THE 1984 CABLE ACT: PROLOGUE AND PRECEDENTS†

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I. INTRODUCTION

Prior to the passage of the Cable Communications Policy Act of 1984 (1984 Cable Act)[1], uncertainty was a hallmark of cable regulation. This uncertainty, often caused by the competition between local, state, and federal entities over authority to regulate, was in large part attributable to the absence of congressional direction. Indeed, it is one of the crippling oddities of cable television that all levels of government are involved in its regulation. As a result, patterns of cable regulation have been overlapping, conflicting, and vague. One of the major functions of the 1984 Cable Act was to ameliorate this situation. How the legislation seeks to do so and the special role of the preemption doctrine in this process, is the focus of this Article.

The Federal Communications Commission (FCC) and the Copyright Royalty Tribunal (CRT) have placed certain regulatory requirements on cable television systems. Their authority and obligations arise under the Communications Act of 1934[2] and the Copyright Act of 1976.[3] At the state level, cable has been treated in a wide variety of ways, ranging from laissez-faire government disengagement to extensive regulation. A few states have established statewide legislative or regulatory agencies.[4] The most pervasive level of government regulation, however, has

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[1] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2779 (to be codified at 47 U.S.C. §§ 601-639).

[2] 47 U.S.C. §§ 151-156 (1982).

[3] 17 U.S.C. §§ 801-810 (1982).

[4] The term "state regulation" can encompass all nonfederal actions which may be implemented at the state level or, at the state's direction, by a political subdivision of the state. We note that sometimes local actions do not have the endorsement of the state, see Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), and successive cases. For the purposes of this Article, "state regulation" refers to direct state level

been local. Municipalities, counties, and other political subdivisions of the states have actively participated in cable matters, though in recent years the permissible extent of this participation has been increasingly unclear.[5]

In this Article, the context of the 1984 Cable Act and its precedents are discussed in terms of the competition for regulatory authority and its consequences. The history of regulation sets the stage for the analysis, in the special context of preemption, of particular problems in regulation, such as franchising, program regulation, and obtaining franchise renewals.

II. Purposes of the 1984 Cable Act

In the period leading up to the passage of the 1984 Cable Act, both the cable industry and the cities (which are the major franchising authorities in the nation) were concerned about the burden of continued uncertainty. While the intensity of their desires for federal legislation did not always mesh, there was some mutual interest in establishing order. Their quest was to determine, to the maximum extent possible, the division of regulatory authority and the limitations that should be imposed on regulation itself.

A discussion of the language contained in the preamble to the 1984 Act, as embodied in section 601, is helpful in studying the purposes of the Act and provides some sense of the conflicts inherent in seeking to resolve the wide range of outstanding disputes.

A. *To Establish a National Cable Communications Policy*

Section 601(1) of the Act states that one purpose of the law

regulation as distinguished from local regulation. "Nonfederal" refers to both state and local levels.

5 The most important challenge to the continued authority of state and local governments to restrict entry by cable systems into franchise areas and to impose restrictions relating to access and program content came in Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985). That decision is the strongest by any federal appellate court imposing first amendment limitations on the power of local governments. On a motion to dismiss for failure to state a claim, the Ninth Circuit held that "when the public utility facilities and other public property . . . necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system," *id.* at 1401, the franchising authority cannot issue exclusive franchises and may, indeed, be required to issue franchises to all who can be accommodated.

The court, while not ruling on the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 2779 (to be codified at 47 U.S.C. §§ 601-639), suggested that "the mandatory access and leased access requirements" of the legislation "pose particularly troubling constitutional questions." 754 F.2d at 1401 n.4.

is to "establish a national policy concerning cable communications."[6] One clear need was to establish a more certain legislative basis for decisions by the FCC.[7] No legislation had emanated from Congress providing guidance for the FCC on the following issues: what role should be played by local franchising authorities; who, if anyone, should regulate program content; what attitude should be taken toward rate regulation; and to what extent should there be an expectancy of renewal by cable operators. The consequence of piecemeal decisions by the governmental competitors for regulatory authority was a patchwork national policy. Many thought a congressionally declared policy would be more responsive to national needs and more consistent with the appropriate role and relationship between Congress and the FCC. According to the House Committee Report that accompanied the Cable Act, the Act "establishes a national policy that clarifies the current system of local, state and federal regulation of cable television."[8] Moreover, prior to the decision of the United States Supreme Court in *Capital Cities Cable, Inc. v. Crisp*,[9] there was uncertainty about the regulatory authority of the FCC, as we subsequently note in this Article.[10]

B. *To Establish Franchise Procedures*

Section 601(2) provides a specific purpose of the legislation, namely to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community."[11] As comforting as the lan-

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6 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2780 (to be codified at 47 U.S.C. § 601(1)).

7 The Federal Communications Commission was created by the Communications Act of 1934, and was given the power to "execute and enforce the provisions" necessary "to regulat[e] interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151 (1982). Section 154(i) specifically grants the Commission power to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (1982).

8 House Committee on Energy & Commerce, H.R. REP. No. 934, 98th Cong., 2d Sess. 19 (1984) (hereinafter cited as House Report).

9 104 S. Ct. 2694 (1984). In *Crisp*, an association of Oklahoma cable system operators challenged the state's ban on alcoholic beverage advertising on out-of-state signals that the plaintiffs retransmitted by cable to their subscribers. The Court held that the Oklahoma ban "reache[d] beyond the regulatory authority reserved to local authorities . . . and trespasse[d] into the exclusive domain of the FCC." *Id.* at 2703. The Court reasoned that the right of the FCC to preempt state and local regulations would assure expansion of cable TV and the presentation of diverse programming on cable TV. *Id.* at 2705.

10 *See infra* notes 40-62, 73-94, and 113-20 and accompanying text.

11 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2780 (to be codified at 47 U.S.C. § 601(2)).

guage appears, it embraces one of the most difficult conundrums in cable regulation. As will be seen, the major conflict is between the goal of encouraging "growth and development of cable systems", while at the same time assuring that such systems are "responsive to the needs and interests of the local community."[12] In fact, it has been the overzealous commitments of cable operators to local communities that, at times, has threatened their growth and development. And while the legislation seems to imply that both these goals can be simultaneously embraced, the law seeks, in many ways, to protect cable operators from their own predilections to overpromise in order to obtain a franchise[13] or, perhaps, to respond without adequate care to expansive requirements in the requests for franchising proposals made by local authorities.[14] In a sense, the 1984 Cable Act, through fulfillment of the balance suggested in this contrapuntal statement of purpose, establishes the kind of ceiling on competitive efforts that would otherwise not be available to the cable industry except through potential violations of the antitrust laws.[15]

C. *To Provide Guidance on the Division of Authority*

Section 601(3) indicates that another purpose of the law is to clarify the appropriate roles of the competitors for regulatory authority—the FCC, the states, and the local communities.[16] As indicated, the need for such direction has become increasingly important.[17] Municipal authorities found their historic relationships to cable systems to be undermined by court decisions and FCC action.[18] Moreover, antitrust laws and first amendment principles were being added to federal preemption as tools to limit the local franchising power.[19] To a large extent, the 1984 Cable Act codifies these trends, but it does so by preserving at

[12] *Id.* (to be codified at 47 U.S.C. § 601(2)).
[13] *See id.* at 2786-87 (to be codified at 47 U.S.C. § 621).
[14] *See id.* at 2790-91 (to be codified at 47 U.S.C. § 625).
[15] As competitors, cable companies might wish certain elements of the process withdrawn from competition. Franchise fees are a good example. It would be a violation of the antitrust laws for a group of bidders to agree not to bid more than 5% of gross revenues to obtain a franchise. The statute makes such conspiring unnecessary on this issue.
[16] 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2780 (to be codified at 47 U.S.C. § 601(3).
[17] *See supra* text accompanying notes 1-5.
[18] *See, e.g., Crisp*, 104 S. Ct. 2694; *Boulder*, 455 U.S. 40.
[19] In *Boulder*, the Court held that Boulder's three month moratorium prohibiting the plaintiff cable company from expanding its services could not escape antitrust scrutiny under the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943). 455 U.S. at 48-57. *Boulder* added antitrust to the arsenal for limiting local cable regulation. *But see Preferred Communications*, 754 F.2d 1396. *See also* Stanzler, *Cable Television Monopoly and the*

least some powers for local government.[20]

D. *To Assure Diversity of Information Sources and Services*

According to section 601(4), a fourth major purpose of the legislation is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[21] As with section 601(2),[22] there is a conundrum here. The drafters were required to balance first amendment considerations precluding abridgment of speech with the desire to establish structural rules that affirmatively—in at least an aspirational way—encourage a diversity of information sources.[23] The statute includes several provisions which, for example, "may require that certain channels or portions of channels on a cable system be available for programming and controlled by a person other than the cable operator."[24] Also included are the novel provisions regarding cable channels for so-called "commercial use," a form of regulation that bears a pale similarity to leased access.[25]

In addition, the Act reflects concerns about content regulation. One of the main themes that permeated consideration of the Act related to the extent to which the cable operator and the franchising authority should have powers and, in the case of the operator, duties, to curb obscene and indecent programming.[26]

E. *To Establish an Orderly Process for Renewal of Franchises*

Section 601(5) provides that a purpose of the Act is to "establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal."[27] As elsewhere, this conciliatory language of purpose hides the combat over appropriate roles which originally gave rise to the need for legislation, and the broad language masks the difficulty of determining under what circumstances a denial would be unfair.

First Amendment, 4 CARDOZO L. REV. 199 (1983) (posits that the establishment of cable monopolies violates the first amendment).

20 *See* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2800 (to be codified at 47 U.S.C. § 636).

21 *Id.* at 2780 (to be codified at 47 U.S.C. § 601(4)).

22 *See supra* notes 10-13 and accompanying text.

23 *See* Associated Press v. United States, 326 U.S. 1, 20 (1945) (upholding the application of antitrust laws to newspapers).

24 House Report, *supra* note 8 at 31.

25 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2782-85 (to be codified at 47 U.S.C. § 612).

26 *See id.* 2801 (to be codified at 47 U.S.C. § 639).

27 *Id.* at 2780 (to be codified at 47 U.S.C. § 601(5).

Nonetheless, it is certainly true that Congress has asserted itself here by establishing national policy, sharply and firmly preempting other directions in renewal policy then emerging at state and local levels.[28]

F. *To Promote Competition*

In an almost mandatory deference to the marketplace, section 601(6) provides that it is a purpose of the Act to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[29] Clearly, the statute deregulates; it eliminates the possibility of regulation in some contexts and marks the division of authority among the federal, state, and local regulating entities. However, it is less clear how the statute "promotes competition" except to the extent that one considers that a less regulated cable industry is more capable of competing with other modes of delivering video programming and other information services.

III. Federal Historical Context for the 1984 Cable Act

How did it come to pass that there was such a complex and Gordian knot to cut? What historic circumstances led to the notion that local governments could become so deeply involved in what was clearly a problem of national telecommunications policy? What roots did the 1984 Cable Act have in the ongoing federalization of cable policy through the actions of the FCC and emerging tendencies in the preemption of local and state regulatory efforts? It is these issues—the federal historical precedents for the 1984 Cable Act—that are now addressed.

A. *A Short History*

1. Refusal to Regulate Cable

For the first seventeen years of cable's growth, the FCC left cable regulation, by and large, to local authorities. In 1958, the FCC first considered its authority over cable in *Frontier Broadcasting Co. v. Collier*.[30] Thirteen television stations complained to the FCC that 288 cable television operators in thirty-six states threatened their economic security. They asked the FCC to exercise jurisdiction over cable as common carriers under section

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[28] *See id.* at 2791-93 (to be codified at 47 U.S.C. § 626).
[29] *Id.* at 2780 (to be codified at 47 U.S.C. § 601(6)).
[30] 24 F.C.C. 251 (1958).

3(h) of the 1934 Communications Act.[31] Declining to do so, the FCC stated that even if cable were determined to be a common carrier under the Act, "it is doubtful that the Commission could so administer its common carrier powers as to restrict or control the entry or operation of CATV systems in the interest of protecting or fostering television broadcast service in particular communities."[32]

Following the *Frontier* decision, the FCC initiated its Auxiliary Services Inquiry[33] into its jurisdiction over cable television pursuant to Titles II and III of the 1934 Communications Act. It found no statutory basis upon which to assert jurisdiction over cable.[34] The FCC was concerned in the *Inquiry* with the effect of cable in forcing local television stations to go off the air.[35] Finding that only three of the ninety-six defunct broadcast stations might have been affected by cable, it concluded that limiting the growth of cable was not justified.[36] Broadcasters would bear a heavy burden of proof to show economic injury due to cable. Yet the FCC recognized the need for an amendment of the 1934 Act to establish the agency's jurisdiction over cable.[37] Though bills were introduced, no legislation was passed.[38]

B. *Assuming Jurisdiction*

As the cable industry continued to grow, the FCC changed its hands-off policy. Though Congress had not granted the FCC specific statutory authority, it did have jurisdiction over microwave relay systems[39] and so the FCC began to regulate cable indirectly through its licensing of those transmitters. In 1962, the FCC held in *Carter Mountain Transmission Corp.*[40] that it could deny an application for a common carrier microwave facility where

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31 Section 3(h) is now codified as 47 U.S.C. § 153(h) (1982). According to the statute, a common carrier is "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission." Recognition of cable TV as a common carrier within the statute would have permitted the FCC to exercise jurisdiction over cable TV and permit the filing of complaints against cable operators under 47 U.S.C. § 208 (1982).

32 24 F.C.C. at 255.

33 Report and Order, 26 F.C.C. 403 (1959).

34 *Id.* at 428.

35 *Id.* at 434-35.

36 *Id.*

37 *Id.* at 441.

38 On some views as to the relationship between Congress and the FCC, see Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 VA. L. REV. 541 (1975).

39 Carter Mountain Transmission Corp., 32 F.C.C. 459, 461-62 (1962), *aff'd sub nom.* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

40 *Id.*

such would serve a cable system and cause possible economic harm to a local TV station.[41] No microwave facilities would be granted unless the cable system could show there was no harmful effect on local TV operation.[42]

This decision was followed by two others, in 1965 and 1966, which extended FCC jurisdictions over all cable systems, not just those using microwave relays.[43] The FCC sought to protect broadcasters, especially struggling UHF operators, and to preserve local TV service through rules governing use of a cable system's channels. The FCC's 1965 First Report and Order,[44] directed at cable systems using microwave relays, identified which signals *must* be carried and which *may* be carried. The First Report also established nonduplication protection of programs for local TV stations within the cable system's service area.[45]

The FCC's 1966 Second Report and Order[46] extended these rules to non-microwave cable systems. Further, cable system importation of signals into the top 100 markets was made more difficult. The resulting scheme was extraordinarily burdensome and required a long and costly case-by-case analysis in determining which distant broadcast signals could be imported. Given the early outcome of hearings on these matters, it appeared that the FCC was freezing the growth of cable by inhibiting distant signal importation. The FCC seemingly looked at cable as a way of adjusting and augmenting the official Table of Allocations[47] of television licenses, taking great pains to assure that the Table's integrity was not to be disturbed. The Commission's cautious approach, the high cost of change, and the associated uncertainty involved meant that the transformation of the nation's communications delivery system in favor of cable was neither inevitable nor immediate.

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41 *Id.* at 464-65.

42 *Id.*

43 First Report and Order, 38 F.C.C. 683 (1965); Second Report and Order, 2 F.C.C. 2d 725 (1966).

44 38 F.C.C. 683 (1965).

45 *Id.* The F.C.C.'s decisions relied on two economic studies, The Fisher Report and the Seiden Report. The Fisher Report, submitted on behalf of broadcasters, concluded that there was a direct correlation between size of audience and station revenues and that the impact of CATV noncarriage, duplication or fractionalization of station audience could be disastrous. The Seiden Report, on the other hand, supported arguments made by the National Cable Television Association that CATV helps to extend the audiences of local stations. The Report showed that CATV impact, if any, affected a relatively small number of local broadcasters by virtue of the fact that only a few systems received microwave service. Competition from other broadcasters, it argued, was in some cases more damaging to a station than competition from CATV. *Id.* at 693, 701.

46 2 F.C.C.2d 725 (1966).

47 Report and Order, 17 Fed. Reg. 3905 (1952).

The Commission's jurisdictional approach in the Second Report and Order was upheld by the Supreme Court in *United States v. Southwestern Cable Co.*[48] The Court held that the agency's statutory power extended to the regulation of cable TV, at least to hold a hearing to determine the right of a cable system to import distant signals over the objection of a local broadcaster. The Court added one qualification to the FCC's otherwise seemingly broad jurisdiction by stating that the FCC's power to regulate cable TV "is restricted to that reasonably ancillary to the effective performance of the FCC's various responsibilities for the regulation of television broadcasting."[49]

FCC jurisdiction over cable was based on the agency's long-established authority under the 1934 Communications Act to regulate broadcasting, authority which had earned considerable deference from the Supreme Court.[50] The Court seemed to agree that the FCC needed to protect broadcasters in order to pursue its statutory mandate to serve the public interest.[51] The Court deferred to the expertise of the FCC as it had consistently done in the past.[52]

In this context, Justice White's concurrence in *Southwestern Cable* is notable.[53] Instead of taking the broad-based jurisdictional approach of section 152(a) of the 1934 Communications Act, he took a narrower two-part approach to justify the agency's jurisdiction, with an emergency option if needed.[54] The two parts are based on section 301 of the 1934 Act, which grants the FCC general authority over broadcasting,[55] and section 303, a catch-all provision conferring authority to "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter."[56] Justice White's point was that the FCC can regulate cable systems as broadcasters. This reasoning, however, like the categorization behind it, becomes forced. Why

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[48] 392 U.S. 157 (1968).
[49] *Id.* at 178.
[50] *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943).
[51] 392 U.S. at 175-78.
[52] *Id.* at 177-78.
[53] *Id.* at 181-82 (White, J., concurring).
[54] *Id.* Justice White's emergency approach (which the majority also uses) is based on section 152(a). Since section 152(a) seems to allow the FCC to implement the aims of sections 301 and 303 over wire carriers, he tried to categorize cable as a common carrier service by wire. Accordingly, even if a cable system is viewed as a common carrier, and not as a broadcaster, the provisions in the Act aimed at protecting broadcasting can be applied to cable systems.
[55] 47 U.S.C. § 301 (1982).
[56] 47 U.S.C. § 303 (1982).

should an order prohibiting a cable system from importing distant signals be deemed necessary "to prevent interference between stations?" How can the FCC rely on the authority "to carry out the provisions of this chapter" to carry out a provision not found elsewhere in Title III of the 1934 Communications Act?

The significance of *Southwestern Cable* lies in its attempt to describe the fundamental jurisdictional and definitional question: What is cable? Is it broadcasting? A common carrier? Both? A hybrid of each? And, considering the presence of both wire and radio in a cable system, can one assume that the authors of the 1934 Act intended to include unforeseen developments like cable television within its scope? By 1968, the answer, at least when cable was seen to effect broadcasting, was a very strong yes.

In the subsequent notice of proposed rulemaking issued in December 1968, the FCC proposed various changes relating to distant signal importation.[57] In lieu of hearings pegged to the standards of the Second Report and Order,[58] the 1968 Proposed Rulemaking[59] proposed that cable systems obtain the "retransmission consent"[60] of the originating television station prior to importing signals located within a 35-mile zone of a top 100 market.[61] Thus, it proposed, in effect, a "public dividend plan" to assist independent UHF stations and the public broadcasting system. The Commission believed that UHF independents were most likely to develop in the top 100 markets, precisely where unfair competition from cable would be most inimical to that development.[62] The effect of the proposal was to freeze cable expansion in major markets since few cable systems were able to obtain retransmission consents.

C. *Search for Compromise*

Another issue which arose was cable's effect on copyright proprietors. In 1968, the Supreme Court held that cable operators did not have to obtain the consent of copyright holders or have to pay royalties for retransmitting material from distant TV stations.[63] The net results was that cable faced a windfall on the

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57 Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968).
58 2 F.C.C.2d 725 (1966).
59 15 F.C.C.2d 417 (1968).
60 *Id.* at app. C, 459-61.
61 *Id.* at 432.
62 *Id.* at 434.
63 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

copyright question if it could just find a way to get by the FCC's signal importation embargo.

But the regulatory thicket was getting more, not less, restrictive. In 1969, the FCC imposed mandatory program origination requirements on systems with over 3500 subscribers: these systems had to originate their own programming on at least one channel.[64] In 1970, the FCC adopted cross-ownership restrictions, prohibiting system ownership by telephone companies,[65] national TV networks, TV stations, and translators in a system's service area.[66] That same year the Commission restricted the growth of pay cable by adopting "anti-siphoning" rules which prevented pay services from outbidding over-the-air TV for popular movies and sports events.[67]

The imbalance between regulatory burdens and copyright bounty led to several efforts to unlock cable's situation. FCC compromises in 1970[68] and 1971[69] were suggested, with emphasis placed on Congress to settle the matter definitively. The FCC's 1971 proposal, known as the Letter of Intent, conceded that its proposals for retransmission consent did not work.[70] The proposal would have lifted the burden on importing some distant signals, but it required a minimum twenty-channel capacity for cable systems in the top 100 markets along with two-way capacity and access channels.[71]

Across town at the White House, however, the deal that would break the deadlock was shaping up. A Consensus Agreement[72] among broadcasters, copyright holders, and cable operators was signed in November 1971. Paralleling the FCC's Letter of Intent, the Consensus Agreement also bound the cable industry to modify its liability-free status under the 1909 Copyright Act and support new legislation.

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64 First Report and Order, 20 F.C.C.2d 201 (1969).

65 Final Report and Order, 21 F.C.C.2d 307 (1970), *recons.*, Memorandum Opinion and Order, 22 F.C.C.2d 746 (1970).

66 Second Report and Order, 23 F.C.C.2d 816 (1970).

67 Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970), *vacated*, Home Box Office v. FCC, 567 F.2d 9 (1977).

68 Second Further Notice of Proposed Rulemaking, 24 F.C.C.2d 580 (1970).

69 Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115 (1971).

70 *Id.* at 117.

71 *Id.* at 117, 128-35. *See also* 15 F.C.C.2d 417 (1968).

72 *Reprinted in* 1972 Cable Television Report and Order, 36 F.C.C.2d 143, 284, app. D (1972). Price, *Taming* Red Lion: *The First Amendment and Structural Approaches to Media Regulation*, 31 FED. COMMUNICATIONS COMM'N L.J. 215 (1979). *See also* 15 F.C.C.2d 417 (1968).

D. *The 1972 Rules*

The rules promulgated in the 1972 Cable Television Report and Order[73] formed the basis for the FCC's regulation of cable television during much of the following decade. The FCC relaxed some restrictions that had previously been placed on cable systems,[74] but its regulatory scheme continued to limit the number of distant signals and the types of programs that could be transmitted.[75] The 1972 rules embodied the FCC's effort to limit local television stations' loss of viewers to non-local stations carried on cable systems.

The rules rested upon the FCC's view that cable regulation would proceed through "deliberately structured dualism,"[76] a concept which became key to the division of authority. State and local governments would be in charge of granting individual franchise grants and would regulate the construction and physical operation of cable systems. The FCC would maintain exclusive jurisdiction over what signals would be carried and over technical standards of systems.

By assigning to itself the power over programming, the FCC would be free to maintain or reconsider—as it eventually did—the necessity of the protections embodied in the distant signal and syndicated exclusivity rules.[77] At least until 1972, the perceived federal interest was primarily the relation of cable to broadcasting rather than an independent purpose of promoting cable as a technology independent of and competitive with broadcasting.[78]

By 1975, the federal purpose was shifting. The FCC expressed the need to preempt "in order to assure the orderly development of this new technology into the national communications structure."[79] Preemption extended to "signal

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[73] 47 C.F.R. § 76 (1984). Generally, the rules addressed: franchising standards, signal carriage, network program nonduplication and syndicated program exclusivity, non-broadcast or cablecasting services, cross-ownership, equal employment opportunity, technical standards, fairness doctrine, equal time requirements for originated programming, sponsorship identification and ministerial reporting requirements.

[74] The FCC relaxed feature film restrictions (reduction from 10-year to 3-year period if film had not been shown locally during that time) and some anti-siphoning regulations.

[75] Cable Television Report and Order, 36 F.C.C.2d 143, 170 (1972), *aff'd*, 49 F.C.C.2d 1090 (1974), *aff'd*, 59 F.C.C.2d 984 (1976), *modified*, Midwest Video Corp. v. FCC, 571 F.2d 1025 (D.C. Cir. 1978).

[76] 36 F.C.C.2d at 207.

[77] *See id.* at 168-70.

[78] *See id.* at 164. *See also* 38 F.C.C. 683, 700-01 (1965) (FCC's responsibility to serve the public interest is best achieved by protecting broadcasters from CATV competition).

[79] Report and Order, 54 F.C.C.2d 855, 863 (1975).

carriage, pay cable, leased channel regulations, technical standards, access, and several areas of franchise responsibility . . . . Non-federal officials have responsibility for the non-operational aspects of cable franchising including bonding agreements, maintenance of rights-of-way, franchise selection and conditions of occupancy and construction [within broad federal guidelines as to the latter two points]."[80]

These claims of preemption were not seriously questioned at the time, to the extent anyone was thinking about the problem. Cities either were unaware of the FCC's strong statements of its jurisdiction in areas they thought they could regulate as part of the franchising process, or, if they knew, they assumed that it was preemption observed in the breach. For instance, in 1974, the FCC took the opportunity to comment on applications for certificates of compliance[81] where franchises specified the signals that a cable operator was obliged to carry, noting that: "Franchising authorities do not have any jurisdiction or authority relating to signal carriage."[82]

The FCC's jurisdiction over cable was strengthened by the Supreme Court's decision in *United States v. Midwest Video Corp. (Midwest Video I)*.[83] This case affirmed the FCC's statutory power to impose program origination rules on cable systems, relying on the "ancillary-to-broadcasting" jurisdiction established four years earlier in *Southwestern Cable*.[84] Although the Court upheld these rules based upon FCC jurisdiction under the Communications Act,[85] Chief Justice Burger wrote, in his concurrence necessary for the 5-4 decision, that the origination requirement "strains the outer limits of even tbe open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and

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80 *Id.*

81 Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 175, 178 (1974).

82 *Id.*

83 406 U.S. 649 (1972).

84 *See supra* notes 47-55 and accompanying text. The FCC's rule, which *Midwest Video* challenged, stated that:

> [N]o CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.

406 U.S. at 653-54 (footnotes omitted).

The Commission reasoned that such a rule would increase "the number of outlets for community self-expression and [augment] the public's choice of programs and types of services. . . ." 406 U.S. at 654 (quoting First Report and Order, 20 F.C.C.2d at 202 (1969)).

85 *See* 406 U.S. at 669-70.

the courts."[86]

Those limits had been shattered by the adoption of the program origination rules, according to the dissenters, who viewed cable as "simply a carrier having no more control over the message content than does a telephone company."[87] The dissent viewed the rules as forcing cable operators to become broadcasters, an action which Congress might take but one which could not be "interstitially authorized in the vague language of the Act."[88] Thus, in the absence of Congressional specification of jurisdiction, the FCC was left with no more guidance than the rather vague distinction between "reasonably ancillary" and "outer limits."

This vague distinction was somewhat clarified in *National Association of Regulatory Utility Commissioners v. Federal Communications Commission (NARUC II)*,[89] where the District of Columbia Circuit Court of Appeals held that the FCC did not have jurisdiction to compel cable companies to develop two-way communication capability,[90] and that it could not preempt state regulation of intrastate nonvideo communication which might be carried by cable.[91] The court, interpreting *Southwestern Cable* and *Midwest I*, stated that: "The [Supreme] 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*."[92] The court found that *Midwest I* represented the farthest outpost of Commission power.[93] The *NARUC II* court also questioned the FCC policy that indivisible regulation of cable TV under a FCC comprehensive scheme is essential if the goal of a national broadband communication grid is to be achieved.[94]

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86 406 U.S. at 676 (Burger, C.J., concurring).
87 *Id.* at 680 (Douglas, J., dissenting).
88 *Id.* at 681.
89 533 F.2d 601 (D.C. Cir. 1976).
90 *Id.* at 608-11.
91 *Id.*
92 *Id.* at 612.
93 *Id.* at 615. The court stated: "*Midwest*, without question, takes a giant step beyond *Southwestern*, in relaxing the nature of the ancillariness necessary to support an assertion of Commission power over cable." *Id.*
94 *Id.* at 613-14 n.77.

> This longterm goal which the Commission sets out for itself apparently has its roots in the general purpose section of the Act, 47 U.S.C. § 151 (1970). While that section does not set forth worthy aims toward which the Commission should strive, it has not heretofore been read as a general grant of power to take any action necessary and proper to those ends.

Id. Later, the Supreme Court, in *Capital Cities Cable Inc. v. Crisp*, 104 S. Ct. 2694 (1984),

E. *Deregulation*

The decade following 1972 saw most of the federal program-related rules governing cable gradually eliminated as a result of court or FCC decisions. In *Home Box Office, Inc. v. Federal Communications Commission,*[95] the District of Columbia Circuit Court of Appeals struck down the FCC's pay cable "anti-siphoning" rules.[96] In *Federal Communications Commission v. Midwest Video Corp. (Midwest Video II)*[97] the Supreme Court overturned common carrier access and channel capacity rules, finding them beyond the jurisdiction of the FCC under the 1934 Communications Act.[98]

Meanwhile, the FCC relieved smaller systems—those with less than 1000 subscribers—of the duty to comply with the syndicated exclusivity and nonduplication of network programming rules that had been part of the 1972 Report and Order.[99] It decided not to adopt a local cable television/newspaper cross-ownership barrier which was being contemplated at the time other cross-ownership bars were put into place.[100] It also eliminated the restrictions on distant signal "leapfrogging" that had been put into place to protect local stations.[101] And, in a 1977 Notice of Inquiry (Economic Inquiry), the FCC began to reexamine the assumption that cable had to be checked, lest it destroy over-the-air television.[102] That year, the FCC indicated that the burden would be lifted from cable systems who sought waivers of the bar to distant signal importations. In *Arlington Telecommunications Corp. (ARTEC),*[103] the FCC said that importation of distant signals into major markets would be presumed to have little or no impact on local broadcasters in those markets, and the burden was on the broadcaster to show otherwise.[104]

The Economic Inquiry followed *ARTEC*'s lead, yielding the

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seemed to recognize the FCC's preemptive capabilities just to encourage such a national scheme.

95 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied,* 434 U.S. 829 (1977).

96 The anti-siphoning rules were premised on the view that the health of the licensed broadcasting system depended on its favored access to certain programming fare: it traditionally carried sports events, films and series. By forbidding competing services from carrying these programs, siphoning would be prevented.

97 440 U.S. 689 (1979).

98 *Id.* at 708-09.

99 First Report and Order, 63 F.C.C.2d 956 (1977); First Report and Order, 52 F.C.C.2d 519 (1975).

100 Second Order and Report, 23 F.C.C.2d 816 (1970).

101 Report and Order, 57 F.C.C.2d 625 (1976).

102 Notice of Inquiry, 65 F.C.C.2d 9 (1977).

103 Memorandum Opinion and Order, 65 F.C.C.2d 469 (1977), *recons. granted,* Memorandum Opinion, 69 F.C.C.2d 1923 (1978).

104 65 F.C.C.2d at 475-76.

1979 Economic Inquiry Report, which concluded that the distant signal carriage rules should be repealed.[105] By then, many of the rules adopted in the 1972 Report had been deleted.[106] The distant signal rules, along with the syndicated exclusivity rules—themselves the subject of a separate economic study[107] — were repealed in 1980.[108]

In the meantime, Congress finally acted — at least as to cable and copyright. The Copyright Act of 1976 granted cable systems compulsory licenses to retransmit distant broadcast signals.[109] A royalty would be due from a cable operator, and payments were to be established by a newly formed Copyright Royalty Tribunal.[110]

The Tribunal was to review royalty rates whenever the FCC changed the signal carriage rules, and the FCC noted this in launching its syndicated exclusivity inquiry.[111]

IV. Federal Regulation Today — Backdrop for the Cable Act

A. *Introduction*

As we have seen, federal, state, and local regulations of the cable industry have developed and operated contemporaneously. And while conflicts between state and local divisions of authority have been infrequent, the division between federal and non-federal jurisdiction has long been contentious. The FCC's own assumptions about the extent of its authority over cable shifted during the period prior to the 1984 Cable Act.[112] The federal interest grew while cable program services in the late 1970's came more and more to be characterized as interstate in nature. Simultaneously, the desire of municipal governments to regulate cable also grew. What was once a sideline interest became a preoccupation of cities, especially because they viewed cable regulation as a potential source of large revenue. State planning agencies which had been created by the legislatures to study telecommunications had also become ambassadors without a portfolio, with no authority to grant franchises but with a mission to be

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105 Report, 71 F.C.C.2d 632 (1979).
106 *Id.* at 656-57.
107 Report, 71 F.C.C.2d 951 (1979).
108 Report and Order, 79 F.C.C.2d 663 (1980).
109 17 U.S.C. § 111 (1982).
110 *Id.* § 801.
111 71 F.C.C.2d 632; 71 F.C.C.2d at 982-83.
112 *See generally* Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (1981).

involved in setting policy. The federal authority's gain could be municipalities' and states' loss, threatening their *raison d'etre*.

However, there was not a desire to increase cable regulation by the FCC. Even before the major deregulatory thrusts of the 1980's, cable rules and policies were, as we have seen, rescinded by the agency and the courts. Instead, two federal policies were emerging that characterized the FCC's intentions. First, there was the desire to promote interstate satellite services in order to increase the diversity of viewing options in the market. Federal rules that made the use of satellite services more difficult—such as the licensing of receive-only earth stations[113] — were eliminated. State rules that interfered with these services were also likely candidates for preemption.[114]

The second major policy concern of the FCC was to insure a competitive video marketplace.[115] As new technologies joined cable in the market, the FCC decided that offerings of like services should be subject to about the same level of regulation. Local regulations that made it more difficult for a cable system to compete in this environment—which denied cable, in the industry's favorite rhetorical expression, access to a "level playing field"—were viewed as conflicting with federal policy. The federal policy was to have as little regulation as necessary, and the method to even out the playing field was the doctrine of preemption.

B. *The Preemption Doctrine*

The doctrine of preemption is important as a backdrop to the 1984 Cable Act, and it will remain important as the complexities of the Act unfurl and the next generation of cases and decisions determine the extent to which federal legislation either curtails or confirms local initiative. Because so much rests on the preemption doctrine, we explore it in some detail here.

The doctrine of preemption is based on the premise that there are certain issues that can be handled best on a national level, or are required to be dealt with federally by our Constitution.[116] Once Congress has expressed its will, explicitly or implicitly, conflicting state action is invalid under the Supremacy

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[113] Regulation of Domestic Receive-only Satellite Earth Stations, First Report and Order, 74 F.C.C.2d 205, 217 (1979).

[114] *Crisp*, 104 S. Ct. 2694, 2704-05 (1984).

[115] *See* Community Cable TV, Inc., 56 RAD. REG.2d (P & F) 735, 740-41, *appealed sub nom.* National League of Cities v. FCC, Nos. 84-1349 (D.C. Cir. July 26, 1984).

[116] *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6, at 319 (1978).

Clause of the Constitution.[117] As the Supreme Court observed in *Fidelity Federal Savings and Loan Association v. De La Cuesta*:[118]

> Preemption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." . . . Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.". . . .
>
> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," . . . or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,". . . .[119]

Prior to the passage of the 1984 Cable Act, it was primarily the implicit nature of the federal interest in cable television that was the basis for preemption, though that implication was obviously related to the Communications Act of 1934. As a result, it was important, in supporting the FCC's actions, that the Supreme Court held: "Federal regulations have no less pre-emptive effect than federal statutes."[120]

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[117] U.S. CONST. art. VI, § 2.

[118] 458 U.S. 141 (1982).

[119] *Id.* at 152-53 (citations omitted).

[120] *Id.* at 153. The Court continued: "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive." *Id.* at 154 (citing United States v. Shimer, 367 U.S. 374, 381-83 (1961)). Although the existence of a federal legislative scheme may imply congressional intent to occupy a field, "[t]he fact that Congress created an [administrative entity, in this context the FCC,] to carry out its statutory program, is not by itself determinative of the preemption inquiry." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 623, at 376-77, § 626, at 386 (1978). Nor, for that matter, does the Cable Act necessarily constitute complete federal preemption or a complete partitioning of jurisdiction. Whether a challenged state action has been preempted depends upon whether or not it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (footnote omitted).

In KVUE, Inc. v. Austin Broadcasting Corp., 704 F.2d 922, 934 (5th Cir. 1983),

C. *FCC Preemption Policy Generally*

The FCC recognized at an early date that local governments would be involved in regulating cable due to its use of streets and rights-of-way and that there would be a resulting problem of reconciling federal regulation with state and local efforts.[121] Considering its limited resources and the desirability of permitting some local regulation, the Commission rejected federal licensing and total preemption. Instead, "deliberately structured dualism" called for the FCC to regulate some aspects of cable, and state or local governments to regulate others under federally prescribed minimum standards.[122] Local governments would grant franchises under the minimum standards, while the FCC would require system operators to obtain certificates demonstrating their compliance with the Commission's rules.[123]

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aff'd, 104 S. Ct. 1580 (1984), the Fifth Circuit Court of Appeals held that a conflicting Texas statute which regulated political advertising on broadcast stations was preempted by the FCC rules, but only as to federal candidates. The *KVUE* court used the same test that the Supreme Court used in *Fidelity Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152-54 (1982). The *Fidelity* decision prescribed an initial determination of whether Congress intended to grant broad and flexible powers to an agency it had created over a general area of regulation, and then a determination of whether the agency has demonstrated its own intent to preempt the field.

Absent explicit agency actions to preempt an entire field, see Wallach, *Whose Intent? A Study of Administrative Preemption: State Regulation of Cable Television*, 25 CASE W. RES. L. REV. 258 (1975), the federal government itself may or may not be exercising active "regulation." Non-exercise of regulation in a preempted area is usually called "negative preemption." For example, pay cable preemption is a negative preemption since the federal government may, but does not, regulate. Its potential power preempts state or local regulation.

121 15 F.C.C.2d at 425.

122 Notice of Proposed Rulemaking, 25 F.C.C.2d 50 (1970). This proceeding terminated in the Cable Television Report and Order, 47 C.F.R. § 76 (1984). The Commission could have instituted a licensing plan for cable but opted for another plan based on practicality rather than jurisdiction.

123 The dual jurisdictional scheme, however, proved more difficult to apply than to articulate. In areas where the FCC did not specifically assert jurisdiction, state and local authorities frequently filled the void. The FCC issued several opinions to clarify the extent of its preemption, which were relied upon extensively to settle jurisdictional questions. 46 F.C.C.2d 175 (1974); Amendment of Part 76 of Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excessive Over Regulation of Cable Television, 54 F.C.C.2d 855 (1975).

For instance, the FCC took the position that it would preempt state and local regulation "to assure the orderly development of this new technology into the national communications structure." 54 F.C.C.2d at 863. It observed:

> The ultimate dividing line, as we see it, rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission.

Id. at 861.

The FCC first applied the preemption doctrine to cable in 1969, when it asserted that "[s]tate or local regulation or conditions inconsistent with" FCC policies were gen-

D. *Federal Preemption of Cable Signals: The* Crisp *Decision*

The 1972 FCC Cable Report & Order presented a broad array of rules regulating cable at the federal level. But its enduring significance was not the rules themselves—most were rescinded or otherwise eliminated. Rather it was the policy of "deliberately structured dualism" and the broad preemption asserted that endured. These policies formed the basis for the Supreme Court's unanimous ratification of federal preemption in 1984 in *Capital Cities Cable, Inc. v. Crisp*.[124]

In *Crisp*, the Attorney General of Oklahoma had issued an opinion concluding that the retransmission of out-of-state liquor commercials by cable TV systems in the state would be considered a criminal violation of the state's constitutional ban on alcoholic beverage advertising.[125] The Supreme Court held that the Oklahoma law was preempted by the FCC, and therefore Oklahoma was prohibited from requiring cable systems to delete liquor advertising contained in signals carried pursuant to federal authority.[126]

The decision to prevent the states from imposing a delete requirement made obvious sense. Unlike Oklahoma broadcasters, who could be notified of beer or wine advertisements running on a national network and therefore could arrange a substitute,[127] cable systems were carrying satellite-delivered and

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erally preempted. This authority was based on Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963) in which the Supreme Court upheld a state statute proscribing price advertising of eyeglasses.

The radio station which brought the challenge argued that the regulation of advertising was preempted by the Communications Act. The Court held that "state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' " 374 U.S. at 430 (quoting Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963)). Such ban on price advertising would be of doubtful validity today under the first amendment. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

If the Commission has not exercised its authority in an area, local governments may have the implicit authority to act subject, of course, tc the cautions concerning negative preemption described above. Citing the *Head* case as one authority, the Supreme Court reached this conclusion in TV Pix, Inc. v. Taylor, 396 U.S. 556 (1970), *aff'g per curiam*, 304 F. Supp. 459 (D. Nev. 1968).

In *Taylor*, the Court let stand a ruling upholding a comprehensive Nevada state regulation of cable television. One ground of the decision was that the state laws, which involved subscriber rates, quality of service, and certain franchising qualifications, governed areas in which the FCC had not as yet exercised its power. This case served as the underpinning not only of Nevada's assertion of jurisdiction over cable television but also of its cable regulation generally.

124 104 S. Ct. 2694 (1984).

125 *Id.* at 2698 (citing Op. Okla. Att'y Gen. No. 79-334 (Mar. 19, 1980)).

126 *Id.* at 2703.

127 *See* Oklahoma Alcoholic Beverage Control Bd. v. Heublein Wines, Int'l, 566 P.2d

distant, out-of-state, broadcast signals. Notification was not practicable. The Attorney General's announcement of an intention to prosecute cable system owners would have meant that cable system owners would have been forced not to carry these signals at all. Moreover, the comprehensiveness of the ban was questionable since it was not equally applied to newspapers, magazines, and other publications printed outside Oklahoma which were distributed in the state: in fact, the ban had not been applied to cable operators until 1980.[128]

The *Crisp* opinion is significant in two other major respects. First, it was an abrupt departure from the careful "ancillary to broadcasting" approach taken by the Supreme Court in its three previous passes at the FCC's jurisdiction over cable, *Southwestern,*[129] *Midwest Video I*[130] *and Midwest Video II.*[131] Instead, the decision adopted as a standard for authority "all aspects of interstate communication by wire or radio" language of section 2(a) of the Communications Act of 1934.[132]

The decision does not address the distinction between jurisdiction and preemption. But up until *Crisp*, the case could have been made that the FCC had no right to preempt, not for lack of a strong federal interest (which was present) but for lack of statutory authority to act at all. Unlike the earlier cases, however, the FCC was not a party in *Crisp* attempting to justify new assertion of jurisdiction against a claim that it had exceeded its authority. Instead, the FCC's jurisdictional parameters were seen as a safe harbor against a state authority that had asserted itself too far.[133] The somewhat perverse lesson here might be that the FCC seems to pick up jurisdictional power in just those instances where it does not exercise it.

Preemption served the FCC's goal of allowing and encouraging cable systems to carry a full array of diverse program signals. Service included not only broadcast signals but satellite signals as well. To promote this goal, the Court was forced to abandon the "ancillary to broadcasting" rationale, as had lower courts in other cable-related contexts where no relation to broadcasting

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1158 (Okla. 1977) (upholding the ban on advertising liquor as applied to broadcast stations).

[128] 104 S. Ct. at 2698.

[129] 392 U.S. 157 (1968).

[130] 406 U.S. 649 (1972).

[131] 440 U.S. 689 (1979).

[132] 104 S. Ct. at 2701 (citing 47 U.S.C. § 152(a) (1982)); *Id.* at 2705 (citing 47 U.S.C. § 151 (1982)).

[133] New York State Comm'n on CATV v. FCC, 669 F.2d 58 (2d Cir. 1982).

could be found.[134]

Crisp is also critically important for its broad endorsement of FCC preemption over all aspects of cable signals, the consequence of pronouncements that had been made at least since the 1972 Rules. Going beyond the facts presented by the case, the decision cites the FCC's assertions about its preemption over all aspects of program service, declared nearly more than a decade earlier, well before the boom in cable satellite channels. These reflections on the FCC's broad authority, only implicit in the statute, were in addition to the specific FCC policies that conflicted with the liquor ad ban, namely the "must-carry" and "may-carry" rules applicable to broadcast signals. The result was that the Supreme Court attached a strong federal interest to cable's efforts "to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country."[135]

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[134] 104 S. Ct. at 2703-04.

[135] *Id.* at 2705.

Under the FCC's early dual federalism model, "regular subscriber service," defined originally as including all broadcast signal carriage and all required access channels including origination programming, was given to the states to regulate. Clarification of the CATV Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 175, 188 (1974). Local regulation of channels that are not part of regular subscription service was preempted by the FCC. This preemption of per program or per channel programming rates was upheld by the Second Circuit in Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

The Court held that the FCC's decision to refrain from price regulation met the then-prevailing judicial test for preemption and FCC jurisdiction: "a policy of permitting development free of price restraint, at every level is reasonably ancillary to the objective of increasing program diversity, and far less intrusive than the mandatory origination rules approved in (*Midwest Video I*) . . . ." 573 F.2d at 767.

In 1984, the FCC in *Community Cable TV, Inc.*, 56 RAD. REG.2d (P&F) 735, *appealed sub nom.* National League of Cities v. FCC, Nos. 84-1349 (D.C. Cir. July 26, 1984), reiterated its total preemption of rates beyond basic, or "regular subscriber," service. At issue was a Nevada PUC order attempting to regulate pay services not offered on a per-channel or per-program basis. It was joined by an appeal from a New Jersey PUC decision ordering a Bayonne cable system not to shift a sports channel from basic to a scrambled, intermediate pay tier, and to maintain the rate structure for both the first and second tiers of service.

Citing virtually all earlier decisions on preemption, the Commission reiterated that local and state authorities are preempted from regulating the rates, terms and conditions of all non-basic offerings. A system is "free to add, delete, or realign its service as long as the basic service contains all the signals mandated by the Commission's rules." 56 RAD. REG.2d at 742. Operators would still be required to go to the franchise authority to change the basic rate. But, cities cannot control what programming is contained on the basic tier so far as discretionary program services are concerned.

Thus, all nonbasic services, such as pay cable, advertising, digital services, alarm systems, two-way, and leased channels, are excluded from this definition and were, therefore, preempted. The Commission's intent and, apparently, the result of the nonbasic preemption, is that rates and services find their own level in the marketplace.

V. The 1984 Cable Act and Preemption

A. *Background to Legislative Passage*

The 1984 Cable Act must be viewed in light of *Crisp* and the FCC's so-called *Nevada* decision, *Community Cable TV, Inc.*[136] These two rulings derailed the 1984 Cable Act for some time during its legislative consideration. Cable interests, including for a time a majority of the Board of the National Cable Television Association, believed that, with *Crisp* behind them and a ready and willing FCC before them, the cable industry would be able to get all it needed, and more than the bill offered, by relying on FCC preemption as needs arose. Legislation which backtracked was worse than the strong record of preemption being written by the FCC.

This situation infuriated some legislators, who needed no reminding that even if the Supreme Court was beyond its review, the FCC was not. For the industry to renege on compromises it made with the National League of Cities, prior to *Crisp* and *Nevada*, was intolerable. Eventually the industry returned to the table. Through the waning days and nights of the pre-lame duck 98th Congress in 1984, the House version of a cable law, H.R. 4103,[137] was merged with S. 66,[138] the Senate bill which had cleared a year earlier. Several "holds" were placed on the bill, with the final legislative skirmishes centering especially on the equal employment opportunity section 634, and on a section concerning public participation in renewal proceedings, section 626(h). Passed on October 11, 1984 the bill was signed by President Reagan on October 30, 1984,[139] and became effective on December 29, 1984.[140]

B. *Federal Preemption*

We shall examine federal preemption in the 1984 Cable Act against the background of FCC preemptive activity and the *Crisp* decision. This is a little like choosing the most difficult face of Mt. Everest to climb, but such an ascent may give us the best

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136 56 RAD. REG.2d (P & F) 735 (1984), *aff'g*, 54 RAD. REG.2d (P&F) 1331 (1983), *appealed sub nom.* National League of Cities v. FCC, Nos. 84-1349 (D.C. Cir. July 26, 1984).

137 H.R. 4103, 98th Cong., 2d Sess. (1984).

138 S. 66, 98th Cong., 2d Sess. (1983).

139 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2779. *See* Pear, *Youth Work Killed by Reagan*, N.Y. Times, Oct. 31, 1984, at A1, col. 1.

140 The provisions of the Act were to take effect 60 days after the date of enactment. § 9(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2806.

sense of the scope and profile of the mountain. In the process, it is important to distinguish between preemption of authority and its reallocation. Although the 1984 Cable Act allocates considerable responsibility and power to franchising authorities, it does so by first assuring preemption and then reallocating what has clearly been seized and embraced as federal subject matter. This preemptive intent is made clear in section 636.[141]

1. Preemption and Rate Regulation

The preemption and circumscription of rate regulation charged by a cable company was one of the most important motivating forces behind the legislation. Although the cable industry had gained a great deal from the FCC in terms of the FCC's exercise of authority and its preemption of local rate regulation,[142] there was a desire to confirm the deregulatory trend through federal legislation—legislation that would make certain the limits on the power of local governments to regulate both cable rates and the program services offered for a particular rate.

Section 623 of the 1984 Cable Act is the main preemptory provision. It first sweepingly states that no federal agency or state may regulate the rates for cable service "except to the extent provided under this section".[143] In the second sentence of the section, franchising authorities are similarly preempted.[144]

Under the Act, for the two-year period that Congress authorized continuing general rate regulation of basic cable services, it did not preempt state laws which themselves limit or preempt rate regulation.[145] Section 623(f) does not preempt the authority of any federal agency, state, or franchising authority to "[prohibit] discrimination among customers of basic cable service"[146] or to provide for the installation or rental of equipment dealing with basic cable service for the hearing impaired.[147]

On the affirmative allocation of authority, the 1984 Cable

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[141] *Id.* at 2800 (to be codified at 47 U.S.C. § 636).

[142] *See supra* notes 113 and 133 and accompanying text.

[143] 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2788 (to be codified at 47 U.S.C. § 623(a)).

[144] *Id.* There is something peculiar about the wording of § 623(a), and the distinction between the first and second sentences. Why may a federal agency or state *not* regulate, *except* as provided, while a franchising authority is authorized *affirmatively* to regulate, *but only* to the extent provided by the Act? Perhaps this syntactical distinction does not strongly support a doctrinal difference, but the wording is curious. Also, it is unclear what is meant, by "communications service," an animal not defined in the statute. *Id.*

[145] *Id.* at 2789 (to be codified at 47 U.S.C. § 623 (g)).

[146] *Id.* (to be codified at 47 U.S.C. § 623(f)(1)).

[147] *Id.* (to be codified at 47 U.S.C. § 623(f)(2)).

Act requires the FCC to establish and implement regulations which authorize franchise power to regulate rates for cable systems "not subject to effective competition."[148] And in a compromise that was vital to the passage of the legislation, it authorizes continued local rate regulation for existing franchises during a two-year period.[149]

It was also important, in terms of the general intent of the legislation and the compromises necessary to obtain it, that there be no preemption of state authority to regulate common carrier services, particularly those that related to telephony, whether or not those services were delivered on a cable television system or not. This permission to regulate was accomplished through the definition of cable service in section 602(5), which excludes such common carrier services.[150]

Some may argue that under *Crisp* the FCC retains further authority to preempt local cable operators pursuant to the powers it holds as a consequence of the 1934 Communications Act. It is unlikely, given the precision of section 623,[151] or at least the painstaking effort to address allocation of jurisdiction questions, that a broad scope of residual authority would be imputed to the FCC. Additionally, section 3 of the law specifies that the 1934 Act applies "with respect to cable service . . . as provided in Title VI [of the Cable Communications Policy Act]."[152] Thus, the FCC's authority over cable may now be limited to that defined in the law, and not extend to its earlier power over common carriers under Title II or broadcasters under Title III.[153] But the role of the FCC prior to the passage of the 1984 Cable Act[154] will be

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148 *Id.* at 2788 (to be codified at 47 U.S.C. § 623(b)(1)).

149 *Id.* at 2788-89 (to be codified at 47 U.S.C. § 623(c)):

> (c) In the case of any cable system for which a franchise has been granted on or before the effective date of this title, until the end of the 2-year period beginning on such effective date, the franchising authority may, to the extent provided in a franchise—
>
> (1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;
>
> (2) require the provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or
>
> (3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for the subscriber's receipt of basic cable service.

Id.

150 H.R. REP. at 41.

151 *Id.* at 2788-89 (to be codified at 47 U.S.C. § 623).

152 *Id.* at 2801 (to be codified at 47 U.S.C. § 3).

153 *See* 47 U.S.C. § 151 *passim* (1982).

154 Under the FCC's early dual federalism model, "regular subscriber service," defined originally as service which includes all broadcast signal carriage and all required

important in understanding current rate preemption issues, especially its *Nevada* decision.[155]

2. Cross-Ownership

Section 613 of the 1984 Act is a very broad effort at preempting any state or local effort to establish ownership tests for cable system operations. In the provision, Congress sets the tests.[156] Under section 613(d), states and franchising authorities are forbidden to "prohibit the ownership or control of a cable system by any person because of such person's ownership or control of any media of mass communications or other media interests."[157] The FCC retains, under section 613(c), the power to establish additional cross-ownership provisions,[158] for example, for newspaper/cable and magazine/cable cross-ownership.

As part of the background for preemption, in 1970 the FCC prohibited local cable/broadcast cross-ownership after an examination of all potential media cross-ownership problems.[159] The Commission was guided by two goals: "[to] increase . . . competition in the economic marketplace . . . [and] increase . . . competition in the marketplace of ideas."[160] However, no cable/newspaper cross-ownership ban was adopted.

In *The Times Mirror Co. v. Division of Public Utility Control*,[161] the Connecticut Supreme Court held that the FCC had not preempted inconsistent state laws involving cable cross-ownership such as newspaper-cable cross-ownership. The state public utilities commission had ordered Times Mirror to divest itself of either its Hartford newspaper or its Hartford cable company or risk revocation of the franchise grant for the cable company.[162]

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access channels including origination programming, was given to the states to regulate. 46 F.C.C.2d at 199 (1974). Local regulations of channels that are not part of regular subscriber service was preempted by the FCC. This preemption of per-program or per-channel programming rates was upheld by the Second Circuit in *Brookhaven CATV*, 573 F.2d 765 (2d Cir. 1978), *cert. denied* 441 U.S. 904 (1979). The court held that the FCC's decision to refrain from price regulation met the then-prevailing judicial test for preemption and FCC jurisdiction: "a policy of permitting development free of price restraints, at every level is reasonably ancillary to the objective of increasing program diversity, and far less intrusive than the mandatory origination rules approved in *Midwest Video I* *Id.* at 767. *See supra* note 135.

155 *See supra* note 135.

156 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2785 (to be codified at 47 U.S.C. § 613(a),(b)).

157 *Id.* (to be codified at § 613(d)).

158 *Id.* (to be codified at § 613(c)).

159 47 C.F.R. § 76.501 (1984).

160 39 F.C.C.2d at 391.

161 192 Conn. 506, 473 A.2d 768 (1984).

162 *Id.* at 507, 473 A.2d at 769.

Times Mirror initially refused, arguing that the FCC had already considered and rejected the imposition of cable-newspaper cross-ownership rules.

The State Supreme Court upheld the public utilities commission's ruling. It noted first that "regulation of cable television is not an area of the law inherently requiring national uniformity."[163] After discussing the various regulations, policy statements, and reports of the FCC, the court concluded that: "This history, combined with unresolved doubts about the FCC's jurisdiction over cable-newspaper ownership, is far from persuasive that federal regulation, either of cable television in general or of media cross-ownership in particular, has pervasively filled the field."[164] The preemptive aspect of the 1984 Cable Act ownership rules does not apply retroactively; prohibitions are valid to the extent that they apply to interests in systems held before July 1, 1984, under then valid state or local laws.[165]

3. Public, Educational, or Government Use Channels

The 1984 Cable Act reinstates the validity of franchise provisions and state laws that relate to the "designation, use, or support" of public, educational, or government (PEG) use channels.[166] This provision illustrates negative preemption. It removes doubts about local franchise requirements for funds to support PEG channels.[167] This style of treatment involves Congressional limitations—though quite permissive ones—on the power of franchising authorities to demand such channels and to enforce franchise requirements respecting them. There is no specific charge to the FCC to establish additional or amplifying regulations.

This direct authorization of local discretion is set against a background in which the FCC once preempted state and local authority, compelled the inclusion of access channels in

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[163] 473 A.2d at 772. The court noted that "[i]n the determination of whether state law has been preempted, the Supreme Court of the United States has in recent years retreated from its earlier view that there was no room for any state regulation of matters already regulated by the federal government. . . . The governing federal principle now is that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." 192 Conn. at 510, 473 A.2d at 771 (citations omitted).

[164] *Id.* at 509, 473 A.2d at 773 (citations omitted).

[165] *Id.* at 510, 473 A.2d at 775.

[166] 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2786 (to be codified at 47 U.S.C. § 611(b)).

[167] *Id.* at 2800-01 (to be codified at 47 U.S.C. § 637).

franchises, and sought to preempt them further by invalidating support for such channels if support was inconsistent with franchise fee limitations. Congress did preempt local regulation of cable franchise requirements concerning public service channels to the extent such channels are modifiable under section 625 of the 1984 Cable Act.[168]

4. Requirement of "Commercial Channels"

Section 612 introduces a requirement that the cable operator designate channel capacity for commercial use by persons unaffiliated with the operator. The statute precludes any federal agency, state, or franchising authority from requiring any cable system to designate channel capacity for such commercial use "in excess of the capacity" required by the law.[169] Furthermore, section 612(b)(3) provides an additional guarantee by prohibiting a franchising authority from requiring a cable operator, through the medium of a request for proposals, to set aside any channels other than the commercial use channels of section 612 or the public service channels of section 611.[170]

5. Technical Standards

Section 624(e) of the 1984 Cable Act confirms the jurisdiction of the FCC to establish technical standards relating to the facilities and equipment of cable systems that are required by a franchising authority.[171] One could say that Congress authorizes total preemption by the FCC but also permits the FCC to allow discretion by the franchising agency.

State regulation of technical standards was explicitly preempted by the FCC in 1974.[172] The FCC based its preemption on the need to create an atmosphere which was "sufficiently flexible to allow for new developments without . . . creating such a climate of uncertainty as to deter the commitment of major economic resources to these developments."[173] The FCC claimed a broad preemption over all standards other than its own.[174] A lib-

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[168] *Id.* at 2790-91 (to be codified at 47 U.S.C. § 625).

[169] *See id.* at 2783 (to be codified at 47 U.S.C. § 612(b)(2)).

[170] *See id.* (to be codified at 47 U.S.C. § 612(b)(3)).

[171] *Id.* at 2790 (to be codified at 47 U.S.C. § 624(e)).

[172] Federal Pre-emption of Cable Television Technical Standards, 49 F.C.C.2d. 470 (1974).

[173] *Id.* at 477.

[174] *Id.* at 480. *See also In re* Micro-Cable Communication Corp., Memorandum Opinion and Order, 51 F.C.C.2d 1015 (1975) (certificate of compliance denied where company was neither certified nor operational by January, 15, 1975 and had not obtained a specific waiver).

eral waiver policy was instituted, however, in order to meet specific demonstrated needs at both state and local levels.[175]

State and local governments may, provided they obtain a waiver authorizing their local enforcements, maintain technical standards not in conflict with those of the FCC. All systems not certified as operational by January 1, 1975, were preempted: all operational systems were grandfathered to their certified standards.[176] Development of different construction or performance tests are not preempted by the FCC.[177]

6. Franchise Fees

On the question of preemption, Congress was quite specific in prohibiting the FCC from providing regulations with respect to franchise fees[178] despite an involved history of doing so. Further, the 1984 Cable Act is a legislative determination of the permissible limit on local exaction of franchise fees.

The question of the proper role of the FCC in governing local franchise fees was one of the most controversial issues leading to the passage of the 1984 Cable Act. The FCC had preempted the questions of franchise fee limitations quite early. Section 76.31 of the FCC's rules stated that: 'Franchise fees shall be no more than three percent of the franchisee's gross revenues per year" for systems that serve 1,000 or more subscribers.[179] The FCC imposed preemption of franchise fee regulation as part of the twin goals of promoting cable television while allowing adequate revenues to defray costs of local regulation.

In the period immediately prior to the passage of the 1984 Cable Act, the preemptive force of the FCC's action was wielded boldly in ways that left local franchising authorities anxious for federal legislation that would alter the FCC's standard. In its *Miami* decision,[180] the FCC indicated a broader sweep as to what would be counted as part of the franchise fee; in an unusual public announcement, the FCC urged what might in other times have been deemed obvious: that without exception, "local authorities should not collect and cable systems should not pay fees in ex-

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[175] 49 F.C.C.2d 480 (1974).

[176] *Id.* at 480-81.

[177] Pittman, Lovett, Ford & Hennessey, 37 RAD. REG.2d (P&F) 429, 440 (1976).

[178] 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2788 (to be codified at 47 U.S.C. § 622(i).

[179] 47 C.F.R. 76.31 (1984) (deleted).

[180] City of Miami, Florida Memorandum Opinion and Order, 56 RAD. REG.2d (P & F) 458 (1984).

cess of three percent of gross revenues."[181]

The statutory approach was designed to assure certainty for the cities, to partially reject FCC policies with respect to franchise fees, as well as to establish limits on what the franchising authorities could collect.

7. Carriage of Broadcast and Other Program Services

Closely linked to preemption of rate regulation is the Cable Act's statutory approach to the regulation of service, facilities, and equipment. This is because there must always be a close relationship between rate regulation and quality regulation of the product. Rate regulation cannot make sense without a determination and classification of the thing that is regulated. Similarly, preemption of rate regulation must have a close relationship to preemption of service regulation.

Prior to the 1984 Cable Act, many franchise agreements contained detailed listings of the programming services the system was required to carry. The franchisee may have promised to carry HBO, Showtime, the Movie Channel, superstations, ad hoc networks, or other services. Yet rarely did such a franchise agreement indicate the circumstances in which the operator could replace one service with another. Furthermore, franchise agreements did not normally speak of the consequences that an operator would face if it failed to provide promised services.

Section 624(a) formally preempts any franchising authority from regulating "services, facilities, and equipment" in a manner inconsistent with the legislation,[182] but the section thereafter states what such a franchising authority can do.[183] Section 624(f)[184] seemingly precludes state and federal agency action with respect to program services, except as expressly provided in the legislation. Similarly, the statute does not seem to preempt federal agency or state law with respect to facilities and equipment.[185]

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[181] Cable Television Franchise Fee Compliance FCC Public Notice, 55 RAD. REG.2d (P & F) 896, 897 (1984). The sometimes ludicrous conflicts yielded by a preemption policy that sought to preclude cable companies from doing what they desperately wanted to do during the course of competition for franchises is set forth in a series of letters from United Cable printed in 98th Cong., 2d Sess. 130 Cong. Rec. 12241-42 (1984).

[182] 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2789 (to be codified at 47 U.S.C. § 624(a)).

[183] *Id.* at 2789-90 (to be codified at 47 U.S.C. § 624(b)-(f)).

[184] *Id.* at 2790 (to be codified at 47 U.S.C. § 624(f)).

[185] The preemption aspects of section 624 can be understood in relation to the perceived crisis that preceded it. Under the *Nevada* decision, *Community Cable TV, Inc.*, *see supra* note 12, the FCC preempted all state or local regulation as to what program serv-

8. Obscenity/Indecency

Nowhere is the preemption puzzle of the 1984 Cable Act so complex as in the area of regulation of programming thought to be obscene or otherwise objectionable to the regulator. We will, here, merely mention the various provisions that touch on this question.

Section 639 prohibits or imposes conditions on cable services if they transmit programming which is obscene or otherwise unprotected by the Constitution of the United States.[186] A somewhat overwrought mirror of this provision exists in section 612(h) which, for commercial use channels, states that cable services which appear on such channels can be prohibited if the service "in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States."[187]

Notwithstanding any failure to preempt, section 639 makes it a crime to transmit over any cable system matter which is "obscene or otherwise unprotected by the Constitution of the United States."[188] And section 638 provides that the law shall not be deemed to "affect the criminal or civil liability of cable programmers or cable operators pursuant to the federal, state, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws."[189]

Just in case the message concerning preemption was missed, one of the handful of colloquies on the floor of the United States Senate concerning the meaning of the legislation dealt with this preemption question. The colloquy, between Senators Trible and Goldwater, determined that section 638 was designed to preserve local laws, and that the Congress wished to make it clear that nothing in the Communications Act of 1934 ought to be interpreted as being more preemptive in this area. As Senator Goldwater put it: "States and localities retain any authority which they would have in this area if the Communications Act of

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ices would be carried or at what price a service was carried, other than those channels required by FCC rules or required access channels. This rendered void many franchise provisions, which incorporated promises for program carriage.

186 1984 U.S. Code Cong. & Ad. News (98 Stat.) 2801 (to be codified at 47 U.S.C. § 639). Preservation of federal regulations with respect to obscene and indecent programming is achieved under *id.* at 2790 (to be codified at 47 U.S.C. § 624(f)(2)).

187 *Id.* at 2785 (to be codified at 47 U.S.C. § 612(h)).

188 *Id.* at 2801 (to be codified at 47 U.S.C. § 639).

189 *Id.* at 2801 (to be codified at 47 U.S.C. § 638). Section 638 exempts cable operators from liability for program consequences incurred on access or commercial use channels provided pursuant to *Id.* at 2782 (to be codified at 47 U.S.C. § 612).

1934 had never been enacted."[190]

VI. Conclusion: Regulation in Context: Assessment of the 1984 Cable Act

The 1984 Cable Act has, as we have seen, relatively clear and simple purposes: the establishment of a national policy concerning cable; the establishment of franchise procedures that assure growth but encourage responsiveness; the distribution of power among the competing governing entities; the encouragement of diversity of information; the establishment of an orderly and fair process for franchise renewal; and, finally, the reduction of what might be thought to be unnecessary regulation and, as a consequence, the promotion of competition among media.

Does the 1984 Cable Act seek to accomplish these objectives? The effectiveness of the legislation will depend on whether there is a responsible development of many of the open questions under the legislation. How much responsibility will emerge for local governments in the renewal process? How carefully will the standards for modification of cable franchise commitments be shaped? How creatively will local authorities ensure that the commercial use channels are properly implemented?

We have already seen that the history of regulation itself has placed obstacles in the way of creating an efficient and pervasive national policy. We have seen, throughout the study of the preemptive effects of the legislation, that varying responses were called for in varying contexts. The result is a rather uncertain and confused response to a situation in which clarity was the stated aim.

It would be unfair to measure the 1984 Cable Act by its clarity—or lack of it—alone. The process of shaping any legislation—particularly in a context where the legislation had to be the approved compromise between competing forces in the society—must yield ambiguity and the postponement of combat to later times and other fora.

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190 S. 66, 98th Cong., 2d Sess., 130 Cong. Rec. 14289 (1984).