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The FCC's Cable Television Jurisdiction: Deregulation by Judicial Fiat

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NOTES

THE FCC'S CABLE TELEVISION JURISDICTION: DEREGULATION BY JUDICIAL FIAT

INTRODUCTION

Well over a decade has elapsed since the Federal Communications Commission first reluctantly asserted jurisdiction over cable television.[1] During this period, the FCC's regulation of cable has evolved from a limited attempt to protect broadcast television from cable television's purported "unfair competition,"[2] to a broad scheme of regulation intended to integrate cable television service into the national communications system and to obtain cable television's unique benefits[3] for the public. To these ends, the FCC rules have included conditions and limitations on cable systems' use of certain broadcast signals,[4] and requirements that cable systems carry the programs of public, educational, governmental, and leased access programmers.[5] The Commission has also restricted the types of program material that can be shown by cable companies for a direct charge,[6] required that cable systems obtain "certificates of compliance,"[7] set technical standards that cable systems must meet,[8] and set guidelines for the proper scope of state and local regulation.[9]

The FCC has thus established itself as the primary source of cable television policy.[10] Yet the Commission has assumed the power and responsibility

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1. First Report and Order, Rules *re* Microwave-Served CATV, 38 F.C.C. 683 (1965) (imposing conditions on cable television's use of microwave transmitters); *see also* Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).

2. *See generally* Second Report and Order, *In re* Amendments to Rules and Regs., 2 F.C.C. 2d 725 (1966); First Report and Order, Rules *re* Microwave-Served CATV, 38 F.C.C. 683 (1965). These FCC actions emphasized the "detrimental impact" of cable television on the broadcast system.

3. 47 C.F.R. §76.1, et seq. (1977). See Notice of Proposed Rulemaking, and Notice of Inquiry to Amend Rules and Regs. Relative to CATV, 15 F.C.C. 2d 417 (1968), where the FCC announced its interest to explore the question of how best to obtain the maximum benefits of developing cable television technology.

4. 47 C.F.R. §§76.51-.161 (1977).

5. 47 C.F.R. §§76.252-.258 (1977).

6. 47 C.F.R. §76.225 (1977).

7. 47 C.F.R. §§76.11-.29 (1977).

8. 47 C.F.R. §§76.601-.617 (1977).

9. 47 C.F.R. §76.31 (1977).

10. While it may seem appropriate that the FCC, because of its expertise and experience in the communications field, have the primary responsibility for the development of cable policy, that conclusion should at least recognize the other potential sources of policy. In particular, local governments have traditionally shown strong interest in cable regulation and until the broad preemption of their authority by the FCC in 1972, had been the basic source of public policy in the regulation of cable. The basis for the exercise

of this position without a legislative commitment of cable television matters to its jurisdiction, and without the policy guidelines that normally would be included in such a delegation of power.[11] Instead, the FCC has relied on the 1934 Communications Act,[12] which by its terms makes no reference to cable, as the source of its regulatory authority in this area.[13] Meanwhile, the Supreme Court has twice cautiously acquiesced in this assumption of power, reasoning that some regulation of cable was "reasonably ancillary" to the FCC's mandate under the Communications Act.[14] In response, Congress has neither confirmed nor withdrawn cable television from FCC jurisdiction,[15] while state and local governments have generally not challenged the jurisdictional boundaries that the FCC has prescribed for their regulatory power.[16]

But the apparent quietude in these policy forms — Congress, the Supreme Court, state and local governments — belies the controversy that has surrounded the FCC's cable television policies. The cable industry has often opposed the regulatory burden that has been imposed by the FCC's regulation.[17] Voices

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of local government authority over cable systems has been their franchising powers, through which contractual conditions have been imposed on cable systems covering such matters as channel capacity, service requirements and rates. State governments have also shown interest in the development of cable television policy. Several have enacted cable television legislation and established commissions designed to study and make recommendations regarding the regulation of cable television. *See generally* authorities cited in note 16 *infra*.

11. *See generally* GELLHORN AND BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS at 58 (6th ed. 1974) (discussing the delegation principle).

12. Communications Act of 1934, *as amended*, 47 U.S.C. §§151-609 (1970).

13. In the Second Report and Order, *In re* Amendments to Rules and Regs., 2 F.C.C. 2d 725, 793-95 app. C (1966), where the FCC first asserted jurisdiction over the non-microwave aspects of the cable operators activities, the FCC said that its jurisdiction was based on the "plain language" of §§1, 2, 3(a) and 3(b) of the Communications Act. That argument has never been fully accepted. The source and scope of the FCC's jurisdiction are still disputed.

14. United States v. Midwest Video Corp., 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

15. Several bills which would have granted the FCC jurisdiction over cable television systems have been considered by Congress, but none have been enacted. *See* S. REP. No. 923, 86th Cong., 1st Sess. (1959); and H.R. No. 6840, 87th Cong., 1st Sess. (1961), reconsidered in Hearings on H.R. 7715 Before the Subcomm. on Communications and Power of the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess. (1965); *Hearings on H.R. 12914, H.R. 13286, and H.R. 14201 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. (1966).

16. State and local governments, according to FCC policy, may regulate the local incidents of cable television systems. The local incidents include: (1) who gets the franchise; (2) how long the franchise lasts; (3) the area included in the franchise; (4) the charges and fees to subscribers; (5) channel capacity; and (6) use of channels. It is primarily in the last two areas — channel capacity and use — that issues of conflicting state and federal goals may arise. Kahn, *Cable TV: To What Extent May the State Regulate?* 49 L.A.B. BULL. 513 (1974). *See also*, S. RIVKIN, CABLE TELEVISION: A GUIDE TO THE FEDERAL REGULATIONS (1973); 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 LAWYER 685 (1972); Davis, *Cable Television Franchising — The Role of Local Governments*, 51 FLA. B.J. 78 (1977); Comment, *Regulating CATV: Local Government and the Franchising Process*, 19 S.D.L. REV. 143 (1974).

17. The criticism has been especially vociferous among the smaller, independent cable

within the academy[18] and within the government[19] have also been highly critical of the FCC's rules, often alleging that the major purpose of the FCC's cable regulations has been protection of powerful broadcast industry interests.[20] As a result, the FCC's regulation of cable television has become a prime target for increasingly popular and effective "deregulation" sentiments.[21]

New pressures have recently emerged to compel the FCC to reconsider and revise its cable television policies. Congress, although it has not yet

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system operators. *See, e.g., Hearings Before the House Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary on H.R. 2223, Copyright Law Revision*, 94th Cong., 1st Sess. 615-16 (1975) (testimony of Cooper, Exec. Sec'y of the Community Antennae Television Ass'n). *Cf.* Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 205-06 (1972) (cable interests indicated they would favor increased federal preemption of local regulation). Broadcast interests have also been dissatisfied at times with the FCC's regulations. *See* Petition to reconsider 23 F.C.C. 2d 825, 894; 34 F.C.C. 2d 271 (1972), where the broadcasters argued that the pay cable rules as promulgated were insufficient to protect broadcast interests. The FCC rejected the petition; Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 150-52 (1972), discussing the broadcaster-supported "retransmission consent" proposal. The proposal was rejected in favor of the broadcast signal carriage rules when the Commission adopted the Consensus Agreement. *Id.* at 284-85.

18. *See, e.g.*, Moore, *The FCC: Competition and Communications*, THE MONOPOLY MAKERS 35 (1973); Besen, *The Economics of the Cable Television "Consensus,"* 17 J. LAW & ECON. 39, 46 (1974); Kahn, *Cable, Competition and the Commission*, 24 CATH. U.L. REV. 854 (1975); Lapierre, *Cable Television and the Promise of Programming Diversity*, 45 FORDHAM U.L. REV. 25 (1973); Comment, *OTP Cable Proposals: An End to Regulatory Myopia*, 24 CATH. U.L. REV. 91 (1974).

19. *See, e.g.*, P. MACAVOY, DEREGULATION OF CABLE TELEVISION (Ford Administration Papers on Regulatory Reform) (1977). Recently, Lionel Van Deerlin (D-Cal.) and Louis Frey (R-Fla.) introduced legislation in the House of Representatives which would totally deregulate cable television. *Federal Reforms Worry Broadcasters*, Tallahassee Democrat, June 19, 1978, at 11a.

20. This passage from Moore, *The FCC: Competition and Communications*, THE MONOPOLY MAKERS 35, 65-69 (1973) exemplified the more trenchant line of criticism: "The FCC's favoritism toward existing broadcasting springs from the premise that its own regulatory duty is to 'guarantee' television for all income groups. . . . Were it not for the Antitrust Division's persistent interest in freeing CATV from competitive restraints, the future would be far more bleak than it is now. . . . The FCC has proposed to limit the number of CATV systems in the top markets a corporation can own. . . . But no matter how competitively independent the CATV franchises become, they will be unable to compete so long as program exclusivity and signal importation restrictions remain. . . . The ultimate explanation of why restrictions remain traces to the ample political power of the broadcast industry."

21. The scope of the "deregulation" movement, as well as its philosophy and politics, may be apprehended by examining, *e.g.*, Schultze, *The Public Use of Private Interest*, HARPER'S at 43 (May 1977); Bleiberg, *Winds of Change: For Airline Regulation They're Finally Blowing Hard*, BARRON'S July 25, 1977 at 7, col. 1; *The Economics for Deregulating Trucking*, Business Week at 56 Nov. 2, 1974; Kane, *The CAB Moves to Roll Back Regulatory Powers*, Wall St. J., Feb. 14, 1977, at 14, col. 6; Sherman, *Applications of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1 (1976); Struve, *The Less Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Williams, *Big Shippers Push for Decontrol of Truck Industry*, Wall St. J., July 6, 1977 at 16, col. 6. *See also Hearings Before the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee*, 94th Cong., 1st Sess. (July 1975) (Testimony of D. Baker, Deputy Ass't Att'y General, discussing deregulation of cable).

produced a law prescribing the guidelines for cable television regulation, has finally enacted a statute which addresses the copyright responsibilities of cable systems that retransmit broadcast signals.[22] Insofar as cable regulation was originally premised on the unfair competition which cable television might wage in the absence of copyright liability, the enactment of this law would seem to require a reconsideration of at least some of the FCC's rules.[23]

Three recent circuit court decisions, each overturning a different portion of the FCC's cable rules, have also freshened the issue of the proper scope of the FCC's powers under the "ancillary jurisdiction" doctrine.[24] One of these decisions, arising in the District of Columbia Circuit, has been denied certiorari by the Supreme Court.[25] The third, decided in the Eighth Circuit, is currently under petition for certiorari,[26] presenting to the Supreme Court an important opportunity to reconsider its previous decisions as to the scope of the FCC's power over cable.

This note first explores the policies of the current FCC cable regulations, most of which were promulgated in 1972. The limitations that have been placed on the FCC's jurisdiction over cable by Congress and the Supreme Court are then discussed. Finally, the note analyzes the proper scope of the FCC's authority in terms of the recent developments in cable television law with a view toward reconsideration of the Supreme Court's past decisions in this area.

BACKGROUND

Television programming has often been criticized for offering the "least objectionable programs" designed for the "least common denominator."[27] Limited channels and dependence on advertising, each supportive of network

22. Copyright Law of 1976, 17 U.S.C. §111 (1977).

23. The FCC, in response to the enactment of the Copyright Act of 1976, initiated an inquiry into the syndicated program exclusivity rules. That inquiry was to have been completed by early 1978, but its completion has been delayed several times. Notice of Inquiry to amend §§76.151-.161 of the Commissioner's Cable Television Rules, 41 Fed. Reg. 50,055 (1976). *See also* Notice of Inquiry into the Economic Relationship between Television Broadcasting and Cable Television, 43 Fed. Reg. 1542 (1977).

24. Midwest Video Corp. v. F.C.C., 571 F.2d 1025 (8th Cir. 1978); Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir. 1977); Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 533 F.2d 601 (D.C. Cir. 1976).

25. F.C.C. v. Home Box Office, Inc., ____ U.S. ____, 98 S.Ct. 111 (1977).

26. Midwest Video v. F.C.C., 571 F.2d 1025 (8th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3221 (Oct. 3, 1978).

27. *See, e.g.*, P. SANDMAN, MEDIA: AN INTRODUCTORY ANALYSIS 254-58 (1976). H. MARCUSE, AN ESSAY ON LIBERATION 12 (1969) has viewed television as a tool of "organized capitalism" which is employed "for the advertising of violence and stupidity, for the creation of captive audiences." THE COMMITTEE FOR ECONOMIC DEVELOPMENT, BROADCASTING AND CABLE TELEVISION: POLICIES FOR DIVERSITY AND CHANGE 12 (1975) has said that television is "the most effective means yet devised for . . . the mass merchandising of goods and services." A review of some statistics may produce some sense of television's impact. By 1975, 97% of the homes in the United States had television service. The average American watched 3½ hours of television per day. Over the course of any given week, 87% of the population will generally be exposed to a television. P. SANDMAN, *supra*, at 64-67, 299-300.

oligopoly,[28] and each having its roots in the technology of broadcasting,[29] may be blamed for this mediocrity and lack of diversity in television's program product.[30] Plans to improve the medium within the context of broadcasting

28. High industrial concentration in combination with high entry barriers is often associated with poor industrial performance, resulting in consistently low outputs, high prices and profits, and lack of progressiveness or risk-taking. Lanzillotti, The Economics of Antitrust (lecture, Advanced Antitrust Seminar, Holland Law Center, University of Florida, Spring 1978). *See generally* J. BAIN, INDUSTRIAL ORGANIZATION 115-24, 251-301, 373-462 (1968). A high degree of concentration and market power has been recognized both at the national level, in network service and in local markets, among broadcast stations. *Id.* at 145. *See* W. JONES, CASES AND MATERIALS ON ELECTRONIC MASS MEDIA: RADIO, TELEVISION AND CABLE 8 (indicating that the overwhelming majority of television programming actually viewed is network originated); P. SANDMAN, *supra* note 27, at 112 (indicating that 83% of the 697 television stations operating in the United States in 1973 were network affiliates). Entry barriers exist by virtue of the limited number of broadcast licenses issued by the FCC. *See* W. JONES, *supra* (discussing the law of broadcast licensing); note 29 *infra* (discussing the consequences of spectrum scarcity). Entry barriers also exist because network affiliations are in some degree essential and exclusive. *See* Note, *Antitrust: The Implications of Television Network Programming*, 27 HASTINGS L.J. 1207 (1976). The existence of oligopoly and oligopolistic behavior in the television industry is supported by observations that highly competitive, highly specialized program production markets are "underemployed" (B. OWEN, J. BEEBE, & W. HENNING, TELEVISION ECONOMICS 32-33 (1978) [hereinafter cited as B. OWENS]) and that consumer demand for television is unfulfilled (Panko, Edwards, Penchos, & Russell, Analysis of Consumer Demand for Pay Television (Report prepared for the Office of Telecommunication Policy, May 1975) [hereinafter cited as Analysis of Consumer Demand]).

29. Each broadcast station transmits its signal under FCC license at a specified power over a designated segment of the electromagnetic spectrum. That spectrum is limited for broadcast purposes and thus imposes a limit on the total number of stations that can transmit simultaneously in an area. Few cities have more than six television broadcast stations operating and available under the FCC's present assignment plan. W. JONES, *supra* note 28, at 7. The broadcast media's dependence on advertising is also attributable partially to constraints inherent in broadcast technology. The use of the airwaves precludes broadcasters from making direct collections from viewers for the service of making their television signals available. The per capita price that a network advertiser will pay for an audience is small when compared with the potential of direct payment. Nevertheless, the size of a typical national audience makes an advertising "spot" extremely valuable in absolute terms. Staff of the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE 62 (Comm. Print 1976) [hereinafter *Cable Performance Staff Report*].

30. Because the first stations established in any given city tend to be network affiliates, and because there are generally fewer than six stations in a given city, the programming available to viewers is network-originated. The consequences for "diversity" are obvious. *See* B. OWEN, *supra* note 28, at 78. There are essentially two aspects to the criticism of advertiser influence. One argues that advertiser support causes the programming of shows that reflect advertiser, not viewer, preferences. *See, e.g.*, B. OWEN, *supra* note 28, at 76: "The signals that enter broadcasters' profit calculations and hence determine programming patterns are the advertisers' values of exposure to viewers, not the viewers' values of programs." *Accord*, P. SANDMAN, *supra* note 27, at 136-37. The other line of argument views the advertising messages themselves as a costly intrusion on the viewer. *See, e.g.*, Kozyris, *Advertising Intrusion: Assault on The Senses. Trespass on the Mind — A Remedy Through Separation*, 36 OHIO ST. L.J. 299 (1975); Reed, *Psychological Impact of Advertising and the Need for FTC Regulation*, 13 AM. BUS. L.J. 171 (1975). *See also* Note, *Ring around the*

have either been discarded without any attempt at implementation or have proved disappointing after substantial periods of experiment.[31] Today it is widely accepted that cable television offers the most promise for improving the diversity and quality of the television medium.[32]

The "promise" of cable to increase diversity and quality in television is based largely on its technical capacity to increase the number of useful channels that can be made available to television service consumers.[33] Increased channel capacity ought to promote more programming for minority tastes and encourage a more efficient allocation of programming and distribution of resources in the television industry.[34] But cable enthusiasts have not restricted their vision of the "wired nation" to the mere broadening and diversification of entertainment material available to television audiences.[35]

Collar, Chain Around Her Neck: A Proposal to Monitor Sex Role Stereotyping in Television Advertising, 28 HASTINGS L.J. 149 (1976).

31. After the FCC recognized the insufficiency of the spectrum portion originally allotted to television broadcasting (the 13 VHF channels) it set aside another segment of the spectrum and created the UHF channels. W. JONES, *supra* note 28, at 7. But UHF has been largely unsuccessful because of tuning difficulties and because of the FCC's "localism" policy. B. OWEN, *supra* note 28 at 122. See also, notes 60-62, *infra* and accompanying text. It has been suggested that the establishment of a fourth network with government support would counter the market power of the present networks. This, in essence, is the approach of the Public Broadcasting Act of 1967, *as amended*, 47 U.S.C. §§390-97 (1976). *See generally* THE COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 27, at 45-47 (1975). The experience with the Public Broadcast System has been disappointing. *Id.* 48-49, P. SANDMAN, *supra* note 27, at 221-22. Pay television in conjunction with broadcasting appears unworkable. B. OWEN, *supra* note 28 at 125-38. There have been several proposals to improve television service by effectively increasing the number of channels available. UHF itself provides a channel capacity far in excess of current use. One proposal would attempt to advance the use of UHF by having the FCC order "deintermixture" of UHF and VHF and mandate "click tuning" for UHF channels. Another plan would establish in a few cities high-power regional stations which would be capable of broadcasting to a larger geographical area than is now allowed. The use of low power VHF "drop-ins" has also been suggested. *Id.*

32. *See, e.g.*, Lapierre, *Cable Television and the Promise of Program Diversity*, 42 FORDHAM L. REV. 25 (1973); Pearson, *Cable: The Thread by Which Cable Television Hangs*, 27 RUTGERS L. REV. 800 (1974). *But see*, Kittross, *Fair and Equitable Service, or a Modest Proposal to Restructure American Television to Have All the Advantages Claimed for Cable and UHF Without Using Either*, 29 FED. COM. B.J. 91 (1976).

33. *See generally* Lapierre, *supra* note 18, at 31-35. A cable system consists of an antenna, a headend and coaxial cable distribution system. The potential of cable to make available more channels for program distribution lies in the fact that its means of final transmission is the coaxial cable. Although each coaxial cable is capable of handling only a limited number of signals, the number of parallel cables can be indefinitely increased. In contrast, attempts to add more channels to the broadcast spectrum must ultimately result in cross-channel interference. Of course, cable's potential to increase the number of available channels is effectively no greater than the receiver set's ability to handle the signals. Thus, the ability of cable to make available a large number of signals on a single dial is in some way dependent on the state of the technology of the converters that accomplish this task. At present, a 40 to 52 channel capacity is seen as the "outer limit" of a cable system. *Id.* at 28.

34. B. OWEN, *supra* note 28, at 77-78.

35. *See, e.g.*, SLOAN COMMISSION, ON THE CABLE: THE TELEVISION OF ABUNDANCE 97-114 (discussing the use of cable for the delivery of educational, health, and other social services).

Unlike broadcast television, cable may potentially be able to supply, in addition to enhanced "one-way" service, certain "two-way" services, including digital subscriber response,[36] voice and video return,[37] subscriber initiation,[38] and point-to-point services.[39] Additionally, the use of cable may increase the practicability of "pay television,"[40] which in economic theory ought to be more responsive to viewer preferences than advertiser-supported television.[41]

Reasonable policy analysts, however, necessarily acknowledge that cable's "promise" has its limits. Cable television systems require vast outlays of capital and thus may never be economically practical in certain areas.[42] Additionally, cable operators are generally local monopolists and, as a result, may have no economic incentive to improve performance beyond providing the basic programming necessary to attract a large percentage of its potential subscribers.[43]

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36. Digital subscriber response is the simplest of the "two-way" services. It would allow viewers to respond to programs based on binary principles. Voting and responding to true/false or yes/no questionnaires would be possible.

37. Voice and video return would allow viewers to respond in kind to the source of the program. In combination with point-to-point service, this feature would essentially duplicate the videophone service that the telephone companies have unsuccessfully sought to promote.

38. Subscriber initiation service would allow a viewer actively to select his program material from a program library. Taken to the logical limit, a person's home television set could be converted into essentially a remote computer terminal. The cable company's responsibility, aside from maintenance of the system, might include maintenance and development of a program library.

39. Point-to-point services would allow communications between cable subscribers analogous to those provided by telephone service, but enhanced by the accessory of the television screen. Essentially, the point-to-point service is a capability of isolating "conversations" and would eliminate the cable operator as the sole source of programming for the cable community. Given point-to-point service and "intelligent" television sets or terminals, persons might play "computer pong" with each other while each is sitting in his own home.

40. Cable television companies generally charge a flat monthly fee for the basic service that is provided when a viewer is "hooked up" to the cable. "Pay television" refers to programming for which an extra charge is levied. Presently companies that offer pay cable typically provide an optional channel which shows current feature movies. The installation of metering equipment is also a possibility and would allow charges on a per-program basis. The pay television concept has also been applied in conjunction with broadcast transmissions. As such, it is usually called "subscription television," while pay television in conjunction with cable is usually called "pay cable." Subscription television has not proved viable in light of the inability to police the black marketing and use of signal decoders, which allow a non-subscribing television owner to receive subscription television signals.

41. B. OWEN, *supra* note 28, at 90, concludes: "The pay TV analysis suggests that both the quantity of resources devoted to television and the specific programs that result will come closer to approaching the desires of viewers under pay TV than under advertiser-supported TV. Furthermore, extensions of the theory of public goals argue that . . . with unlimited channels, free competitive entry, and pure pay TV, the allocation of resources might approach an economically affluent level."

42. THE COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 27, at 61 (burial of cable in urban areas is extremely expensive); CABLE PERFORMANCE STAFF REPORT, *supra* note 29, at 5 (cable is uneconomical in rural areas).

43. Where, without a cable subscription, a viewer would be unable to receive the basic

One of the most significant limits on cable television is that cable, in itself, is merely an innovative distribution technology.[44] So far, at least, cable systems have primarily relied on retransmission of broadcast signals for their program material.[45] Although origination cablecasting and satellite or microwave interconnection of cable systems may eventually lead to greater diversity,[46] cable's primary impact has historically been the delivery of programs that had been available only in large urban areas to audiences living in smaller ones.[47]

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complement of three network signals, the provision of those signals would probably be adequate to attract most of the community's potential subscribers.

44. It has been said that the cable industry's "overwhelming need in the short term is to obtain the necessary program materials to fill cable's multichannel capacity." THE COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 27, at 68. But insofar as that statement implies that economic constraints would inhibit program supply to the cable industry, it is probably incorrect. An analysis of program supply markets indicated that program production resources are underemployed, are competitive, and would respond to increased demand. B. OWEN, *supra* note 28, at 17-36.

45. Consider Gainesville, Florida, which has "all the qualities within it that are necessary to create a 'Cabletown, U.S.A.'" Roth and Associates, *Cable Television in Gainesville and Alachua County, Florida: A Study Prepared for the Gainesville-Alachua County Utilities Board* (Washington, D.C., 1973) (on file in Gainesville municipal library). Without subscribing to the local cable television service, a Gainesville viewer could receive the signals of two broadcast stations, one an ABC affiliate and the other an NET station operated by the state university. By subscribing to cable—as 18,500 households in that city do—a viewer gains access to two NBC signals, one CBS signal, two more ABC signals, and one more NET affiliate, originated in cities larger than Gainesville and located within a radius of 150 miles. *Id.* Only recently, in response to public pressure and in exchange for a rate increase, the cable company began to import an Atlanta-originated station transmitted by satellite and with a non-network format. *University City Television Cable Company Operations* (Semi-annual report submitted to Gainesville-Alachua County Regional Utilities Board, Oct. 1977). The remainder of the twelve-channel capacity is used for the transmission of automated services, such as the UPI news and the stock exchange wire service. Otherwise, less than 75 channel-hours of programming per month is originated from the local cable company's studios, much of which is the programming of a national religious group and live unedited transmissions of the local city council's meetings, transmitted free pursuant to the FCC's access rules. There is some two-way service available and used by a local community college. There are no "pay cable" services. *Id.* Compare the situation in Tulsa, Oklahoma. Its cable service has a 36-channel capacity, 24 of which are in use, four of which retransmit local signals and two of which are imports. Other channels are devoted to the origination of movies and children's programs, to various news services, to "access" programming and to automated services. THE COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 27, at 67.

46. *See generally* Shapiro, Epstein & Cass, *Cable-Satellite Networks: Structures and Problems*, 24 CATH. U.L. REV. 692 (1975).

47. Cable systems can originate programming. In fact, for certain systems, a significant cablecasting requirement was imposed by the FCC on cable operators. 47 C.F.R. §74.111(a) (1972) (repealed 39 Fed. Reg. 43,302 (1974)). But one reason that networks—in contrast to unaffiliated local broadcasters—have been able to provide highly attractive programming has been their national revenue base. In 1960, the cost of producing a season of television episodes was about $1.74 million. In that year, a local broadcaster would have been willing to pay between $1,500 and $13,650 for the same number of episodes, bought in syndication for his local market. B. OWEN, *supra* note 30, at 42-43. Meanwhile, cable operators have argued that free access to broadcast signals for retransmission purposes, unhampered by copyright liability, is a necessity if cable systems are to generate profits and amass the capital

Beyond these economic limitations, the cable television industry has also faced political obstacles to its development. To the broadcast stations and the networks, the "promise" of cable television has been tantamount to the threat of competition in markets where for several decades broadcasters have enjoyed dominant, if not exclusive, positions.[48] In several contexts, the FCC has viewed cable's competition as potentially detrimental to the national broadcast system.[49] The FCC's response to the possible negative effects of cable television's growth has been regulation that many claim has impaired the growth of cable and denied viewers a more salutary selection of television services.[50]

Policy Themes in the FCC's Regulation of Cable Television

A primary purpose in the FCC's regulation of cable has been protection of the existing system of television services. This policy theme is exemplified by the FCC's statements which accompanied the announcement of the broadcast carriage rules, where the FCC said that a major objective of the rules was to:

> insure at least a minimum of service in underserved areas, set limits to the impact of cable distant signal carriage on over-the-air broadcasting, and eliminate certain elements of competitive unfairness resulting from the fact that cable systems are not required under existing copyright laws to pay for the television broadcast programming they pick up and distribute[,] . . . [and] (to promote service) attuned to the needs and interests of the cable community.[51]

necessary to invest in the equipment to provide the more advanced cable services. *See* Sloan Commission, *supra* note 35, at 213.

48. A primary contention of broadcasters has been that cable, by using distant signals without having to pay copyright royalties, produces unfair competition for local broadcasters. The broadcaster's fear has been that viewers faced with a wider choice of programming will be more sparsely divided among the available channels. This phenomenon, which has been called audience fracture, would threaten advertising revenues for the local broadcaster, perhaps causing the marginal ones to go under, and decreasing profits for others. *See* Lapierre, *supra* note 18, at 35-58. *See generally Hearings Before the House Subcomm. on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary on H.R. 2223, Copyright Law Review*, 94th Cong., 1st Sess. (1975). Another potential point of competition between the broadcast and cable industries is in program supply markets. It is acknowledged that viewers will pay far more to watch a television program than advertisers will pay to show it to them. Consequently, pay cable because it has greater revenue-raising capabilities, might be able to siphon programming currently shown on networks, even though pay cable may ultimately show the program to a smaller audience. *See* Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 Den. L.J. 477, 481 (1976); Horowitz, *Pay TV and Sports Siphoning*, in *Inquiry into Professional Sports: Final Report of the Select Committee on Professional Sports*, (House Report No. 94-1786) 94th Cong., 2d Sess. (1977); Analysis of Consumer Demand, *supra* note 28. *See also* Kahn, *supra* note 18; Pearson, *Cable: The Thread by Which Television Competition Hangs*, 27 Rutgers L. Rev. 800 (1974).

49. *Compare* note 48 *supra with* authorities cited in notes 51-53 *infra*.

50. *See* Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 Va. L. Rev. 541 (1975).

51. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 149-50 (1972).

The anti-competitive pay cable rules,[52] advanced by the FCC in order to save "free" television,[53] are a significant variant on this same protectionist policy goal.[54]

Another important policy theme in the FCC's regulation of cable has been to treat cable operators as if they were broadcasters, charging them with affirmative burdens that it believes will further the public interest in first amendment values.[55] For instance, in announcing the "access rules,"[56] which require cable operators to furnish transmission opportunities to various groups, the FCC asserted that: ". . . it is . . . appropriate that the fundamental goals of a national communications structure be furthered by cable — the opening of new outlets for local expression, the promotion of diversity in television programming, [and] the advancement of educational and instructional television, and increased informational services of local governments."[57] The application of the "fairness" doctrine and "equal time" rules[58] to cablecasting was grounded on a similar statement of FCC objectives.[59] "Localism" is another example of a policy developed under the framework of the FCC's regulation of broadcasters, which has been adapted to the cable television context.[60] Localism was especially evident as a consideration underlying the recently repealed "leapfrogging" rules,[61] which required that cable systems import certain signals from the nearest regional source.[62]

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52. 47 C.F.R. §76.225 (1976).

53. *See* Memorandum, Opinion and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 23 F.C.C. 2d 825, 826 (1970).

54. *See* Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DEN. L.J. 477, 477-81 (1976). *See also* Brown, *The Subscription Television Controversy: A Continuing Symptom of Federal Communication Commission Ills*, 24 FED. COM. B.J. 259 (1970-1971); Rappaport, *The Emergence of Subscription Cable Television and Its Role in Communications*, 29 FED. COM. B.J. 301 (1976).

55. U.S. CONST. amend. I. *See generally* Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515 (1975); Hagelin, *First Amendment Stake in the New Technology: The Broadcast Cable Controversy*, 44 U. CIN. L. REV. 427 (1975); Note, *Cable Television and Content Regulation: The FCC, the First Amendment, and the Electronic Newspaper*, 51 N.Y.U.L. REV. 133 (1976).

56. 47 C.F.R. §§76.252-.258 (1977).

57. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 190 (1972).

58. 47 C.F.R. §76.209 (1976).

59. First Report and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 20 F.C.C. 2d 201, 223-25 (1969).

60. *See* Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (discussing 1952 Television Station Allocation Plan). *See also* Bendix Aviation Corp. v. United States, 272 F.2d 533 (D.C. Cir. 1960), *cert. denied*, 361 U.S. 965 (1960).

61. 47 C.F.R. §76.59(6)(b) (1975), *revised*, 41 Fed. Reg. 3860, 3868 (1976) on grounds that rules were burdensome on cable operators and did not serve the public interest, rejecting *inter alia* arguments that the rule promoted the public's "opportunity to receive . . . programming responsive to community needs and interests." *Id.* at 3864.

62. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 179 (1972). The Commission made the following remarks in announcing the broadcast carriage rules: "Clearly, cable service can provide greater diversity — can, if permitted. provide the full television complement of a New York or a Los Angeles to all areas of the country. Although that would be a desirable achievement, it would pose a

But the present cable regulations should not be viewed simply as acts of FCC protectionism or as analogs of long-standing policies toward broadcasters. Nor is it necessarily appropriate that these be the guidelines of cable regulation. Cable is, after all, a medium different from broadcasting, prospectively offering new types of services. The unique attributes of cable such as its ability to make available more channels, its two-way services capabilities, its closed circuit nature, its revenue base of subscriber fees, and the inevitable interest of local governments, might compel consideration of a broader set of factors in policy-making.[63]

To some extent, the FCC has recognized the unique characteristics of cable television and has sought to take a promotional, if qualified, policy stance towards cable development. For instance, in resolving the problem of cable's detrimental impact on local broadcasters,[64] the FCC decided to take a pragmatic approach with the "basic objective . . . to get cable moving so that the public may receive its benefits . . . ."[65] But the measure of this promotional position has been the extent to which cable growth can be achieved "without jeopardizing the basic structure of over-the-air television."[66] Accordingly, the Commission has treated cable systems as supplemental – that is, useful for filling in the geographic and performance shortcomings of the broadcast structure – but detrimental to the overall system insofar as its services might overlap and compete with those historically supplied by broadcasters.[67] In short, the FCC's model for regulation of the television service industry has not been premised on dynamic competition.[68]

Moreover, the FCC's techniques for obtaining the benefits of cable tele-

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threat to broadcast television's service. We believe, however, that those who are not accommodated as are New York or Los Angeles viewers should be entitled to the degree of choice that will afford them a substantial amount of diversity and the public services rendered by local stations." *Id.* at 177.

63. *See generally Cable Performance Staff Report, supra* note 29; P. MACAVOY, *supra* note 19; SLOAN COMMISSION, *supra* note 35; Gerlach, *Toward the Wired Society: Prospects, Problems, and Proposals for a National Policy on Cable Technology*, 25 MAINE L. REV. 193 (1973); Note, *Proposed Cable Communications Act of 1975: A Recommendation for Comprehensive Regulation*, 1975 DUKE L.J. 93 (1975).

64. Cable's detrimental impact is alleged on the basis of the theory of audience "fracture." That phenomenon in theory is attributable to cable's importation of distant signals which will compete for audiences with the signals of local broadcasters, threatening their revenues from advertising.

65. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 164 (1972). *See generally* First Report and Order, *In re* Amendments to Adopt Rules and Regs. for Microwave Stations, 38 F.C.C. 683 (1965).

66. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 164 (1972).

67. *See* Cable Television Proposals, 31 F.C.C. 2d 115, 115 (1971); Memorandum Opinion and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 23 F.C.C. 2d 825, 826 (1970); Fourth Report and Order, *In re* Amendment to Provide for Subscription Television Service, 15 F.C.C. 2d 466, 484 (1968); First Report and Order, *In re* Amendments to Adopt Rules and Regs. for Microwave Stations, 38 F.C.C. 683, 689 (1965).

68. *See generally* Besen, *Economic Policy Research on Cable Television: Assessing the Costs and Benefits of Cable Deregulation*, in P. MACAVOY, *supra* note 19 (discussing the consequences of replacing regulatory with competitive constraints).

vision have often emphasized the imposition of affirmative duties.[69] These affirmative requirements have been based on the Commission's vision of "a future for cable in which the principal services, channel uses, and potential sources of income will be from other than over-the-air signals."[70] Yet, at the same time, the FCC has been somewhat insensitive to the economic burdens and inhibitory effects on service expansion that have been associated with these requirements.[71]

Although the local monopoly of most cable systems may justify regulation designed to improve cable operators' performance, and may include obligations to perform affirmative duties, local government may stand in a better position than the FCC to assess the needs of the local community.[72] Indeed, that position of flexibility and sensitivity seems more compelling than the FCC's rationale for its affirmative regulations: because "[b]roadcast signals are being used as a basic component in the establishment of cable systems, . . . it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable. . . ."[73] Local government's proximity to local concerns also seems more compelling than the FCC's rationale that local regulation might be confusing for its preemption of local authority.[74]

Because regulation by local government is "inescapable,"[75] because Congress has never delegated to the FCC authority to regulate cable television, and because Congress certainly has not prescribed any policy goals for the FCC's cable regulation,[76] the FCC's displacement of local authority seems especially presumptuous. The impropriety of that presumptuousness would appear to be exacerbated by the FCC's disregard of the traditional American preference for free enterprise and competition, and of the fundamental administrative law principle that administrative agencies may exercise only so much authority as is properly delegated to them.[77]

THE SUPREME COURT'S INTERPRETATION OF THE COMMUNICATIONS ACT

The FCC was established by the Communications Act of 1934.[78] The scope of its authority under the 1934 Act has traditionally been interpreted

69. *See, e.g.*, 47 C.F.R. §§76.252-.258 (1977) (access rules).

70. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 190 (1972).

71. *See* Memorandum Opinion and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 23 F.C.C. 2d 825, 826 (1970) (rejecting argument of cable operators that mandatory origination was economically burdensome).

72. LeDuc, *Control of Cable Television: The Senseless Assault on States' Rights*, 24 CATH. U.L. REV. 795 (1975).

73. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 190 (1972).

74. *Id.* at 193-207 (1972). *See generally* 47 C.F.R. §76.31 (1975) (describing federal-state/local relationships); Note, *Cable Television in Illinois: The Problems of Concurrent Jurisdiction*, 50 CHI.-KENT L. REV. 119 (1973).

75. Cable Television Report and Order, 36 F.C.C. 2d 143, 207 (1972).

76. See note 11 *supra*.

77. American Power & Light Co. v. S.E.C., 329 U.S. 90, 112 (1946); Yakus v. United States, 321 U.S. 414, 424 (1944).

78. 47 U.S.C. §§151-609 (1970).

broadly to allow the agency to cope with new developments in the communications media.[79] Since the Act was passed long before the advent of cable television,[80] however, and because by its terms the Act is specifically applicable only to common carriers and broadcasters,[81] the agency was initially reluctant to extend its regulation to cable television.[82] By 1962, however, the FCC had taken some preliminary measures in the regulation of cable.[83] Yet it was primarily after 1968, after the Supreme Court's decision in *United States v. Southwestern Cable Co.*,[84] that the FCC embarked on the ambitious course of regulation that its rules have reflected.[85] Thus the *Southwestern* decision, which upheld an FCC order prohibiting a cable company from expanding its

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79. National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943); F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 220 (D.C. Cir. 1967) (upholding FCC's regulation of cable).

80. The first cable television system appears to have been constructed in 1948 in Mahoney City, Pennsylvania. PHILLIPS, CATV: A HISTORY OF COMMUNITY ANTENNA TELEVISION 8-10 (1972).

81. Subchapter I of the Federal Communications Act, 47 U.S.C. §§151-155 (1970) is entitled "General Provisions"; Subchapter II, 47 U.S.C. §§201-223 (1970) is entitled "Common Carriers"; Subchapter III, 47 U.S.C. §§301-330 (1970) is entitled "Special Provisions Relating to Radio." Because radio communication is defined to include transmission by pictures, the Act has been held to cover television. 47 U.S.C. §153(b) (1970); Allen B. Bumont Laboratories v. Carroll, 184 F.2d 153 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

82. *See* Frontier Broadcasting v. Collier, 24 F.C.C. 251 (1958).

83. The FCC in 1962 placed restrictions on the use of microwave transmissions which cable television systems used to communicate signals over long distances. Carter Mountain Transmission, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963). In 1966, the FCC asserted jurisdiction over cable systems proper and issued the forerunners of the current broadcast carriage and non-duplication rules. Second Report and Order, *In re* Amendment to Govern the Grant of Authorizations for Microwave Stations to Relay Television Signals to CATV, 2 F.C.C. 2d 725 (1966). At that time, the FCC based its jurisdiction over cable on the plain language of §§1, 2, 3(a) and 3(b) of the Communications Act. *Id.* at 793 app. The Commission rejected arguments that it did not have jurisdiction because there was no Communications Act provision granting authority or because the Commission had previously denied its authority. *Id.* at 729. The Commission countered the contention that §2(b) of the Communications Act, prohibiting FCC regulation of intrastate common carriers, precluded FCC regulation of cable television. Cable television, it said, was not a common carrier, and furthermore, carried interstate broadcast signals. *Id.* at 729-31. Specific grounds for the regulations issued were said to lie in several sections of the Communications Act's Subchapter III, which authorized the FCC to develop a television assignment plan. *Id.* at 794 app.

84. 392 U.S. 157 (1968).

85. *See generally* Notice of Proposed Rulemaking and Notice of Inquiry, *In re* Amendment of Rules and Regs. Relative to CATV, 15 F.C.C. 2d 417 (1968). The Supreme Court decided that same year that cable television systems were not liable in copyright for their retransmissions of broadcast signals. Fortnightly Corp. v. United Artists, 392 U.S. 390 (1968). In Notice of Proposed Rulemaking and Notice of Inquiry, *In re* Amendment of Rules and Regs. Relative to CATV, 15 F.C.C. 2d at 434-35, the Commission indicated that the reason for its expanded regulation was protection of UHF broadcast stations from cable's "unfair competition." The Commission relied on *Southwestern* as having granted it jurisdiction over cable. *Id.* at 434.

service into a major broadcasting market,[86] has been viewed as granting after the fact the authority which Congress had not previously granted.[87]

An understanding of the *Southwestern* holding requires an examination of the methodology used by the late Justice Harlan, who wrote for six members of the Court.[88] His opinion began by noting that the Communications Act set out the FCC's responsibilities in its Section 151[89] and that the scope of the Act was described in Section 152(a).[90] Southwestern Cable, the appellee, had principally argued that Section 152(a) did not independently grant regulatory authority to the FCC; rather, this section of the Act only limited the types of communications to which Subchapter II (pertaining to common carriers) and Subchapter III (pertaining to radio) otherwise applied.[91] Harlan refuted that contention, but never expressly stated that Section 152(a) amounted to a delegation of authority. Instead he ambiguously remarked that there was "no reason to believe that Section 152 does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.' "[92]

Harlan then found that under Sections 303(f) and (h), which are in the Act's Subchapter III, Congress had given the FCC the power to prevent channel interference and to establish and allocate broadcast zones. Additionally, he found that under Section 307(b), the FCC had the responsibility to assure efficient and equitable service.[93] Harlan found reasonable the FCC's determination that the detrimental impact on broadcasters of Southwestern's activities might jeopardize the achievement of those goals. Consequently, the Court

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86. *In re* Midwest Television, Inc., 13 F.C.C. 2d 478 (1968). Southwestern Cable Co. was carrying the signals of Los Angeles stations into the San Diego area. The FCC had prohibited by rule such extensions of broadcast signals unless the cable company demonstrated that it would be consistent with the establishment and maintenance of broadcast service in the area. On petition for relief under the rule by a broadcaster with stations in both San Diego and Los Angeles, the FCC prohibited Southwestern from further expanding its service. The Ninth Circuit had reversed the FCC's decision on the grounds that the Commission was without authority to issue the order under the Communications Act.

87. *Cable Performance Staff Report, supra* note 29, at 27-28.

88. Justice Douglas and Marshall did not participate. Justice White concurred in the result, arguing that the Commission's statutory power to prevent interference between broadcasters was sufficient to support the order. He said that the FCC must base its jurisdiction generally on provisions of the Communications Act other than §152(a). 392 U.S. at 181-82 (White, J., concurring).

89. 392 U.S. at 167. Section 151 states that the FCC was created "[f]or the purpose of regulating . . . communication by wire and radio so as to make available . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service . . . ." The statute also states other purposes for which the FCC was established. 47 U.S.C. §151 (1970).

90. 392 U.S. at 167. Section 152(a) states: "The provisions of this Act shall apply to all interstate and foreign communication by wire or radio . . . 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 . . . ." 47 U.S.C. §152(a) (1970).

91. 392 U.S. at 171-72. Respondents also emphasized that the FCC itself had thought its authority unfounded, citing the two instances when it had gone to Congress for enabling legislation. *Id.* at 169-71.

92. *Id.* at 173.

93. *Id.* at 174.

sustained the FCC's power to promulgate the order.[94] Nevertheless, Harlan emphasized the narrowness of the Court's holding:

> There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize . . . is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. . . . We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.[95]

Courts have since focused on the words "reasonably ancillary" as providing, in some degree, a distillation of the *Southwestern* opinion.[96] It is, in fact, tempting to read *Southwestern* as saying simply that the FCC has authority over cable television insofar as its regulations are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." When the Supreme Court next examined FCC regulation of cable, in *United States v. Midwest Video Corp.*,[97] the plurality essentially adopted that view.[98] But a much narrower reading is clearly possible and probably more consistent with Harlan's overall approach in *Southwestern*.

Harlan's methodology indicates that the initial inquiry in determining the legality of FCC rules should consider whether the transmission activity in question is one which the Communications Act was intended to reach.[99] Subsequently, a court, given the fact that cable television systems are not specifically included in the Act, would consider the reasonableness of allowing the FCC to regulate the cable systems in the specific manner contemplated. The legality of the FCC's regulation in any given instance might turn on the relationship of the cable activity regulated to the FCC's responsibilities as set out under the Act.

The *Southwestern* Court, one might argue, found that it could treat the problem posed by Southwestern Cable's importation of distant broadcasts to the detriment of local broadcasters as one involving essentially the transmission and use of broadcast signals. Harlan's focus, therefore was at least initially on the nature of the activity and not on the actors or on the activity's effect. It was not necessary in order to sustain the FCC action that Section 152(a) confer jurisdiction over cable systems so long as the Act conferred jurisdiction over the use of broadcast signals. For Harlan and the *Southwestern* Court, the need for the "reasonably ancillary" standard arose only to settle whether the FCC had the power to compel a non-broadcaster, non-common carrier to

94. *Id.* at 175-77.

95. *Id.* at 178.

96. See cases cited at note 24 *supra.*

97. 406 U.S. 649 (1972).

98. *Id.* at 650-51, 662-63.

99. For evidence of that intent, one would look primarily to §152. Interstate communications, whether by wire or radio would be subject to regulation. 47 U.S.C. §152(a) (1970). *Cf.* 47 U.S.C. §152(b)(3) (1970) (prohibiting FCC jurisdiction over "carriers" engaged in interstate communication "solely through connection by radio, or by wire and radio.")

comply with the FCC's statutory goals.[100] Recognizing that Southwestern and other cable companies were functionally traffickers in broadcast signals — or, as Chief Justice Burger would later say, "not exactly strangers to the stream of broadcasting"[101] — the Court was satisfied that the test had been met, that the burden on cable systems was reasonable. The regulation only went so far as to regulate broadcast traffic.[102]

By 1972, when the Supreme Court decided the case of *United States v. Midwest Video*,[103] the FCC had expanded[104] the scope of its cable television regulation to include a "mandatory origination" requirement.[105] Under that rule, certain cable companies were required to transmit, or "cablecast," programs to their subscribers.[106] The cable companies were to function as new outlets for program material by making available programming beyond the basic offering of retransmitted broadcast signals.[107] Because the "mandatory origination" rule did not directly involve broadcast signals at all, it presented for the Supreme Court a test of the FCC's authority much different than the order challenged in *Southwestern Cable.*

The Court nevertheless again affirmed the FCC's regulation, albeit without a majority opinion. Justice Brennan, writing for the four-member plurality,[108] began by reading *Southwestern* to have held that Section 152(a) of the Communications Act granted the FCC regulatory authority over cable television.[109] He continued:

> This conclusion . . . did not end the analysis, for [§152(a)] does not in and of itself prescribe any objectives for which the Commission's regula-

100. Section 152(a) says that the provisions of the chapter apply to persons engaged in interstate communication "by radio." 47 U.S.C. §152(a) (1970).

101. 406 U.S. at 676 (Burger, C. J., concurring).

102. *Cf., Cable Performance Staff Report, supra* note 29, at 28: "[S]ince the Commission had argued for jurisdiction only because of impact upon conventional broadcasting the Court limited its holding to that ground."

103. 406 U.S. 649 (1972).

104. *See generally* Memorandum Opinion and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 23 F.C.C. 2d 825 (1970); First Report and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 20 F.C.C. 2d 201 (1969).

105. 47 C.F.R. §74.1111(a) (1972) (amended, 39 Fed. Reg. 43,302 (1974)).

106. The rule required that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operated to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs. . . ." 47 C.F.R. §74.1111(a) (1972) (repealed 39 Fed. Reg. 43,302 (1974)). Cable companies were opposed to the requirements primarily because of its economic burden. *See* Memorandum Opinion and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 23 F.C.C. 2d 825, 826 (1970). The burden of the rule was contingent on cable system's use of broadcast signals. First Report and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 20 F.C.C. 2d 201 (1969); Notice of Proposed Rulemaking and Notice of Inquiry, *In re* Amendment of Rules and Regs, Relative to CATV, 15 F.C.C. 2d 417, 422 (1968).

107. Notice of Proposed Rulemaking and Notice of Inquiry, *In re* Amendment of Rules and Regs. Relative to CATV, 15 F.C.C. 2d 417, 421 (1968).

108. Brennan, J., was joined by White, Marshall, and Blackmun, JJ. Burger, C.J., concurred in the result. See text accompanying notes 121-127 *infra.*

109. 406 U.S. at 660.

> tory power over CATV might properly be exercised. We accordingly went on to evaluate the reasons for which the Commission had asserted jurisdiction and found that the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities.[110]

In effect, Brennan abandoned the *Southwestern* analysis, which had suggested that the FCC look to the Communications Act for a jurisdictional basis over each regulated cable function or activity. Justice Brennan's primary concern appeared to be whether the FCC's objectives in the regulation were sound, and only in passing did Brennan note that the origination rule "serve[s] the policies of §§1 and 303(g)."[111] As he formulated the test, the legality of the FCC's cable jurisdiction depended on whether the Commission had determined that the action taken would "further the achievement of long-established regulatory goals in the field of television broadcasting."[112] Cable could be governed "with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting."[113] In other words, the mandatory origination rule could be wholly supported by the fact that the FCC had an existing policy of increasing the outlets for community expression and the diversity of television programs and services.[114]

Justice Douglas wrote the *Midwest Video* dissent, which, like Brennan's plurality opinion, represented the views of four members of the Court.[115] The dissent's basic proposition was that the FCC had no authority to promulgate the mandatory origination rule absent Congressional authority.[116] Thus the opinion directly challenged Brennan's assertion that Section 152(a) was jurisdictional and that the *Southwestern* Court had held it to be so.[117] Un-

110. *Id.* at 661.

111. *Id.* at 669. Brennan said of the origination rule: "In essence the regulation is no different from Commission rules governing the technological quality of CATV broadcast carriage. In the one case, of course, the concern is with the strength of the picture and the voice received by the subscriber, while in the other, it is with the content of the programming offered. But in both cases the rules serve the policies of §§[151] and 303(g) . . . . In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 669-70.

112. *Id.*

113. *Id.* at 667.

114. *Id.* at 667-68. A further question addressed by the plurality was whether the rule was supported by substantial evidence. The respondent had argued, and the lower court had agreed that, because the economic burden of the rule stifled the growth of cable, it was contrary to the public interest. The plurality, however, was satisfied that the Commission had made sufficient effort "to tailor the regulation to the financial capacity of CATV operators," noting that it was "beyond the competence of the Court of Appeals . . . to assess the relative risks and benefits of cablecasting." *Id.* at 672-74. For an example of subsequent lower courts' treatment of evidentiary issues in the context of the FCC's ancillary jurisdiction over cable, *see* Home Box Office v. F.C.C., 567 F.2d 9 (1977).

115. Douglas, J., was joined by Stewart, Powell, and Rehnquist, JJ. 406 U.S. at 677.

116. *Id.*

117. Douglas interpreted *Southwestern* as saying only that the Communications Act under §152(a) "was not limited to the precise methods of communication" known when

fortunately, Douglas' opinion did not stop there. If it had, the inference might readily be drawn that the dissent had applied the *Southwestern* Court's analysis and found no statutory basis for the origination rule.[118] Douglas went on, however, to distinguish the order affirmed in *Southwestern Cable* from the rule under consideration in *Midwest Video,* primarily on the grounds that the latter required that cable operators engage in affirmative acts and expenditures. Such affirmative acts and expenditures, he said, could not be required of broadcasters and thus, could not be imposed on cable companies.[119]

Douglas' distinction between the two cases on the basis of their economic burden seems to go only to the issue of whether a regulation is reasonable, but does little to clarify what is ancillary. To this end, Douglas might have emphasized the functional differences between the activities which the FCC had regulated in the two cases. While *Southwestern* directly involved cable transmission of broadcast signals, *Midwest Video* involved activities that did not use broadcast signals at all. One suspects that Douglas intended to make this distinction, although his choice of language is ambiguous.[120]

Chief Justice Burger's decisive concurrence is highly significant in terms of *Midwest Video's* precedential value, but his opinion is the least susceptible of clear interpretation. Although the Chief Justice acknowledged that the mandatory origination rule "strains the outer limits" of the Commission's legal jurisdiction,[121] his treatment of the Commission's powers at times appears broader than that of the plurality. He remarked that, although Congress could not have had any intent in the 1934 Act with regard to cable television, "that statutory scheme plainly anticipated the need for comprehensive regulation as pervasive as the reach of the instrumentalities of broadcasting."[122] Unpredictable scientific advances, he said, require that "regulatory schemes must be flexible and virtually open-ended."[123]

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the Communications Act was passed. *Id. Compare* that interpretation *with* the plurality view, *id.* at 659-61, *and* United States v. Southwestern Cable Co., 392 U.S. at 173.

118. See generally 406 U.S. at 649, 679-81 (Douglas, J., dissenting). Douglas used specific provisions of the Act primarily to advance his argument that the FCC cannot compel cable operators, to become broadcasters or to perform the functions of broadcasters. This position refuted the plurality's assertion that cable companies can be regulated as long as its regulation is consistent with the FCC's responsibilities for broadcasting regulation. Douglas saw the "mandatory origination" rule as forcing cable operators, otherwise no more than "carriers," into becoming a broadcaster while broadcasters themselves live under more lenient rules. *Id.* at 680. He said that §303(g) "relates to the objectives of the Act" and was not jurisdictional. *Id.* at 681.

119. *Id.* at 678.

120. Douglas, for example, stated that in Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968), the Supreme Court "made clear how foreign the origination of programs is to CATV's traditional transmission of signals." 406 U.S. at 678. Later he asserted: "Of course, the Commission can regulate a CATV that transmits broadcast signals. But to entrust the Commission with the power to force some, a few, or all CATV operators into the broadcast business is to give it a forbidding authority." *Id.* at 681 (Douglas J., dissenting).

121. 406 U.S. at 676 (Burger, C.J., concurring in result).

122. *Id.* at 675.

123. *Id.* at 674-75.

The most appropriate interpretation of Burger's opinion may be that he viewed the FCC as having a broad jurisdiction over cable television, but one that is defeasible in the face of certain conditions. He noted, for instance, that cable television "is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act."[124] Later he said that the "essence of the matter is that when [cable operators] interrupt the broadcast signals and put it in their own use for profit, they take on burdens, one of which is regulation by the Commission."[125] He concluded that "until Congress acts, the Commission should be allowed wide latitude."[126] Each of these statements includes a factual premise that is susceptible to change. Burger's statement that the FCC mandatory origination rule "strains the outer limits of its authority" implies that changes in the primary activity of cable operators, or some expression of intent by Congress with respect to cable, might reverse Burger's vote.[127]

Recent Circuit Courts of Appeals Decisions

A narrow interpretation of the *Southwestern Cable* opinion might restrict the FCC's authority over the cable television to activities in which cable directly makes use of broadcast signals.[128] Presumably, that view was preserved by the *Midwest Video* dissent.[129] In contrast, a synthesis of the opinions by Brennan and Burger in *Midwest Video* would support the proposition that, as long as cable systems retransmit broadcast signals and "until Congress acts," the FCC may regulate cable television consistently with goals that have been developed in the FCC's experience with the regulation of broadcasting.[130] The latter view, given the facts of *Midwest Video*, would appear to allow the FCC to consider the overall impact of cable television on the national communications systems in drafting cable regulations.[131]

In at least three circuit court of appeals cases that have reviewed the FCC's cable rulemaking since *Midwest Video*,[132] the FCC has asserted that

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124. *Id.* at 675.

125. *Id.* at 676.

126. *Id.*

127. See text accompanying notes 214-222 *infra.*

128. See text accompanying notes 96-102 *supra.*

129. See text accompanying notes 115-120 *supra.*

130. See text accompanying notes 108-114 and 125-128 *supra.*

131. The open-endedness of the "ancillary jurisdiction" doctrine under Midwest Video has been acknowledged and cited as a reason for enacting cable legislation at this time. *Cable Performance Staff Report, supra* note 29, at 28-29.

132. Midwest Video Corp. v. F.C.C., 571 F.2d 1025 (8th Cir. 1978); Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, —— U.S. ——, 98 S.Ct. 111 (1977); Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 533 F.2d 601 (D.C. Cir. 1976). A fourth case reviewing the FCC's cable rulemaking involved no challenge to the FCC's jurisdiction over cable. Rather, petitioner ACLU sought a further rulemaking. It wanted the FCC to impose common carrier obligations on cable systems and to limit cable operators to cablecasting on one channel. The petition was denied on the ground that the FCC's refusal to issue such orders was not inconsistent with actions "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." A.C.L.U. v. F.C.C., 523 F.2d 1344 (9th Cir. 1975). A fifth case has recently been

Southwestern Cable-Midwest Video vested it with broad regulatory powers over the cable industry.[133] Each of those courts, however, has rejected that argument and has refused to recognize an unlimited grant of cable jurisdiction. Moreover, each has invalidated some portion of the FCC's cable rules.[134]

The first two of these cases were heard and decided in the District of Columbia Circuit. In *National Association of Regulatory Utility Commissioners v. FCC* (hereinafter NARUC),[135] the petitioner challenged the FCC's preemption of state regulation of two-way, point-to-point, non-video communication.[136] The state utilities commissioners saw this cable television service as similar to, and competitive with, services offered by intrastate common carriers[137] whose regulation had been expressly reserved to the states under Section 2(b) of the Communications Act.[138] In contrast, the FCC's rationale for the preemption of state regulation was that optimum development of cable could only be achieved where the cable technology was treated as an organic whole for regulation purposes.[139] That argument led necessarily to the FCC's ambitious proposition that the FCC, under *Southwestern Cable* and *Midwest Video*, had blanket jurisdiction over the cable television industry.[140]

Judge Wilkey, writing for the majority, rejected the proposition specifically asserted by Justice Brennan in *Midwest Video* that Section 152(a) was "unambiguously jurisdictional."[141] Explaining the precedential value of *Southwestern Cable* and *Midwest Video*, he argued:

> [The] Court's reasoning . . . compels the conclusion that the cable jurisdiction, which they have located primarily in §152(a), is really incidental to and contingent upon, specifically delegated powers under

decided in the second circuit. Brookhaven Cable TV, Inc. v. Kelley, 573 F.2d 765 (2d Cir. 1978). That court distinguished the prior circuit cases and upheld the FCC's preemption of local and state regulation of pay-cable rates. See text accompanying notes 197-205 *infra*.

133. Midwest Video Corp. v. F.C.C., 571 F.2d 1025 (8th Cir. 1978); Home Box Office v. F.C.C., 567 F.2d 9 (D.C. Cir. 1977); Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 533 F.2d 601, 606 (D.C. Cir. 1976).

134. Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1038-39 (8th Cir. 1978); Home Box Office v. F.C.C., 567 F.2d 9, 25-26 (D.C. Cir. 1977); Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 533 F.2d 601, 614 (D.C. Cir. 1976).

135. 533 F.2d 601 (D.C. Cir. 1976).

136. The preemption of state authority in this area was announced in 1972. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 193. *See also* Memorandum Opinion and Order, *In re* Advisability of Federal Preemption of CATV Technical Standards, 49 F.C.C. 2d 1078, 1081 (1974); Clarification of the Cable Television Rules, *In re* Advisability of Federal Preemption of CATV Technical Standards, 46 F.C.C. 2d 175, 185-86.

137. 533 F.2d 601 (D.C. Cir. 1976). *See also* Nat'l Ass'n of Regulatory Util Comm'rs, 525 F.2d 630 (D.C. Cir. 1976).

138. National Ass'n of Regulatory Util. Comm'rs. v. F.C.C., 533 F.2d 601, 610 (D.C. Cir. 1976). *Cf.* T.V. Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd*, 396 U.S. 556 (1970) (states may regulate cable systems as public utilities if regulation does not interfere with federal objectives).

139. 533 F.2d at 611.

140. *Id.*

141. *Id.* at 612.

> the Act. The statute's introductory section is made a locus for powers which must of necessity be recognized if the purposes set out in the broadcasting sections are to receive their fullest realization. The Court thus was not recognizing any sweeping authority over the entity as a whole, but was commanding that each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission's power over *broadcasting*.[142]

The Court's initial duty in testing a rule under the ancillary jurisdiction test, according to the *NARUC* court, was to "weigh the statutory purposes served by allowing . . . jurisdiction, against those which would thereby be impaired."[143] The court found that Section 152(b),[144] which precludes FCC jurisdiction over intrastate common carrier activities, was a substantial bar to the FCC's preemption of state regulation of a cable operator's intrastate non-video, point-to-point services.[145]

The Section 152(b) bar might have ended the analysis under *Southwestern Cable*.[146] Judge Wilkey, however, read *Midwest Video* as expanding the policy considerations that might support agency action. The "ancillary to broadcasting" test, he said, might be satisfied by "any regulation of cable which in its own right serves the purposes pursued by broadcast regulation."[147] Nevertheless, Wilkey determined that no such purpose could be discovered and substantiated. A policy to promote communications services might have been sufficient, but the court found no evidence that state regulation would impair the ability of cable systems to raise revenue to support public services.[148] The court also noted that there was a certain asymmetry in *NARUC*, which had not been present in *Midwest Video* and which made the instant regulation especially undesirable. In *Midwest Video*, the regulated cable activity competed with broadcast signals under the jurisdiction of the FCC; in *NARUC*, competition with the cable activity arose from activities primarily under the purview of state and local regulatory authorities.[149] Noting the Section 152(b) bar and the absence of a significant statutory or broadcast purpose, the *NARUC* court distinguished its factual situation from an "ideal test case."[150]

Home Box Office v. FCC,[151] decided one year later in the same court,

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142. *Id.*

143. *Id.* at 607.

144. 47 U.S.C. §152(b) (1970).

145. Nat'l Ass'n of Regulatory Util Comm'rs v. F.C.C., 533 F.2d at 607-11 (D.C. Cir. 1976).

146. *But see* 533 F.2d at 621-23 (Lumbard, Circuit Judge, concurring). Judge Lumbard thought it unnecessary to reach the issue of whether §152(b) prohibited the preemption of state authority, noting that if cable companies were common carriers, they had been made so by a rule which the FCC would have no authority to promulgate. *Id.* at 621.

147. *Id.* at 615 (Wilkey, J., for the court).

148. *Id.* at 616.

149. *Id.*

150. *Id.* The ideal test case, according to Wilkey, would have presented two factors missing in *NARUC*. First, the regulated activity would have involved entertainment programs that were in competition with broadcast audiences. Secondly, there would have been no statutory bar. *Id.* at 616-17.

151. 567 F.2d 9 (D.C. Cir. 1977).

involved a challenge to the FCC's pay cable rules.[152] Because it involved those rules, it was not only a case much closer to the "ideal test case" Judge Wilkey had alluded to in *NARUC*,[153] but was also a case of far more controversy and consequence within the broadcast and cable industries.[154] At the heart of the pay cable controversy was the highly political question of who might control the most lucrative television entertainment events.[155] Further, the pay cable rules, which practically destroyed competition between the cable and broadcast industry for the most desirable television programs, were especially susceptible to "protectionist" and "agency capture" accusations.[156] Yet, if the political propriety of the pay cable rules was questionable, so was the legal basis for invalidating the rules. Unlike *NARUC*, the *Home Box Office* court found no provision of the Communications Act that specifically withdrew the subject matter of the rules from the FCC's jurisdiction.[157] Furthermore, the "long-established regulatory goals developed in the field of television broadcasting" which Judge Wilkey had found wanting in *NARUC*,[158] were not ostensibly a problem for the FCC in *Home Box Office*.[159]

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152. 47 C.F.R. §76.225 (1977).

153. See note 151 *supra*.

154. Some notion of the significance may be achieved by noting that *Home Box Office* was a consolidation of fifteen separate cases. Among the intervenors and briefs amicus curiae were the National Citizens Committee for Broadcasting, the American Mothers Committee, Inc., Professional Baseball, and Twentieth Century-Fox Film Corp. The Antitrust Division of the Department of Justice also filed a brief.

155. For many cable visionaries, the transformation of the television "wasteland" into the "wired nation" has been deemed largely dependent on the future of pay cable. Program diversity, programming for selective minority audiences, the elimination of commercialism and improvement of the television industry's program production and distribution markets have each been held out as a potential benefit that might accrue if pay cable could become financially viable. See note 45 *supra*. That viability, it has been argued, is dependent on pay cable promotors having access to the most desirable programs. Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 25 (D.C. Cir. 1977). On the other hand, the potential expansion and growth of pay cable has long been seen as a threat to the networks and broadcasters. In turn, representatives of the broadcast industry have argued that pay cable would destroy free television because of its tendency to divert or siphon the most popular programs from the advertiser supported broadcast networks. In particular, poor people and residents of rural areas, to whom it might never be economically feasible to bring cable service, have been identified as the potential losers in the siphoning scenario. Pay cable, in other words, has been characterized as essentially an anti-democratic, anti-egalitarian phenomenon. *See generally* First Report and Order, *In re* Amendment to Rules and Regs. Relative to CATV, 20 F.C.C. 2d 201 (1969); Fourth Report and Order, *In re* Amendment Relating to the Distribution of Television Broadcast Signals by CATV, 15 F.C.C. 2d 466 (1968); First Report, *In re* Amendment to Provide for Subscription Television Service, 23 F.C.C. 532 (1957).

156. *See generally* 567 F.2d at 51-52 (discussing "Ex Parte Contracts"). *See also* Note, *Ex Parte Contacts in Informal Rule-Making*, 65 CALIF. L. REV. 1315 (1977); Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 311 (1972) (Johnson, Comm'r, dissenting).

157. *Compare* 567 F.2d at 28-34 *with* 533 F.2d at 607-11.

158. 533 F.2d at 615.

159. *But see* Brief for Respondent at 30, Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir. 1977). The FCC, having argued that it had broad regulatory powers over cable,

In fact, the District of Columbia Circuit Court of Appeals had already upheld essentially the same rules as applied to subscription television.[160]

Nevertheless, the *Home Box Office* court, in a per curiam opinion,[161] held that the pay cable rules were beyond the legitimate scope of the FCC's authority.[162] In reaching its conclusion, the court initially applied the "reasonably ancillary to the Commission's authority over broadcast television" standard as had been developed in the *NARUC* case as the result of a synthesis of the *Southwestern Cable* and *Midwest Video* opinions.[163]

The *Home Box Office* court interpreted *Southwestern Cable-Midwest Video* as looking in "two directions." First, the Supreme Court looked towards an "expansive jurisdiction" for the FCC, based on Section 152(a) of the Communications Act. Yet the *Home Box Office* court found in those same decisions a limitation on FCC jurisdiction: the FCC, in its regulation of cable, could "act only for ends for which it could also regulate broadcast television."[164] According to the court, the test was whether the Commission could "demonstrate specific support for its actions in the language of the Communications Act or . . . ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television."[165] Applying the jurisdictional standards, the court then found two possible grounds for sustaining the FCC's jurisdiction to issue the rules.

One ground was the statutory mandate of Section 151 of the Act[166] to insure a nation-wide system of communications. The court dismissed this contention, finding that pay cable's purported threat to nationwide service, based on the theory that certain rural areas would be deprived of service by "siphoning," was no more than a naked allegation unsupported by the record.[167] The court did find merit in the second argument, that the FCC had

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did not attempt to clearly bring its anti-siphoning rules within the "long-established goals" test.

160. Nat'l Ass'n of Theatre Owners (NATO) v. F.C.C., 420 F.2d 194 (1969), *cert. denied*, 397 U.S. 922 (1970). See text accompanying notes 170-173 *infra*.

161. The court explained the "per curiam" designation in a footnote: "The opinion in this case is issued as a per curiam, not because it has received less than full consideration by the court, but because the complexity of the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the panel." 567 F.2d at 17 n.1. The court's division of labor suggests not only the "creative reading" recommended in note 177 *infra*, but also that the *Home Box Office* inquiry entails an undesirably burdensome scope of review.

162. 567 F.2d at 28-30. The court also found independent evidentiary grounds and first amendment grounds for its holding. *Id.* at 34-51. Further, the court rebuked the FCC and other parties for their "ex parte contacts" but took no conclusive action on the matter. *Id.* at 58. *See generally* Note, *supra* note 156. Finally, the court reaffirmed the position it had taken with regard to the FCC's subscription television rules. 567 F.2d at 59-60.

163. 567 F.2d at 27.

164. *Id.*

165. *Id.* at 28.

166. 47 U.S.C. §151 (1970).

167. 567 F.2d at 25. The court's treatment of this issue demonstrates the substantial evidentiary burden imposed by the ancillary jurisdiction requirement. The court said: "[The] Commission has nowhere spelled out even a theory of the dynamic which could

a long-standing broadcast television policy to "maintain present levels of public enjoyment" by regulation of program format. However, analogizing the pay cable rules to compulsory format changes in license renewal proceedings, the court found that the FCC had been unwilling in the past to compel such format changes. Such past reluctance estopped assertion of long-standing policy in the instant case.[168]

This estoppel by analogy by the *Home Box Office* court seems flawed. The court purported to evaluate the pay cable rules against the measure of policy goals, but instead measured the rules against the means employed by the FCC in pursuance of those goals. If that measure had been the test under *Midwest Video,* the mandatory origination requirement upheld in that case probably would have failed since the FCC has never required broadcasters to originate programming on a separate channel. On the other hand, the FCC had classified programming for broadcasters and required certain types of program presentations at certain times,[169] regulations as closely analogous to the pay cable rules as compulsory format changes.

The court's analysis of this issue — whether the pay cable rules were supported by established regulatory goals in the field of television broadcasting — turned entirely on the merits of the imperfect analogy drawn between compulsory format changes and the pay cable rules. The shortcoming of the court's analogical method becomes more evident when considered with its limited discussion of *NATO v. FCC,*[170] the case that upheld the subscription television rules.[171] Those rules were based on the same broadcast policy goals designed to prevent "siphoning" as were the pay cable rules. Additionally, the subscription television rules employed practically identical means to reach those goals — namely, rules precluding pay television from using the most desirable entertainment programs that had typically been shown on

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result in loss of broadcast television service to regions not served by cable. Nor is such a dynamic readily apparent. For example, cablecasters are unlikely to withhold feature film and sports material from markets they do not serve since broadcast of this material in such markets could not reduce the potential cable audience . . . . In these circumstances, the postulated loss of regional service is too speculative to support jurisdiction." *Cf.* United States v. Midwest Video Corp, 406 U.S. 649, 676 (1972) (Burger, C.J., concurring) (arguing that important reasons for upholding the FCC rule were the court's limited scope of review and the FCC's expertise in regulatory problems in this area).

168. 567 F.2d at 28-32. The court discussed at length Citizens Committee to Save WEFM v. F.C.C., 506 F.2d 246 (D.C. Cir. 1974), where it had upheld the position of the citizens' committee to have the FCC order a change in format. In the instant case, the FCC relied on that D.C. Circuit Court of Appeals opinion to show that the FCC had authority to order changes in program format to maintain present levels of public enjoyment. The *Home Box Office* court, however, was unconvinced that the FCC had since given up the position it had taken in *WEFM.* The court said: "If the Commission's own recently announced standards are applied to the rules challenged here, it seems clear that the rules cannot stand." 567 F.2d at 31.

169. 47 C.F.R. §73.658(k) (1976).

170. Nat'l Ass'n of Theatre Owners v. F.C.C., 420 F.2d 194 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970), discussed in *Home Box Office,* 567 F.2d at 32-34, 59-61.

171. Fourth Report and Order, *In re* Subscription Television, 15 F.C.C. 2d 466 (1968).

"free" television.[172] Yet the court refused to reconcile its treatment of the pay cable rules with this case.[173]

While ignoring precedent apparently on point, the court proceeded to explore new sources of limitation on the FCC's cable authority. In *NARUC*, the court had said that the boundaries of the FCC's reasonably ancillary jurisdiction could be found only by balancing the statutory goals and well-developed broadcast television goals tending to support the instant FCC rulemaking, against Communications Act policies to the contrary.[174] The *Home Box Office* court found no such competing provisions of the Communications Act. Yet, much as the *NARUC* court had looked to the Communications Act for indications that the FCC's jurisdiction over cable might be bounded by established policy, the *Home Box Office* court sought out policy themes to limit the FCC's cable jurisdiction.[175] Unlike the *NARUC* court, however, the *Home Box Office* court did not confine its search to the provisions of the Communications Act. Instead, that court recognized that established FCC policies should be available not only to support FCC regulation of cable, but to limit it as well. Specifically, the *Home Box Office* court would have required the FCC to consider the impact of its pay cable rules on "its otherwise long-standing policy favoring diversification of control of programming choices."[176]

Thus the *Home Box Office* case broadened the relevant legal inquiries into the FCC's cable television rulemaking. As such, the opinion was a fair response to the *Midwest Video* plurality. *Southwestern Cable*, read narrowly, would only have allowed the FCC to look to policies embodied in its statutory mandate for authority over cable companies. *Midwest Video* permitted the FCC to raise self-generated policies as support for its cable jurisdiction. Equity then demanded that opponents litigating the validity of FCC rules be allowed to demand that the courts at least consider long-established policies tending to undermine the FCC's rulemaking rationale.

Home Box Office, however, did not stop there. Read broadly, *Home Box Office* authorized a more zealous search for constraints on the FCC's ancillary jurisdiction over the cable industry.[177] The court said that the first

172. *Compare* Memorandum Opinion and Order, *In re* Amendments Relative to CATV, 23 F.C.C. 2d 825 (1970) *with* Fourth Report and Order, *In re* Subscription Television, 15 F.C.C. 2d 466 (1968).

173. The court confined its discussion of the subscription television rules to the changes in the rules since they were upheld. Concluding that the amendments were unimportant or for the better, the court concluded that the rules should be reaffirmed since *NATO* had foreclosed reconsideration of certain issues. *NATO* is also discussed for its interpretation of the Communications Act. 567 F.2d at 32-34.

174. 533 F.2d 601, 607 (D.C. Cir. 1976).

175. *See generally* note 177 *infra.*

176. 567 F.2d at 40.

177. This point may be ascertained as the result of a creative reading of the case. These policy themes are discussed by the court to a great extent under its section on the evidentiary issues. *Id.* at 34-43. The first amendment issues are discussed under still another section. *Id.* at 43-51. Nevertheless, if the court intended that evidentiary issues be separated from jurisdictional issues, so that the court might have jurisdiction over cable television, but possibly not the evidentiary support for its rules, it provides little guidance in that

amendment, for instance, required that the FCC's rules be drawn narrowly and be based on regulatory goals evincing an "important or substantial governmental interest . . ., a requirement which translates in the rulemaking context into a record that convincingly shows a problem to exist . . . ."[178] The court also indicated that consideration of anti-competitive effects under the antitrust laws was also a significant factor influencing the propriety of the FCC's cable rulemaking. The court would have required development of a substantial record demonstrating concern and appreciation for the preservation and promotion of competition.[179] Perhaps most importantly, the *Home Box Office* court viewed the due process/substantial evidence requirement, read in light of the "ancillary jurisdiction" doctrine, as creating a presumption in favor of an unregulated cable industry. According to the court, the FCC's formulation of the best means to regulate cablecasting in order to supplement over-the-air broadcasting was an "artificial narrowing of the scope of the regulatory problem [which is] arbitrary and capricious and . . . ground for reversal."[180]

By looking to such broad themes as the first amendment, the antitrust laws, and the doctrines of due process and by elevating them to positions of heightened cogency in the context of the FCC's ancillary jurisdiction power, the *Home Box Office* court greatly broadened the relevant inquiries into the FCC's rulemaking under its reasonably ancillary powers. Given that courts' inquiries into agency action are traditionally limited, the approach seems to raise serious problems.[181] It essentially places the court in a position where its political judgment would replace that of the FCC. That stance is tanta-

direction. In fact, the court stated that the FCC's jurisdiction over cable television turns on the nature of the record it establishes in the rulemaking proceeding. The court said, "we hold today that the Commission has not established its jurisdiction on the record evidence before it . . . . [W]e do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the Commission could legitimately regulate the broadcast media. . . . Further, we require that the Commission state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists. Because our holding is so limited, it is possible that the Commission will, after remand, be able to satisfy the jurisdictional prerequisites for regulating pay cable television." *Id.* at 34. There are other instances when the court asserted that the scope of the FCC's legitimate power is bounded by its ability to muster evidence. *Id.* at 31-32. In effect, by requiring that the FCC produce evidence of its policies to prove jurisdiction and by retaining the prerogative of determining whether that evidence is substantial, the court made a broad policy-oriented inquiry into the propriety of the FCC's rules. Where jurisdictional and evidentiary matters separate is impossible to ascertain.

178. 567 F.2d at 50 (following United States v. O'Brien, 391 U.S. 367 (1968)).

179. 567 F.2d at 40-43. The petitioners, including the Antitrust Division of the Department of Justice, apparently did not sustain the burden of going forward with the evidence on the anti-competitive issues and the court therefore refused to include that rationale as an independent ground for invalidating the pay cable rules. *Id.* at 40. The court's treatment of the anti-competitive issues suggests that they might not have the elevated significance in the ancillary jurisdiction context that the first amendment would have.

180. 567 F.2d at 36.

181. *See* Vermont Yankee Nuclear Corp. v. Natural Resources Defense Council, Inc., —— U.S. ——, 98 S.Ct. 1197, 1207-15 (1978); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

mount to admitting that the results are unpredictable, which seems highly undesirable given the broad impact and broad economic consequences of the FCC rules. Certainty in this area of the law is crucial.

Perhaps recognizing that the *Home Box Office* result was desirable on policy grounds, but legally unnecessary, the Eighth Circuit Court of Appeals in *Midwest Video Corp. v. F.C.C.*[182] (hereinafter *Midwest Video II*) recently refused to engage in the open-ended policy search that *Home Box Office* adopted. In *Midwest Video II*, a cable operator attacked the FCC's "access" rules. When promulgated in 1972, the access rules had been the heart of the FCC's program to have cable television "realize some of [its] potential."[183] Cable television interests, however, had asserted that there was little demand for access services and that the cost of compliance with the rules drained cable system revenues and discouraged financing of new plants and services. The ultimate effect, they argued, was to suppress cable expansion.[184] Nevertheless, the FCC in 1976 reaffirmed its commitment to the requirement of access channels while making only minor revisions directed at softening the economic burden of meeting the rules.[185]

The "dispositive issue" for the unanimous *Midwest Video II* court was whether the FCC had jurisdiction to promulgate the access rules.[186] Emphatically, the court said it did not. It rejected the FCC's argument that it was vested with "sweeping jurisdiction" over cable television.[187] Rather, following the language in *NARUC*, the court said that "whatever jurisdiction [the FCC] may have is contingent upon its delegated powers," and that "each attempt to regulate cable systems must be individually justified."[188]

Although the FCC had argued that several provisions of the Communications Act supported its authority, the court rejected these arguments as spurious.[189] Further, the court read narrowly the *Southwestern Cable* and *Midwest Video* decisions holding that the FCC might regulate cable with a view to protecting or pursuing its goals:

182. 571 F.2d 1025 (8th Cir. 1978).

183. Cable Television Report and Order, *In re* Amendment Relative to CATV, 36 F.C.C. 2d 143, 189 (1972).

184. *See* Walsh, *CATV: Let the Cables Grow*, 55 MARQ. L. REV. 205, 231 (1972).

185. 59 F.C.C. 2d 294 (1976), *reconsideration denied*, 62 F.C.C. 2d 399 (1976).

186. 571 F.2d at 1035. The court also discussed "constitutional considerations," including first amendment and due process issues, but clearly stated that it was unnecessary to do so. *Id.* at 1052. A similar treatment was given to matters of evidence. *Id.* at 1059-63. Judge Webster joined only the part of the court's opinion which treated the jurisdictional issues. He indicated that he was in general agreement with the court's discussion of the other issues but thought it unnecessary to discuss them. *Id.* at 1063. Unlike *Home Box Office*, the jurisdictional and evidentiary issues appear analytically separable. The *Midwest Video II* court, nonetheless, acknowledged that its analysis of the constitutional issues "are such as to reinforce our conclusions on the jurisdictional issue." 571 F.2d at 1053.

187. 571 F.2d at 1037.

188. *Id.* at 1039. In acknowledging that it was not dealing with a "normal" breadth of delegation question, the court drew an interesting analogy between the "reasonably ancillary" standard and the "necessary and proper" clause. U.S. CONST. art. I, §8, cl. 18. The court interpreted these as allowing the FCC and Congress, respectively, to "carry into execution" powers which they had otherwise been specifically delegated. 571 F.2d at 1036 n.25.

189. 571 F.2d at 1036 n.25.

> Because the free public access concept . . . has nothing to do with retransmission of broadcast signals on existing channels, the relationship of interaction between cable and broadcast systems present in *Southwestern* and *Midwest Video* is totally absent here. The present rules are not designed to govern some deleterious interrelationship of cable systems to broadcasting, or to require that cable systems do what broadcasters do, but relate to cable systems alone, and are designed to force them into activities not engaged in or sought; activities having no bearing, adverse or otherwise, on the health and welfare of broadcasting.[190]

In fact, the goals that the FCC had cited in support of the access rules such as increased outlets and augmented program choice, were essentially the same as those approved by the plurality in *Midwest Video* to support the mandatory origination rule.[191] Nevertheless, the *Midwest Video II* court rejected those goals as mere "objectives" which could not be "divorced from the context of broadcasting" without losing their power as a basis for the Commission's cable jurisdiction.[192]

In distinguishing goals from objectives, the *Midwest Video II* court was clearly concerned with the open-endedness of the "reasonably ancillary" jurisdiction doctrine as the FCC had sought to interpret it.

> The fundamental principle that governmental agencies are limited to the exercise of power delegated by the Congress would be nullified if an agency . . . were at liberty to expand its jurisdiction, as far and wide as it wished, by the facile, case-by-case step of re-writing the objectives found in the delegating statute. If "jurisdiction" be synony-

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190. *Id.* at 1038.

191. *See* 406 U.S. 649, 667-68. In fact, the access rules were historically closely related to the mandatory origination rule. *See* Report and Order, *In re* Cable Television Annual Fees, 49 F.C.C. 2d 1090 (1974).

192. The court's distinction between objectives and goals is elusive. Apparently, objectives are purposes internally generated by the Commission, but having only an indirect relationship to statutory objectives stated in Section 1. In contrast, goals seem to be the equivalent of statutory objectives. But the court placed heavy reliance on the fact that, in its brief, the FCC had not formulated the question presented as whether the rules were designed "to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets . . ." (the express language from the *Midwest Video* plurality opinion). Instead, the FCC had argued that the question was simply "whether the rules are a 'reasonable exercise of agency authority to promote statutory objectives.'" Apparently this was not enough. The court stated: "We are cited to no instance in which 'increasing outlets' and 'augmenting choices' have themselves been approved as jurisdiction-spawning goals." The *Midwest Video II* court never indicated who must approve such goals if they are to support jurisdiction. If the court meant the Supreme Court, that would indicate only an extremely narrow reading of *Midwest Video*. Even so, in this area the Supreme Court has only the power to interpret the law and not to create it. A statutory basis for jurisdiction should be required. *See* 571 F.2d at 1040-41. *Cf.* 567 F.2d at 34 (Commission need not find express statutory authority for its cable regulations); Brookhaven Cable TV v. Kelley, 573 F.2d 765 (2d Cir. 1978), discussed at notes 197-205 *infra* and accompanying text (holding that cable regulation is valid where designed to promote diversity).

> mous with agency drafted, ad hoc "objectives," Congress and the Courts become essentially superfluous.[193]

In particular, the court rejected the FCC's contention that cable systems could be required to construct expensive facilities and hold them out for use by others because they generally made use of retransmitted broadcast signals,[194] or because the FCC had "unsupported visions" of cable's potential which it hoped to encourage.[195] The court asserted that "[a] cable system is on this record a private enterprise."[196]

Shortly after the Eighth Circuit's *Midwest Video II* decision, the Second Circuit Court of Appeals decided *Brookhaven Cable TV, Inc. v. Kelley*.[197] In that case, several cable television operators[198] challenged New York State's regulation of pay cable television rates on grounds that the FCC had preempted the area.[199] The state, relying on *NARUC, Home Box Office,* and *Midwest Video II*,[200] argued, *inter alia,* that the FCC had no jurisdiction to preempt the state's regulation. The court, however, found those cases readily distinguishable and upheld the cable interests' position.[201]

Following *Midwest Video,* the court found that the crucial inquiry was whether the FCC's rules served the long-established goals in increasing program diversity in television broadcasting.[202] In *NARUC,* the *Brookhaven* court said, that the FCC had failed to demonstrate that the diversity goal was promoted.[203] In *Home Box Office* also, according to the *Brookhaven* court, the FCC's regulation had failed because the intent had not been to promote diversity, but merely to discourage competition.[204] Additionally, the access rules rejected in *Midwest Video II* were simply too intrusive. They were an attempt to impose common carrier obligations on cable operators in contravention of specific rules prohibiting the FCC from creating such duties.[205]

The *Brookhaven* court's discussion of the previous circuit court cases is simplistic. Thus, the opinion's lack of analysis renders it worthy of little attention, notable only as a further indication of the uncertainty that has developed in this area of the law. Certainly in *Home Box Office,* the ultimate goal of the FCC's anti-siphoning regulations had not been to lessen competition. Discouraging competition was an intermediate goal which the FCC believed, however incorrectly, would encourage television service in the public interest. Further, the Eighth Circuit in *Midwest Video II* did not find the access rules offensive simply because they were burdensome. *Midwest Video II* demanded

193. 571 F.2d at 1041-42.
194. *Id.* at 1043-44.
195. *Id.* at 1044-45.
196. *Id.* at 1043.
197. Brookhaven Cable TV, Inc. v. Kelley, 573 F.2d 765 (2d Cir. 1978).
198. *Id.* at 766.
199. *Id.* at 766-67.
200. *Id.* at 767-68.
201. *Id.* at 768.
202. *Id.* at 767.
203. *Id.*
204. *Id.*
205. *Id.* at 768.

a statutory basis for the FCC's cable regulation before the reasonableness inquiry became relevant. *Brookhaven,* however, ignored that statutory analysis while casually adopting the permissive position of the *Midwest Video* plurality, pausing only to emphasize the importance of the goals of increasing program outlets and improving viewers' program choice. Thus, the *Brookhaven* court suggests a reconciliation of preceeding cases with a focus on the relationship of the FCC's cable television regulation to the single goal of improving program diversity. This test is modified by an inquiry into whether the regulation is overly burdensome. The reconciliation, however, is unappealing. *Brookhaven's* distinctions of previous circuit cases is questionable; its test gives essentially the same carte blanche to the FCC allowed by the *Midwest Video* plurality from which the other circuits have departed. In essence, the *Brookhaven* opinion represents the most honest application of the *Midwest Video* opinion, but amounts to a clear rejection of the trend followed in other circuits.

Reconcilliation of the Cases

Under the *Midwest Video II* view of the FCC's cable jurisdiction, legitimate FCC regulation of cable would look only to Sections 151 and 303(g) of the Communications Act, pertaining respectively to the FCC's purposes and to its powers and duties, as the source of its policy objectives.[206] The *Midwest Video II* opinion, consequently, looks in a direction different from *Home Box Office,* which had continued to recognize the vitality of the *Midwest Video* plurality opinion, and which only overcame the result that *Midwest Video* seemed to demand by a questionable use of precedent and by an undesirable mode of analysis.[207] *Midwest Video II* suggests a return to an analysis resembling that used in *Southwestern Cable. Midwest Video II, Southwestern Cable,* and also *NARUC,* seem to require a firm statutory foundation for the FCC's cable rulemaking.[208] Moreover, given the language of the Communications Act, an extension of the FCC's cable jurisdiction to the regulation of cable operator activities that do not directly use or affect incoming broadcast signals and their subscribers' capacity to receive them, appears inconsistent with *Midwest Video II's* strict interpretation of *Southwestern Cable.* Meanwhile, the *Midwest Video II* analysis would achieve the *Home Box Office* result.

Midwest Video, in contrast, seems to stand for the proposition that the FCC may regulate aspects or functions of cable that do not directly use the signals of broadcasters. Under *Midwest Video,* the FCC apparently may con-

206. 571 F.2d at 1037-38. The court combined the *Midwest Video* plurality's reliance on these sections with Chief Justice Burger's "strains the outer limits" statement to reach the conclusion that those sections were the sole sources of authority for the FCC. *But cf.* United States v. Southwestern Cable Co., 392 U.S. 157, 174 (1968) (47 U.S.C. §§303(f), (h), and 307(b) are sources of authority). *See also* 571 F.2d at 1036 n.25 (rejecting the FCC's arguments that jurisdiction could be based on §§152, 153, 154(i), 154(j), 301, 303, 307, 308, 309, 315, and 317 of the Communications Act).

207. See text accompanying notes 168-180 *supra.*

208. See text accompanying notes 88-93, 141-145, and 187-193 *supra.*

sider the overall impact of cable on its national communications plans and regulate cable television accordingly. The *Midwest Video* plurality did attempt to limit the FCC's cable jurisdiction by restricting it to serving long-established regulatory goals in television broadcasting. That standard, however, has not proved meaningful. Faced with the fundamental proposition that the FCC's cable jurisdiction is not unbounded, the courts, with the exception of the *Brookhaven* court, have employed unsatisfactory reasoning to distinguish *Midwest Video* and to put teeth into the constraints that the Supreme Court sought to establish.

It is especially difficult to reconcile *Home Box Office* or *Midwest Video II* with the Supreme Court's holding in *Midwest Video*. *Home Box Office's* treatment of *Midwest Video*, relying on a highly suspect analogy, and ignoring a case that was on point, must be regarded as spurious. *Midwest Video II* presents a more palatable analysis, but because the *Midwest Video* plurality essentially said that the legality of the FCC's rules would turn on their underlying goals or objectives, *Midwest Video* and *Midwest Video II* are difficult to reconcile. Both the mandatory origination rule and the access rules were designed to further the same regulatory policies — the promotion of local outlets for speech and increasing the diversity of speech. Moreover, the *Midwest Video II* court's distinction between the factual situations presented by the two cases relies greatly on reasoning used by the *Midwest Video* dissent, which found the rules to be invalid because they required affirmative acts and expenditures.[209]

A point of greater merit made by the *Midwest Video II* court was that the access rules were an attempt to convert cable systems into common carriers — a forbidden practice under the Communications Act, according to the court.[210] This point once again, however, calls attention to the unique characteristics of cable television and demonstrates that cable operations may perform two basic functions. In one role, the cable company may operate as a functional extension of the interstate broadcasting system, as a terminal and a conduit for broadcast signals. In another, the cable company operates a local, self-contained transmission system. That functional distinction could separate the District of Columbia and Eighth Circuit decisions from *Southwestern Cable*: despite *Midwest Video*, the recent circuit court decisions in *NARUC, Home Box Office* and *Midwest Video II* have held that the FCC may not regulate cable operators except in their use of signals that are taken off-the-air.

Perhaps the trend within the circuits towards narrowing the legitimate scope of the FCC's cable jurisdiction conforms with current policy preferences. Broad dissatisfaction now exists with the performance of the federal

209. The *Midwest Video II* court said that the access rules were invalid, while the mandatory rules were not, because the former required "extensive and expensive construction, and equipment purchase and installation." 571 F.2d at 1039. The court also said that, under the access rules, "cable operators can have no discretion or responsibility for program content, may make essentially no change, and are forced to act like common carriers," whereas the mandatory origination rule had only required that they act like broadcasters. *Id.*

210. 571 F.2d at 1050-52 (citing 47 U.S.C. §153(h)).

regulatory agencies generally and with the performance of the FCC in particular.[211] The FCC's cable rules have been the subject of several proposals for deregulation.[212] Nevertheless, until the Supreme Court expressly confirms this trend in the circuit courts, the state of the law remains unsettled.

The circuit decisions might be reconciled with *Midwest Video* by acknowledging that in *Midwest Video,* the Supreme Court was evenly divided, and that therefore the party that "controls" Chief Justice Burger's vote, controls the Court. Burger's *Midwest Video* concurrence suggests that the FCC's cable jurisdiction is defeasible, contingent upon cable television's continued retransmission of broadcast signals and upon continued congressional inaction.[213] Consideration of events that have occurred since *Midwest Video,* however, reveals that the conditions under which the *Midwest Video* decision was made have changed substantially.

For purposes of meeting Burger's *Midwest Video* concurrence, Congress can be said to have "acted" by passing the Copyright Law of 1976 which requires that cable television operators pay for retransmission of broadcast signals.[214] The significance of the copyright area to FCC regulatory authority lies in the historical role of copyright law in cable television regulation.[215] The FCC's original regulatory interest in cable had been based in large part on cable's "unfair" competition which the FCC saw as a threat to the national broadcast systems. The "unfairness" of that competition grew from two Supreme Court decisions,[216] which held that cable retransmissions were essentially exempt from copyright liability. Those Supreme Court decisions were made during a time when a new copyright law was pending in Congress.[217] Not until 1976 was a new copyright law passed. In the interval, the FCC

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211. See notes 18-21 *supra* and accompanying text.

212. *See* Draft Cable Television Legislation proposed by the Office of Telecommunication Policy (August 1975), *reprinted in* P. MACAVOY, *supra* note 19, at 13; Draft Cable Television Legislation, proposed by the Department of Justice (June 1975), *reprinted in* P. MACAVOY, *supra* note 19, at 120. However, although both of these proposed statutes are characterized as "deregulatory" in nature, they both confer substantial powers over cable television upon the FCC.

213. See text accompanying notes 124-127 *supra.*

214. 17 U.S.C. §111 (1977). *See generally* Botein, *News Copyright Act and Cable Television—A Signal of Change,* 24 BULL. CR. SOC. 11 (1976); Note, *The New Copyright Law and Cable Television, Interpretation and Implications,* 7 PERF. ARTS REV. 176 (1977).

215. *See generally,* Marke, *United States Copyright Revision and Its Legislative History,* 20 L. LIB. J. 121; Brennan, *Some Observations on the Revision of the Copyright Law from the Legislative Point of View,* 24 BULL. CR. SOC. 151 (1976).

216. Teleprompter, Inc. v. C.B.S., Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists, Inc., 392 U.S. 390 (1968).

217. A bill to revise the copyright law was first introduced in 1964. H.R. 11947, 88th Cong., 2d Sess. (1964). It did not pass. Once again, in 1967, in the 90th Cong., a bill was introduced in the House and passed. H.R. 2512, 90th Cong., 1st Sess. (1967). But the companion bill, S.597, 90th Cong., 1st Sess. (1967), failed in the Senate. Several bills were introduced in subsequent sessions, but were blocked by industrial interests dissatisfied with the provisions on cable. Marke, *supra* note 215 at 125-37. The final bill, Pub. L. No. 94-553, 90 Stat. 2541 (1976) was passed only after the affected industries collaborated and reached a broader agreement. *Id. See generally* Consensus Agreement, Cable Television Report and Order, 36 F.C.C. 2d 143, 284 (1972).

established and expanded its cable jurisdiction, and the Supreme Court heard and decided *Southwestern Cable* and *Midwest Video*. Those cases each cited cable's retransmission activity as a legitimate reason for regulation. Thus, when the Copyright Law of 1976 was enacted, imposing liability on cable companies for their use of broadcast signals, the regulatory environment in which the *Southwestern Cable* and *Midwest Video* cases had been decided was substantially changed.[218]

The courts generally have rejected the invitation to draw inferences from Congress' failure to enact a law with respect to the FCC's cable jurisdiction.[219] Nevertheless, Chief Justice Burger apparently viewed congressional inaction as highly significant, reasoning that the FCC ought to have broad authority over cable unless Congress acts. The issue in the wake of the 1976 Copyright Act is whether Congress has now "acted."

Because of its context, the Chief Justice's statement probably reflects an anticipation of an amendment to the Communications Act and not to the Copyright Act. Neither the statute itself[220] nor the comments of congressmen and staff indicate that the enactment of the law was intended to trigger the defeat of the FCC's cable television jurisdiction.[221] Nevertheless, some congressmen apparently did contemplate that the law would prompt a reconsideration or withdrawal of certain of the FCC's cable regulations. The FCC has responded by opening an inquiry into its syndicated program exclusivity roles.[222] Because of the historical significance of the copyright issue in the FCC's regulation of cable, the congressional solution to cable's unfair competition should fulfill Burger's precondition for the defeasance of the FCC's broad cable jurisdiction.

CONCLUSION

Although the Supreme Court has now twice considered the scope of the FCC's regulation over cable television, its opinions have failed to create certainty in the area. Dissatisfaction with the FCC's cable policies, and the need to establish jurisdictional standards to limit the FCC's open-ended "ancillary jurisdiction" authority have moved two circuit courts to apply *Southwestern Cable* and *Midwest Video* creatively, seeking an optimal solution. In another circuit, the court applied *Midwest Video* mechanically failing

218. One commentator suggested: "To a very real extent, the Court may have preferred regulation to litigation as a means of dealing with increasingly complicated problems of intermedia as well as intermodal competition, and assumed, incorrectly but not unjustifiably, that new copyright legislation would follow hard on the heels of its decision." Botein, *The New Copyright Act and Cable Television — A Signal of Change*, 24 BULL. CR. SOC. 1, 2 (1976).

219. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. at 170; Midwest Video Corp. v. F.C.C., 571 F.2d at 1036.

220. 17 U.S.C. §801(2)(b); §111(d)(2)(b) (1977). The Copyright Act clearly contemplated continuing authority of the FCC over cable's use of broadcast signals. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 176 (1976).

221. *See* Brennan, *Some Observations on the Revision of the Copyright Law from the Legislative Point of View*, 24 BULL. CR. SOC. 151, 154 (1976).

222. See note 23 *supra*.