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THE POWER OF THE FCC TO REGULATE CABLE PAY-TV: JURISDICTIONAL AND CONSTITUTIONAL LIMITATIONS

BY MARK D. HOFFER*

I. THE BACKGROUND OF THE PROBLEM

The Federal Communications Commission (FCC) was created by the Communications Act of 1934,[1] a broadly based statute superseding earlier, largely ineffective attempts to regulate radio.[2] Under the terms of the Act, the FCC has the power to regulate "broadcast services,"[3] which in the 1930's principally included radio. Broadcast television, when it arose in the 1940's, was an obvious object of the Commission's power.[4] More recently,

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[1] 47 U.S.C. §§ 151-609 (1970).

[2] The Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed by the Radio Act of 1927, ch. 169, § 39, 44 Stat. 1174), vested authority over broadcast frequencies in the hands of the Secretary of Commerce. However, this authority was substantially weakened by subsequent judicial decisions. In Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923), *appeal dismissed per stipulation*, 266 U.S. 636 (1924), the court held that the Secretary lacked discretion to refuse to renew a broadcast license on the grounds of interference. In United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926), a district court held that licencees were not bound by nonstatutory regulations and could operate on any frequency despite the Secretary's order to the contrary. Following those decisions, the Secretary abandoned all attempts to regulate, and the airspace became jammed with self-styled radio operators who cared little about interference or national security needs. Justice Frankfurter summarized the chaotic situation when he remarked: "With everybody on the air, nobody could be heard." National Broadcasting Co. v. United States, 319 U.S. 190, 212 (1943). Congress thereafter decided upon a permanent regulatory agency with the power to set conditions precedent for broadcasting, and to license only those operators who met the requirements and could be accomodated within reasonable limits of interference. The first was the Federal Radio Commission, created by the Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed by the Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1102). It was succeeded 7 years later by the present Federal Communications Commission. On the early history of broadcast regulation, see National Broadcasting Co. v. United States, *supra* at 210-13; W. EMERY, BROADCASTING AND GOVERNMENT: RESPONSIBILITIES AND REGULATIONS 10-25 (1961).

[3] *See* subchapter III of the Act, 47 U.S.C. §§ 301-31 (1970).

[4] Broadcasting is defined by the statute as: "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1970). By way of clarification, "radio communications" are further defined as:

> the transmission by radio of writing, signs, signals, pictures, and sounds of

the Commission has sought to exercise power over other new forms of communication as they have become available.

The first of these was community antenna television, often known as cable TV (CATV). Starting in the early 1950's, CATV provided, for a fee, better reception of radio and television in areas where the broadcast signal was weak.[5] The FCC began regulating cable TV in 1965,[6] largely for fear that its amplification of distant signals would undercut local broadcasters.[7] In *United*

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all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission.

Id. § 153(b). Television is clearly broadcasting because it relies on radio waves, specifically the VHF portion of the electromagnetic wave spectrum—54-88 MHz and 174-220 MHz—which was allocated to broadcast television in 1951. Sixth Report and Order, 41 F.C.C. 148 (1951).

[5] *See* S. REP. No. 923, 86th Cong., 1st Sess. 3-4 (1959). Cable TV captures weak broadcast signals through a master antenna, amplifies them, and distributes them to individual homes over a network of coaxial wire. The technology of cable TV is more fully defined in ON THE CABLE/THE TELEVISION OF ABUNDANCE 11-23 (Sloan Comm'n 1971) [hereinafter cited as SLOAN REPORT].

[6] Direct regulation of cable TV began with the First Report and Order on Microwave Served CATV, 38 F.C.C. 683, *modified*, Memorandum Opinion and Order, 1 F.C.C.2d 524 (1965), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), *approved*, United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972). A form of indirect regulation had begun two years earlier, with the FCC controlling cable TV through microwave carriers which served it. Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), *aff'd sub nom.* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963) (denying the use of a microwave carrier to a cable TV system which allegedly threatened local broadcasters). The nature and use of microwave carriers is explained in note 7 *infra*.

[7] As an amplifying and distributing device, cable TV proved a boon to local broadcasters. It provided a means whereby their audiences could be extended and maximized beyond the range of the local broadcaster's transmitter. *See, e.g., VHF Booster and Community Antenna Legislation: Hearings before the Senate Comm. on Interstate and Foreign Commerce, Pts. I & II*, 86 Cong., 1st Sess., at 503 (1959) (statement of Harold Fellows, Pres., National Ass'n of Broadcasters) [hereinafter cited as *1959 CATV Hearings*]. This satisfaction, however, was to be short lived. Cable TV gradually expanded its function as a "master antenna" for local stations to include importing more distant TV signals for the added enjoyment of its subscribers. This was done through the use of microwave relays, high frequency transmission facilities used to relay messages from point to point via common carrier. Local broadcasters began to complain that CATV with unchecked powers of importation would hamper their financial stability (by fractionalizing audiences and revenues, and by program duplication). *See, e.g., 1959 CATV Hearings*, at 380-86 (statement of Frank Reardon, KGEZ-TV, Kalispell, Mont.), 501-18 (statement of Harold Fellows, Pres., National Ass'n of Broadcasters); *Regulation of CATV: Hearings before the Communications and Power Subcomm. of the House Comm. on Interstate and Foreign Commerce on H.R. 7715*, 89th Cong., 1st Sess. at 317-53 (1965) (statement of Vincent T. Wasilewski, Pres., National Ass'n of Broadcasters), 355-78 (statement of Lester W. Lindow, Executive Director, Maximum Service Telecasters, Inc.) [hereinafter cited as *1965*

States v. Southwestern Cable Co.[8] and again in *United States v. Midwest Video Corp.*,[9] the Supreme Court sustained the FCC's exercise of jurisdiction over cable TV.

The next development in the 1950's was broadcast pay television, also known as subscription television.[10] Subscription TV used conventional broadcast signals to provide a wider range of programs than network television.[11] The FCC began regulating

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CATV Hearings], *Regulation of CATV: Hearings before the Communications and Power Subcomm. of the House Comm. on Interstate and Foreign Commerce on H.R. 12914, H.R. 13286, and H.R. 14201*, 89th Cong., 2d Sess. at 352-73 (1966) (statement of Vincent T. Wasilewski, Pres., National Ass'n of Broadcasters), 373-425 (statement of Lester W. Lindow, Executive Director, Maximum Service Telecasters, Inc.); *Regulation of CATV: Hearings before the Communications and Power Subcomm. of the House Comm. on Interstate and Foreign Commerce on H.R. 10268, H.R. 10510, H. Con. Res. 87, and H. Con. Res. 205*, 91st Cong., 1st Sess. at 287-313 (1969) (statement of Douglas A. Anello, General Counsel, National Ass'n of Broadcasters) [hereinafter cited as *1969 CATV Hearings*]; First Report and Order on Microwave Served CATV, 38 F.C.C. 683, 688-91, *modified*, Memorandum Opinion & Order, 1 F.C.C.2d 524 (1965), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), *approved*, United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17; CATV and TV Repeater Services, 26 F.C.C. 403, 413-14 (1959).

[8] 392 U.S. 157 (1968), *rev'g* Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967).

[9] 406 U.S. 649 (1972), *rev'g* Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971).

[10] In 1955, two pay-TV proponents, Zenith Radio Corp. and Teco, Inc., convinced the FCC to issue a Notice of Proposed Rulemaking, 20 Fed. Reg. 988 (1955), inviting comments as to whether authorization of subscription television (STV) would be in the public interest. Because of Congressional pressure, the first STV station was not authorized until 1961. Hartford Phonevision Co., 30 F.C.C. 301 (1961), *aff'd sub nom.* Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir.), *cert. denied*, 371 U.S. 816 (1962). A complete review of interim developments is provided in National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 195-97 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

[11] Contract rights to first run movies, athletic events, and cultural presentations are purchased by the entrepreneur. These are broadcast on a conventional TV channel, using conventional TV equipment, with the exception that the aural and visual signals are purposely distorted. In order to rectify the image and receive these programs (which are not available on network TV), subscribers lease special decoding devices at established rates. *See* R. BLOCK, OVER THE AIR PAY-TV: FOR WHOM WILL IT PAY? 6-8 (1974); R. ADLER & S. BAER, THE ELECTRONIC BOX OFFICE: HUMANITIES AND ARTS ON THE CABLE 42 (1974). Following FCC authorization of STV in 1961, *supra* note 10, three systems became operational in Hartford, Toronto, and Los Angeles/San Francisco. All three failed due to lack of viewer support. *See* Blank, *The Quest for Quantity and Diversity in Television Programming*, 56 AM. ECON. REV. 448, 451-54 (1966). General interest in STV has declined, although additional authorizations have been sought and granted. Blonder-Tongue Broadcasting Corp., 25 P. & F. RADIO REG. 2d 104 (1972); B & F Broadcasting, Inc., 28 P. & F. RADIO REG. 2d 414 (1973). *See also* Paul Kagan Pay-TV Newsletter, June 11, 1974 at 2 (describing plans for financing new STV systems).

subscription TV in 1968, under pressure this time from theater owners who feared loss of their audiences.[12] This jurisdiction was upheld in *National Association of Theatre Owners v. FCC*.[13]

The most recent development is cablecast pay television, or cable *pay*-TV. Introduced in 1972,[14] cable pay-TV provides the same service as subscription TV—programs for a fee—but uses cable rather than broadcast transmission.[15] The FCC had anticipated cable pay-TV by 1970, and has imposed regulation since that time.[16] Cable pay-TV is of special concern to the national broadcast networks. Unlike cable television proper, it does far more than merely amplify weak signals. Unlike subscription TV, it does not rely on conventional broadcast TV equipment, and is therefore not affected by the limited capacity of the air to carry broadcasts without minimal interference.[17]

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[12] Fourth Report and Order, 15 F.C.C.2d 466 (1968), *aff'd sub nom.* National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). Literature on the regulation of subscription television includes: Brown, *The Subscription Television Controversy: A Continuing Symptom of Federal Communications Commission Ills*, 24 FED. COMM. B.J. 259 (1971); Comment, *Subscription Television, the FCC, and the Courts*, 15 ST. LOUIS L.J. 283 (1970).

[13] 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

[14] Cable pay-TV was first introduced at the 1972 National Cable Television Association Convention. Broadcasting, May 22, 1972, at 21-22. The first systems went into commercial operation in early 1973. Paul Kagan Pay-TV Newsletter, Feb. 8, 1973, at 1.

[15] An agreement is reached between the pay-TV entrepreneur and a cable television operator for the use of vacant channels on the latter's system. In exchange for a stated percentage of future gross revenue, the entrepreneur is granted the right to transmit material which he has personally selected, purchased, and edited. Subscribers to the cable pay-TV are drawn from the pool of individuals already connected to the "parent" cable television system. They pay fees on a per-program or per-channel basis and are also leased special decoding devices to receive the transmission clearly. The technology of cable pay-TV is set out in detail in R. ADLER & S. BAER, *supra* note 11, at 30-46; Pay Cable: An Industry Overview 2-10 (National Cable Television Ass'n 1974). A sample channel lease agreement can be found in A.B.A./A.L.I., LEGAL ASPECTS OF THE REGULATION AND OPERATION OF PAY TELEVISION SYSTEMS AND LEASED CABLE TELEVISION CHANNELS 369 (1974).

Cable pay-TV has grown into an industry which encompasses 43 cable television systems, 60,000 households, and 11 states. NCTA, Subscription Cablecasting Fact Sheet (Apr. 1974) at 1 [hereinafter cited as Fact Sheet].

[16] Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970). The literature on regulation of cable pay-TV includes Pearson, *Cable: The Thread by Which Television Competition Hangs*, 27 RUTGERS L. REV. 800, 818-22 (1974); Comment, *Regulation of Pay-Cable and Closed Circuit Movies: No Room in the Wasteland*, 40 U. CHI. L. REV. 600 (1973).

[17] Television has been relegated to the VHF portion of the electromagnetic spectrum, *supra* note 4, which allows for 12 clear channels, given a stipulated bandwidth of 6 MHz each. No one locality has all 12 channels in use because of interference problems. New York City and Los Angeles are the national leaders, each having 6 television channels by

The greater flexibility of cable pay-TV (it can deliver almost any program the public will pay to see and hear) virtually assures its power to compete effectively with other forms of communication for audiences and profits. The networks have argued that cable pay-TV will eventually divert not only their viewers and advertising dollars, but their programming as well. They have argued cable pay-TV will be able in the end to "siphon off" (*i.e.*, bid away) the most popular shows currently shown on network television.[18] The FCC responded to these complaints by promulgating a set of regulations—known as "anti-siphoning" rules—restricting the program content of cable pay-TV.[19]

This article argues first that under the Communications Act of 1934 the FCC lacks power over cable pay-TV, and second that, were such a power granted by Congress, the application of the "anti-siphoning" rules to cable pay-TV violates the first amendment.

FCC allocation. 47 C.F.R. § 73.606 (1975). The FCC has attempted to alleviate the overcrowding of VHF by opening up the more numerous UHF frequencies for television use. However, because of technical drawbacks, financial woes, and administrative bungling, UHF television is still more myth than reality. *See* Webbink, *The Impact of UHF Promotion: The All-Channel Television Receiver Law*, 34 L. & CONTEMP. PROB. 535 (1969).

[18] Broadcasters estimate that cable pay-TV could, if left unchecked, derive sufficient bargaining power to force exclusive rights to new motion pictures, merely by attracting 2 percent of the current TV households in the United States. N.A.B. Fact Sheet: Economic Effects of Siphoning 6 (1974). *But see* R. NOLL, M. PECK, & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 297 (1973). More detailed analysis on the ability of cable pay-TV to outbid network TV is found in First Report and Order, 52 F.C.C.2d 1, 9-10, *reconsideration denied*, Memorandum Opinion and Order, 54 F.C.C.2d 797 (1975). Similar rhetoric was used by the television networks to oppose broadcast pay-TV when it first emerged. *See* Fourth Report and Order, 15 F.C.C.2d 466, 500 (1968).

[19] The rules were adopted in Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970), and codified in 47 C.F.R. § 76.225 (1975). They were patterned after similar rules which had been previously adopted for subscription television. Fourth Report and Order, 15 F.C.C.2d 466 (1968), as codified in 47 C.F.R. § 73.643 (1975).

The FCC has recently reviewed the anti-siphoning rules for both broadcast and cable pay-TV and found them basically satisfactory, subject to some changes in detail. *See* First Report and Order, 52 F.C.C.2d 1, *reconsideration denied*, Memorandum Opinion and Order, 54 F.C.C.2d 797 (1975) (rules on movies, sports, and series amended; jurisdiction reaffirmed); Second Report and Order, 40 Fed. Reg. 52731 (1975) (series rule deleted). The thrust of this article is limited, as the text indicates, to anti-siphoning rules as they relate to cable pay-TV.

II. THE POWER OF THE FCC OVER CABLE PAY-TV UNDER THE COMMUNICATIONS ACT OF 1934

A. *The Text of the Act*

In support of its rules governing cable pay-TV, the FCC has claimed a general power over all broadcast and wire communications under the 1934 Act. The Supreme Court, in dictum, has acquiesced in this view. But analysis of the Act itself reveals no such power.

The provision on which the FCC relies for its assertion of broad power is section 2(a) of the Act:

> (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.[20]

But the words: "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio," do not constitute a grant of power. Congress could easily have written: "The power of the Commission shall extend . . .," but it did not. Section 2(a) does not establish the extent of the FCC's power, but describes an area within which that power shall operate; it does nothing more than allude to other provisions in the Act, which are themselves grants of power.[21]

If we read section 2(a) as a grant of power in itself, that power must apply to all *persons* "engaged in such communication" as well as to all communication. And if that power is held by the FCC independently of other provisions of the Act, it is hard to see where its boundaries are. Would it extend to the homes or families of the affected "persons"? The more difficult the answer to

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[20] 47 U.S.C. § 152(a) (1970).

[21] *See* First Report and Order on Microwave Served CATV, 38 F.C.C. 683, 753 (Loevinger, Comm'r, dissenting), *modified*, Memorandum Opinion and Order, 1 F.C.C.2d 524 (1965), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), *approved*, United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972).

such questions, the more likely that section 2(a) describes persons subject to specific powers granted *elsewhere* in the Act.

Other provisions of the 1934 Act, taken individually and together, confirm that section 2(a) is not a grant of full power to the FCC. Section 4 contains an enumeration of the general powers of the Commission;[22] subchapter II grants to the Commission specific powers over common carriers;[23] subchapter III contains an entire section enumerating the Commission's specific powers over radio communications.[24] If section 2(a) were a grant of power over all wire and broadcast communications, these enumerations of specific (and more limited) powers would be surplusage. The purpose of section 2(a), placed near the beginning of the Act and couched in general terms, is to establish a framework for the Act and to ground it squarely within the power of Congress to regulate commerce.[25] To see in such broad language a specific grant of power would be akin to deriving a "general welfare" power from the preamble of the Constitution.

If section 2(a) is not a grant of power, the Commission's claim of jurisdiction over cable pay-TV must rest on some other provision of the Act, and no other provision supports such a claim. The powers granted to the Commission are distributed over two subchapters, one relating to "common carriers" and the other to "broadcast communications." Cable pay-TV falls into neither category.[26] The specific powers in section 303 of the Act,

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[22] 47 U.S.C. § 154 (1970).

[23] *Id.* §§ 201-23.

[24] *Id.* §§ 301-30.

[25] Indeed, the Act states that

> nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio . . . .

Id. § 152(b). *See also* S. REP. No. 781, 73d Cong., 2d Sess. 3 (1934) (stating that the purpose of the section was, among others, to delineate federal and state jurisdiction over communications).

[26] Broadcasting is defined in note 4 *supra*. Cable pay-TV is clearly not broadcasting because it does not rely on transmission via radio waves. *See* note 15 *supra*.

Common carriers are defined as:

> any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . but a person engaged in broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(h) (1970). This section sheds little light on the nature of common carriers and recourse must be had to additional FCC materials. These indicate that an archetypal

governing broadcast communications,[27] while they might fairly be construed to extend beyond the narrowest definition of "broadcast" communications to embrace various auxiliary services, do not reach so far as to cover a mode of communication entirely different in nature from broadcast television.

In *Southwestern Cable*,[28] the Supreme Court rejected this line of argument.

> We cannot construe the Act so restrictively. Nothing in the language of [section 2(a)], in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions.[29]

The Court relied for its position almost entirely on a few brief excerpts, taken largely out of context, from the legislative history of the 1934 Act. One particular excerpt was invoked by the Court to establish that the Commission was vested with "broad authority" over communications.[30] However, that two-word quotation is from the President's message to Congress in support of the bill.[31] Presidents do not always get what they ask for, and their pronouncements are not the will of Congress. Further, the sentence in which the words "broad authority" occurs is the following: "In the field of communications, however, there is no single government agency charged with broad authority."[32] It is hard to infer a grant of power by Congress from this sentence. Finally, Roosevelt's message specifically proposed that the new Commission be vested only with such powers as were already distributed among existing agencies.[33] The history of the Act in fact cuts rather strongly *against* the position taken by the Court.

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common carrier must possess four characteristics: (1) Interstate operations; (2) the offering of a "communications service"; (3) to the public; (4) "for hire." FCC, Memorandum on Jurisdiction, reprinted in *1965 CATV Hearings, supra* note 7, at 104, ¶ 15. Cable pay-TV is not a "communications service"—a mere vehicle over which messages selected by the consumer may be carried (such as telephone or telegraph service). Cable pay-TV messages (*i.e.*, actual cable pay-TV programming), though responsive to consumer tastes, are under the control of the entrepreneur.

[27] 47 U.S.C. § 303 (1970).

[28] United States v. Southwestern Cable Co., 392 U.S. 157 (1968), *rev'g* Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967).

[29] *Id.* at 172.

[30] H.R. REP. No. 1850, 73d Cong., 2d Sess. 1 (1934), *cited id.* at 168.

[31] The text of the address appeared originally in 78 Cong. Rec. 3181 (1934).

[32] *Id.*

[33] The address continued by stating:

The committee reports from both Houses indicate that section 2 of the Act is designed to settle the respective spheres of power between the Federal Government and the states, not to make a specific grant of power to the FCC;[34] and indicate that the Act as a whole grants no new powers to the Federal Government, but only consolidates existing jurisdiction within a single new agency.[35] In any event, the Court's endorsement in *Southwestern Cable* of a broad FCC power over wire communications was entirely by way of dictum, as the majority opinion was quick to point out:

> There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. . . . We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.[36]

The holding itself in *Southwestern Cable*—that a specific exercise of power over CATV by the FCC was legitimate[37]—was based entirely on a theory of "ancillary jurisdiction."[38] In a sole

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> I recommend that the Congress create a new agency to be known as the "Federal Communications Commission," such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission—. . . .
>
> It is my thought that a new commission such as I suggest might well be organized this year by transferring the present authority for the control of communications of the Radio Commission and the Interstate Commerce Commission.

Id. These remarks have always been construed as advocating an FCC geared solely to the concerns of its predecessor agencies. *See, e.g., Hearings before the Senate Comm. on Interstate Commerce on S. 2910*, 73d Cong., 2d Sess. at 48 (1934) (testimony of Henry A. Bellows, National Ass'n of Broadcasters), 106 (testimony of David Sarnoff, R.C.A.); *Hearings before the House Comm. on Interstate Commerce on H.R. 8301*, 73d Cong., 2d Sess. at 105 (1934) (testimony of Henry A. Bellows, National Ass'n of Broadcasters).

[34] *See, e.g.*, S. REP. No. 781, 73d Cong., 2d Sess. 3 (1934).

[35] *See, e.g.*, H.R. REP. No. 1850, 73d Cong., 2d Sess. 3 (1934); S. REP. No. 781, 73d Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10312-13 (1934) (statement of Rep. S. Rayburn, Chmn., House Comm. on Interstate Commerce).

[36] 392 U.S. at 178.

[37] In response to the fears of broadcasters over signal importation by cable television (*see* note 7 *supra*), the FCC imposed rules which prohibited CATV from importing any distant signal into the nation's top 100 markets, absent a showing of public interest. 47 C.F.R. § 74.1107(a) (1972). The rules have since been modified by the Cable Television Report and Order, 36 F.C.C.2d 143, *reconsideration denied*, 36 F.C.C.2d 326 (1972). *See* 47 C.F.R. §§ 76.61, 76.63 (1975).

[38] 392 U.S. at 178. Ancillary jurisdiction is discussed at text accompanying notes 44-50 *infra*.

concurrence, Mr. Justice White disagreed with the reading of section 2(a) offered by the majority, and took a position close to the one advanced in this article:

> Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), says that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . . ." I am inclined to believe that this section means that the Commission must generally base jurisdiction on other provisions of the Act.[39]

In *United States v. Midwest Video Corp.*,[40] decided three years after *Southwestern Cable*, the Court again recognized a broad grant of power in section 2(a) of the Act, but erroneously characterized the dictum of *Southwestern Cable* as a holding:

> We also held that § 2(a) is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions . . . apply.[41]

Once again, however, the Court relied on the theory of "ancillary jurisdiction" to decide the case.[42]

After *Midwest Video*, the state of the case law on FCC jurisdiction is far from clear. Only four Justices, including Mr. Justice White, joined in the plurality opinion in *Midwest*; Mr. Chief Justice Burger concurred in the result, but questioned the broad jurisdiction granted to the FCC;[43] and four Justices dissented. Thus, despite the assertions found in these cases, it cannot be said that the Supreme Court has squarely held section 2(a) of the Act to be a grant of power broad enough to include jurisdiction over cable pay-TV. Indeed, if the power of the FCC were as great as is suggested in dictum, the theory of "ancillary jurisdiction," on which the Court actually relied in *Southwestern Cable* and *Midwest Video*, would be unnecessary.

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[39] 392 U.S. at 181.

[40] 406 U.S. 649 (1972), *rev'g* Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971).

[41] *Id.* at 660.

[42] *Id.* at 662-63.

[43] Chief Justice Burger remarked:

> Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts.

Id. at 676.

B. *Ancillary Jurisdiction*

Under the doctrine of "ancillary jurisdiction," the FCC may regulate any form of communication which is "reasonably related" to broadcasting, since power over "broadcast communications" is specifically granted in section 303 of the Act.[44] The Commission has justified its proposed regulation of cable pay-TV by alleging a threat of "siphoning" and attendant injury to regular broadcast television.[45] Although the Supreme Court has twice upheld FCC regulation of cable television proper (CATV) under the doctrine of "ancillarity,"[46] it has yet to speak on the matter of cable pay-TV.

"Ancillarity" is a compelling argument in favor of the Commission's power over CATV; were it rejected, the FCC's statutory jurisdiction over "broadcast" communication might be largely frustrated. But the argument has little force with respect to cable pay-TV. The jurisdiction over CATV upheld in *Southwestern Cable* and *Midwest Video* was over a medium which is strictly auxiliary to broadcast television.[47] As used in CATV, the cable is in essence a long antenna provided to viewers who otherwise receive a weak signal from the broadcast networks.[48] Since the distribution of broadcast signals is clearly the subject of FCC control, the Court's decisions are eminently reasonable.[49] But in

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[44] 47 U.S.C. § 303 (1970).

[45] *See* First Report and Order, 52 F.C.C.2d 1, 44-45, *reconsideration denied*, Memorandum Opinion and Order, 54 F.C.C.2d 797 (1975).

[46] *See* United States v. Midwest Video Corp., 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

[47] The explicit concern of *Southwestern Cable* is described in note 37 *supra*. *Midwest Video* dealt with proposed rules that would require cable television systems to cablecast programs of local interest. *See* Second Report and Order on Microwave Served CATV, 2 F.C.C.2d 725, *stay denied*, 3 F.C.C.2d 816 (1966), *reconsideration denied*, 6 F.C.C.2d 309 (1967), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), *codified as* 47 C.F.R. § 76.201 (1973). The rules have since been rescinded. Report and Order, 49 F.C.C.2d 1090 (1974).

[48] *See* note 5 *supra*.

[49] Put another way, by carrying TV signals along the cable, CATV indirectly gains through the exploitation of a resource that is subject to FCC control. As a trade-off, the courts have expressly imposed a degree of federal regulation:

> CATV systems receive the signals of television broadcast stations, amplify them, transmit them by microwave or cable, and ultimately distribute them.

United States v. Southwestern Cable Co., 392 U.S. 157, 161 (1968).

> The use of broadcast signals has enabled CATV to finance the construction of high capacity cable facilities.

United States v. Midwest Video Corp., 406 U.S. 649, 656 (1972).

cable pay-TV the cable is used as a self-contained form of communication; it is a channel for selling entertainment entirely separate from broadcast television.[50] An entrepreneur could set up a cable and sell anything from recorded French lessons to reruns of children's shows without encroaching in the slightest on the air waves. This activity would be no more "auxiliary" to broadcast television than that of a mail-order book company. It is true that cable pay-TV can compete with broadcast television for audiences and ideas. But so can the stage, live sporting events, or even phonograph records. The point is too broad to serve as an argument for FCC jurisdiction.[51]

C. *Plenary Rulemaking Powers*

A third theory of jurisdiction over cable pay-TV advanced by the FCC rests on the broad rulemaking powers granted in the Communications Act. The most sweeping of these, section 4(i),[52] confers on the Commission power to make rules "necessary" to the exercise of its power over communications.[53] The Commission

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> Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. *The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.*

Id. at 676 (Burger, C.J., concurring) (emphasis supplied).

[50] *See* note 15 *supra*.

[51] The FCC has, in any event, a general duty to promote competition within the broadcast industry, and not to engage in economic protectionism. *See, e.g.*, Communications Act of 1934, 47 U.S.C. §§ 301, 304, 307(b), 307(d), 309(h), 312 (1970); United States v. Radio Corp. of America, Inc., 358 U.S. 346, 351 (1958); National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943); FCC v. Sanders Bros. Radio Station, 340 U.S. 470, 474-75 (1940); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, 362 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963); Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230, 235 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952); Mansfield Journal Co. v. FCC, 180 F.2d 28, 33 (D.C. Cir. 1950); Hyde, *The Role of Competition & Monopoly in the Communications Industry*, 13 ANTITRUST BULL. 899, 900 (1968); Johnson & Hoak, *Media Concentration: Some Observations on the United States' Experience*, 56 IA. L. REV. 267, 290-91 (1970). *Cf.* Mackay Radio & Tel. Co. v. FCC, 97 F.2d 641, 643 (1938).

[52] 47 U.S.C. § 154(i) (1970).

[53] Specifically, the section states that:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

Id. A similar provision is:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall . . . (r) [m]ake such rules and regulations and prescribe such restrictions and con-

claims the power under these provisions over almost any person or organization identified as a threat to a statutory policy,[54] and justifies applying anti-siphoning rules to cable pay-TV by asserting a policy which favors maintenance of flourishing and diverse broadcast television.[55]

Except in its attempt to rely on more specific support in the rulemaking provisions of the Act itself, this argument is virtually the same as the one advanced for "ancillary jurisdiction," and fails in the same manner when applied to cable pay-TV. The rulemaking powers granted to the Commission are couched in narrow terms and are in support of other powers;[56] they cannot in themselves be read as a source of sweeping control over all communications.[57]

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ditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . .

Id. § 303(r).

[54] The expression of this theory itself can be seen in the regulation of cable television proper. *See, e.g.*, Second Report and Order on Microwave Served CATV, 2 F.C.C.2d 725, 727-29, 734, 794-97, *stay denied*, 3 F.C.C.2d 816 (1966), *reconsideration denied*, 6 F.C.C.2d 309 (1967), *aff'd sub nom.* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). *But see* CATV and TV Repeater Services, 26 F.C.C. 403, 429 (1959).

The attitude that this theory of jurisdiction extends to any and all persons or organizations is evident in Second Report and Order, *supra* at 730.

[55] The FCC has a major responsibility under subchapter III of the Act. It is "the obligation to provide a widely dispersed radio and television service" with a "fair, efficient, and equitable distribution" of service among "the several states and communities." S. REP. No. 923, 86th Cong., 1st Sess. 5-6 (1959); 47 U.S.C. § 307(b) (1970). Because of the threat of siphoning, cable pay-TV is seen as undermining the continued vitality of broadcast TV service, hence the Commission's overall responsibility under subchapter III of the Act. *See* First Report and Order, 52 F.C.C.2d 1, 44-45, *reconsideration denied*, Memorandum Opinion and Order, 54 F.C.C.2d 797 (1975) (stressing the "continuing economic vitality of free television," enhancing "the integrity of broadcast signals" and the obligation to "make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide wire and radio communications service" (citations omitted)).

[56] Both rulemaking clauses use such phraseology as "not inconsistent with this chapter"; "not inconsistent with law"; "as may be necessary in execution of the Commission's functions"; and "as may be necessary to carry out the provisions of this chapter." Such language, especially the last two excerpts, mark the rulemaking grants as mere technical tools to enforce jurisdiction vested elsewhere in the statute. *See* 47 U.S.C. §§ 154(i), 303(r) (1970).

[57] The sweep of the rulemaking clauses, if construed to be jurisdictional grants, is virtually boundless:

> The principal argument urged in support of the Commission's jurisdiction [over such cable television companies] is that it is desirable for the FCC to have such jurisdiction in order to attain the general objectives of the Communications Act. However, if this reasoning is sound, then the jurisdiction

III. CABLE PAY-TV AND THE FIRST AMENDMENT

It is settled law that the protections of freedom of speech and of the press in the first amendment[58] extend to radio and television.[59] Anti-siphoning regulations are clearly abridgements of the broadcasters' power to speak unrestrainedly.[60] But because of the special nature of the broadcast medium, the Supreme Court has also countenanced certain constraints on the form and content of broadcast communications as necessary incidents of FCC regulation. The interest of the public in efficient and varied use of the air waves has been held to justify some limitation on the networks' power to broadcast whatever they want. In this area the Court has engaged in a classical balancing, "a candid and informed weighing of competing interests."[61]

> of the Commission is literally unlimited. There is scarcely any aspect of organized social living that is not in some way related to the complex ramifications of the communications system . . . . Such a vague and broad reasoning simply will not sustain jurisdiction as to activities not plainly within more specific statutory language.

1965 CATV Hearings, supra note 7, at 36 (statement of L. Loevinger, FCC Commissioner).

[58] The first amendment to the Constitution reads in appropriate part that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

[59] Section 326 of the Communications Act specifically enjoins the FCC from engaging in censorship. 47 U.S.C. § 326 (1970). Appellate courts have also repeatedly stressed that the guarantees of the first amendment are as applicable to radio and television as they are to any other mode of expression. *See, e.g.*, Superior Films, Inc. v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring) ("the First Amendment draws no distinction between the various methods of communicating ideas."); Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 895 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971) ("no rational distinction can be made between radio and television on the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment."); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (first amendment rights apply to any "significant medium for the communication of ideas."); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."). However, the reach of those guarantees may well differ between the various media. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952); Kunz v. New York, 340 U.S. 290, 307 (1951) (Jackson, J., dissenting); Kovacs v. Cooper, 336 U.S. 77, 79 (1949) (Jackson, J., concurring).

[60] *See* 47 C.F.R. § 76.225 (1975).

[61] Dennis v. United States, 341 U.S. 494, 524-25 (Frankfurter, J., concurring), *rehearing denied*, 342 U.S. 842 (1951), *rehearing denied*, 355 U.S. 936 (1958). The nature of the balancing test is defined, and a list of significant opinions included in T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 48-58 (1967). In the telecommunications field, the balancing test is exemplified by three recent decisions. In Red Lion

Under the established law of the first amendment, both within and without the area of communications, the FCC's anti-siphoning rules cannot be applied to cable pay-TV. The interests entering into the "balance" are entirely different from those relating to broadcast or cablecast network television, and the established first amendment "balancing" yields a different result.

A. *Preservation of a Scarce Resource*

The most important element entering into the balance in the case of conventional broadcast is "spectrum scarcity."[62] If the "ether" or channel airspace used by radio and television is indeed a precious and limited natural resource,[63] the allocation of this scarce resource to broadcasters can plausibly be accompanied by such regulation as the public interest demands.[64] In such situations, the regulation of speech may be necessary to preserve the possibility of any speech at all. If four tried to speak at once in a

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Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Court upheld the Commission's fairness doctrine rules against a first amendment challenge. While conceding that the broadcast licensee has the private right to speak as he chooses under the constitutional mandate (*id.* at 389-90), the majority nonetheless concluded that the public's right to hear a full panoply of political commentary was stronger. "It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

In Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), the Court rejected the contention that public groups are guaranteed some form of access to radio and television. A test of balancing was invoked (*id.* at 102), but the majority concluded that the first amendment prevailed over the need for such a guarantee. *Id.* at 120-21.

Finally, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court upheld the right of a broadcasting company to telecast a rape victim's name, obtained from records open to public inspection. The Court concluded that "political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish" (*id.* at 496), and that the material in contention "contains none of the indicia of those limited categories of expression . . . of such slight social value . . . that any benefit to be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 495.

[62] *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943):

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio is inherently not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.

Id. at 226.

[63] *See* note 17 *supra*.

[64] *See, e.g.*, Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 638 (1965); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 663 (1970); National Broadcasting Co. v. United States, 319 U.S. 190, 215-16 (1943); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940).

town square which could only hold three, no one could be heard at all unless the town moved in to prevent a brawl. An extension of this principle is the Commission's "Fairness" doctrine, the requirement that interested parties be invited to answer the networks' contentions on certain matters,[65] which the Supreme Court upheld in *Red Lion Broadcasting Co. v. FCC*[66] against a first amendment challenge. The Court squarely placed the public's access to a full range of views above the broadcaster's unfettered right to speak. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[67]

The "scarce resource" analysis does not support the application of anti-siphoning rules to cable pay-TV. The cable does not use broadcast frequencies.[68] Where cable pay-TV is concerned, there is no scarcity of the power to communicate.[69] The public can receive over the cable as many programs as it will pay to see and hear. In this respect, cable pay-TV is no different from the daily press. There is potentially a town square for each speaker.[70]

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[65] The fairness doctrine consists of two distinct obligations: (1) The duty to broadcast all sides of significant public issues; and (2) the duty of broadcasters to provide a right of reply when individuals or groups have been attacked over their facilities. The first obligation is codified in 47 U.S.C. § 315(a) (1970). The latter is contained in 47 C.F.R. § 73.123 (1975).

[66] 395 U.S. 367 (1969), *rev'g* Radio & Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968).

[67] *Id.* at 390. The court expressly relied upon notions of "spectrum scarcity" in reaching its conclusion. *Id.*

[68] Cable television does not use broadcast signals except to the extent that its primary purpose is the amplification and distribution of weak signals already in the air. *See* note 5 *supra*.

[69] Cable pay-TV, in contrast to its parent cable system, has no contact with broadcast frequencies whatever. The corpus of its transmissions consists of material selected, purchased, and edited by the individual entrepreneur. *See* note 15 *supra*. Further, cable pay-TV does not become engaged in a "scarcity" question by virtue of its occupying a channel on a cable television system. Cable television systems in the current state of the art may carry up to 40 channels. *See* SLOAN REPORT, *supra* note 5, at 2. Indeed, FCC regulations require all CATV systems within the top 100 TV markets to carry a minimum of 20. 47 C.F.R. § 76.251(a)(1) (1975). In contrast to the crowded radio spectrum, there is ample room for many voices catering to many tastes.

[70] The Justice Department, for example, has argued this position before the FCC repeatedly, stating that cable pay-TV entrepreneurs are "businessmen engaged in a business, cablecasting, into which any number of others may enter." Comments of the Justice Dep't, F.C.C. Docket 19954, Nov. 1, 1972, at 10. Proponents of cable pay-TV (arguing for less restrictive, or no regulation) have likewise rebutted the notion of "spectrum scarcity." *See, e.g.*, Comments of Optical Systems Corp., F.C.C. Docket 19554, Sep. 20, 1974, at 43 [hereinafter cited as Optical Comments]. *See also* First Report and Order, 52 F.C.C.2d

B. *Other Interests To Be Weighed*

The arguments which balance other interests against the freedom of speech of the broadcasters fundamentally resemble the "scarce resource" analysis in that they rely on the special nature of the broadcast medium. Again, the difference between cable pay-TV and broadcast communication blunts the force of these arguments as applied to the former.

1. Public Domain or Ownership

Courts have upheld FCC regulations limiting the freedom of broadcasters on the ground that the channel airspace is "owned" by the public.[71] Broadcasters are treated as trustees of the property.[72] Analogies are commonly drawn from constitutional decisions in which the inherent "public character" of property is held to survive its private use.[73]

The "public domain" theory is inapplicable to cable pay-TV. Cables used in transmitting entertainment for a fee have no inherent "public" character. There is no reason they cannot be owned and operated by those who build them. To be sure, the cable owners and builders must generally obtain some form of public authorization to use streets, ducts, and rights of way routing the cables.[74] This is at best an argument for allowing states and localities, not the FCC, to impose limitations on cable pay-

1, 74 n.6, *reconsideration denied*, Memorandum Opinion and Order, 54 F.C.C.2d 797 (1975) (Robinson, Comm'r, concurring in part and dissenting in part) (questioning application of scarcity rationale to cable pay-TV).

[71] *See, e.g.*, H.R. REP. No. 281, 88th Cong., 1st Sess. 205-07 (1963); *In re* Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 254-55 (1970) (Johnson, Comm'r, dissenting), *rev'd*, Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966); EMERSON, *supra* note 64, at 660-61; Johnson & Westen, *A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 U. VA. L. REV. 574, 591 (1971); Robinson, *The F.C.C. and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 151 (1967); Note, *Regulation of Program Content by the F.C.C.*, 77 HARV. L. REV. 701, 713 (1964).

[72] *See, e.g.*, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[73] *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1971); Food Emp. Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[74] *See, e.g.*, Section 362, Charter of the City of New York (Rev. 1972), which empowers the Board of Estimate to grant franchises for the use of city streets, pipes, and conduits "for the transmission of electricity . . . heat or power." *Id.*

TV.[75] And the argument sweeps too broadly: It would justify government control over all forms of communication that use such public places as streets, sidewalks, and parks.[76] The courts have never gone so far.[77]

2. Rights/Privileges Doctrine

Closely related to the notion of "public ownership" is the theory that "those who obtain a license are granted a privilege . . . therefore . . . a licensee, exercising such a privilege, must abide by Commission imposed rules."[78] In sum, a distinction is drawn between a naturally vested right, and a privilege benevolently granted by government. The triennial licensing of radio and television[79] is held to fall in the latter category, and the generosity of the state is held to be a fair exchange for a heavier degree of regulation.[80]

Commentators have rejected the idea of a rights/privileges dichotomy as "little more than a legalism."[81] Furthermore, the

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[75] States and localities are currently precluded from regulation of cable pay-TV. *See* Interpretive Ruling, 31 F.C.C.2d 747 (1971); Cable Television Report and Order, 36 F.C.C.2d 143, 193, *reconsideration denied*, 36 F.C.C.2d 326 (1972). This ruling has evoked much dissatisfaction from the states and localities, probably because they view cable pay-TV as a source of much needed revenue (through the imposition of franchise fees). *See, e.g.*, Broadcasting, May 20, 1974, at 57-58; July 1, 1974, at 39.

[76] Radio & Television News Directors Ass'n v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Robinson, *supra* note 71, at 152-53.

[77] *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Gregory v. Chicago, 394 U.S. 111 (1969); Edwards v. South Carolina, 372 U.S. 229 (1963); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. New Hampshire, 312 U.S. 569 (1941); Hague v. CIO, 307 U.S. 496 (1939) (all cases recognizing the public's constitutional right to use streets and parks in the exercise of first amendment freedoms).

[78] Radio & Television News Directors Ass'n v. United States, 400 F.2d 1002, 1019 (7th Cir. 1968), *rev'd sub nom.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969); Television Corp. of Michigan v. FCC, 294 F.2d 730, 733-34 (D.C. Cir. 1961).

[79] The FCC is statutorily empowered to grant and renew all broadcast licenses. 47 U.S.C. §§ 307(a), (d) (1970). Renewals are currently on a three year basis. 47 C.F.R. § 73.630(a) (1975).

[80] Put quite simply, the rationale is that since no one has a right to a broadcast frequency (the frequency spectrum constituting scarce, publicly held property), the state could scrutinize the circumstances under which a privilege to broadcast was granted, even to the extent of compromising constitutional rights.

[81] Note, *supra* note 71, at 713. For a full discussion of how the doctrine arose, and its current status, *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

Supreme Court has proven unreceptive to the notion that government may extract the surrender of constitutional liberties in return for some form of subsidy.[82] Objections directed at the doctrine's application to cable pay-TV are even clearer. The whole underpinning of "privilege" rests upon our earlier assumption that broadcast frequencies are few and far between,[83] making their allocation a very real privilege for the aspiring broadcaster. Since the latter reasoning does not apply to cable pay-TV,[84] the rights/privileges doctrine falls with it.

3. Unique Impact

Courts have also upheld FCC regulation of broadcasters on the ground that radio and television have a unique impact on the listening and viewing public. This impact, said to be much greater than that associated with other media (such as newspapers or periodicals), justifies a greater degree of control.

The major decision utilizing this approach is *Banzhaf v. FCC*,[85] where the court included advertising within the scope of the fairness doctrine.[86] In dismissing a first amendment challenge to this inclusion, Chief Judge Bazelon discussed the impact of various media and distinguished radio and television:

> Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets and circular letters, which are available to those without technical skills or deep pockets. Moreover, the broadcasting medium may be different in kind from publishing in a way which has particular relevance to the case at hand. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air."

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[82] *See, e.g.*, Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874); Barron v. Burnside, 121 U.S. 186, 200 (1887); Milwaukee Social Democratic Club Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921)(Holmes, J., dissenting); Terral v. Burke Construction Co., 257 U.S. 529, 532 (1922); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 515 (1926); Frost & Frost Trucking Co. v. California R.R. Comm'n, 271 U.S. 583, 593-94 (1926); United States v. Chicago, St. Paul & Minneapolis Ry., 282 U.S. 311, 328-29 (1931); Lamont v. Postmaster General, 381 U.S. 301, 305 (1965).

[83] *See* note 17 *supra*.

[84] *See* text accompanying notes 68-70 *supra*.

[85] 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969).

[86] The fairness doctrine is described briefly in note 65 *supra*. *Banzhaf* itself concerned the right of reply by public interest groups to cigarette advertisements (replies that would stress the health hazards posed by smoking).

> In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinarily habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[87]

Banzhaf has not given rise to many subsequent decisions resting on the concept of impact.[88] Thus there is doubt about the continued viability of impact as a first amendment counterbalance. However, assuming *arguendo* that the concept is still valid, it is plainly inapplicable to cable pay-TV. The nature of the special impact of radio and TV, as developed by Chief Judge Bazelon, consists of three elements: (1) The greater impact of any one channel because of the overall paucity of airspace;[89] (2) the

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[87] 405 F.2d at 1100-01.

[88] There are but two subsequent decisions which appear to rely on the concept of impact. In Robinson v. American Broadcasting Companies, 441 F.2d 1396 (6th Cir. 1971), the court refused to enjoin broadcast announcements which stressed the harmful effects of cigarette smoking. In concluding that such an injunction would clearly violate the first amendment (*id.* at 1399), the court took notice of the differing nature of radio and television, and traced that distinction to the idea of impact. *Id.* at 1398-99. In Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), the court upheld the constitutionality of an outright ban of cigarette advertisements on radio and TV. The court also relied upon impact in squaring its ruling with the first amendment. *Id.* at 585-86. Apart from *Robinson* and *Capital*, the concept of impact has only appeared in the opinions of Judge Bazelon, and only as dicta. *See, e.g.*, Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 79 (D.C. Cir.) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1972); Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 275 (D.C. Cir. 1974) (Bazelon, C.J., concurring); National Broadcasting Co., Inc. v. FCC, 516 F.2d 1101, 1176 n.65 (D.C. Cir. 1974) (Bazelon, C.J., dissenting from the order vacating the previous order granting rehearing en banc), *cert. denied sub nom.* Accuracy in the Media, Inc. v. National Broadcasting Co., Inc., 96 S. Ct. 1105 (1976); Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 420 (D.C. Cir. 1975) (Statement of Bazelon, C.J., in favor of granting rehearing en banc).

There is also some doubt as to whether *Banzhaf* is traceable to previous first amendment law. There is some validity in tracing the concept of impact to the dissenting opinion of Justice Jackson in Kunz v. New York, 340 U.S. 290, 308 (1951). However, the doctrine (if it indeed may be labeled as such) is more likely a product of scholarly speculation, transmuted by *Banzhaf* into the force of law. *See, e.g., Robinson, supra* note 71, at 154-55 (cited in *Banzhaf*); Note, *supra* note 71, at 713; Note, *Memorandum on First Amendment Issues Involved in Red Lion Broadcasting Co. v. FCC, News Directors' Association v. United States, and Banzhaf v. FCC*, 43 CONN. B.J. 517, 524 (1970).

[89] "Unlike broadcasting, the written press includes a *rich variety* of outlets for expression . . . ." 405 F.2d at 1100 (emphasis supplied).

fact that television and radio are thrust upon the consumer, and can be avoided only by affirmative action;[90] and (3) the assumption that television and radio have greater psychological effect upon the public because of their numerical pervasiveness.[91] Cable pay-TV is not plagued by spectrum scarcity, and is but one voice out of many available to CATV subscribers.[92] It is not thrust upon the consumer; indeed, *obtaining* any cable TV service requires the affirmative act.[93] Finally, the differing technology of cable pay-TV constrains its growth, and renders it far less pervasive than radio or television.[94]

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[90] "Written messages are not communicated unless they are read, and reading requires an *affirmative act*. Broadcast messages, in contrast, are 'in the air.' " *Id.* (emphasis supplied).

[91] "It is difficult to calculate the *subliminal impact* of this *pervasive propaganda* . . . ." *Id.* (emphasis supplied). This allusion to the numerical pervasiveness of radio and television is further clarified in Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 79 n.65 (D.C. Cir.) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1972) (stressing the fact that the average American household watches television an average of 6 hours per day). *See also* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 586 n.13 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972).

[92] *See* note 69 *supra*.

[93] Cable pay-TV is available either on a per-program or per-channel fee basis. Those systems operating on a per-program basis require the subscriber to purchase tickets or other devices to activate the decoding units on their TV receivers and receive a particular program. *See, e.g.*, the systems described in ADLER & BAER, *supra* note 11, at 34. Those systems operating on a per-channel basis require at minimum that the viewer connect his television to a cable TV network, and lease a decoding device from the entrepreneur on a monthly basis. All programs transmitted over that cable pay-TV channel will be received as a matter of course. The majority of cable pay-TV systems are now operating on this basis. *See* Fact Sheet, *supra* note 15, at 2.

[94] Normal broadcast television service is currently received by some 66,200,000 homes. Broadcasting: Yearbook 12 (1974). This number has risen steadily over the last decade. *Id.* at 68. The average American family watches television an average of 6 hr. 52 min. per day, or 44 hr. 7 min. per week. *Id.* at 69.

Present penetration and future expansion of cable pay-TV is much more limited, tied as it is to the growth of cable television proper (since CATV serves as the carrier for cable pay-TV). At present, cable pay-TV services roughly 60,000 homes, or 1 percent of all homes served by CATV (estimated at 7 million, Broadcasting: Cable Sourcebook 5 (1974) The total number of homes served by cable television in turn amounts to only 9 percent of the families served by broadcast television generally. Estimates of the future expansion of cable pay-TV are generally couched in pessimistic terms. *See, e.g.*, NOLL, PECK & MCGOWAN, *supra* note 18, at 142, 149 (suggests that cable pay-TV will eventually penetrate only 4 percent of the homes served by CATV). *But see* Stanford Research Institute Press Release, Apr. 11, 1974, at 1 (commenting on a recently concluded study which indicates that cable pay-TV will achieve a 30 percent penetration rate by 1985, with 25 million subscribers and revenues of over $4 billion per annum).

On the issue of average family exposure, the National Association of Broadcasters

4. Commercial Structure of Broadcast Television

The profits of the broadcast industry are obtained almost entirely from advertising.[95] Since there are few broadcast channels,[96] advertisers who want to reach the broadest public tend to avoid subsidizing shows which are "high brow" or controversial.[97] The need to offset the influence of a small number of large advertisers is a strong argument for allowing some control by the FCC over network programming.[98] But once again, the argument fails when applied to cable pay-TV. Cable pay-TV is apt to be more ecumenical in its programming than broadcast network television. A given program need only find a small segment of the public willing to pay for it to justify its transmission.[99]

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indicates that cable pay-TV will be used with more discretion than broadcast television. *See* National Ass'n of Broadcasters, Fact Sheet: Economic Aspects of Siphoning (1974) at 2-3 (suggesting that the weekly median would be one 2-hour movie per family, amounting to a yearly exposure of some 100+ hours of viewing).

[95] Total television revenues (less commissions) for fiscal 1972 amounted to $3,179,400,000 (an increase of 15.6 percent from the previous year). FCC, Television Financial Data, 39 FCC ANN. REP. 223 (1973). Gross advertising revenues for television amounted to $3,675,000,000 in fiscal 1972 (also amounting to an increase of 15.6 percent from the previous year). *Id.*

[96] *See* note 17 *supra*.

[97] The major networks, relying on advertising revenues, are thus pressured into broadcasting only those programs which satisfy the sponsor's interests. *See, e.g.*, FCC, OFFICE OF NETWORK STUDY, TELEVISION NETWORK PROGRAM PROCUREMENT, 2d Interim Report (1965):

> It is an economic fact of life that under our present system of television broadcasting the ultimate diversity of programs . . . whatever may be the intent and efforts of licensees, cannot be substantially greater than the sum of the diversity of commercial interests and advertising objectives among the sponsors for whom it is "good business" to provide economic support for television.

Id. at 26. As an example of the control wielded by sponsors, consider the fact that over 55 percent of all television series are cancelled each year, many of which have garnered popular praise and viewing audiences exceeding 20 million homes. *See* Optical Comments, *supra* note 70, at 14.

The delicate symbiosis between broadcasters and advertisers is set out in detail in Note, *Diversity in Television Program Content: A Proposal for Sustaining Programming*, 7 COLUM. J.L. & SOC. PROB. 319, 322-23 (1971).

[98] *See, e.g.*, Banzhaf v. FCC, 405 F.2d 1082, 1100 n.76 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969); Note, *supra* note 70, at 714. *Cf.* Kalven, *Broadcasting, Public Policy, and the First Amendment*, 10 J.L. & ECON. 15, 31-32 (1967).

[99] In other words, because it relies solely upon subscriber fees for income (rather than advertising, which is expressly forbidden) cable pay-TV will schedule programming based upon popular demand rather than external forces. The purchasing power of the individual consumer, when added to that of his fellows, can ensure a program fare closer to individual

CONCLUSION

This article has argued that the anti-siphoning rules, as applied to cable pay-TV, violate both the commands of the Communications Act of 1934, and the first amendment. The legal analysis suggests that the courts should nullify these rules on appellate review.[100]

It should be noted, however, that the analysis contained herein proceeds on classical tenets of statutory construction and first amendment theory. A number of public policy issues, decidedly non-traditional in character, have yet to be resolved. These issues are important, because they may ultimately support the article's thesis or provide renewed impetus for anti-siphoning controls. For example, will a viable cable pay-TV, unfettered by such controls, provide the solution to a growing network monopolization over programming?[101] Will it stimulate the growth of cable television proper in urban areas?[102] Conversely,

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tastes and needs. *See, e.g.*, Minasian, *Television Pricing and the Theory of Public Goods*, 7 J.L. & ECON. 71, 75 (1964).

[100] The Justice Department has recently initiated a challenge to the anti-siphoning rules in the United States Court of Appeals for the District of Columbia Circuit. *See* N.Y. Times, Feb. 6, 1976, § 2, at 58, col. 6.

[101] By 1973, the degree of this monopolization had increased to the point where 84 percent of all prime time television was selected and prepared by the major television networks. Long, *Antitrust and the Television Networks: Restructuring Via Cable TV*, 6 ANTITRUST L. & ECON. REV. 99, 102 (1973). This has evoked fears of mass "thought control" by a small group of network executives. *See, e.g.*, Johnson, *Freedom to Create: The Implications of Antitrust Policy for Television Programming Content*, 8 OSGOODE HALL L.J. 11, 18 (1970). Advocates of cable pay-TV suggest that a fully developed medium, as an alternative program source, will liberate the American viewer from his role as "a virtual prisoner . . . of three giant organizations . . . ." Optical Comments, *supra* note 70, at 12.

[102] The outstanding potential of CATV takes three primary forms: as a source of greater program diversity; as a future vehicle for two-way "broadband" communications; and as a technological solution to the shortcomings of traditional VHF/UHF broadcasting. These benefits have been noted by Congress, commissions, commentators, and the courts. *See, e.g.*, *1969 CATV Hearings, supra* note 7, at 67 (testimony of Irving Kahn, Telepromp-ter Corp.), 135 (testimony of Harold Wigren, Joint Council on Educational Telecommunications), and 210 (testimony of Harold Barnett, consultant, National Cable Television Ass'n); FINAL REPORT: PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY (1968) at ch. 7, 36-39; CABLE: REPORT TO THE PRESIDENT, CABINET COMM. ON CABLE COMMUNICATIONS 9-16 (Office of Telecommunications Policy 1974); SLOAN REPORT, *supra* note 5, at chs. 6, 8, 9, and 11; Southwestern Cable Co. v. United States, 392 U.S. 157, 164 (1968); United States v. Midwest Video Corp., 406 U.S. 649, 651 (1972).

As to the relationship between these benefits, the cities, and cable pay-TV, the following reasoning is advanced; Cable operations within major cities pose special finan-

will a strictly regulated cable pay-TV ensure that low income groups receive the same leisure-time options as wealthier Americans?[103] Will it prevent inflationary and self-destructive price wars between the media over program material?[104] At this time, the answers supplied are neither consistent or conclusive. At best, they suggest the need for continued scholarly analysis, and for continued concern by the FCC, the courts, and the American public.

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cial problems. For example, the National Association of Broadcasters has suggested that the cost of wiring in urban households to CATV amounts to over $300 per home and over $600 per apartment. National Ass'n of Broadcasters, Fact Sheet on Economic Aspects of Siphoning 4 (1974). The Justice Department has voiced fears that a restricted cable pay-TV capacity (*i.e.*, by virtue of anti-siphoning rules) would inhibit already cautious CATV operators from entering urban areas, where cable has yet to take hold. Optical Comments, *supra* note 70, at 19-21. Cable pay-TV could, it is claimed, provide CATV proper with enough additional revenues to maintain inner-city operations on a continued basis. First Report and Order, 52 F.C.C.2d 1, 15, *reconsideration denied*, Memorandum Opinion and Order, 54 F.C.C.2d 797 (1975).

[103] Opponents of cable pay-TV suggest that without the check imposed by the anti-siphoning rules, 20 percent of the consumer units at the bottom of the income ladder would be deprived of over 80 programs per year. These programs would be withdrawn from free television and sold to cable pay-TV producers (because of the latter's alleged financial power). They would cost the average viewer $134 per year, and would be unobtainable by lower-income Americans (whose total annual recreation budget amounts to $84 and is subject to other demands quite apart from television). National Ass'n of Broadcasters, Fact Sheet on the Potential Impact of Pay Television upon Low Income Consumers (1974).

[104] The price war has perhaps already begun. *See, e.g.*, Paul Kagan Pay TV Newsletter Commentary, July 30, 1974. The author recounts the record-breaking deal between NBC Television and Paramount Pictures for the exclusive rights to *The Godfather*. The price tag amounted to over $10 million, a far cry from the older average of $750-800 thousand per film, and even from recent "blockbusters" such as *The Poseidon Adventure*, which cost ABC Television an estimated $3.3 million. *See also* First Report & Order, 52 F.C.C.2d 1, 17, *reconsideration denied*, Memorandum Opinion & Order, 54 F.C.C.2d 797 (1975).