as in the police power to protect health, safety, and property.⁶⁶

Even after the FCC assumed regulation of cable television, state and local governments continued to play a significant regulatory role.⁶⁷ One authority recently maintained that "[f]ederal regulation of cable television is nonexclusive and state authority to regulate cable is not in question."⁶⁸ Certainly, the deregulation of cable at the federal level has been a factor in the continued development of local power.⁶⁹ The primary focus of local control is on the franchising process;⁷⁰ nevertheless, local control is checked by FCC guidelines and standards.⁷¹ Still, the Commission has consistently recognized the legitimacy of municipal authority.⁷² As a result of both Congress' failure to clarify FCC jurisdiction and the cable industry's subjection to regulation on three governmental levels, the federal-local regulatory relationship has been a confusing one.⁷³ Prior to *Capital Cities*, however, one could be certain that local government played an integral part in cable television's regulatory maze.⁷⁴

66. *Id.* See also Note, *supra* note 63, at 185 (recognizing that "[c]able operators cannot construct their systems without governmental permission to use local thoroughfares").

67. See Noam, *Towards An Integrated Communications Market: Overcoming the Local Monopoly of Cable Television*, 34 FED. COM. L.J. 209, 230-31 (1982) ("Because cable is franchised largely on a local basis, local governments have become a logical locus of regulation, both by setting conditions in their franchise contracts and by the continued supervision of the contract's fulfillment.").

68. Herbst, Matz & Gibbs, *supra* note 8, at 396.

69. See *id.*; Marticorena, *supra* note 62, at 114 (stating that "the FCC has gradually withdrawn jurisdiction in this area and allowed, by negative implication, increased local control over cable television.").

70. See Noam, *supra* note 67, at 230-31. For the position that "[s]ince local governments are the most attuned governmental bodies to community needs and desires, their input into the franchising process is crucial," see Note, *supra* note 63, at 207.

71. See 47 C.F.R. § 76.31 (1983). See also Herbst, Matz & Gibbs, *supra* note 8, at 406.

72. See *In re* Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships, 66 F.C.C.2d 380, 391 (1977), *aff'd in relevant part*, 71 F.C.C.2d 569, 571 (1979); Cable Television Report and Order, 36 F.C.C.2d 143, 207 (1972). See also Herbst, Matz & Gibbs, *supra* note 8, at 388 (noting that in its 1972 Rules, the Commission recognized that "local governments must be intimately involved since cable uses streets and public ways"); Comment, *Hit or Myth?: The Cable TV Marketplace, Diversity and Regulation*, 35 FED. COM. L.J. 41, 45-46 (explaining that the FCC relaxed its franchising rules in 1977 "because the FCC felt local officials, not the federal government, could best judge what is required"); Note, *supra* note 63, at 198 n.125 (noting the FCC's conclusion that "cities were the proper regulatory agents of cable television"); *Id.* at 200 ("The Commission reasoned that since local authorities must enforce the regulations imposed upon cable operators, they should create them. Further, after six years of experience, local governments were 'more sophisticated in regulatory matters.'") (citation omitted).

73. Note, *supra* note 63, at 181 n.8.

74. A discussion of the relative merits of local control exceeds the scope of this comment. See generally Davis, *Cable Television Franchising—The Role of Local Governments*, 51

Capital Cities appears to have a serious impact on local regulation of cable.⁷⁵ In the decision, the Court concludes that the FCC preempts "any state or local regulation of th[e] entire array of signals carried by cable television systems."⁷⁶ Even more critical is the effect which the decision may have on the regulatory leverage provided local authorities by their franchisor status:

Capital Cities also calls into question the increasingly common practice whereby local governments use their franchising powers to force cable operators to put or retain satellite-delivered services in the basic service package, and so to keep or put such services within the regulatory power of these local authorities.⁷⁷

In spite of the Court's suggestion that localities may "regulate such local aspects of cable systems as franchise selection and construction oversight,"⁷⁸ the overall broad language of the opinion makes challenges to a wide range of local regulations conceivable.⁷⁹

Perhaps the most troublesome aspect of the *Capital Cities* opinion is its suggestion that the powers retained by states and localities were somehow delegated to them at the Commission's discretion.⁸⁰ The Court states:

In marking the boundaries of its jurisdiction, the FCC determined that, in contrast to its regulatory scheme for television broadcasting stations, it would not adopt a system of direct federal licensing for cable systems. Instead, the Commission announced a program of 'deliberately structured dualism' in which state and local authorities *were given responsibility* for granting franchises to cable operators within their communities and for overseeing such local incidents of cable operations as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights

FLA. B.J. 78 (1977); Comment, *Community Antenna Television: The Case for Municipal Control*, 22 WAYNE L. REV. 99 (1975); Note, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 DRAKE L. REV. 391 (1978).

75. 104 S. Ct. at 2701 (emphasis added). See *supra* note 61 and accompanying text. For example, one commentator observes that "[m]ore than simply affirming the FCC's authority . . . the *Capital Cities* opinion seems to suggest that any other attempt by local authorities to regulate satellite-delivered programming would be pre-empted by the FCC."

76. Goodale & Bruce, *supra* note 3, at 4, col. 2.

77. *Id.* See also Freeman, *Supreme Court Backs Cable in OK Liquor Ad Ban Case*, 5 Multichannel News, June 25, 1984, at 35, col. 5 (observing that "another issue which might be tested is any municipal franchising rule which requires cable operators to carry certain channels on basic rather than tiering channels"); Pols, *supra* note 3, at 5, col. 1 (stating that *Capital Cities* makes "the validity of local franchise requirements which relate to the programming provided over the cable system . . . questionable").

78. 104 S. Ct. at 2703.

79. See Freeman, *supra* note 77, at 35, col. 5.

80. See 104 S. Ct. at 2703 (in which the Court referred to "the regulatory authority reserved to local authorities by the Commission's rules") (emphasis added).

of way.⁸¹

By characterizing the FCC as having "given responsibility" for operational concerns to localities while retaining responsibility for non-operational matters itself, the Court would appear to leave local governments free to "exercise whatever authority they have over cable at the grace of the FCC."⁸² Arguably, the jurisdictional and preemptive authority granted to the Commission by the Court would seem to be unlimited.⁸³

IV. JUDICIAL INFLUENCE UPON THE OTHER FEDERAL BRANCHES

A. *The Commission Follows Suit*

The *Capital Cities* decision is a most welcome one from the perspective of the FCC. To begin with, it represents judicial reaffirmation of an otherwise tenuous basis for jurisdictional authority—the Communications Act of 1934.⁸⁴ Judicial reliance on this act as the legislative grant of FCC authority over cable has been consistently criticized.⁸⁵ But the more significant effect of *Capital Cities* is the fact that it gives the Commission new regulatory momentum—momentum on which it has already capitalized.

81. 104 S. Ct. at 2702 (citing Cable Television Report and Order, 36 F.C.C.2d 143, 207 (1983)) (emphasis added).

82. Goodale & Bruce, *supra* note 3, at 4, col. 1. See also Pols, *supra* note 3, at 5, col. 2 (stating that the Court "characterized the present state and local regulatory role as having been delegated to states and localities through FCC actions").

83. For the view that the opinion included no indication of any limits on the FCC's jurisdiction, see *Nation's Cities*, *supra* note 3, at 5, col. 1. See also Freeman, *supra* note 77, at 35, col. 5 (calling *Capital Cities* "a very important case with implications reaching across the whole spectrum of regulation of cable by state and local governments").

84. 47 U.S.C. § 152(a) (1982) ("The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . .").

85. See, e.g., Comment, *FCC Regulation of Cable Television*, 54 N.Y.U. L. REV. 204, 215 (1979) (suggesting that the 1934 Act neither grants authority nor embodies any congressional intent regarding cable).

Ultimately, Congress must shoulder the responsibility for the confusion over cable television in the national scheme of communications regulation. The Communications Act, which verges on obsolescence, has not been significantly revised since 1934. By abdicating the field, Congress has forced the FCC and the courts to deal with this dynamic industry in what is essentially a standardless vacuum.

Id. at 235-36.

Congress has not significantly revised the Communications Act of 1934. Courts and the FCC, therefore, have rendered their decisions concerning the cable industry without having prescribed standards to rely on. Authorities have stretched and strained the Communications Act to cover the many technological developments in the communications field.

Note, *supra* note 63, at 203. See also Note, *supra* note 33. For an excellent discussion of Congress' delegation of preemptive authority to federal agencies, see 21 Duq. L. Rev. 1087 (1983). See also Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

In *In re Community Cable TV, Inc.*,⁸⁶ the FCC took full advantage of the Supreme Court's expansive language in an attempt to settle once and for all the uncertainty surrounding its preemptive authority.⁸⁷ The ruling states: "It is evident that petitioners have fundamentally misconstrued the thrust of our prior decision. As the United States Supreme Court most recently recognized in *Capital Cities Cable, Inc. v. Crisp*, . . . our policy in this field has been explicit and settled for two decades."⁸⁸ Again borrowing from *Capital Cities*, the Commission concludes that "[s]tate regulation of these services, as the Supreme Court has recently noted, 'is completely precluded by federal law.'⁸⁹

At one point, the Commission appears to concede that the scope of its authority has not always been so explicitly defined when it states that "policies in this area [have] evolved through a step-by-step process"⁹⁰ Nevertheless, the Commission concludes its ruling with a retreat to the *Capital Cities* opinion: "We believe that our policy of preemption is both reasonable and in harmony with our desire to assure continued diversity of programming for the viewing public."⁹¹

The practical effect of *Community Cable* is to preempt all local franchise provisions purporting to regulate the content or placement of broadcast signals.⁹² Thus, the ruling erodes the ability of local governments to exercise regulatory authority through the imposition of specific franchise requirements. Indeed, the decision undermines what was previously local government's most effective regulatory weapon—the cable franchising process. Finally, an inference can be drawn from this FCC ruling and its exclusion of any reference to congressional policy: the Commission views its preemptive authority as having been granted by the Court, rather than by Congress.⁹³

86. F.C.C. No. 84-331 (July 25, 1984), 56 RAD. REG. 2d (P&F) 735 (1984).

87. The *Community Cable* ruling concerned in particular the FCC's preemption of "nonbasic services" (those not regularly provided to all subscribers). The effect of the ruling is to preempt rate regulation by franchising localities of these "nonbasic services" regardless of how cable operators choose to "tier" their services. 56 RAD. REG. 2d (P&F) at 740-42.

88. 56 RAD. REG. 2d (P&F) at 739.

89. *Id.* at 740.

90. *Id.* at 741-42 (citing 66 F.C.C.2d 380, 402 n.21 (1977)).

91. *Id.* at 742 (referring to *Capital Cities*).

92. Pols, *FCC Stands Fast, Implements Cable Rules*, Nation's Cities Weekly, July 30, 1984, at 7, col. 4. While the effect of *Capital Cities* is uncertain, "[t]he FCC's ruling is expected to have a wide ranging impact on franchises throughout the country, virtually all of which include provisions which are in direct conflict with the FCC's policies as established in the *Community Cable TV, Inc.* case." *Id.*

93. Interestingly enough, the Commission chose to include recognition of current congressional initiative in a footnote:

Although the pleadings before us today touch on issues which are also being and have recently been considered by Congress, . . . our result today is based specifically upon prior Commission decisions, and is not meant to express a view as to the merits or desirability of any proposed legislation.

B. Frustration of Congressional Compromise

Just two weeks prior to the Supreme Court's *Capital Cities* decision, the National League of Cities (NLC) and the National Cable Television Association (NCTA) reached agreement on a compromise deregulation bill then before the House.⁹⁴ The bill was a proposed amendment to the Communications Act of 1934 and provided guidelines for the exercise of both FCC and local authority with respect to cable television regulation.⁹⁵ For purposes of this discussion, it is important to note that the bill clearly left more authority to localities than the broad *Capital Cities* ruling.⁹⁶

Although the NCTA initially approved the pending bill, it suddenly withdrew its support in reaction to the Court's broad opinion and the subsequent FCC ruling.⁹⁷ Indeed, as *Capital Cities* and *Community Cable* gave the cable industry far more authority than was expected from the legislative process, the NCTA took the position that it would support only a bill which more accurately reflected these recent decisions.⁹⁸ Not surprisingly, the decisions had the opposite effect on the NLC, turning the NLC's initial criticism of the bill into sudden enthusiasm for passage. However, in light of *Capital Cities* and the NCTA walkout which that

56 RAD. REG. 2d (P&F) at 741 n.12 (referring to H.R. 4103, 98th Cong. 2d Sess. (1984)).

94. H.R. 4103, 98th Cong., 2d Sess. (1984). The Senate had passed a comparable bill in the previous session. S. 66, 98th Cong., 1st Sess. (1983). See also Karr, *Cable TV Industry, Cities Compromise on Deregulation Bill*, Wall St. J., June 1, 1984, at 45, col. 3; *NLC Board Approves Cable Compromise*, Nation's Cities Weekly, June 18, 1984, at 1, col. 3; *Cable TV Pact Clears House Panel*, Nation's Cities Weekly, July 2, 1984, at 1, col. 2 (summarizing H.R. 4103's major provisions).

95. For a discussion of the initial positions of the NCL and the NCTA, see *Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the Comm. on Energy and Commerce on H.R. 4103 and H.R. 4229 (Bills to Amend the Communications Act of 1934 to Provide a National Policy Regarding Cable Television) and H.R. 4299 (A Bill to Amend the Communications Act of 1934 to Establish a National Cable Communications Policy Which Guarantees Local Jurisdictional Authority Over Franchises While Encouraging Competition, and For Other Purposes)*, 98th Cong., 1st Sess. (1983).

96. See Trice, *Cable Wars*, CAL. LAW, July 1984, at 54, 55 (stating that the bill "gives primary jurisdiction over cable to the FCC, while recognizing the cities' authority to grant local franchises"); Arthurs, *Rulings Complicate Cable Legal Picture*, Legal Times, Aug. 20, 1984, at 1, col. 4 (the legislative compromise "would have given cities statutory powers to regulate rates"); Crook, *Cable Industry Looking for Some Law and Order*, L.A. Times, June 5, 1984, § 6, at 1, col. 1 (quoting Paul E. Zeltner, member of negotiating team for NLC and the U.S. Conference of Mayors, as saying that the "agreement preserves local authority over cable franchises").

97. See Pols, *Cable Bill Essential This Year—Cities Urged to Push Passage*, Nation's Cities Weekly, Aug. 20, 1984, at 1, col. 2.

98. See Isikoff, *Firms Ask Changes in Cable Bill: Say Legislation Must Reflect FCC, Court Decisions*, Wash. Post, July 18, 1984, at D1, col. 6. See also Nation's Cities Weekly, Aug. 20, 1984, at 6, col. 1 (noting that, without H.R. 4103, the trend in FCC decisions such as *Community Cable* would eventually destroy all local control over the franchising process).

decision eventually precipitated, the legislative process was delayed and the compromise bill was given virtually no chance of success.⁹⁹

V. CONCLUSION

The future impact of *Capital Cities* is as yet uncertain. For now it should be noted as a judicial statement which employs language much broader than the issue addressed. From a factual setting expected by many to be decided on first amendment grounds, the Court abandons its "reasonably ancillary" standard and places local regulation of cable television at the mercy of the FCC.¹⁰⁰ To accomplish this, the Court reaffirms a tenuous basis for FCC jurisdiction¹⁰¹ and rejects a strong twenty-first amendment claim.¹⁰²

While on its face *Capital Cities* reads like a lecture on the concepts of federalism, one might be more disturbed by the decision's implications for separation of powers. Although the legislative basis for FCC authority over cable television has been questioned, the Court proceeds to expand this authority on the basis of *the Commission's* own preemptive intent.¹⁰³ Thus, with no more than copyright legislation to consult as an indication of congressional policy, the Court essentially delegates regulatory authority to the Commission.¹⁰⁴ In the absence of any congressional guidance, this judicial grant of power has been enthusiastically exercised by the FCC as evidenced by *Community Cable*.¹⁰⁵

Capital Cities is an example of broad judicial decisionmaking which ignores current legislative history. Arguably, the Court had waited long enough for Congress to act. However, by expanding the Commission's preemptive authority beyond prior judicial limits and leaving future municipal regulatory power at the discretion of the FCC,¹⁰⁶ the Court greatly enhanced the cable industry's lobbying position. As a result, the product of four years of legislative negotiations—a compromise deregulation bill—was jeopardized.

As a practical matter, *Capital Cities* represents a victory for the FCC

99. See Goodale & Bruce, *supra* note 3, at 4, col. 3 (suggesting that *Capital Cities* may have "sounded the death knell for the compromise bill"); Arthurs, *supra* note 96, at 4, col. 3. ("The recent Supreme Court and FCC rulings have made that compromise less attractive to cable operators, . . . and for the moment the deal is off.")

100. See *supra* text accompanying notes 58-62.

101. See *supra* note 85.

102. See *supra* notes 51-57 and accompanying text.

103. See *supra* text accompanying note 61.

104. For an excellent analysis of such "judicial delegation" using FCC regulation of cable television as an illustration, see Mallamud, *Courts, Statutes and Administrative Agency Jurisdiction: A Consideration of Limits on Judicial Creativity*, 35 S.C.L. Rev. 191 (1984).

105. See *supra* text accompanying notes 84-93.

106. See *supra* text accompanying notes 80-82.

and the cable industry, which are left in a better position to continue their partnership toward the complete deregulation of cable television. In addition, the decision constitutes a judicial "frustration of powers," having an obvious impact upon both regulatory and legislative posture.

As this comment was completed, Congress closed its second session of 1984 with the unexpected passage of a cable deregulation bill thought to be in its final hour.¹⁰⁷ This action does not, however, alter the conclusion that *Capital Cities* constitutes a judicial "frustration of powers." In fact, the successful bill reflects recent House amendments which place further restrictions on local power.¹⁰⁸ Thus, to the discontent of supporters of municipal authority, Congress has to a certain extent incorporated the Court's broad statement into law.

Admittedly, however, the legislation does limit the otherwise broad scope of *Capital Cities*. Senate debate included specific reference to the decision¹⁰⁹ and made it clear that a particular provision of the bill preserves the validity of state and local obscenity laws:

Section 638 makes it clear that nothing in this measure is to be interpreted as granting exclusive authority for regulating cable television content to the FCC. Rather, States and localities retain any authority which they would have in this area if the Communications Act of 1934 had never been enacted.¹¹⁰

Only time will reveal the extent to which this long-awaited cable legislation limits *Capital Cities* and preserves a legitimate role for municipality authority.

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107. Cable Franchise Policy and Communications Act of 1984, S. 66, 98th Cong., 2d Sess., 130 CONG. REC. 14,289-97 (1984); Telephone interview with Ruth Minetto, Cable Television Information Center, Alexandria, Virginia (Oct. 18, 1984). See also *Congress Limits Local Control of Cable TV*, N.Y. Times, Oct. 12, 1984, at A15, col. 1; *Bill on Cable TV Policy is Sent to White House*, Richmond Times-Dispatch, Oct. 12, 1984, at A6, col. 1.

108. In particular, an amendment to H.R. 4103 reduced the "grandfathering" period for local rate regulation from four to two years following the effective date of the legislation. 130 CONG. REC. S14286 (daily ed. Oct. 11, 1984). Also, franchise renewal was simplified for cable operators by an amendment which placed a heavier burden on local authorities to show that a franchise should not be renewed prior to commencement of the administrative proceedings. *Id.*

109. 130 CONG. REC. S14289 (daily ed. Oct. 11, 1984) (statement of Sen. Tribble).

110. *Id.* (statement of Sen. Goldwater); H.R. 4103, 98th Cong., 2d Sess. § 638 (1984).