

FCC's Authority to Preempt State Regulations of Pay Cable Television Upheld (Brookhaven Cable TV, Inc. v. Kelly)

Andrew A. Peterson

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Peterson, Andrew A. (1979) "FCC's Authority to Preempt State Regulations of Pay Cable Television Upheld (Brookhaven Cable TV, Inc. v. Kelly)," *St. John's Law Review*: Vol. 53 : No. 2 , Article 7.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol53/iss2/7>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

COMMUNICATIONS LAW

FCC'S AUTHORITY TO PREEMPT STATE RATE REGULATION OF PAY CABLE TELEVISION UPHELD

Brookhaven Cable T.V., Inc. v. Kelly

Established by the Federal Communications Act (the Act),¹ the Federal Communications Commission (FCC) was created to regulate "interstate and foreign communications by wire and radio."² The Act specifically grants the FCC regulatory authority over both broadcasters³ and common carriers.⁴ Cable television, one of the most rapidly growing forms of communication,⁵ initially was thought to be beyond the scope of FCC jurisdiction⁶ since it does not fit within the statutory definition of either broadcaster⁷ or common carrier.⁸ In the face of Congress' failure to respond to FCC requests

¹ 47 U.S.C. §§ 151-609 (1976). Enacted in 1934, Pub. L. No. 416, 48 Stat. 1064, the Communications Act existed even before broadcast television was invented. Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DENVER L.J. 477, 477 & n.4 (1976). It was not until 1951 that television was deemed to be within the Act's definition of a broadcasting medium subject to the FCC's regulatory authority. Sixth Report and Order, 41 F.C.C. 148 (1952).

² 47 U.S.C. § 151 (1976).

³ The powers and duties of the FCC with respect to broadcasters are set forth in 47 U.S.C. § 303 (1976).

⁴ The FCC's authority with respect to common carriers is outlined in detail in Subchapter II of the Act, 47 U.S.C. §§ 201-221 (1976).

⁵ The first commercial community antenna television (CATV) system was established in Lansford, Pennsylvania, in 1950. Witt, *CATV and Local Regulation*, 5 CAL. W.L. REV. 30, 30 (1968); Note, *Regulation of Pay-Cable and Closed Circuit Movies: No Room in the Wasteland*, 40 U. CHI. L. REV. 600, 604 (1973) [hereinafter cited as *No Room in Wasteland*]. Since that time, the CATV industry has experienced explosive growth, see Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366, 368 (1966), and has drawn a considerable amount of scholarly attention. See, e.g., Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501 (1977); Brown, *The Subscription Television Controversy: A Continuing Symptom of Federal Communication Commission Ills*, 24 FED. COM. B.J. 259 (1971); Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DEN. L.J. 477 (1976); Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 VA. L. REV. 541 (1975); Comment, *Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules*, 1971 DUKE L.J. 1151 [hereinafter cited as *New Rules*].

⁶ CATV and Repeater Services, 26 F.C.C. 403, 404 (1959). The FCC noted that it had not been given absolute authority over "any and all enterprises which happen to be connected with one of the many aspects of communications." *Id.* at 429. Thus, even if it could be shown that cable television adversely affected broadcast television, the FCC believed itself without power to intervene. *Id.* at 438.

⁷ Under 47 U.S.C. § 153(o) (1976), broadcasting is defined as "the dissemination of radio communications intended to be received by the public directly or by the intermediary of relay stations."

⁸ "Common carrier" is defined in the Act as "any person engaged as a common carrier

for clarifying legislation,⁹ however, the Commission reversed its prior position in 1966 and asserted jurisdiction over Community Antenna Television (CATV),¹⁰ a form of cable that intercepts and retransmits broadcast television signals to improve reception of local stations and bring distant broadcasts to local subscribers.¹¹ In *United States v. Southwestern Cable Co.*,¹² the Supreme Court up-

for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy." *Id.* § 152(h). In *National Ass'n of Reg. Util. Comm'rs (NARUC) v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976), the court, dissatisfied with this imprecise definition, concluded that the essential characteristics of a common carrier are "the undertaking 'to carry for all people indifferently,'" and the willingness to carry material that is wholly within the user's control. *Id.* (footnote omitted) (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960)).

It has been suggested that the FCC possesses the authority to regulate cable television operators as common carriers. The Commission's express decision not to subject cable television to the extensive regulatory scheme mandated for common carriers has been upheld by the Ninth and District of Columbia Circuits. *American Civil Liberties Union (ACLU) v. FCC*, 523 F.2d 1344 (9th Cir. 1975); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966).

⁹ In CATV and Repeater Services, 26 F.C.C. 403, 438 (1959), the FCC called upon Congress to "clarify the situation" with respect to its authority to regulate cable television. Consequently, legislation was introduced in the Senate in 1959 which would have given the FCC authority over CATV. S. 2658, 86th Cong., 1st Sess. (1959). Although it was favorably reported out of committee in the Senate, S. REP. No. 923, 86th Cong., 1st Sess. (1959), the bill was returned to committee after debate on the floor. 106 CONG. REC. 10547 (1960). In 1966, the FCC asked Congress for legislation which would "confirm [its] jurisdiction [over cable] and . . . establish such basic national policy as [Congress] deems appropriate." H.R. REP. No. 1635, 89th Cong., 2d Sess. 16 (1966) [hereinafter cited as H.R. REP. 1635]. The proposed bill, H.R. 13286, 89th Cong., 2d Sess. (1966); see H.R. REP. 1635, *supra*, died after being returned to committee without floor debate. For a discussion of these proposals and their effect on subsequent FCC assertions of jurisdiction over cable, see *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170-71 (1968).

¹⁰ See Second Report and Order, 2 F.C.C.2d 725 (1966). See also *No Room in Wasteland*, *supra* note 5, at 605. Cable television initially became subject to direct regulation by the FCC in Rules re Microwave-Served CATV, First Report and Order, 38 F.C.C. 683 (1965), which, as modified, Memorandum Opinion and Order, 1 F.C.C.2d 524, 530-31 (1965), was approved by the Eighth Circuit in *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 71 (8th Cir. 1968); accord, *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967).

¹¹ CATV is a system through which broadcast television signals are captured by a large, strategically positioned antenna and amplified for retransmission by wire to paying subscribers. Albert, *supra* note 5, at 501. Such a system is particularly useful because it improves reception of local programs and is capable of picking up and amplifying distant signals so that, for example, television viewers may "watch a full season of Chicago Cubs baseball on TV sets in Louisville." *Id.* at 502.

¹² 392 U.S. 157 (1968); see notes 30-35 and accompanying text *infra*. The issue before the *Southwestern Cable* Court was whether the FCC had the authority to require CATV operators to transmit the broadcast signals of any television station into whose area they transmitted competing signals. In addition, the Court considered a regulation prohibiting CATV operators from duplicating the programming of local broadcasters for 15 days before and after it was broadcast locally. See Rules re Microwave-Served CATV, First Report and Order, 38 F.C.C. 683, 716-30 (1965). The rules were designed to protect local broadcasters from competition for audiences and revenues. *United States v. Southwestern Cable Co.*, 392 U.S. at 165-66.

held FCC jurisdiction over CATV and, four years later, sanctioned an FCC rule requiring CATV operators to originate their own programming.¹³ In light of increased efforts by the FCC to regulate the various forms of cable,¹⁴ the federal courts have been struggling to define the scope of the agency's jurisdiction in this area. Recently, in *Brookhaven Cable T.V., Inc. v. Kelly*,¹⁵ the Second Circuit adopted a broad view of FCC authority, upholding the Commission's power to preempt state rate regulation of pay cable television, a medium which does not utilize broadcast signals.¹⁶

The plaintiffs in *Brookhaven* were cable television operators¹⁷ who sought a declaration that New York's attempt to regulate pay cable rates¹⁸ was preempted by the FCC's declared policy that the

¹³ *United States v. Midwest Video Corp.* 406 U.S. 649 (1972); see notes 36-41 and accompanying text *infra*.

¹⁴ After initially deciding that it did not have jurisdiction over CATV, the FCC took a diametrically opposite position less than a decade later. See note 12 and accompanying text *supra*. The nature of the FCC's regulation of CATV also became increasingly intrusive, culminating with mandatory program origination rules. See notes 36-41 and accompanying text *infra*. Two years after the origination rules were successfully defended before the Supreme Court, see note 38 and accompanying text *infra*, the FCC abolished the regulation. 39 Fed. Reg. 43,302 (Dec. 12, 1974). Finally, in a similar instance of policy reversal, the FCC decided to apply the rules governing Subscription Television (STV) to pay cable, Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970), although 9 months earlier it had expressly declined to do so. First Report and Order, 20 F.C.C.2d 201, 204 (1969).

¹⁵ 573 F.2d 765 (2d Cir.), cert. denied, 47 U.S.L.W. 3683 (U.S. Apr. 17, 1979), *aff'g* 428 F. Supp. 1216 (N.D.N.Y. 1977).

¹⁶ 573 F.2d at 766. Like CATV signals, see note 11 *supra*, pay cable television signals are transmitted through coaxial cables rather than by way of the finite broadcast spectrum. Brief for Appellants at 15-16, *Brookhaven Cable T.V., Inc. v. Kelly*, 573 F.2d 763 (2d Cir. 1978). The use of coaxial cables, which have the capacity to carry a large number of simultaneous transmissions, dramatically increases pay cable's potential for providing a wide variety of programming. See Hoffer, *supra* note 5, at 480 n.15.

¹⁷ Two trade associations and a supplier of specialized programming for pay cable television joined the cable operators in their challenge to the state regulation. 573 F.2d at 766.

¹⁸ Cable television is regulated at both the federal and state levels. See generally Albert, *supra* note 5; Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972). Three possible jurisdictional predicates for the involvement of states in the regulation of cable television are its authority over its public streets, its police power to protect safety, health and property, and specific statutory authority to issue cable television franchises. Albert, *supra* note 5, at 509.

New York's statutory scheme for regulating cable television is set forth in N.Y. EXEC. LAW §§ 811-831 (McKinney Supp. Pam. 1972-1978). Under § 819 (1), all operators of cable systems must be franchised by the municipality in which they operate. The provisions of the franchise agreements determine the rates that cable operators may charge for their services. *Id.* § 825. After New York's statute was enacted, there was considerable confusion concerning the applicability of the rate regulation provisions to pay cable operators. 573 F.2d at 766-67. In response, the New York State Commission on Cable Television issued a "Clarification of Commission Policy" which declared that the state rather than the FCC had authority to regulate rates charged by pay cable television operators. *In re Rates Charged by Cable Television Cos. for "Auxiliary" Programming*, No. 90010 (Comm'n on Cable Television 1976).

infant industry should be permitted to develop without rate regulation.¹⁹ The defendant, New York State Commission on Cable Television,²⁰ and the defendant-intervenor, the National Association of Regulatory Utility Commissioners (NARUC),²¹ argued that the FCC lacked jurisdiction to preempt state regulation of pay cable television rates,²² and that jurisdiction had not been effectively exercised even if it did exist.²³ The district court ruled in favor of the plaintiffs on both issues.²⁴

On appeal, the Second Circuit affirmed. Writing for a unani-

The Clarification further stated that the franchising rate approval requirements were applicable to pay cable services as well as basic cable services. Cable companies providing pay cable services were given two months to inform appropriate authorities of their rates or face penalties. *Id.*

¹⁹ 573 F.2d at 767. The district court permitted the FCC and the United States to intervene as parties plaintiff. 428 F. Supp. at 1217. The FCC's position was expressed as follows:

After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services . . . would not only be premature but would in all likelihood have a chilling effect on the anticipated development.

Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Docket Nos. 20018 *et al.*, 46 F.C.C.2d 175, 199-200 (1974). The *Brookhaven* plaintiffs argued that New York's attempt to regulate rates in the pay cable industry contravened this federal policy and, consequently, violated the Supremacy Clause, U.S. CONST. art. VI, as well as the first, fifth and fourteenth amendments of the United States Constitution. 573 F.2d at 767.

²⁰ N.Y. EXEC. LAW § 814 (McKinney Supp. Pam. 1972-1978) establishes a five-member commission on cable television to represent "the broad range of interests related to telecommunication needs and concerns." *Id.* The commission is charged with the creation and maintenance of a statewide plan for developing cable television services in a manner consistent with federal law. *Id.* § 815. The commission is empowered to prescribe standards and procedures to be followed by municipalities in granting franchises. *Id.* § 815(1)(a).

²¹ NARUC "is a quasi-governmental, nonprofit organization whose membership includes governmental and regulatory bodies throughout the United States." 428 F. Supp. at 1218 (footnote omitted).

²² Brief for NARUC at 7-8, *Brookhaven Cable T.V., Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978). NARUC acknowledged that the FCC has some jurisdiction over CATV, *see note 12 supra*, but contended that the preemption of state regulation of pay cable rates was beyond its authority. Brief for NARUC at 8.

²³ Brief for NARUC at 8. Conceding that a "CFR section is not an indispensable prerequisite of preemption," NARUC nevertheless argued that "the FCC cannot, through the use of mere policy statements, order the States not to exercise jurisdiction and, at the same time, fail to actually regulate the field it is preempting." *Id.*

That the FCC may preempt without adopting formal regulations was recognized by the District of Columbia Circuit in *National Ass'n of Reg. Util. Comm'rs (NARUC) v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976); *accord*, *Continental Air Lines, Inc. v. CAB*, 522 F.2d 107 (D.C. Cir. 1974).

²⁴ 428 F. Supp. at 1226.

mous court,²⁵ Judge Lumbard noted that the regulation at issue in *Brookhaven* was "far less intrusive" than those previously upheld by the Supreme Court.²⁶ Relying heavily on the earlier Supreme Court decisions in which the breadth of FCC jurisdiction over cable television was considered,²⁷ Judge Lumbard stated that the FCC has jurisdiction to preempt state regulation of pay cable television rates if such action is "'reasonably ancillary' to 'the achievement of long-established regulatory goals in the field of television broadcasting.'"²⁸ Since the court found the FCC's policy of permitting the industry to develop without price restraints directly related to the "objective of increasing program diversity," it concluded that the "reasonably ancillary" test was satisfied.²⁹

The "reasonably ancillary" test applied in *Brookhaven* was derived from the Supreme Court's holding in *United States v. Southwestern Cable Co.*³⁰ In deciding the jurisdictional question, the *Southwestern Cable* Court focused on section 152(a) of the Act, which makes the statute's provisions applicable "to all interstate and foreign communications by wire or radio."³¹ The Court found

²⁵ 573 F.2d at 766. In addition to Judge Lumbard, the panel included Judge Oakes and District Judge Wyzanski, who sat by designation.

²⁶ *Id.* at 767. In concluding that the FCC has the authority to preempt state and local rate regulation, the Second Circuit distinguished three recent courts of appeals cases in which FCC assertions of jurisdiction were struck down. The Second Circuit's finding of a nexus between federal preemption and the goal of enhanced diversity was held sufficient to distinguish National Ass'n of Reg. Util. Comm'rs (NARUC) v. FCC, 533 F.2d 601 (D.C. Cir. 1976), a case in which no connection between the goal sought to be furthered and the FCC's regulation had been established. 573 F.2d at 767. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977), was distinguished on the ground that there, the FCC had failed to establish a genuine problem of siphoning of broadcast programming to justify the issuance of extensive anti-siphoning rules. 573 F.2d at 767. Finally, noting the "unintrusive" nature of the preemption at issue in *Brookhaven*, the Second Circuit distinguished a recent Eighth Circuit case, *Midwest Video Corp. v. FCC* (Midwest II), 581 F.2d 1025 (8th Cir.), *aff'd*, 47 U.S.L.W. 4335 (U.S. Apr. 3, 1979). In *Midwest II*, the imposition of the burdens of a common carrier on cable operators was found to be beyond the FCC's authority. 573 F.2d at 768.

²⁷ 573 F.2d at 767 (citing *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)); see notes 30-44 and accompanying text *infra*.

²⁸ 573 F.2d at 767 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)).

²⁹ 573 F.2d at 767.

³⁰ 392 U.S. 157 (1968); see note 12 *supra*.

³¹ 47 U.S.C. § 152(a) (1976); see 392 U.S. at 171-73. Section 152(a) provides in pertinent part:

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided

that section 152(a) is not limited by the specific grants of power contained elsewhere in the Act and concluded that the provision confers jurisdiction which is at least broad enough to reach basic CATV services.³² Significantly, in an apparent recognition of the tension between the Act's broad purposes³³ and the narrow jurisdictional grants contained in its specific provisions,³⁴ the Court stated that the FCC may exercise its authority only when its action is "reasonably ancillary" to the agency's power to regulate broadcasting effectively.³⁵

In *United States v. Midwest Video Corp.*,³⁶ a decision characterized as a "giant step beyond" *Southwestern Cable*,³⁷ the Court upheld the FCC's authority to compel certain CATV operators to originate their own programming.³⁸ In reaching this result, the

³² 392 U.S. at 178.

³³ The FCC was created for the purpose of "regulating interstate and foreign communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communications service." 47 U.S.C. § 151 (1976). Courts have acknowledged that communications was a field "both new and dynamic" when the Act was passed into law, and that the FCC should therefore have a "comprehensive mandate" with "not niggardly but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). In light of this broad purpose, the *Southwestern Cable* Court found no reason to suppose that § 152(a) did not "confer regulatory authority over 'all interstate . . . communication by wire or radio.'" 392 U.S. at 173 (footnote omitted).

³⁴ See notes 3, 4, 7, 8 and accompanying text *supra*.

³⁵ 392 U.S. at 178. The *Southwestern Cable* Court's conclusion concerning the import of § 152(a) has been somewhat controversial. In a concurring opinion, Justice White specifically took issue with the majority's construction, stating:

My route to reversal . . . is somewhat different from the Court's. Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), says that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio" I am inclined to believe that this section means that the Commission must generally base jurisdiction on other provisions of the Act.

392 U.S. at 181 (emphasis added by the Court). Justice White's position appears to be supported by language in the Senate Report accompanying the Act. Faced with the options of drafting either a "detailed and practicable bill which incorporated all [existing] legislation pertinent to the subject," or "a short bill creating the Commission and delegating to it by reference the powers [previously] vested in [other agencies]," Congress chose the former course by adopting "definite statutory provisions." S. REP. NO. 781, 73d Cong., 2d Sess. (1934), reprinted in 5 AMERICAN LANDMARK LEGISLATION 495-96 (I. Sloan ed. 1977) [hereinafter cited as S. REP. 781]. This choice apparently was made in the interest of enhancing the Commission's administrative effectiveness. S. REP. 781, *supra*, at 495-96. The Act's broad purposes were to be effectuated through the enactment of further legislation as it became necessary, with ongoing input from the FCC. S. REP. 781, *supra*, at 496-97. For a recent critical discussion of the Supreme Court's construction of § 152(a) as a grant of power, see Hoffer, *supra* note 5, at 482-83.

³⁶ 406 U.S. 649 (1972).

³⁷ *National Ass'n of Reg. Util. Comm'rs (NARUC) v. FCC*, 533 F.2d 601, 615 (D.C. Cir. 1976).

³⁸ 406 U.S. 651-53, 653 n.6. Origination programming originates in the cablecaster's

Midwest Video Court attempted to clarify the scope of its decision in *Southwestern Cable* by stating that the jurisdiction over CATV recognized in that case was not limited to regulatory measures calculated merely to protect traditional broadcast television.³⁹ Instead, the Court stated, section 152(a) gives the FCC authority to regulate CATV operators to affirmatively "promote the objectives for which the Commission has been assigned jurisdiction over broadcasting."⁴⁰ Aimed at promoting diversity in the programming available to cable subscribers, the regulation at issue was held to satisfy this formula.⁴¹

The test for FCC jurisdiction suggested in *Southwestern Cable* and *Midwest Video* appears to require an analysis of both the medium and the specific regulation in question.⁴² Although the Supreme Court has never squarely addressed the question whether the FCC has authority over pay cable television,⁴³ it seems clear that at least some jurisdiction exists under the rationale articulated in *Midwest Video*.⁴⁴ The scope of this authority, however, remains

studio and is sent directly to the homes of subscribers through a coaxial cable. *Id.*, see 34 Fed. Reg. 17659 (Oct. 31, 1969).

³⁹ 406 U.S. at 667.

⁴⁰ *Id.*

⁴¹ *Id.* at 668. *Midwest Video* was decided by a sharply divided Supreme Court. Justices White, Marshall and Blackmun concurred in the plurality opinion authored by Justice Brennan. In a separate concurring opinion, Chief Justice Burger stated: "Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." *Id.* at 676 (Burger, C.J., concurring). The dissent argued that there is neither historical nor statutory authority for a regulation which "bludgeoned [a carrier] into becoming a broadcaster." *Id.* at 680 (Douglas, J., dissenting). Even the dissenters, however, appeared to assume that "the Commission has authority to regulate origination of programs if CATV decides to enter the field." *Id.* (Douglas, J., dissenting).

⁴² See *id.* at 662-63.

⁴³ See Comment, 23 VILL. L. REV. 597, 609 (1978). The *Brookhaven* court apparently did not find it necessary to address the distinctions between pay cable and CATV. 573 F.2d at 767. A problem analogous to jurisdiction over the cable medium was considered in *National Ass'n of Theatre Owners (NATO) v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970). The *NATO* court was asked to decide whether the FCC had power to regulate Subscription Television (STV), a medium which uses the broadcast spectrum but offers a wider range of programming than is available on traditional broadcast television. STV entrepreneurs purchase the rights to special features such as sports events and feature films and then broadcast them over the airwaves in a scrambled form. STV subscribers lease decoding devices in order to receive this programming in intelligible form on conventional television receivers. See R. BLOCK, *OVER THE AIR PAY-TV: FOR WHOM WILL IT PAY?* 6-8 (1974). Under pressure from theater owners who feared loss of business due to competition from STV operators, the FCC began to regulate STV in 1968. Fourth Report and Order, 15 F.C.C.2d 466 (1968), *aff'd sub nom.* *National Ass'n of Theatre Owners (NATO) v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970); see Hoffer, *supra* note 5, at 479-80. The Commission's authority to regulate this medium was upheld in *NATO*. 420 F.2d at 195. See generally Brown, *supra* note 5; Hoffer, *supra* note 5.

⁴⁴ The pay cable service at issue in *Brookhaven* involves the use of a coaxial cable system

somewhat problematic. The *Midwest Video* rationale seems to mandate a careful inquiry into the regulatory goal underlying the specific FCC rule.⁴⁵ While the "long-established goal" test produced a satisfactory result in *Brookhaven*,⁴⁶ it has not provided a sufficiently sensitive standard for evaluating the propriety of other FCC measures in the area of cable regulation. Consequently, courts confronted with challenges to FCC rules directed at cable operators have had to modify and refine the *Midwest Video* test in order to reach sound conclusions. The District of Columbia Circuit, for example, has required the FCC to come forth with substantial evi-

that also retransmits broadcast signals and provides "origination" programming. 428 F. Supp. at 1218; see Hoffer, *supra* note 5, at 480 n.15. The cable subscriber, who generally receives retransmitted broadcasts and programming originated by the cable operator, may also receive pay cable programming by paying an additional fee. 428 F. Supp. at 1218. The only real difference between the "origination" programming considered in *Midwest Video* and the pay cable programming in question in *Brookhaven* is that the latter is supplied by a private entrepreneur who "leases" the right to use the cable operator's facilities, Hoffer, *supra* note 5, at 480 n.15, while the former is developed in the cable operator's own studios. See note 38 *supra*. It is interesting to note that the *Midwest Video* Court apparently did not find the distinction between origination and pay cable programming significant. Although it did not directly consider the question, the plurality assumed without discussion that the FCC's definition of cablecasting as "programming 'subject to the exclusive control of the cable operator'" did not "preclude the operator from cablecasting programs produced by others." 406 U.S. at 653 n.6 (quoting 47 C.F.R. § 76.5 (w) (1971)). Since pay cable signals generally are transmitted through coaxial cables which also retransmit broadcast signals, it would appear that the *Midwest Video* rationale provides a sufficient basis for the FCC to exercise authority over the pay cable medium.

A more difficult question would be presented by a case in which the pay cable operator does not provide the additional service of retransmitting broadcast signals. Since language in *Midwest Video* clearly implies that a relationship with the broadcast spectrum is the *quid pro quo* where the FCC seeks to regulate, 406 U.S. at 662 n.2, and that case has been acknowledged as establishing the "farthest outpost of Commission power," *National Ass'n of Reg. Util. Comm'rs (NARUC) v. FCC*, 533 F.2d 601, 615 (D.C. Cir. 1976), it would appear that cable operations of this type would be beyond the reach of the FCC, since they lack any link to the broadcast spectrum. See note 16 *supra*.

⁴⁵ See text accompanying notes 40 & 41 *supra*. In *National Ass'n of Reg. Util. Comm'rs (NARUC) v. FCC*, 533 F.2d 601 (D.C. Cir. 1976), the court stated:

We are not persuaded that either the statute on its face or the construction which it has been given in *Southwestern* and *Midwest* supports the Commission's argument that it has a blanket jurisdiction over *all* activities which cable systems may carry on. . . .

The Court . . . 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*.

Id. at 612 (emphasis by the court) (footnotes omitted).

⁴⁶ The *Midwest Video* Court expressly recognized program diversity as a permissible basis for the exercise of FCC authority over cable operators. 406 U.S. at 669. Thus, when faced with a regulatory policy that was intended to promote the same goal, the *Brookhaven* court had little difficulty concluding that the FCC had acted in a manner consistent with its statutory mandate. See 573 F.2d at 767.

dence of an actual problem⁴⁷ and to establish a nexus between the regulation and the goal sought to be achieved.⁴⁸ Similarly, the Eighth Circuit has required proof that the regulation has a bearing "on the health and welfare of broadcasting."⁴⁹ Moreover, while courts seem willing to accept "unintrusive" measures such as the policy of nonregulation challenged in *Brookhaven*,⁵⁰ they are more circumspect when considering regulations which impose restrictions or affirmative burdens on cable operators.⁵¹ FCC rules designed to

⁴⁷ *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977). The *Home Box Office* court was confronted with a challenge to FCC anti-siphoning rules which had the effect of restricting "sharply the ability of cablecasters to present feature film and sports programs if a separate program or channel charge is made for [such] material." 567 F.2d at 19. The court interpreted *Southwestern Cable* and *Midwest Video* to require that the FCC be able to demonstrate statutory support for its actions or "ground them in a well-understood and consistently held policy developed in the [FCC's] regulation of broadcast television." *Id.* at 28 (citation omitted). Finding neither a legitimate goal nor a genuine problem of siphoning, the court struck down the rules. *Id.* at 60.

⁴⁸ *National Ass'n of Reg. Util. Comm'rs (NARUC) v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). In *NARUC*, the FCC sought to preempt state regulation of two-way, point-to-point, non-video communications broadcasted over the leased access channels of cable systems. *Id.* at 605. The court found this preemption to be outside of the Supreme Court's "reasonably ancillary" standard because there was no evidence that a broadcast purpose would be served even in an indirect manner. *Id.* at 617.

⁴⁹ *Midwest Video Corp. v. FCC (Midwest II)*, 571 F.2d 1025, 1038 (footnote omitted), aff'd, 47 U.S.L.W. 4335 (U.S. Apr. 3, 1979). The *Midwest II* court was confronted with an FCC rule requiring cable operators with over 3,499 subscribers to maintain "access" channels and make them available on a "first-come, nondiscriminatory basis." 571 F.2d at 1034 (citing 47 C.F.R. § 76.256(d)(1)-(2)(1976)). The articulated goal in this case was to provide expanded outlets for community expression. 571 F.2d at 1041. The court held that the means sought to be employed in order to achieve that goal "exceeded [the FCC's] own recognized jurisdictional limitations in the field of television broadcasting." *Id.* at 1050. The court rejected the FCC's reliance on regulatory goals as the exclusive predicate for the assertion of jurisdiction. It stated:

Whether we find the "policy" attractive is irrelevant. A court may favor an agency-sponsored policy, while condemning the agency's exercise of unauthorized power in a specific action taken in pursuit of that policy. The nobility of a goal or policy cannot justify usurpation, by the Commission or by us, or a power to pursue it in whatever manner we think might "work." . . .

.

Rhetoric in praise of objectives cannot confer jurisdiction.

Id. at 1041-42; see *id.* at 1041-47.

⁵⁰ In *American Civil Liberties Union (ACLU) v. FCC*, 523 F.2d 1344 (9th Cir. 1975), see note 8 *supra*, the Ninth Circuit upheld the FCC's decision to refrain from classifying access channels as media subject to common carrier requirements in order to allow development free from restraint until experience with that type of regulation could be accumulated. 523 F.2d at 1349. The *ACLU* court supported the FCC's belief that "[r]ate regulation in the absence of experience . . . would be detrimental to the development of cable television." *Id.*

⁵¹ See *Midwest Video Corp. v. FCC (Midwest II)*, 581 F.2d 1025 (D.C. Cir.), aff'd, 47 U.S.L.W. 4335 (U.S. Apr. 3, 1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977); *National Ass'n of Reg. Util. Comm'rs (NARUC) v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). In each of these cases, the court rejected FCC rules which imposed substantial burdens on cable operators. See notes 47-49 *supra*.

regulate the content of cable programming have been subjected to particularly close scrutiny.⁵²

It is submitted that a judicial test that stresses the unintrusiveness of a regulation is an inadequate guide for measuring the regulatory jurisdiction of a federal administrative agency. To the extent that the "reasonably ancillary" and "long-established regulatory goal" tests require the courts to rely on the unintrusiveness of a particular regulation, they seem unduly vague and indefinite. It is therefore suggested that legislative action is needed to provide the FCC with specific guidelines for exercising its authority in the area of cablecasting.⁵³

Andrew A. Peterson

⁵² See, e.g., *Midwest Video Corp. v. FCC (Midwest II)*, 571 F.2d 1025, 1053-59 (8th Cir.), *aff'd*, 47 U.S.L.W. 4335 (U.S. Apr. 3, 1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 61 (D.C. Cir.) (per curiam) (Weigel, J., concurring), *cert. denied*, 434 U.S. 829 (1977). In its landmark decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court held that the FCC has limited authority to regulate the content of broadcast programming in order to protect the viewer's access to "those views and voices which are representative of his community." *Id.* at 389. Noting that the "First Amendment is [not] irrelevant to public broadcasting," the Court nevertheless concluded that some degree of regulation is justified by the de facto monopoly that licensed broadcasters have over the limited broadcast spectrum. *Id.* at 389-90. It is submitted, however, that the *Red Lion* rationale may be inapplicable to cases involving cable television services. Unlike the limited broadcast spectrum, coaxial cables have the capacity to carry 20-60 simultaneous signals. 523 F.2d at 1348. Thus, since the "scarcity" theory utilized by the *Red Lion* Court is less persuasive in the case of cable television, FCC attempts to regulate the content of cablecasts are more likely to be viewed as an infringement of cable operator's first amendment rights. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 61 (D.C. Cir.) (per curiam) (Weigel, J., concurring), *cert. denied*, 434 U.S. 829 (1977); Hoffer, *supra* note 5, at 490-98. See generally Note, *Cable Television and Content Regulation: The FCC, The First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133 (1976); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971).

⁵³ In drafting the Act, its framers sought to avoid incurring "administrative obstacles from the viewpoint of effective regulation by the Commission to be created," see note 35 *supra*, and envisaged FCC reports to Congress as being "quite helpful in framing future legislation directly affecting the regulation of the communications business." S. REP. 781, *supra* note 35, at 496-97. Further legislation, however, has not yet been enacted. See note 9 *supra*.

In response to reports suggesting that "local authorities are uniquely suited to regulate such matters as subscriber service complaints and rate disputes," STAFF OF HOUSE COMMERCE SUBCOMM. ON COMMUNICATIONS, OPTIONS FOR CABLE TELEVISION REGULATION, 95th Cong., 2d Sess. 568 (Comm. Print 1977) [hereinafter cited as OPTIONS], Reps. Lionel Van Deerlin (D-Calif.) and Louis Frey (R-Fla.) announced the introduction of H.R. 13015, which would, among other things, relegate jurisdiction over cable television to the states. 36 CONG. Q. 1547-51 (June 17, 1978). One purpose of the bill, according to Rep. Van Deerlin, is to "get the federal government out of the business of regulation." *Id.* at 1547. The bill is the result of 20 months of "subcommittee hearings, panel discussions, meetings and staff study of the telecommunications industry." *Id.* One such study, OPTIONS, *supra*, has suggested that the "rationale for cable regulation by the federal government flows principally . . . from cable's

potential negative impact on over-the-air broadcasting,” and that the role of a federal agency should be to “weigh the effects of cable development” on that medium. *Id.* at 568. In all other areas, “cable regulation could be left to those who authorize the construction of the system and are served by it.” *Id.*