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CATV LEASED-ACCESS CHANNELS AND THE FCC: THE INTRACTABLE JURISDICTION QUESTION

Paul J. Berman*

I. Introduction

Control over the channels of communications is a great source of power in our society. The framers of the first amendment recognized this fact when they guaranteed freedom of speech and press, the two means of information dissemination of the day. Later governmental dealings with communications channels have also attempted to ensure that control over communications channels is not abused. For example, when federal regulation of telephone and telegraph companies was first legislated in 1910, concern was voiced that control over such important facilities and services not be lodged unchecked in the hands of only a few private enterprises.¹ Similarly, regulation of radio broadcasting stems at least in part from the recognition that control over the "scarce" resource of the radio spectrum carries with it a great deal of power.²

In 1934, the Communications Act consolidated the previously fragmented regulation of electrical communications. Prior to the 1934 Act, communications common carriers—then the telephone and telegraph companies—were regulated by the Interstate Commerce Commission,³ and radio broadcasters were regulated by the Federal Radio Commission.⁴ Since the 1934 legislation, new technologies useful for the provision of communications and communications-related services have been introduced. Television broadcasting has been made operational on a large scale; communications satellite technologies have been deployed; computer technologies are becoming increasingly intertwined with communications channels; and multichannel microwave and cable technologies have been developed and installed. Of these it is perhaps CATV—Community Antenna TeleVision or CAble TeleVision—that most seriously challenges the existing legal structure. The important question is who will control the channels of communications: the federal, state, or local governments, the owner of the CATV system or facility, or the enterprise or citizen wishing to use the facility to communicate?

The history of the relationship between CATV and government is notable for the absence of any formal congressional declaration of policy toward the development of this new communications medium. The government regulatory stance has instead been set by administrative agencies, particularly the Federal

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¹ 45 Cong. Rec. 5533 (1910) (remarks of Representative Bartlett).
² See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the television broadcasting "equal time" requirement). "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government." Id. at 375-76.
Communications Commission. The story of the FCC's arrogation of power over CATV is important because the answer to the jurisdictional question is just as elusive today as it was 15 years ago when the FCC first formally addressed the question. CATV is a peg that will not easily fit into the holes provided by the 40-year-old Communications Act. For example, some or all of the channels of a CATV system can be used to carry television broadcast signals to subscribers' homes and offices. The CATV system receives television signals off-the-air at the system antenna. The signals are received by a conventional television antenna or, through the use of such techniques as microwave relay systems, the signals may be imported to the CATV system from remote television markets. Once received at the system antenna or "head-end," the broadcast signals are carried simultaneously over different channels of the cable—just as many conventional television channels are carried simultaneously over the air—to each subscriber, who selects a channel to be viewed on his television set.

A CATV system may provide more than these "broadcast" channels. Other channels of a CATV system can be leased by the CATV operator to virtually anyone desiring to have his program carried over one or more channels of the CATV cable to subscribers. Such a program can be recorded on a video tape and then "played" at the CATV head-end at various times, depending on the terms of the lease, or the program can originate "live" and be carried by "closed-circuit" means such as cable and terrestrial or satellite relay to the CATV head-end for carriage to subscribers according to the terms of the lease agreement.

These leased-access channels serve a function that is, in all its significant qualitative aspects and legal attributes, communications common carriage. Thus, this article proposes as a model for regulation that these channels be treated as communications common carrier channels. This model has been either overlooked or avoided, but in any event has not been accepted by the FCC.

Against the standard provided by the model of communications common carrier regulation incorporated into the Communications Act, the range of the Commission's power over CATV leased-access channels is considerably shorter than that actually asserted by the Commission. This lends insight into the interests of at least some of the contenders for control over the development of CATV. Treating leased-access CATV channels as communications common carrier channels under the terms of the Communications Act of 1934 means that regulation of at least some aspects of these channels would be moved from the federal to the local or state level, diminishing the FCC's power. To the cable operator, regulation of CATV by state and local authorities means a decrease in power over his cable system. This is because exclusive federal regulation

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5 The term "communications common carriage" often evokes the image of the public switched telephone system, a nearly universal point-to-point communications facility. As will be discussed at p. 181 infra, text accompanying notes 210-11, the characteristics of switched circuits, point-to-point service and universal coverage are not necessary to the provision of communications common carriage. Rather, the essential characteristics of a communications common carrier involve nondiscriminatory reasonable access to the communications facility provided by the carrier and lack of control by the carrier over the contents of the communications carried. See Section III infra; Berman, Computer or Communications? Allocation of Functions and the Role of the Federal Communications Commission, 27 FED. COMMUNICATION B.J. 161, 201-08 (1974).
under current practices and budget constraints leaves the cable operator with considerable discretion. Besides issues arising from the incursion of CATV into the traditional forum of television broadcasters, who at present generally view CATV as a communications competitor, the new offering of communications common carrier services by CATV systems arouses the concern and the defenses of the traditional communications common carriers, American Telephone and Telegraph in particular, some of whose activities now become the concern of CATV system owners as well. The interplay of these interests makes it difficult for FCC regulation to achieve the announced goal of encouraging the use of these channels for increased program diversity and wide-open public debate. Viewing leased-access CATV channels as communications common carrier channels presents several issues not addressed by the FCC. The jurisdictional difficulties presented by questions of control over these communications channels are severe. Thus, in light of the uncertain applicability of the 40-year-old policy of the Communications Act to CATV, the strength of the political interests involved, and the importance of the questions of allocation of social power raised, congressional action is warranted.

II. FCC and the Cable: About Face

When CATV was first introduced in Lansford, Pennsylvania, and Astoria, Oregon, the acronym stood for Community Antenna TeleVision. The technology was used to pick up television broadcast signals and relay them to homes in areas remote from the actual broadcast station. As in the development of radio broadcasting, CATV was pushed by receiver salespeople as a way of extending the market and increasing the demand for television receivers. It was all very simple—a big antenna, a cable to carry the signals, and drop lines into the homes of the subscribers—so that people who bought television sets had something to watch on them.

That motivation for CATV may sound absurd today, when television broadcasting covers a large portion of the country. But in the late forties and early fifties, the FCC imposed a freeze on the assignment of new television licenses, thereby suspending the growth of television broadcasting pending an FCC study of how to allocate radio frequencies throughout the country. Large portions of the country had no television broadcast service prior to the freeze, but by the end of the freeze in 1952, there were already 70 CATV systems, serving approximately 14,000 subscribers.

During this time, CATV was a boon to the broadcasters. It extended television markets into areas the television signal did not otherwise reach. With the lifting of the freeze, however, the situation began to change. FCC licensing policy aimed at the development of at least one television service in every part

of the country. The ultimate goal was the establishment of at least two broadcast stations in every community.\(^9\) Since the very high frequency (VHF) television spectrum was crowded, the FCC ostensibly relied on the development of broadcasting in the ultrahigh frequency (UHF) range. But UHF broadcasting did not develop as planned, and even after the VHF freeze was lifted, many parts of the country continued to have television service provided to them only by "repeater," "booster," or "satellite" stations. The only function of these stations was to receive television signals and rebroadcast them; they engaged in virtually no programming services. These "booster" operations, and local broadcasters, began to perceive CATV as a threat. It was thought that CATV systems, by importing television signals, diluted the markets of local and "booster" broadcasters.

A. The Initial Decision Not to Regulate

The Commission was forced to confront the issue of the status of CATV vis-a-vis the FCC by a complaint filed by Frontier Broadcasting, Inc. Frontier was the leader of a group of rural, Western television broadcasters who asserted that CATV systems were common carriers and, as such, were subject to regulation under Title II of the Communications Act of 1934.\(^10\) In retrospect, the broadcasters' motives seem clearly discernable: If CATV were regulated like a telephone company-type common carrier, then the rate of return on investors' capital would be limited and, presumably, investment in CATV systems would also be limited. The FCC, however, decided that CATV systems as then operated were not communications common carriers. In reaching this decision, the Commission either disregarded or was ignorant of the work of its own staff reaching a contrary conclusion.\(^11\) The crucial issue in Frontier Broadcasting Co. v. Collier, according to the Commission, was who controlled the content.

Fundamental to the concept of a communications common carrier is that such a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who choose to employ such facilities and to compensate the carrier therefore may communicate or transmit intelligence of their own design and choosing between the points on the system of that carrier and other carriers connecting with it. In other words, the carrier provides the means or ways of communication for the transmission of such intelligence as the subscriber may choose to have transmitted. The choice of the specific intelligence to be transmitted

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\(^10\) The Communications Act of 1934 is divided into six titles. Title I contains general provisions, dealing with definitions and the general policy of the Act. Title II deals with communications common carriers: telephone companies are the prime example. Communications by radio is covered by Title III, the section specifically dealing with broadcasters. Title IV provides for enforcement procedures and penalties. Title V contains administrative procedures; and Title VI deals with miscellaneous subjects such as the effective date of the Act, repeals of other duplicative legislation and the President's war powers.

From this definition of communications common carrier the Commission’s result was simple: Since the CATV system operator, not the subscriber, chose which television signals were to be picked up and transmitted to the homes of the subscribers, the CATV system was not a communications common carrier.

Since the FCC did not provide the desired relief, the Western broadcasters sought help from Congress. The Communications Subcommittee of the Senate Interstate and Foreign Commerce Committee pressured the FCC to reconsider its decision not to regulate CATV systems. A reconsideration came in the form of a general inquiry into the effect of CATV on local broadcasters. The report and order resulting from this inquiry, the 1959 Report and Order re CATV and Repeater Services, reached the same result as Frontier, but for different reasons. Basically, four arguments were proposed by those favoring FCC regulation of CATV systems: (a) the systems are involved in broadcasting; (b) the systems are involved in communications common carriage; (c) the FCC has plenary power to regulate interstate communications; and (d) the FCC can regulate CATV systems which use microwave operations as a means of relaying distant signals through the regulation of the microwave carrier.

The FCC found no basis in the Communications Act’s provisions dealing with broadcasting (Title III) and common carriage (Title II) which would support an assertion of jurisdiction over CATV systems and, in so doing, reaffirmed the Frontier decision. Similarly, plenary power to regulate “any and all enterprises which happen to be connected with one of the many aspects of communications” was not found. Moreover, regulating CATV systems by controlling the microwave carriers serving them was rejected as contrary to a Commission rule against content restriction of common carriers and because it was extending

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12 Frontier Broadcasting Co. v. Collier, 24 F.C.C. 451, 454 (1958). One decision has followed Frontier, noting that the legislative history is silent, or at best unhelpful, as to the point in question. See Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966).

13 One might question whether this would have been the result reached by the Commission if the case had arisen after the Supreme Court’s decision in Teleprompter Corp. v. CBS, 415 U.S. 394 (1974). In Teleprompter, discussed more fully in text accompanying notes 147-153 infra, the issue was whether cable system importation of signals from remote television markets, through the use of microwave relay facilities, subjected the cable system operator to copyright liability for the use of the programs so imported. The Court held that although the cable system operator had some choice as to the television stations whose signals were to be imported, such choice did not amount to enough control over the content of the signals carried so as to constitute “origination” of programming. Hence, cable system operators would not be subject to copyright liability for releasing imported television signals to the public.


16 FCC jurisdiction over microwave transmission systems is clear insofar as such systems utilize the radio spectrum.

17 26 F.C.C. at 426-31.

18 The Commission, however, did not note the prohibition on the resale of communications common carriage services long incorporated into the tariffs of the common carriers. See, e.g., American Telephone and Telegraph, F.C.C. Tariff No. 260, § 2.5. Although such restrictions on the use of common carrier-provided channels of communications rests on
FCC jurisdiction indirectly over the same CATV systems which the FCC felt it could not regulate directly.\(^{19}\)

Although the FCC concluded that it could not regulate CATV systems because the Communications Act of 1934 would not permit it,\(^{20}\) hindsight and close evaluation of the 1959 *Report and Order re CATV and Repeater Services* indicate a more practical political basis. The harm that CATV systems pose to television broadcasters is evaluated before the jurisdictional question.\(^{21}\) Although the FCC appeared to say it lacked power to regulate CATV systems, the 1959 *Report and Order re CATV and Repeater Services* actually concluded only that regulation was unnecessary at the time, leaving potential future regulation a possibility.

In short, it is argued, aside from the fact that CATV's are within some of the definitions of the Communications Act (although their being so makes the argument stronger) we can control them because of their effect upon broadcasting, clearly an interstate business and one which we are instructed to foster and lead to orderly maximum development.

Assuming this concept has legal validity (a point we believe is open to question, and upon which it is unnecessary for us to pass) in order to acquire jurisdiction on this basis, . . . we would have to make a finding that in a certain situation, or in situations falling within certain limits, there would be substantial adverse impact on the local station. We have expressed above our inability to determine where the impact takes effect, although we recognize that it may well exist. Accordingly, we would find it impossible, from anything presented to us so far, to make the necessary finding, either in a particular situation or generally.\(^{22}\)

On second rebuff by the FCC, the Western broadcasters returned to Congress, whereupon legislation to regulate CATV systems was introduced.\(^{23}\) By

20 Id. at 441.
21 The unresolved issue is whether jurisdiction is discretionary, to be based on a Commission finding of fact. The strongest argument that the Commission has no discretion derives from the terms of § 2(a) of the Communications Act itself, 47 U.S.C. § 152(a), which reads: "The provisions of this Act shall apply to all interstate or foreign communication by wire or radio . . . which originates and/or is received in the United States . . ." (emphasis added).
In strict terms, then, the question for the FCC should have been only whether CATV was interstate or foreign communication by wire or radio. The question of "harm" affects only the substance of the regulations. In contrast, it has been argued that the FCC's mandate, enacted in 1939 under a restrictive interpretation of the commerce clause, was intended to expand in scope according to Supreme Court interpretations of that clause. See Lyon, *Old Statutes and New Construction*, 44 Colum. L. Rev. 509 (1944). Thus, FCC jurisdiction based on evaluation of "harm" to existing FCC-regulated services could be warranted.
22 26 F.C.C. at 431 (emphasis added).
23 Several pieces of legislation were originally introduced. S. 1886, introduced by Senator Magnuson, would have required cable operators to obtain local station consent before carrying any signals originating from those television stations and would have required CATV systems to carry all local television signals. Senators Moss and Murray offered an amendment that would have required FCC licensing of CATV systems based on FCC findings that no local stations would be adversely affected. A less restrictive proposal, S. 2303, was submitted by Senator Monroney; this bill would have only required CATV systems with more than 50 subscribers to obtain certificates of "public convenience and necessity" from the FCC, but, while extending FCC authority over CATV systems, did not specify the content of FCC regulation.
1960 compromise legislation was proposed, but at the last minute CATV system owners and operators withdrew their support and the bill was returned by a 39-38 vote to committee, where it died. Similar legislation, proposed in the following year, also failed.

Broadcast interests continued, however. As television broadcasting grew, so did CATV and the allegations of its interference with television broadcasting. The more broadcasters affected, the more protests were heard, and by 1962 the FCC was ready to reconsider its decision not to regulate CATV.

B. Reversal: The Decision to Regulate

The first step through the door left open in 1959 came with the application of Carter Mountain Transmission Corp. for a permit to install a microwave radio relay to pick up television signals and carry them to Carter's CATV systems in Wyoming. The FCC denied Carter's application until Carter could demonstrate that its CATV operations would not duplicate the programming of the local television station. By imposing conditions to be met before the microwave carrier permit issued, the FCC was for the time being regulating indirectly what it had said only three years earlier it could not regulate directly. The barriers which the FCC perceived in 1959 to CATV regulation must have seemed transparent, if not invisible, in 1962 at the time of the Carter Mountain decision; the 1959 Report and Order re CATV and Repeater Services was mentioned only in the opinion of dissenting Commissioner Cross. The FCC construction of its mandate was upheld in 1963 by the United States Court of Appeals for the District of Columbia in Carter Mountain Transmission Corp. v. FCC.

Once the decision to regulate was made, regulatory policy had to be developed. Carter Mountain was followed by a Notice of Inquiry for a proposed rulemaking to establish a Commission policy toward CATV. By the time the Inquiry was finished in 1965 and the Report and Order re Microwave-Served CATV ready, the CATV industry had changed significantly. By 1964, there were 1300 CATV systems, serving more than 1.2 million homes; CATV systems were being established at the rate of more than one per day; the size of the

24 Senator Pastore proposed S. 2653, which incorporated the rebroadcast consent and local carriage rules of S. 1886, supra note 23, added a requirement of nonduplication of programming during certain time periods established by the FCC, and established a procedure whereby challenges and hearings on CATV licenses held by the Commission could be open to the public.


26 "In the 87th Congress, the Commission proposed S. 1044, and H.R. 6840, which would have expressly authorized the Commission to authorize rules for the protection of stations providing locally originated television programs. These bills received no action. The Commission proposed no legislation to the 88th Congress, and no action was taken on any bills," Notice of Inquiry and Notice of Proposed Rulemaking re CATV, 1 F.C.C.2d 453, 464 n.13 (1965).

27 See Wire Mire, supra note 8, at 368.


29 See text accompanying notes 16-20 supra.


average city served by CATV had risen; and CATV was breaking into larger markets with one or more established television broadcast outlets. The broadcasters began to protest that continued CATV expansion portended the revolution of television broadcasting into a highly concentrated industry quite different from its existing, locally-based structure.  

The FCC's response to these developments came in the 1965 *First Report and Order re Microwave-Served CATV*, which proposed as an initial matter that the Commission had jurisdiction over CATV systems, whether or not they used microwave transmission facilities to import television signals. This 1965 *First Report and Order re Microwave-Served CATV* was accompanied by a *Notice of Inquiry and Notice of Proposed Rulemaking re CATV* which called for comments on the jurisdictional issue. These documents reflected the FCC's perception that regulation was needed because an increasing number of markets were being exploited by CATV. By 1966, the FCC's *Second Report and Order re CATV*, which both expanded on the 1965 *First Report and Order re Microwave-Served CATV* and dealt with the issues propounded in the 1965 *Notice of Inquiry and Notice of Proposed Rulemaking re CATV*, had lumped microwave-served CATV systems together with CATV systems that did not rely on microwave relay facilities. This 1966 *Second Report and Order re CATV* also cited the Commission's commitment to the development of UHF broadcasting as a reason for regulating CATV systems generally.

By the time of the 1966 *Second Report and Order re CATV*, the Commission had decided to regulate all CATV systems, and set about to prove that it had the necessary jurisdiction. This proof started with a Commission memorandum on its jurisdiction and authority attached as an appendix to the 1965 *Notice of Inquiry and Notice of Proposed Rulemaking re CATV*, which was again attached unaltered to the 1966 *Second Report and Order re CATV*. In that memorandum, the FCC actually asserted regulatory jurisdiction over CATV systems, whether or not served by microwave carriers. After reciting the purpose of the Communications Act of 1934 and the definitions of communications by wire and radio provided in the 1934 Act, the memorandum provided jurisdictional justification for the FCC regulations promulgated:

32 *Wire Mire*, supra note 8, at 386.
40 Communications Act of 1934, 47 U.S.C. § 153(a)-(b) (1970); "'Wire communications' or 'communications by wire' means the transmission of writing, signs, signals, pictures and sounds of all kinds by aid of wire, cable, or other like connection, between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.'"
41 "'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission.'"
From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire or radio. . . . CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established . . . as interstate communication" . . . CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, . . . and hence constitute "interstate communication by wire" to which the provisions of the act are applicable.\(^41\)

This rationale for FCC jurisdiction over CATV systems was upheld by the Supreme Court. FCC jurisdiction to regulate CATV systems was challenged and upheld in 1968 in United States v. Southwestern Cable Co.\(^42\) The Court held that the Commission's authority over "all interstate . . . communication by wire or radio" permits regulation of CATV systems.\(^43\)

The use of the term "CATV" in the Court's opinion is unfortunate. By the time of the Southwestern decision, CATV had begun a transformation from Community Antenna TeleVision to Cable Television. CATV services were not limited to the simultaneous retransmission of television signals received "off-the-air." New services, beginning with relatively simple arrangements for transmitting weather data, or for showing the AP wire or the Dow Jones ticker, were included. These services did not rely on the broadcasters for programming.\(^44\) They might have used the same cable that the television retransmissions used, but they exploited the potential of the cable technology to provide many channels simultaneously.

It is therefore important to understand precisely what the Court held in Southwestern. The opinion quite clearly dealt only with CATV systems insofar as they carry signals of television broadcast stations.

CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.\(^45\)

In holding that the FCC had authority to regulate CATV systems as "ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting,"\(^46\) the Court validated FCC jurisdiction over only those two functions:

There is no need here to determine in detail the limits of the Com-

\(^{41}\) 1 F.C.C.2d at 479, 2 F.C.C.2d at 793. This particular rationale for FCC jurisdiction over CATV channels that carry signals that originate at television broadcast antennas was validated in General Tel. Co. v. FCC, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969), discussed fully with text accompanying notes 133-140 infra.

\(^{42}\) 392 U.S. 157 (1968).

\(^{43}\) Id. at 178.

\(^{44}\) Leduc, supra note 6, at 157.

\(^{45}\) 392 U.S. at 163.

\(^{46}\) Id. at 178.
mission's authority to regulate CATV... We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.47

Any lingering doubt that the Court was dealing with any other functions that CATV systems might perform is removed by the limiting language setting forth the scope of the case in the United States' (and the FCC's) brief:

It seems plain, therefore, that the statutory powers given the Commission are ample to authorize its regulation of the carriage of television signals by CATV systems. Indeed, that is the only aspect of CATV operations over which Commission authority has been asserted. No attempt has been made to franchise or otherwise regulate entry into the CATV business, nor to fix CATV rates or limit the number of systems which can operate in a particular area.48

The substantive rules promulgated in the 1966 Second Report and Order, and approved in Southwestern, had the effect of freezing CATV expansion in the top 100 television markets by prohibiting CATV importation of television signals from outside the market. The action was drastic and prompted congressional study, but with the same political forces at work in Congress as at the Commission, it is not surprising that the resulting proposed legislation incorporated FCC suggestions as to the substance of CATV regulation.49 As with other congressional attempts to deal with CATV, the bill was not enacted; in fact, it never reached the floor for debate.50 By now the initiative over CATV had clearly shifted, and the FCC would act until stopped by the Congress.

C. New Issues in Regulation: Program Origination

The regulation the FCC had imposed, while designed to alleviate (if only by postponing) some confrontations, raised other issues. CATV system owners in those markets where signal importation was banned turned to originating their own programming. This activity was undertaken despite claims that it constituted pay-TV or that it threatened the broadcaster's hegemony in the program production market. In the 1969 First Report and Order re CATV Program Origination,51 the FCC addressed the claims squarely, and promulgated yet more rules. These required that CATV systems with more than 3,500 subscribers52 provide some original programming as of January 1, 1971, and are thus called the Program Origination rules.

Most significantly, the 1969 Program Origination rules, as well as the 1969 First Report and Order re CATV Program Origination, reflected a change in FCC attitude toward CATV. No longer was CATV merely something "ancil-

47 Id.
50 LEGDUC, supra note 6, at 158.
52 These CATV systems, because they are larger, of course are perceived to have a greater effect on television audiences.
In the 1969 First Report and Order re CATV Program Origination, the FCC addressed the notion that, by allowing programs produced by other than traditional broadcasters or CATV operators to be carried over CATV systems without any control over program content by the CATV operators, CATV systems might serve important policy interests by disseminating information from diverse and antagonistic sources. Recognizing that the crucial issues are those of access and control over the content of the communications carried, the Commission suggested that over some channels, the CATV operator should exercise no control over content. Over these channels, the CATV operator would act like the communications common carrier described in Frontier Broadcasting:

The public interest would be served by encouraging CATV systems to operate as common carriers on some channels in order to afford an outlet for others to present programs of their own choosing, free from any control of the CATV operator as to content (except as required by the Commission's rules and applicable law), and to provide other communications services. . . . From a diversity standpoint, it seems beyond dispute that one party should not control the content of communications on so many channels into the home. . . . In light of the foregoing, it is our opinion that the public interest would be served by encouraging CATV systems to operate as common carriers on some channels.

Even though the declarations of the public interest are clear and strong, the FCC chose to wait until further study to impose rules requiring such common carrier operation.

Thus, the 1969 Program Origination rules basically require CATV systems with more than 3,500 subscribers, as a condition to carrying the signals of any television station, to operate to a significant extent as a local outlet by providing "cablecasting." As defined in the FCC's 1969 Program Origination Rules, cablecasting is "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." It was the FCC's intention that this program

55 See text accompanying note 12 supra.
56 20 F.C.C.2d at 202, 205, 207.
57 Id. at 207.
58 20 F.C.C.2d at 223 (47 C.F.R. § 74.1101, 1111, repealed, 36 F.C.C.2d 212 (1972)).
origination requirement help ensure that program origination facilities would also be available for use by those desiring to originate programs on channels which the CATV operator would lease to them. To encourage such activity, the FCC also required the CATV operator to make facilities available for local production and presentation of programs other than automated services. Although in subsequent regulations the "common carrier" language is almost completely abandoned, the rules subsequently promulgated by the Commission incorporate the policies outlined in the 1969 First Report and Order re CATV Program Origination.

It was this "local origination" requirement that prompted the second serious challenge to FCC regulation of cable television. The program origination rule clearly represented a substantial expansion of the FCC's jurisdiction over CATV. The challenge finally reached the Supreme Court in United States v. Midwest Video, in which the "controversy . . . centered on whether the Commission's program origination rule is 'reasonably ancillary to the effective performance of [its] various responsibilities for the effective regulation of television broadcasting.'" Significantly, the issue of jurisdiction to regulate CATV was not litigated by the parties in the case.

The parties before us do not dispute that in light of Southwestern CATV transmissions are subject to the Commission's jurisdiction as 'interstate . . . communication by wire or radio' within the meaning of § 2(a) [of the Communications Act of 1934] even insofar as they are local cablecasts.

The Court decided by a plurality of four. Reversal of the Court of Appeals for the Eighth Circuit required the concurrence of the Chief Justice, who was severely troubled by the issue of jurisdiction, as reflected in his separate opinion:

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 decision of Commission and the courts.

The plurality of the Court, however, did address in a lengthy footnote the issue of whether or not the FCC had jurisdiction to require program origination.

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59 20 F.C.C.2d at 209.
60 Id. (47 C.F.R. § 74.1111, repealed, 36 F.C.C.2d 212 (1972)).
61 This changing of labels while maintaining of substance was not lost on the Supreme Court:

Although the Commission did not impose common-carrier obligations on CATV systems in its 1969 report, it did note that "the origination requirement will help insure that origination facilities are available for use by others originating on leased channels." Public access requirements were introduced in the Commission's Report and Order on Cable Television Service, although not directly under the heading of common-carrier service. See Report and Order on Cable Television Service.

36 F.C.C.2d 143, 212 (1972).
64 Id. at 662-63.
65 Id. at 676 (Burger, C.J., concurring).
At bottom, CATV systems are subject to FCC regulation, said the Court, because the FCC can condition the carriage of broadcast signals on the origination of programming. Furthermore,

[the devotion of CATV systems to broadcast transmission—together with the interdependencies between that service and cablecasts, and the necessity for unified regulation—plainly suffices to bring cablecasts within the Commission's § 2(a) jurisdiction.]

D. Regulation of Local Incidents

In the meantime, the Commission did not even wait for the Court's decision in Midwest Video before suggesting, and then promulgating, yet another set of regulations dealing more fully with the "local incidents" of CATV. Local incidents are the aspects of CATV that can be separated from the function of carrying the signals of broadcast stations. They include the franchising process at the local level, the rates subscribers are charged, and the existence of capability for other communications services. The new Cable Rules, when proposed by the FCC, attempted to reach a compromise between industry interests and advocates of the public interest. However, the Commission's proposal failed to deal with some critical issues concerning copyright liabilities. These questions were addressed, and answers formulated, in a series of closed-door meetings involving the National Cable Television Association, the National Association of Broadcasters, the Association of Maximum Service Telecasters, and attorneys representing copyright proprietors' interests. The meetings were held not under the auspices of the FCC, but rather under the newly formed Office of Telecommunications Policy. OTP had been called into action by the parties to the meetings, by congressional inactivity and by its own youthful desire to establish itself as an important force in communications policy formulation. Although the National Cable Television Association was unhappy with the compromise reached, there was no guarantee that the FCC would accept NCTA counterproposals, and worst of all, the broadcasters might use their political leverage at the congressional level to explode the whole problem into a wide-open congressional debate. Under such pressures the agreement was signed by the industry-group figures, and the FCC accepted the consensus agreement in its entirety. Commissioner Johnson dissented, claiming that "the FCC

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66 Id. at 663 n.21.
68 Cable Television Report and Order, 36 F.C.C.2d 143 (1972).
71 Berner, supra note 69, at ch. 3.
72 Id.
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has, in effect, abandoned its role as a formulator of policy and interpreter of law for that of political pundit.\textsuperscript{73}

Throughout the progress of the consensus agreement negotiations, however, the substance of the rules dealing with nonbroadcast channels remained the same. As promulgated in February of 1972, in the \textit{Cable Television Report and Order},\textsuperscript{74} the Cable Rules establish a hierarchy of cable channel uses. First, the rules require of cable systems in the top 100 television markets that for each cable system channel that is used to carry programs received from television broadcasts off-the-air, the system must provide one channel suitable for transmission of signals which do not involve any over-the-air broadcasting.\textsuperscript{75} The Rules then proceed to establish requirements for specific uses for these nonbroadcast channels, and a structure as to when these uses are to be served:\textsuperscript{76}

A. Dedicated Channels

1. \textit{Public Access}: To encourage public debate cable systems are required to maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis.

2. \textit{Education}: To encourage education, cable systems are required to maintain at least one specially designated channel for use by local educational authorities.

3. \textit{Government}: Cable systems are required to maintain at least one specially designated channel for local government uses (cablecasting local city council meetings, civic events, etc.)

B. Leased Access Channels

After the above requirements have been satisfied, the cable operator is to offer other non-broadcast channel capacity (i.e. channels not used to carry television signals received off-the-air) for lease to third parties on a time-slot or permanent basis. On at least one such channel, priority is to be given to part-time users.

C. Priority for Dedicated Channels

Leased access operations may only be undertaken with the express understanding that they are subject to displacement if there is a demand to use the channels for their specially designated purposes.

Finally, in an effort to ensure that there will always be enough channel capacity to meet demand, the 1972 Cable Rules require that when a cable system is used to a specified high degree, more channel capacity must be made available.\textsuperscript{77}

\textsuperscript{73} 36 F.C.C.2d at 317 (Johnson, Cmm'r, dissenting).
\textsuperscript{74} 36 F.C.C.2d 143 (1972).
\textsuperscript{75} 47 C.F.R. § 76.251(a)(1)-(2) (1975).
\textsuperscript{76} The structure of this table is taken from Gerlach, \textit{supra} note 70, at 229. The substance is from 47 C.F.R. § 76.251 (1975).
\textsuperscript{77} 47 C.F.R. § 76.251(a)(8) (1975).
For all of the FCC's arguments that these nonbroadcast channels will be used in such a manner as to vindicate the important right of access to communications media, the rules governing these channels are full of "jokers, open manholes, and assorted loopholes." Many of these problems stem in full or in part from the fact that, in precluding state and local regulation of the operation of these channels, the FCC has placed a good deal of power in the hands of the CATV system owner or operator. The interests of the owner or operator might not always be congruent with those of the users of these nonbroadcast channels. First, with regard to expansion of capacity when the cable system reaches the specified saturation level, it is unclear whether the FCC rules (whose history provides excuse from the expansion requirement if unduly burdensome), and the FCC itself, are "tough enough" to enforce the rules with the vigor needed to ensure that cable channels do not become a "scarce" resource as are television channels. Moreover, it has been observed that by carefully timing tests of the amount of use of his system, a cable operator can evade the thrust of the regulation requiring increases in channel capacity to be implemented when the system's specified "saturation point" is reached.

Second, because state and local regulation of almost all the operation of nonbroadcast channels is precluded and the federal regulations ambiguous, the cable system operator himself maintains substantial control over the access to nonbroadcast channels, as well as control over the prices charged for the use of the channel and any studio equipment used to produce programming.

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78 The growth of the "right to access" in the literature and the cases is excellently documented and discussed in Gerlach, supra note 70, at 222-28.
79 Id. at 230.
81 "If it were necessary to rebuild or add extensive new plant, this could not be reasonably expected within the six-month period [specified in the rules]. The requirement for activating capacity within 6 months is based on our understanding that only relatively modest effort is involved in converting existing potential to actual capacity." Cable Television Report and Order, 36 F.C.C.2d at 192.
82 Gerlach, supra note 70, at 231. Gerlach's suggestion, see text accompanying note that the FCC is not "tough enough" to enforce the CATV rules to make sure that leased-access channels do not become a "scarce" resource, is already being supported by Commission-provided evidence. The 1972 Cable Rules provided that systems then in operation had until 1977 to comply with the rules in 47 C.F.R. § 76.251 requiring 20-channel capacity; the availability of an equivalent amount of bandwidth for nonbroadcast purposes for each broadcast channel used; technical capacity for some return communications; a single channel for public, educational, local government, and leased-channel use; such capacity to be expanded on need; and equipment and facilities necessary for the production of programming on the public access channel. On July 9, 1975, however, the Commission was persuaded to cancel the 1977 deadline for reconstruction of CATV systems to meet the requirements of the nonbroadcast channel rules in 47 C.F.R. § 76.251(a) (1)-(8) by arguments that (a) the industry lacked the capital to provide any reconstruction; (b) more than the five years between 1972 and 1977 would be needed to generate the necessary revenue; and (c) financial interests would not extend credit because of the state of the economy and the perception of CATV reconstruction as a poor investment. Cable Television Service-Access Channels, 34 P & F Radio Reg. 723 (1975). The FCC could only promise to explore alternatives to "deadline" rebuilding in its pending Docket 20508. Id. at 736. The end result may well be that on some cable systems "grandfathered" under the 1972 Rules, leased-access channels—perhaps even all channels—are or will soon become "scarce."
83 Rules Evaluation, supra note 62, at 827.
84 Barnett, supra note 80, at 745; Gerlach, supra note 70, at 232; Rules Evaluation, supra note 62, at 832-33; Note, Toward Community Ownership of Cable Television, 83 Yale L.J. 1708, 1712 (1974) [hereinafter cited as Community Ownership].
ditionally, there is no meaningful definition or delineation of the equipment that a cable system must make available in order to meet the requirement that it operate to a substantial degree as a local programming outlet.\textsuperscript{55}

Because most cable systems are local monopolies (because it appears a priori wasteful to dig up streets for a second system),\textsuperscript{86} the FCC found it necessary to impose limits on the control the cable owner may exercise over the content of the communications carried over these nonbroadcast channels. Specifically, in close analogy to the common carrier defined in Frontier Broadcasting: 87

Each such system shall exercise no control over program content on any of the channels [used for nonbroadcast services], however, this limitation shall not prevent it from taking appropriate steps to insure compliance with the operating rules described [below].\textsuperscript{88}

The “operating rules” further limit the uses of these nonbroadcast channels.\textsuperscript{89} But, importantly, the rules require that, with regard to the public access and other leased-access channels, access be afforded on a first-come, first-served basis.\textsuperscript{90}

Once the Commission began to deal with the local incidents of cable television, it had also to deal with the local incidents of cable television regulation.\textsuperscript{91} While the federal-state-local relationships dictated by the FCC with regard to most aspects of cable regulation are delineated in a separately labelled section of the 1972 Cable Rules,\textsuperscript{92} those rules dealing with regulatory control over nonbroadcast channels are embedded in the substantive regulations themselves:

Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels. . . .\textsuperscript{93}

This means that as of the effective date of the 1972 Rules, the FCC has pre-empted state and local regulation with respect to most nonbroadcast channels. The justification for this action was based on FCC predictions of the confusion and impracticality that would be generated by more than one level of regulation.

There remains the issue of whether also to permit state or local regulation

\textsuperscript{85} Rules Evaluation, supra note 62, at 829.
\textsuperscript{86} But see Riverside Cable Corp., 42 F.C.C.2d 783 (1973), in which the Commission found itself without ability to deal with the second of two cable systems in the city of Perris, California, where that second system carried no broadcast signals.
\textsuperscript{87} See text accompanying note 12 supra.
\textsuperscript{88} 47 C.F.R. § 76.251(a)(9) (1975) (emphasis added).
\textsuperscript{89} For public-access channels, the cable system is required to establish rules requiring first-come, nondiscriminatory access; and to prohibit the presentation of advertising material for commercial purposes, lottery information, or obscene or indecent material. Additionally, the list of all persons requesting access time must be made public. 47 C.F.R. § 76.251(a)(11)(i) (1975). \textsuperscript{90} 47 C.F.R. § 76.251(a)(11)(i), (iii) (1975).
\textsuperscript{91} Barnett, supra note 80, at 685; New Rules Analysis, supra note 53, at 1161.
\textsuperscript{93} 47 C.F.R. § 76.251(a)(11)(iv) (1975).
of these channels where not inconsistent with federal purposes. We think that in this area a dual form of regulation would be confusing and impracticable. Our objective of allowing a period for experimentation might be jeopardized if, for example, a local entity were to specify more restrictive regulations than we have prescribed. Thus, except for the government channel, local regulation of the access channels is precluded. If experience and further proceedings indicate its need or desirability, we can then delineate an appropriate local role.  

Perhaps even more significantly, the FCC once again addressed the problem of whether or not it even had jurisdiction over these nonbroadcast channels. Again, the Commission chose not to rely solely on a theory of plenary FCC power over communications and, with regard to access channels presenting nonbroadcast programming, chose not to rely solely on a theory that these channels were "ancillary to broadcasting." Instead, in a statement reflecting the weaknesses of these bases for asserting regulatory jurisdiction, the Commission provided further specific elaboration:

We now turn to the question of the regulation of access channels presenting non-broadcast programming. We believe that such regulation is properly the concern of this Commission. These channels fulfill Communications Act purposes and are integrally bound up with the broadcast signals being carried by the cable. It is by no means clear that the viewing public will be able to distinguish between a broadcast program and an access program; rather the subscriber will simply turn the dial from broadcast to access programming, much as he now selects television fare. Moreover, leased channels will undoubtedly carry interconnected programming via satellite or interstate terrestrial facilities, matters that are clearly within the Commission’s jurisdiction. Finally, it is this Commission that must make the decisions as to conditions to be imposed on the operations of pay cable channels, and we have already taken steps in that direction. . . . Federal regulation is thus clearly called for.

Finally, the most significant difficulty with regard to the nonbroadcast channels stems from the fact that the cable operator may potentially face legal liability based on the content of the communications carried over these nonbroadcast channels. Although the FCC rule provides that the cable operator shall have no control over the content of the programming, the FCC could not promise the cable operator that he would be free from libel liability based on the programming carried over nonbroadcast channels. The FCC could only indicate that it was confident that any speech on access channels would be protected under the reasoning of Rosenbloom v. Metromedia, Inc. because, the Commission assumed, "most users will presumably air opinions on matters that are of

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94 36 F.C.C.2d at 193.
96 See text accompanying note 53 supra.
97 36 F.C.C.2d at 193.
at least as much 'public or general interest' as in the Rosenbloom case.  
Furthermore, since the cable operator has, under FCC rule, no control over the content of the communication, it would be impossible, stated the FCC, for such an owner to have actual malice.  

In case Rosenbloom and its progeny did not provide adequate protection, however, the FCC asserted that the no-censorship requirement was a “valid regulation having the 'force of law.'” But this self-serving assertion most likely provides little comfort to the cable operator who will note that under the FCC's admittedly pervasive jurisdiction over television broadcasting, the Communications Act does not entirely preempt the field.  

It was with regard to the control over content of these nonbroadcast, public, and leased-access channels that the FCC began to confront the boundary beyond which it could not by itself extend the Communications Act. Recognizing that it was doubtful whether the FCC had the power to provide immunity from state libel laws without any Congressional statement on the matter, the FCC stated, “[I]f a problem should develop in this respect, it is readily remedied by Congress and . . . we would welcome clarifying legislation.” Where Congress has acted, enacting the “equal time” section of the Communications Act, federal immunity from state liability for statements made during an “equal time” broadcast allowed pursuant to the statute was implied. There is no such congressional statement with regard to cable television.  

Until such legislation is passed, cable system operators who feel that federal case law and the FCC rules offer inadequate protection may prescreen nonbroadcast programming, censoring those deemed objectionable. Presumably, an opinion from a conservative counsel will allow control of the content of nonbroadcast programming to revert to the cable system operator. Operator-independent programming may thus be deterred, and the policy of decentralizing the control over the content of the programming that is carried by all of those cable channels into the home thus undermined.

E. Program Origination Reconsidered

In the meantime, during the court battle over the local origination requirement and the promulgation of the 1972 Cable Rules, the Commission began the process of reversing itself with respect to the very regulation finally tested by the Supreme Court in Midwest Video. The Commission had stayed the local origination requirement after the Court of Appeals for the Eighth Circuit struck down

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100 36 F.C.C.2d at 195.  
101 Id.  
102 Id. at 196.  
103 Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963) (state law prohibiting the advertisement of prices for optical services applicable to television broadcaster whose signals were received in New Mexico).  
104 36 F.C.C.2d at 196.  
107 Id., noting that even though cable systems in New York require access channel users to promise to indemnify the systems for libel, operators still prescreen all programs.
the regulation in the decision subsequently reversed by the Supreme Court in *Midwest Video*. Even with Supreme Court affirmation of the program origination rule, however, the stay was not lifted by the Commission.

Our hesitancy to remove the stay has resulted from a state of uncertainty—not as to jurisdiction or authority, but as to the basic propriety of reinstating the rule as it is presently constituted.

But this was the critical question to the plurality in *Midwest Video*:

> [W]hether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."[109]

The Supreme Court plurality in *Midwest Video* found that the Commission had so reasonably determined. But by the end of 1974, only a year and a half after the *Midwest Video* decision, the Commission was ready to reverse itself, finding that its rule would not do the job.

> [T]he Commission has concluded that the mandatory origination scheme is not likely to be the most effective means of fostering local expression.[110]

Thus, the FCC repealed the mandatory origination requirement in its December 1974 *Report and Order re Program Origination by Cable Television Systems*. The repeal of the rule was based on the Commission's conclusion that

imposing mandatory origination rules is unlikely to best serve our cablecasting goal. Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract.[113]

The conclusion of the Commission in 1974 was actually presaged by Justice Douglas, who authored the opinion for the four dissenting Justices in *Midwest Video*.

CATV is simply a carrier having no more control over the message content than does a telephone company. A carrier may of course seek a broadcaster's license; but there is not the slightest suggestion in the Act or in its history that a carrier can be bludgeoned into becoming a broadcaster while all other broadcasters live under more lenient rules. There is not the slightest cue in the Act that CATV carriers can be converted into broadcasters.
The 1974 Report and Order re Program Origination by Cable Television Systems did, however, reinforce an earlier step taken in the direction of requiring cable system operators to act as communications common carriers with regard to nonbroadcast channels. Instead of requiring the cable operators to originate programming, the FCC requires that as of January 1, 1976, operators of cable systems with more than 3,500 subscribers make programming and origination facilities available to the public on a first-come, nondiscriminatory basis. The rules elaborate the requirement in the repealed 1972 program origination rule that the cable system have available facilities for local production and presentation of programs. The new rules also specify that the cable operator is to have no control over the content of nonoperator cablecast programs, except as needed to ensure compliance with the operating guidelines set forth by the Commission.

The 1974 rules require cable systems to operate in a manner strikingly like the communications common carriers described in Frontier Broadcasting. Nevertheless, the Commission specifically disavowed common carrier regulation in its 1974 Report and Order re Cable Program Origination by Cable Television Systems so as to enable the cable system operator to engage in programming if he so chooses. By so doing, however, the Commission again leaves the cable system operator in potential conflict with those who would lease the channels or use the program production facilities. And again, by preempting local regulation of nonoperator cablecast channels and facilities, the Commission effectively delegates a great deal of discretion to the cable operator in the implementation of the FCC's rules. Indeed, the Commission specifically so provides:

The equipment availability rule is designed to foster diverse local expression. Thus, no one person or group can claim priority or exclusive use. Any charges for equipment use must be consistent with our goal of affording the public a low cost means of television access. Reasonable rules developed by the operator against abuse or damage to equipment and compensation for same are to be expected. We leave this up to the operator.

The uncertainty about the scope of federal authority and the scope of state

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116 47 C.F.R. § 76.253(b) (2) (1975). The operating rules are set out in the following subsection (b)(3):
   (3) Operating rules. (i) Each such system shall establish rules requiring first-come non-discriminatory availability of equipment and bandwidth; prohibiting the presentation of lottery information and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215, respectively); requiring sponsorship identification (see § 76.221); specifying an appropriate rate schedule; and permitting public inspection of a complete record of the names and addresses of all persons or groups requesting use of equipment or bandwidth. Such a record shall be retained for a period of two years; (ii) The operating rules required by this section shall be filed with the Commission within 90 days after a cable system first makes equipment available and such rules shall be available for public inspection as provided in § 76.305(b). Except on Commission authorization, no local entity shall prescribe any other rules concerning the use or manner of operation of bandwidth for non-operator cablecasting.
117 See text accompanying note 12 supra.
118 See text accompanying notes 78-93 supra.
119 47 C.F.R. § 76.253(b) (3) (1975).
120 49 F.C.C.2d at 1108.
and local regulation continues today. In a recent 1974 Notice of Proposed Rule-making and Inquiry re Duplicative and Excessive Overregulation of Cable Television,\(^{121}\) the FCC indicated that it was prepared to reconsider its division of regulatory authority over cable between the federal, state, and local levels. The reconsideration was based on the report of a Federal-State-Local Advisory Committee on cable regulation which recommended that the FCC declare that “it is totally pre-empting regulation of cable and simultaneously announcing its intention not to occupy certain defined areas of jurisdiction subject to the condition that local [and state] regulation is consistent\(^{122}\) with other policies of the Commission. To do otherwise, the Committee urged, would leave the FCC with only two alternatives, both of which a majority of the Committee adjudged unacceptable: (a) total preemption foreclosing legitimate local interests, or (b) maintenance of the status quo.\(^{123}\)

It is interesting to note that in response to the Committee’s report, the Commission still felt the need to ask for comments related to the question of “under what authority the Commission could adopt rules regulating the type or nature of non-federal regulatory programs.”\(^{124}\) At the time of the 1974 Notice of Inquiry and Proposed Rulemaking, more than 15 years had passed since the FCC first formally addressed the question of its jurisdiction—its power—over cable television in Frontier Broadcasting.\(^{125}\) But the Chairman of the FCC himself, in a concurring statement in the 1974 Notice, was forced to admit that still “the issue of regulatory jurisdiction over cable television is a complex and difficult subject, fraught with serious legal and constitutional problems.”\(^{126}\)

Nevertheless, in April of 1975, the Commission reasserted jurisdiction over “pay” cable channels and preempted local regulation of such channels. “Pay” cable channels are channels for which a per-channel or per-program charge is made to the subscriber. The Commission based its assertion of jurisdiction over these channels on the ground that the Midwest Video decision provided ample justification for the action taken, even though it admitted the infanticide of its own rule that the Supreme Court had upheld in Midwest Video.\(^{127}\) Preemption of local regulation was based on the FCC’s belief that the complex nature of subscription cablecasting, with implications not coincident with state boundaries, dictated that its regulation emanate from a single source, i.e., the FCC.\(^{128}\)

Section III of this article is designed to suggest a model of cable television systems which will simplify some of the complexities and difficulties with regard

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121 49 F.C.C.2d 1199 (1974).
122 Id. at 1203.
123 Id.
124 Id. at 1210. Perhaps it is a mere oversight, but the Commission, as in most of its dealings with cable television, asks first whether it should adopt the proposals under consideration before it asks whether it can adopt those proposals. See note 21 supra. It is interesting to note that two weeks before the Commission asked for comments on its authority over non-federal regulatory positions it was already certain of its position. See Cable Television Report and Order, 49 F.C.C.2d 1078, 1083 (1974), denying reconsideration of the FCC’s 1974 Clarification of Cable Television Rules.
125 See text accompanying note 12 supra.
126 49 F.C.C.2d at 1211 (Wiley, Chmn., concurring).
to the FCC's jurisdiction over nonbroadcast channels of cable systems, leased-access channels in particular. The purpose is to demonstrate that the answers to some of the questions concerning the FCC's jurisdiction over these channels can be found in the specific terms of the Communications Act itself.

III. Channels and Cables

Modern communications theory draws on the communications model proposed in the late 1940's by Claude E. Shannon. In this model, the central feature, connecting the sender and transmitter to the receiver and listener, is the channel. Most simply stated, a channel of communication is a path over which information flows.\(^{129}\)

Some form of this concept is also incorporated into the Communications Act of 1934, at least in the context of communications common carriage, where a "line" of communications is defined as

\[
\text{any channel of communication established by the use of the appropriate equipment.}^{130}\]

Perhaps most importantly, this definition of a channel of communications—like Shannon's model itself—is not bound to any specific technology. Defining a channel of communications even as a means of getting a certain quantity of signals at a certain strength and quality over a certain distance does not tie the model to any specific technology.\(^{131}\) The technical means of communications are many and varied, including speech, print, braille, radio, optical fibres, laser beams, and on and on. As broad as the jurisdiction of the FCC is, defining the Commission's jurisdiction in terms of communications by wire and radio actually leaves out a great deal.

The distinction between the channel of communications and the equipment used to establish it has been emphasized by the FCC:

\[\text{[W]e believe that the definition of line manifests a primary Congressional concern over the channel of communication rather than merely the wires and cables, i.e., the equipment used to establish the channel.}^{132}\]

This functional interpretation of channels of communications, divorced from a technological substrate, has been upheld in courts with regard to CATV. The most important case for the development of a functional model is General Telephone Co. of California v. Federal Communications Commission.\(^{133}\) That 1969 case in the United States Court of Appeals for the District of Columbia involved communications facilities owned by telephone companies and leased to CATV operators for the carriage of television signals from the CATV head-end or antenna to the subscribers' homes. The question in the case was whether the facilities were subject to the jurisdiction of the FCC. An affirmative answer

\(^{129}\) Telephone interview with Mr. Kelley E. Griffith, Chief, Domestic Rates Division, Common Carrier Bureau, Federal Communications Commission, July 1973.


\(^{131}\) Interview with Professor Hendrik Bode, Division of Engineering and Applied Physics, at Harvard University, August 1973.


\(^{133}\) 413 F.2d 390 (D.C. Cir. 1969).
meant that before facilities for such use could be constructed, approval of the
FCC under § 214(a) of the Communications Act was required. The telephone
companies placed strong reliance on the fact that the common carrier lines used
for the transmission of television signals pursuant to contract with CATV oper-
ators were physically located within the boundaries of one state. Thus, the
companies argued, the facilities were specifically exempt from FCC jurisdic-
tion by provision of the Communications Act itself:

Subject to the provisions of section 301 of this title, nothing in this chapter
shall be construed to apply or to give the Commission jurisdiction with re-
spect to (1) charges, classifications, practices, services, facilities or regulations
for or in connection with intrastate communication service by wire or radio
of any carrier. . . .

The court, in an opinion by then Circuit Judge Warren Burger, held that
the FCC did have jurisdiction to require § 214 certification before communica-
tions channels destined for such use are to be constructed:

The Supreme Court [in Southwestern] aptly characterized the functional
aspects of the CATV systems as an “essentially uninterrupted and properly
indivisible” stream of communications. The FCC’s jurisdiction was thus upheld based on a functional model focusing
on the use of a particular channel at a given time. The path over which the
information flows starts at the broadcaster’s antenna and ends in the sub-
scriber’s home. Since the complete channel uses a transmission medium over
which the FCC has jurisdiction (the over-the-air travel of electromagnetic
signals), the FCC has jurisdiction over all of the channel, notwithstanding the
fact that the medium through which the signals travel changes from air to wire
someplace midstream.

A corollary of this functional approach is that jurisdiction over communi-
cations channels depends on the use of the channel. Since FCC jurisdiction is
limited to interstate and foreign communications by wire or radio, its jurisdic-
tion is limited to those channels of communication which are used to carry
signals that have either crossed state or country boundaries or have travelled

134 Id. at 397.
136 413 F.2d at 401.
137 Actually, the path used by the information that eventually flows to the television
viewers starts with the creation of the information when the television program is produced.
From there, there are many ways in which the program can be sent to the broadcaster’s
antenna to be disseminated over the air. These include sending the program on film or video-
tape to the local broadcast studio where it will be reconverted into electronic signals suitable
for television broadcasting. Or the program could be sent as film or as a stream of electronic
signals to television network headquarters in New York, by mail or by communications
common carrier paths, respectively. From there, the program would again be sent as a
stream of electronic signals from the network headquarters to affiliates over point-to-point
communications paths, owned either by the network itself or leased from the communications
common carriers. And the network affiliates would then do the actual broadcasting. For an
excellent discussion of the factors involved in getting television programming, particularly
the news, to and from the networks’ headquarters, see A. Epstein, News From Nowhere
(1973).
through the air at some time.\textsuperscript{139} Thus, in \textit{General Telephone} the issue framed for decision by the Court was whether the Communications Act vests in the Commission jurisdiction over channel transmission service and facilities of telephone companies \textit{constructed to carry TV and FM radio signals} between a CATV antenna (or microwave receiver) and the subscribers, when the reception and transmission facilities are entirely within one state and \textit{when they are constructed to provide transmission service to CATV operators carrying signals which originate from TV and FM broadcasters} in another state.\textsuperscript{140}

This principle was further illustrated in a decision by the FCC itself in 1973 in \textit{Sterling-Manhattan Cable Television v. New York Telephone}.\textsuperscript{141} In that case, New York Telephone (NYT) had constructed telephone lines and leased them as cable television channels without first obtaining a § 214 certificate from the FCC. Sterling complained because NYT was leasing its channels to Trans-World Communications, which was using the channels to show feature movies on television sets in Sterling’s Manhattan franchise area. In holding that NYT did not require FCC certification, the Commission, citing \textit{General Telephone}, noted that “such certification, of course, would be needed before Telephone Company could lawfully use the subject facilities to transmit broadcast television signals for cable system operators.”\textsuperscript{142} The focus is on the use of the channel, and the clear implication of the case is that if the channels are not used for interstate signals, they are not subject to FCC regulation.\textsuperscript{143}

It follows that if one or more cables provide more than one channel, the system operator may serve more than one function. In other words, merely because all of the channels are carried over one wire does not mean that they all have to be used in the same manner. Thus, the FCC’s 1972 Cable Rules require that some channels be used for carriage of signals received “off-the-air” from broadcast stations; at least three channels to be used (one each) for educational, local, government and public-access programs; and a number of channels to be used for leased access on a first-come, first-served basis, even though all of those channels are provided by the same CATV cable or system.

With the different uses, of course, run differing rights and liabilities. On the channels carrying broadcast signals, the cable operator is restricted by FCC rule as to which television signals may be carried.\textsuperscript{144} Over the channels in which the cable operator engages in program origination, the operator is subject to rules and regulations, such as the “equal time” and “fairness” provisions, much

\textsuperscript{139} It will be assumed for purposes of this article that the FCC has jurisdiction over broadcast signals, even if they do not “cross” state or country lines. \textit{Cf.} Communications Act of 1934 § 301, 47 U.S.C. § 301 (1970).

\textsuperscript{140} 413 F.2d at 396-97 (emphasis added). As discussed in note 139 \textit{supra}, the possible requirement that the broadcast signals cross state lines will here be treated as irrelevant.

\textsuperscript{141} 38 F.C.C.2d 1149 (1973).

\textsuperscript{142} Id. at 1158 n.23 (emphasis added).

\textsuperscript{143} \textit{See also} Riverside Cable Corp., 42 F.C.C.2d 783 (1973).

\textsuperscript{144} 47 C.F.R. Pt. 76, Subpt. D (1972). The rules regulating carriage of television broadcast signals differ depending on such factors as what and how many television signals are “significantly viewed” in the cable franchise area and in which television market the cable system is located.
like those governing conventional broadcasters.\textsuperscript{145} Finally, with respect to those channels to be made available for lease to third parties, access is to be on a first-come, nondiscriminatory basis, and the cable operator is to have no control over the content of the programming carried on those channels.\textsuperscript{146}

The fact that a cable operator may simultaneously maintain different sets of rights and liabilities with respect to different functions simultaneously served was illustrated by the United States Supreme Court in 1974 in \textit{Teleprompter v. Columbia Broadcasting System, Inc.}\textsuperscript{147} In that case the Court held that CATV operators were not liable for copyright infringement for carrying television signals picked up off-the-air and relayed by microwave facilities from distant broadcast stations.\textsuperscript{148} As presented to the Court, the issue was whether the use of microwave links to import signals into remote television markets changed a CATV system from a "viewing" or "receiving" operation, which incurred no copyright liability,\textsuperscript{149} into a "broadcasting" or "performing" operation which would be liable for copyright infringement.

CBS, arguing for copyright liability, claimed that three functions performed by Teleprompter's CATV systems turned them into broadcasters for purposes of the copyright law. First, CBS argued, when cable operators originate programming locally, they "perform" just as broadcasters do. Second, CATV operators in question sell advertising time to commercial interests desiring to sell goods or services in the CATV service area, as broadcasters do in their television markets. And third, when CATV operators interconnect their systems so that one program is transmitted over more than one CATV system simultaneously, the CATV systems have transformed their functions into those of broadcasters. By serving these three "broadcasting" functions, the argument finally concludes, these CATV systems are transformed into broadcasters (performers), thus subjecting them to liability for copyright infringement.\textsuperscript{150}

The Court, however, rejected this "all or nothing" classification:

\begin{quote}
The copyright significance of each of these functions—program origination, sale of commercials, and interconnection—suffers from the same logical flaw: in none of these operations is there any nexus with the defendant's reception and rechanneling of the broadcasters' copyrighted materials. . . . [W]e hold that . . . the development and implementation of these new functions, even though they may allow CATV systems to compete more effectively with the broadcasters for the television market, are simply extraneous to a determination of copyright infringement liability with respect to the reception and retransmission of broadcasters' programs.\textsuperscript{151}
\end{quote}

\textsuperscript{145} 47 C.F.R. Pt. 76, Subpt. G (1972). These rules themselves suggest that the FCC was aware that there would be problems with regard to the operation and control of the leased-access channels. For if the leased-access channels were working according to plan, including the provision for expansion of system capacity, there would be no need to regulate the program origination function of the cable operator himself as if the communications medium provided by cable television were "scarce."

\textsuperscript{146} See text accompanying notes 71-93 supra.

\textsuperscript{147} 415 U.S. 394 (1974).

\textsuperscript{148} It should be noted that this potential liability of the cable operator was one of the factors that generated complaint about CATV operators to the FCC more than 15 years earlier in \textit{Frontier Broadcasting Co. v. Collier}, 24 F.C.C. 451, 454 (1958).

\textsuperscript{149} \textit{Fortnightly Corp. v. United Artists Television Inc.}, 392 U.S. 390 (1968).

\textsuperscript{150} 415 U.S. at 403-04.

\textsuperscript{151} Id. at 405.
Although couched in the language of the doctrines of standing\textsuperscript{152} the holding is clear: On some channels, the CATV operator may have copyright problems; but that does not mean that the same problems carry over to those channels over which the cable operator serves different functions.\textsuperscript{153}

The rejection of the proposed "all or nothing" approach is significant because it indicates the Court's reacceptance of a method of analysis quite distinct from the jurisdictional argument suggested by the Court in Midwest Video. In Midwest Video, it will be recalled, it was the "interdependencies" of CATV systems' broadcast retransmission and program origination that plainly sufficed to bring the program origination within the Commission's jurisdiction.\textsuperscript{154} The Court in Midwest Video was thus lumping functions together—the approach explicitly rejected in Teleprompter. The focus in Teleprompter on the different functions served simultaneously by a single piece of telecommunications equipment is not a new mode of analysis. As early as 1932, the Supreme Court in Smith v. Illinois Bell Telephone\textsuperscript{155} held that, because a telephone plant can be put to both interstate and intrastate uses, such plant must be allocated into interstate and intrastate categories so as to enable independent evaluation of federal and state regulation.

If the Supreme Court can impute a congressional requirement of independent consideration of the liabilities a cable operator incurs with respect to the independent functions served by different, separate cable channels, then it would seem reasonable to extend this analysis to those channels over which the cable operator is not supposed to have any control over content—the leased-access channels. "Leased-access channels" refers to those channels over which the 1972 Cable Rules' divestiture of CATV operator control is by rule ostensibly complete.\textsuperscript{156} Thus not included are the public-access channels, the educational channels, the local government channels, and any cable operator origination channel over which the nature of the subject matter (and, in fact, some restriction on content in terms of advertising limitation) is specified in the Cable Rules.\textsuperscript{157}

There are two central features of the rules with respect to these leased-access channels. First, the CATV operator is to have no control over the content

\textsuperscript{152} CBS was denied standing because, although it would complain of an "injury in fact," it was unable to assert that the copyright infringements occasioned by the "broadcasting" performed by CATV operators damaged any "legally protected interests" of CBS. Thus, there was no "nexus" between the allegedly illegal activity and any of CBS's alleged injuries. It might be argued, however, that as a matter of constitutional law, the article III "cases and controversies" requirement is met so long as sufficient injury is alleged. Nevertheless, even though CBS could allege injury, the activity it complained of injured someone else's legally protected interests, i.e., those who dealt with CATV operators when those operators were performing "broadcasting" functions. Because CBS might easily be a competitor of the program producers whose rights it sought to assert, CBS could not be deemed to be an adequate "surrogate" for those copyright proprietors whom it sought to represent.

\textsuperscript{153} The Court in Teleprompter went on to hold that, over channels which are used to carry television broadcast signals, even if microwave facilities are employed in that carriage, CATV operators still function on the "viewer" side of the line, and hence are free of copyright liability with regard to the television signals carried.

\textsuperscript{154} See text accompanying note 66 supra.

\textsuperscript{155} 282 U.S. 133 (1932).

\textsuperscript{156} 47 C.F.R. § 76.251(a)(9) (1975).

\textsuperscript{157} See 47 C.F.R. § 76.251 (1975).
of the communications carried. That aspect is left to the control of the person leasing the channel. Second, access to these channels is to be provided on a first-come, nondiscriminatory basis.

One is immediately struck by the close parallel between the rules governing leased-access channels and the functional terms used by the FCC to describe a communications common carrier:

Fundamental to the concept of a communications common carrier is that such a carrier holds itself out or makes a public offering to provide facilities by wire or radio whereby all members of the public who choose to employ such facilities and to compensate the carrier therefore may communicate or transmit intelligence of their own design and choosing between the points on the system of that carrier and other carriers connecting with it. In other words, the carrier provides the means or ways of communication for the transmission of such intelligence as the subscriber may choose to have transmitted. The choice of the specific intelligence to be transmitted is, therefore, the sole responsibility or prerogative of the subscriber, and not the carrier.

In fact, while the precise boundaries of the definition of a communications common carrier are extremely unclear, a communications common carrier is at base described by two features: (1) nondiscriminatory access on a first-come basis for all who can pay the price, and (2) no control by the carrier over the content of the communications carried.

Communications common carriers, like broadcasters, are also subject to the authority of the Federal Communications Commission pursuant to the Communications Act of 1934. Usually, the Act is thought to deal with telephone and telegraph companies—the traditional, established communications common carriers. But when the FCC perceives that the functional requirements are met, new offerings of communications service have been classified as communications common carriers.

Classifying leased-access channels of CATV systems as communications common carrier channels, however, poses grave jurisdictional problems for the FCC’s assertion of regulatory authority over those channels. Specifically, if the CATV operator can be a broadcaster over some channels, and not a broadcaster over others, as Teleprompter tells us, there is little to suggest that the CATV operator cannot be a communications common carrier over some non-broadcast channels, in particular over leased-access channels. But if the

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163 The proposition, of course, is not free from problems. See discussion Section V infra.
leased-access channels, serving the function of communications common carriage, do not cross any state lines and do not use any radio facilities, then it would seem that the language of the Communications Act itself prevents FCC regulations of those channels.

Subject to the provisions of section 301 of this Act, nothing in this chapter shall be construed to apply to give the Commission jurisdiction with respect to (1) charges, classifications, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .

This jurisdictional hurdle itself suggests one possible reason why the "common carrier" label was dropped almost completely from the language of FCC opinions when leased-access channels were discussed. But the communications common carriage functions those channels serve have remained in the rules. The FCC still asserted jurisdiction over those channels; and, as noted above, the Commission did not rely on any plenary grants of power that it might have. Rather, an independent basis for federal jurisdiction over leased-access channels was provided. The next section of this article examines that basis, followed by a discussion of other problems which are suggested when the functional equivalence between leased-access cable channels and communications common carrier channels is observed.

IV. FCC Jurisdiction and Leased-Access Channels

Holmes said that jurisdiction is power; and nothing could be more apt to describe control over communications channels. For this reason, if for none other, the FCC's assertion of jurisdiction over leased-access channels, in the face of a statutory provision seeming to indicate that the FCC has no such jurisdiction, deserves very close examination. The FCC's basis for asserting regulatory control over these channels, quoted above, will be analyzed, assertion by assertion, and compared against the legal and functional structure for the regulation of communications common carrier channels.

164 These restrictions serve to ensure that the channels are not interstate channels of communications. See notes 138-40 & accompanying text.
165 Communications Act of 1934 § 2(b), 47 U.S.C. § 152(b) (1970). Section 301 of the Act deals with the licensing and uses of the radio spectrum and radio transmitters.
166 See note 61 supra.
167 See text accompanying note 53 supra.
168 Furthermore, given the history of the Communications Act itself, an assertion of plenary power would be subject to serious challenge in any event. The two major operational parts of the Communications Act of 1934 correspond to earlier legislation providing for the regulation of communications common carriers and radio broadcasters by separate bodies. Since 1910, regulations of communications common carriers had been vested in the Interstate Commerce Commission. Federal regulation of radio broadcasting had been authoritatively vested in the Federal Radio Commission in 1927. As part of New Deal reorganizations, regulation of communications common carriers was incorporated into Title II of the 1934 Act. Provisions paralleling the Radio Commission's powers were incorporated into Title III. Thus, grants of power made to the FCC are not made under Title I, which might be the source of any plenary power, with its broadly phrased "purpose" and "applicability" sections, but under Titles II and III. See New Rules Analysis, supra note 53, at 1167.
169 See text accompanying note 97 supra.
A. The Argument That Nonbroadcast and Broadcast Channels Are 
"Integrally Bound Up"

In asserting jurisdiction over leased-access channels, the FCC began:

We turn now to the question of regulation of access channels presenting nonbroadcast programming. We believe that such regulation is properly the concern of this Commission. These channels fulfill Communications Act purposes and are integrally bound up with the broadcast signals being carried by the cable. . . .

That leased-access channels fulfill Communications Act purposes is no reason, in and of itself, for asserting FCC jurisdiction over them. There are a good number of government programs or private enterprises that fulfill Communications Act purposes but are not subject to the jurisdiction of the FCC. For example, the low interest loans provided by the Department of Agriculture's Rural Electrification Administration and by the Rural Telephone Bank for the extension of telephone service to remote, rural areas are designed to provide universal telephone service, a goal incorporated into the mandate of the FCC:

to make available . . . to all the people of the United States a rapid, efficient, Nation-wide and worldwide communication service, with adequate facilities at reasonable charges . . .

In fact, the loan program was established because the FCC had been unsuccessful in getting the telephone companies to extend their lines to such rural areas. This is not surprising, given that extension of telephone lines is essentially a local affair and that the FCC's jurisdiction deals with interstate and foreign communications.

Also, the fact that "[access] channels . . . are integrally bound up with the broadcast signals being carried by the cable" does not provide a basis for asserting jurisdiction. First, the FCC's technological rules regarding cable system operation require that each of a system's channels be free from interference from any of the others. It is also clear that the channels are to be used for separate functions, serving separate purposes as well. Lumping such functions and purposes together under the "integrally bound up" rubric does violence to the method of analysis used by the Supreme Court in Teleprompter, which treated separate functions separately.

Even more compelling is the observation that if access channels are bound up with broadcast channels, so are intrastate communications common carrier channels integrally bound up with interstate communications common carrier

175 See text accompanying notes 152-57 supra.
channels. For example, an intrastate telephone call (one originating and terminating in the same state) and an interstate call might be carried over the same wire, but of course on separate channels.\footnote{176} This fact does not grant the FCC jurisdiction over the intrastate use of the telephone channel.\footnote{177} Nor should it, by the same analogy, grant jurisdiction to the FCC over the leased-access channels of a cable system merely because some of the other channels on the system carry broadcast signals or are otherwise subject to the FCC's power.\footnote{178} The channels do not cross state lines and are not established by radio technology.\footnote{179}

B. The Argument that the Consumer Will Not be Able to Distinguish Between Access and Broadcast Programs

The FCC continued:

It is by no means clear that the viewing public will be able to distinguish between a broadcast program and an access program; rather the subscriber will simply turn the dial from broadcast to access programming, much as he now selects television fare.\footnote{180}

Again, analogy to traditional common carrier channels—those provided by the telephone companies—is in order. This "subscriber confusion" argument simply proves too much. It would imply that the FCC should have, and does have, regulatory jurisdiction over all telephone calls, both interstate and intrastate, merely because when a telephone rings or even when a phone is picked up, a telephone subscriber cannot tell whether the call is an interstate one or an intrastate one. Clearly, FCC jurisdiction over intrastate communications common carriers does not extend so far; thus, it should not extend to the intrastate communications common carriage performed by cable systems.\footnote{181}

176 This is true in two respects. First, the same wire might be part of two different channels at two different times, one channel intrastate, and another interstate. Second, if more than one call is carried over the same telephone wire, as with "trunk" lines, then each call might be using an interstate or intrastate channel. The fact that all of the calls are using channels provided by the same technological substrate during a particular portion of the path from sender to receiver of each particular call is of no significance.

177 Admittedly notwithstanding the seemingly flat bar against federal regulation of intrastate communications common carrier channels, the FCC might exercise some authority over the technical standards of intrastate channels indirectly so as to insure that, when the channels are used for interstate communications, the federal technical requirements will be met. See text accompanying notes 214-16 infra.

178 Analogy to the telephone network provides at least part of the argument for the National Association of Regulatory Utility Commissioners, which is appealing the FCC's continued assertion of jurisdiction over leased-access channels, regardless of the use to which the channels are put. Brief for Petitioner at 7-8, National Ass'n of Regulatory Util. Comm'n v. FCC, Civil No. 75-1075 (D.C. Cir., filed June 20, 1975). Although the Association is challenging only the FCC's assertion of jurisdiction with regard to nonvideo uses of leased-access channels, the arguments that two-way, point-to-point, nonvideo communications services for hire via cable are not encompassed within the FCC's "ancillary to broadcasting" jurisdiction and are carrier services subject to state regulation would have obvious applicability to leased-access channels carrying video services as well. Cf. Sterling-Manhattan Cable Television v. New York Tel., 38 F.C.C.2d 1149 (1973).

179 These restrictions serve to ensure that the channels are not interstate channels of communications. See notes 138-40 & accompanying text supra.


181 It should also be noted that the entire "consumer confusion" argument could be undercut quite simply by requiring that users of leased access channels identify the channel periodically as an access channel.
C. The Argument That Intrastate Channels Are Potential Interstate Channels

Further, the FCC's jurisdictional argument proceeds:

Moreover, leased channels will undoubtedly carry interconnected programming via satellite or interstate terrestrial facilities, matters that are clearly within the Commission's jurisdiction.\footnote{182}

Again, this argument proves too much. For if it is applied to all communications common carriage, not only that performed by cable systems, all telephone calls would be regulated by the FCC. With regard to traditional communications common carriers, it is the use of the channel that determines who regulates. This was stated by the Supreme Court in \textit{Smith v. Illinois Bell Telephone}\footnote{183} as early as 1932. Thus, if the telephone line from home to the telephone office is used for an intrastate call, there is no federal regulation; if the line is used for an interstate call, then there is federal regulation, without any change in the physical facilities used to get the call from the local phone office to the home. And if a home or business has more than one telephone number assigned to it, it is perfectly possible that one "line" might be subject to federal regulation at the same time that another is not, even though the "lines" are provided by only one wire or cable. Thus, the "capability" argument used by the FCC denies the analytical basis on which the FCC's jurisdiction over communications common carrier channels leased to CATV operators for the carriage of television signals was upheld in \textit{General Telephone}:\footnote{184} It is the use of the channel that is determinative. But it is not argued that the FCC should not have jurisdiction when an interstate or foreign use is made of leased-access channels.

Even though the Supreme Court in \textit{Midwest Video} noted the "capability" argument as a possible support for FCC jurisdiction, the FCC itself seems to have questioned this basis for asserting jurisdiction over communications channels in \textit{Sterling-Manhattan Cable Television v. New York Telephone}.\footnote{185} Sterling had asked that the FCC assert jurisdiction over the NYT channels being used to carry movies to hotel rooms because of "the language in the \textit{Midwest Video} case to the effect that the capacity for interstate non-broadcast programming may, in itself suffice to bring cablecasts within [the FCC's] jurisdiction as interstate communication."\footnote{186} The Commission in \textit{Sterling-Manhattan}, however, noted that the Supreme Court did not decide the question.\footnote{187}

D. The Argument That the FCC Has Jurisdiction Over Access Channels Because It Has Jurisdiction Over Other Nonbroadcast Channels

In continuing its jurisdiction justification, the FCC states:

\footnote{182}{Cable Television Report and Order, 36 F.C.C.2d 143, 193 (1972).}
\footnote{183}{282 U.S. 133 (1932).}
\footnote{184}{See text accompanying notes 132-35 supra.}
\footnote{185}{38 F.C.C.2d 1149 (1973).}
\footnote{186}{Id. at 1158.}
\footnote{187}{The "capability" argument would also run counter to the language of § 2(b) of the Communications Act of 1934, quoted in text accompanying note 135 supra.}
Finally, it is this Commission that must make the decisions as to what conditions to be imposed on the operations of pay cable channels, and we have already taken steps in that direction. (See § 76.225). 188

The strongest argument to support FCC jurisdiction over pay cable, origination or access cablecasting operations for which a per-program or per-channel charge to subscribers is made, is based directly on the "ancillary to broadcasting" basis for upholding FCC jurisdiction over CATV in Southwestern. The basic assumption is that promoters and producers of "television" type programming, such as movies, prize fights, and the World Series, may find pay cable arrangements more lucrative than normal commercial broadcasting outlets. Thus, in order to protect the broadcasting industry from loss of important programming sources, the argument would go, the FCC must regulate pay cable. Protecting broadcasting in this manner would clearly be "ancillary" to the regulation of broadcasting.

The statement quoted above to the effect that FCC regulation of pay cable channels is imperative, however, is located in that paragraph of the 1972 Cable Television Report and Order in which the Commission is providing jurisdictional justification for its regulation of leased-access channels. The clear inference is that the Commission based its assertion of authority over leased-access channels (where no per-program or per-channel charge is made) on its authority to regulate pay cable channels. 189 In other words, when reduced to the language of Southwestern, the Commission is regulating leased-access channels because they are ancillary to the Commission's regulation of pay cable, which is ancillary to the Commission's regulation of broadcasting. Such a leap stretches the holding of Southwestern along with the jurisdiction of the Commission to a considerable degree.

Another basis for FCC jurisdiction over pay or subscription cablecasting was argued in April 1975, in the First Report and Order re "Pay Cable." 190 The Commission held that the Supreme Court's decision in Midwest Video provided ample justification for jurisdiction over cable channels for which a per-channel or per-program charge is made. 191 The assertion of jurisdiction, while noting that the rule in question in Midwest Video is now defunct, fails to address at least two issues. First, the Midwest Video analysis might be questioned in the light of the Supreme Court's independent functional analysis of independently

188 Cable Television Report and Order, 36 F.C.C.2d 143, 193 (1972).
189 The focus here is on access channels, not on origination channels which are presently subject to FCC regulation pursuant to the Midwest Video case. It should be noted, however, that the regulation governing "pay" cable may be subject to attack on other grounds. The "pay" cable rule deals in large measure with restrictions as to when feature movies may be carried over certain cable systems. While framed as a restriction on the operation of cable television operators, the rule obviously also restricts the universe of outlets to which a feature movie copyright proprietor may sell or rent his product. Such restrictions are not unlike those found to be in excess of the Commission's jurisdiction in GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). In that case, restrictions on the freedom of purchase of communications services by data processing subsidiaries of common carriers which, by FCC rule, were separate entities from the common carrier parent were held invalid as imposing a restriction on those subsidiaries which were not faced by other independent data processors.
served functions in *Teleprompter*. Second, the *Midwest Video* affirmation of jurisdiction was in fact based on the Court's perception as to the merits of the rule in question. Now that the Commission has decided that mandatory operator origination is not the most effective means to foster local expression, so too might the Court decide that upholding Commission assertions of jurisdiction in the area of cable television regulation is not the most effective means of serving first amendment interests or encouraging congressional policy-making in the area.

The Commission's assertion of jurisdiction over pay cable channels, of course, does not speculate on the effect the Commission's repeal of the program origination rule may have on the Justices' attitudes toward other Commission claims of extended jurisdiction. In fact, had the Court known in advance that the Commission would quickly repeal the rule, the Court might well have dismissed the case as moot, refusing to spend precious Court time on what has now become an academic exercise. One suspects that, as a practical matter, in any future court challenge to Commission rules in the area, the Commission's rapid repeal of the program origination rule will draw attention as an indicator of the Commission's own uncertainty as to the effects of its rules with regard to cable television nonbroadcast channels. The result could easily be a reduction in judicial credence of Commission findings and beliefs about what the Commission says it is doing and what purposes it purportedly is serving.198

E. The Argument That Regulation Is Needed

The jurisdictional argument in conclusion proclaims:

*Federal regulation is thus clearly called for.*194

This statement by the FCC, more than any other made with respect to FCC jurisdiction over leased-access channels, might be true. But so too might it be true that federal regulation of some aspects of intrastate telephone service might be called for.195 There is a long way, at least in the theory of congressional delegation of power, between perceiving that regulation is called for and actually having the power to provide the called-for regulation. The critical issue here is who decides when a new industry or a new service offering is to be regulated: Congress or the administrative agency?

V. Leased-Access Channels as Common Carrier Channels: Benefits Costs and Problems

On analysis, the most interesting ramifications of treating cable leased-access

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192 *See* text accompanying note 111 *supra*.
193 This speculation may not be idle for very long. The Commission's "pay" cable rules are currently being appealed in a case filed recently in the United States Court of Appeals, District of Columbia Circuit. *Home Box Office, Inc. v. FCC*, Civil No. 75-1280 (D.C. Cir., filed Aug. 12, 1975).
195 *See* *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), discussed at note 213 *infra*.
channels as communications common carrier channels were not raised by the Commission when it asserted jurisdiction over those channels. These issues include the allocation of CATV plant between interstate and intrastate uses for ratemaking purposes and the suggestion of a requirement of universal CATV service. Most importantly, however, deciding that leased-access channels are indeed communications common carrier channels would facilitate the goals espoused by the Commission in requiring the channels to be available. First, the notion that a communications common carrier is to have no control over the contents of the communications carried is well-established. And second, as a corollary of this lack of control, communications common carriers are protected from liability for libel or slander with regard to the communications carried. Thus, notwithstanding the jurisdictional difficulties, a declaration by the Commission that these are communications common carrier services would both alleviate cable operator concern about libel liability and relieve channel lessee restraint due to any control that the cable operator might retain.

Moreover, it is not at all clear that state or local regulation of some aspects of CATV operation would be detrimental or harmful. It is intuitively clear that the Iowa farmer and the Manhattan highrise dweller have different information needs. Yet it is precisely such differences in needs and attitudes that make local solutions preferable to a national solution to some cable television issues and problems. From the federal viewpoint, more than one level of regulation of leased-access channels may seem confusing or duplicative. But this conclusion might well be dictated by the tenets of uniformity and evenhandedness fundamental to federal regulation, the same basic principles which preclude the federal regulation that accommodates diversity between states by discriminating among them. Yet, it has been observed: "There are obvious values—in terms of simplicity, the understandability of the law, and even in certainty—in a dual system of government under which many problems are

196 See Gerlach, supra note 70; Note, Common Carrier CATV: Problems and Proposals, 37 BROOKLYN L. REV. 533 (1971) [hereinafter cited as Common Carrier CATV]; Note, Regulation of Community Antenna Television, 70 COLUM. L. REV. 837 (1970); Rules Evaluation, supra note 62; Community Ownership, supra note 84.

197 No case has been discovered which even entertains the notion that a telephone company would be liable for libel for the content of the communications carried over telephone channels. With regard to telegraph companies, however, the control the telegrapher has in transcribing the message from voice or record into code and back has limited the telegraph companies' privilege from libel liability to a qualified privilege. As a general rule, a telegraph company is free from libel liability for the communications carried if the message is transmitted in the regular course of the business and if the company and its agents are free of ill will and malice. O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1949); Parker v. Edwards, 222 N.C. 75, 21 S.E.2d 876 (1942); 74 AM. JUR. 2d Telecommunications § 77 (1974); W. PROSSER, LAW OF TORTS § 793 (4th ed. 1971). Even though, as Prosser indicates, "the better view is that it is privileged to publish matter obviously defamatory, unless there is reason to believe the sender is not privileged," some older cases have indicated that the qualified privilege enjoyed by telegraph companies is limited to those situations in which the message is ambiguous or the operator reasonably believes the sender to be privileged. E.g., Paton v. Great Northwestern Tel. Co., 141 Minn. 430, 170 N.W. 511 (1919). See also Nye v. Western Union Tel. Co., 104 F. 628 (7th Cir. 1900).

198 Even though it has taken the Commission more than 15 years to find a final answer to the CATV jurisdictional problem, it only took the Commission 11 months to decide to regulate, as communications common carriers, new service offerings combining both computer and communications technologies and functions. See generally Berman, supra note 5.
handled finally at the local level without the necessity for resort to a central authority.\textsuperscript{199}

But a model which allocates regulatory authority over CATV leased-access channels to state and local bodies\textsuperscript{200} because the channels are used to provide intrastate communications common carriage raises several questions as well. First, one might question whether a cable operator is allowed to engage in both program origination and communications common carriage at the same time, in light of the arguable prohibition of such a combination of functions in § 3 (h) of the Communications Act: "[A] person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier..."\textsuperscript{272} There are, however, several reasons why this provision would not apply to CATV operators. At the outset, it is clear that a cable television operator is not engaged in radio broadcasting. But even if that observation is not sufficient to avoid application of the statutory proscription, it is also clear that the history of radio broadcasting is sufficient. In the early 1920's, the American Telephone and Telegraph Company decided to try to enter the field of radio broadcasting according to a scheme modelled substantially on the operation of the telephone network. The telephone company would own the radio stations, which would be connected with long-distance telephone lines, and responsible community groups would use the stations and the network to address the nation. The company would only require that the groups pay it enough to cover the expenses of operating the stations and to provide a reasonable rate of return on the company's investment. This plan was thwarted later in the 1920's by both independent broadcasters and an antitrust consent agreement which saw the withdrawal of AT&T from commercial broadcasting and the birth of the National Broadcasting Company.\textsuperscript{202} Section 3(h) of the Communications Act of 1934 is a vestige of that consent agreement designed to ensure that broadcasting would not be subject to any of the traditional restrictions imposed on common carriers, such as first-come, nondiscriminatory access and, more importantly, limits on profit levels. The provision was not designed to prevent a common carrier from engaging in broadcasting\textsuperscript{203} and, indeed, such a combination of functions was suggested by the FCC with regard to cable television in 1972:

For now, we remain of the view that the most appropriate mix for the orderly development of cable and for encouraging the maximization of its potential for the public benefit is one that embraces "... a multi-purpose CATV operation combining carriage of broadcast signals with program origination and common carrier services..." (First Report and Order in

\textsuperscript{200} The absence of regulation on the state level need not be determinative of federal jurisdiction. In Texas, for example, local telephone service is not regulated on the state level. Rather, such regulation is allocated to local bodies.
\textsuperscript{201} Communications Act of 1934 § 3(h), 47 U.S.C. § 153(h) (1970).
\textsuperscript{203} Telephone interview with Henry Geller, former General Counsel, Federal Communications Commission, September 1975.
Docket 18397 . . .) The rules adopted [with respect to access and use of nonbroadcast channels] are designed to accomplish that.204

Another suggested problem concerns the service coverage a cable operator would be required to provide if the system were regarded as providing communications common carriage. Specifically, it has been argued that as a communications common carrier, a CATV system would be required to establish universal service, that is, service to every home within the system’s service area.205 But this observation mistakes for an essential requirement of communications common carrier a policy that is incorporated into the language of the Communications Act:

> to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide and world-wide communication service, with adequate facilities at reasonable charges. . . .206

Thus, telephone companies in Mississippi are considered communications common carriers, even though as of December 31, 1972, only 76 percent of Mississippi households had telephone service.207

The distinction is between the legal requirement that a communications common carrier merely allow his facilities to be used by anyone choosing to do so and the statutory policy that communications service be extended actively to all. For example, the FCC recently classified as communications common carriage a new service offering designed to create a communications network for computer data transmission, even though the service would only be extended to those cities where demand was high enough to support the service.208 Furthermore, as noted above,209 by 1950 the FCC had not been successful in implementing the policy that telephone service be extended universally to remote rural areas. The task of subsidizing these rural operations was therefore delegated to the Rural Electrification Administration and later to the Rural Telephone

204 Cable Television Report and Order, 36 F.C.C.2d 143, 197 (1972). Furthermore, the FCC has approved as communications common carriage an offering of service by the common carriers called Multipoint Distribution Service. This service uses more or less omni-directional microwave signals to serve the identical function that CATV systems serve with leased-access channels established by wire distribution facilities. But rather than requiring the MDS operator to set aside channels or time for specific purposes or to originate programs, the MDS operator's responsibility, like that of any communication common carrier "is to provide services necessary to, and ancillary to, the provision of the communication service offered, without affecting or influencing the content of the information communicated. Put more simply, the carrier's responsibility is to provide 'a pipeline' pursuant to his tariff for the transmission of customer provided information between two or more points as specified by the customer." 39 Fed. Reg. 2761 (1974). The multipoint nature of the technological configuration employed, however, would appear to place the common carrier offering MDS in a position very close to the configuration desired by AT&T when it attempted to go into the broadcasting business: the carrier provides the means for radio dissemination of the signals from one point to many, and the user provides the information or the programming.


209 See text accompanying note 171 supra.
Bank, which operate under the auspices and the participation of the Department of Agriculture, not the FCC.210

A similar point can be made with respect to the proposition that communications common carriage necessarily implies the provision of a switched, point-to-point communications service. To be sure, such attributes are commonly found when considering traditional common carriers such as telephone and telegraph companies. But neither point-to-point service nor switching is an essential requirement of communications common carriage. Western Union, for example, offers a common carrier service called Mailgram which uses terminals installed in post offices to enable the user to send the same message to many places simultaneously, in effect establishing a point-to-multipoint service. Similarly, switching of communications channels is introduced into communications networks because it is unrealistic in almost every case for each user to have an independent, private, and separate line connecting him with every other user. Instead, in the telephone network, for example, a hierarchical network design using trunk lines and switching centers is employed to reduce the number of lines and to increase system flexibility and security.211

The jurisdictional division occasioned by treating leased-access channels as communications common carrier channels does, at least at first glance, raises a difficulty with regard to separating the intrastate and interstate uses of the channels provided by a single cable system for rate-making purposes. Even though there are different uses of CATV channels, interstate and intrastate services will use some physical plant jointly, such as the cable itself. Furthermore, when a leased-access channel normally serving intrastate functions is interconnected in such a manner as to activate federal regulation, the same physical facility will have been subject to two different regulatory schemes, again making cost and price allocations difficult.

It must be recalled, however, that procedures for separating costs to be allocated to interstate and intrastate uses of the same physical plant have long been used in setting telephone rates. No doubt, the procedure has changed over the years, as have the resulting cost allocations;212 but the presently employed separations process and mechanism are incorporated into the FCC’s own rules.213 This is not to suggest that the process is a simple one or that it is devoid of political considerations. Rather, the point is here made that the problem is not insurmountable and may even be mandated by the fact that although the national communications network is a unified system, the federal governmental system incorporates two levels of government. In fact, it has been suggested that the pricing of CATV services is detailed enough to require the kind of supervision which a local or state agency is competent to undertake and which a national body, such as the FCC, cannot responsively provide.214

210 See note 171 supra.
212 See generally D. GABEL, DEVELOPMENT OF SEPARATIONS PRINCIPLES IN THE TELEPHONE INDUSTRY (1955).
214 Common Carrier CATV, supra note 196, at 546-47.
A more meaningful problem with respect to federal-state relations in the context of cable television regulation may arise with respect to the technological specifications of cable channels. Because cable channels can be used to serve interstate or intrastate functions, it may be argued that the interstate, federally regulated uses must be assured that channels meeting federal standards will be available. Thus, in the telephony context, it has been observed that the demands of federally regulated, long-distance services have prompted the introduction of techniques designed to improve local channel quality. But in the telephony context, the answer to the question of how far a state may regulate in a manner inconsistent with federal technical requirements is still unsettled.

It seems clear, however, that if a state or local authority were to provide for technical standards that meet (or even exceed) the channel quality requirements established by the FCC for interstate or broadcast uses of CATV channels, then there would be no problem of state imposition of undue burdens on interstate commerce.

The most difficult and important obstacles to the acceptance of a model suggesting that federal regulation of some CATV channels is precluded are presented by the decision in the Midwest Video case. That case was decided after the promulgation of the 1972 Cable Rules, which provided for federal jurisdiction and preemption of leased-access channel regulation. It is clear that the plurality opinion contemplates the provision of cablecasting by the cable operator as a condition precedent to the carriage of television signals over the cable system. Thus, a strong case can be made that the FCC could condition the carriage of television signals on the cable operator's provision of leased-access channels. But whether or not the FCC can proceed one step further, asserting regulatory jurisdiction over these leased-access channels and other "local incidents" of cable television, precluding local regulation of such incidents, is a much more difficult position to sustain. For in so asserting jurisdiction and so preemting state and local regulation of leased-access channels, the Commission has had to overlook, ignore, or refuse to recognize that such channels are used

215 See GABEL, supra note 212, at 33-34.
216 It seems fairly clear that a federal court would defer to an administrative agency's requirements as to technical specifications of communications channels used for both interstate and intrastate purposes, although "administrative regulations" do not fit the precise language of the supremacy clause of the Constitution and although the Communications Act makes specific exemption for intrastate channels from federal regulation. The issue is on appeal from an FCC decision in Telerent Leasing Corp., 45 F.C.C.2d 204, on appeal sub nom. North Carolina Public Util. Comm'n v. United States, Civil No. 74-1220 (4th Cir., filed Feb. 27, 1974). In that case, the North Carolina Public Utilities Commission found that interconnection of nontelephone company equipment with the telephone network would cause significant damage to the intrastate telephone network. The PUC therefore prohibited such interconnection with regard to intrastate use of the network. The effect of the state decision would be to bar interconnection on all calls. In order to implement the Carterfone decision, 13 F.C.C.2d 420 (1968), which allowed for nontelephone company interconnection on interstate calls, the FCC in Telerent said that it had preempted the interconnect field and was requiring all carriers and connecting carriers subject to FCC jurisdiction at all to file interconnection tariffs with the FCC. Carterfone was based on a finding that there would not be significant damage to the telephone system if, subject to technical standards, nontelephone company equipment were interconnected with the telephone network. The issue of whether or not the FCC can so preempt is being appealed.
217 The easiest path for any local or state authority would be to incorporate the federal technical requirements by reference, thus ensuring that conflicts are kept to the bare minimum.
218 See text accompanying notes 62-70 supra.
as communications common carrier channels and, as such, are exempt from federal regulation under the terms of the Communications Act itself.

Further, in upholding the FCC's mandatory origination rules, the plurality in Midwest Video relied heavily on the fact that the local origination rules served the important policies of encouraging diversity and robust debate incorporated into the Communications Act. There can be no question, however, that classifying leased-access channels as common carrier channels and employing the existing legal structure to ensure nondiscriminatory access and to restrict to a minimum any cable operator control over the content of the communications would also serve the same purposes of the Communications Act and, indeed, the first amendment.

The critical question thus becomes: Who decides how these policy interests are to be served? If the regulatory model for communications common carriage is employed, then the congressional answer to that question is clear, and federal regulation of leased-access channels would be precluded. But if the functional analysis which would treat leased-access channels as communications common carrier channels is ignored, then no congressional intent is readily apparent because Congress simply has been unable, for whatever reason, to "speak" with regard to cable television regulation. Thus, by maintaining an analytical separation between cable television, in all its aspects, and common carriage, the FCC has been able to argue that in the absence of any apparent congressional intent, the Commission ought to be given a wide degree of latitude in deciding how Communications Act and first amendment policies are to be served.

No statutorily prescribed scheme [for CATV] has been imposed, nor does our action run counter to any expressed legislative purpose.219

Of course, it goes without saying that with no statutorily prescribed scheme imposed, there could be no expressed legislative purpose to which a Commission action could run counter. But by making such a statement, the FCC has given clear indication that until Congress acts, the Commission will proceed to regulate cable television as it sees fit. Admittedly, the mandate of the FCC is broad, but does that breadth include filling political voids left by Congress?

219 Teleprompter Cable Systems Inc., 33 P. & F. Radio Reg. 2d 1141, 1151 (1975) (denying local certificate of compliance to Teleprompter's Johnstown, Pennsylvania, cable system). For support for the proposition that the action of denying a local certificate of compliance did not run counter to any expressed legislative purpose, as no statutorily prescribed scheme for CATV had been imposed, the Commission cited General Tel. Co. v. FCC, 413 F.2d 390, 405 (D.C. Cir. 1969) and American Tel. & Tel. Co. v. FCC, 487 F.2d 965 (2d Cir. 1973). The latter case involved an FCC requirement that carriers seek "special permission" for rate increases in addition to the tariff-filing procedures specified by the Communications Act. In holding that the Commission's requirement circumvented the statutory plan for carrier-initiated rate increases, the court distinguished the statutory treatment of communications common carriers and cable television operators:

Since procedures and limitations for ancillary regulation of the CATV industry had not been provided for in the statute, the issue before the Court in United States v. Southwestern Cable Co., 392 U.S. 157 (1968) was significantly different from that in the instant case. In upholding the Commission's order in Southwestern, the court did not condone circumvention of statutorily prescribed procedures with consequent frustration of statutory purpose.

487 F.2d at 975, quoted at 52 F.C.C.2d at ———.
VI. Conclusion

Whether or not the Federal Communications Commission has jurisdiction under the terms of the Communications Act of 1934 to regulate some or all aspects of CATV is a question demanding much more than an academic exercise in the application of an old statute to a new technology. The issue is both critical and political: Who—Congress, courts or Commission—decides who—marketplace, Congress, courts, federal commissions, state agencies, local bodies, private entrepreneurs—decides how information services are to be made available, to whom, and for how much.

Such decisions are political ones, not only because they contribute to the larger social allocation and distribution of resources, but also because they obviously affect how and what information is received by citizens in our society. Important first amendment interests are therefore involved. This is particularly true with respect to those channels of CATV systems which could be made available on a first-come, nondiscriminatory basis, and which could be free from any control by the owner of the system as to the content of the information carried. To at least some observers, it is the availability of these leased-access CATV channels that presents a viable potential for aiding substantially in relieving what has been seen as a crisis caused by growing demands by numerous groups for access to "the media."

The FCC has conditioned the carriage of television broadcast signals by CATV systems on the provision of program origination equipment and the availability of access channels of various kinds. Thus, as a purely logical matter, the FCC could also condition the carriage of television broadcast signals on a rule that the cable system operator engage in no services which might be classified as communications common carriage. If such a condition were imposed, then the suggestion that the FCC does not have jurisdiction over leased-access channels would be eliminated by hypothesis. Such elimination of jurisdictional uncertainty would, of course, represent a flagrant sacrifice of important policy objectives, announced and articulated by the FCC itself, in order to insulate FCC jurisdiction from attack.

But the FCC seems to have attempted to do precisely that, albeit less flagrantly, with regard to the leased-access channels of cable systems as described in the FCC's own rules. The Commission has avoided any language that indicates that these channels are used as a communications common carrier would use them. In so doing, the FCC has at least obfuscated the question of whether leased-access CATV channels might be excluded from FCC jurisdiction under the terms of the Communications Act itself because they are channels used for intrastate communications common carriage. Avoiding the communications common carrier model also means that the FCC is unable to provide the cable operator with complete assurance that he will not incur liability for such wrongs as libel for the carriage of communications over which the cable operator is supposed to have no control as to content. Thus, the cable operator must maintain some control, and his interests begin to diverge from the interests of those who
would desire to use those leased-access channels free of any involvement by the private system operator.

While designed to serve the policy of encouraging program diversity, the FCC rule allowing the cable operator to engage in program origination if he so desires also has unfortunate side effects. Users of leased-access channels may be viewed by the operator as competitors to be discouraged, not as participants in the process for the provision of information from diverse and antagonistic sources to a wide audience. If there were ever any fears that cable operators, as controllers of a source of many communications channels, would have undue power, these fears have manifested themselves in the restrictions imposed on the programming provided by the cable operator himself, restrictions closely paralleling those of television broadcast programming made necessary by the scarcity of that medium. But these fears and those restrictions can be discarded if, with respect to nonbroadcast channels, the cable operator is viewed merely as the provider of a communications facility, and nothing more.

Relying on a communications common carrier model would prohibit the cable operator from exercising any control over the content of the communications carried; it would require that the facilities be available, like the telephone system, on a first-come, nondiscriminatory basis; and it would require that the communications facilities be available at reasonable, yet compensatory, prices. But most importantly, relying on the communications common carrier model would place the cable operator in a position to support the use of leased-access channels and to encourage the establishment of new sources of information and information services in our society.

Control over information and information services in our society is indeed a great source of power. The existence of the Federal Communications Commission is testimony to congressional realization of that fact. The Communications Act of 1934 which created that Commission speaks directly to the regulation of communications common carriers and radio broadcasters. In contrast, the application of that 40-year-old Act to cable television has been marked by Commission vacillation and self-reversal, both with respect to its own jurisdiction and its own substantive rules. There is no legislative history to aid the Commission in the regulation of cable television. There are no true standards or specific procedures to guide the Commission in its application of its self-assumed, broad delegation of power over cable television. The need for congressional action is apparent and, with regard to cable television regulation, such action is long overdue.

The jurisdictional division between interstate and intrastate uses of our unified telecommunications network, however, suggests broader congressional action might be warranted. In the over 40 years since the Communications Act was enacted, there has been a significant shift in the Constitutional interpretation of the power of the federal government under the commerce clause of article I,
§ 8. In this light, the FCC's increase in power, whether self-delegated or not, serves to signal the need for a fresh new approach toward the development of a national communications policy—the kind of broad, sweeping reappraisal that only Congress, together with the President, can perform.

To the FCC, the cable operators, the copyright owners, the television broadcasters, the Office of Telecommunications Policy, the telephone companies—to all the actors with some element of input and control over cable television systems in particular, and communications systems in general, congressional action means wide-open, political debate. And such debate may portend, for those with vested interests in the regulatory process, some loss of control or power. To the Congress, on the other hand, the social power inherent in control over communications channels assures that addressing the problem of the regulation of cable television systems means grappling with important and difficult political issues. But, after all, that is what the Congress is elected to do.

N.B. Since this article went to press, the Ninth Circuit rendered its decision in American Civil Liberties Union v. FCC, 35 P. & F. Radio Reg. 2d 1 (9th Cir., Sept. 16, 1975). The court there specifically rejected the ACLU's argument that access channels should be regulated as common carrier channels, notwithstanding the court's observation that access channels possess technical characteristics that make their regulation as a common carrier possible. However, the question of the FCC's jurisdiction was never addressed in the opinion. It was apparently never argued that the FCC already regulates leased-access channels according to the basic principles of common carrier regulation, and that, accordingly, FCC jurisdiction over them might be questioned. Cf. text accompanying note 166, p. 172 supra.