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# THE FCC, CABLE TV, AND VISIONS OF VALHALLA: JUDICIAL SCRUTINY OF COMPLEX RULEMAKING AND INSTITUTIONAL COMPETENCE

Allen E. Shoenberger\*

A number of recent decisions by the United States Court of Appeals for the District of Columbia,<sup>1</sup> its counterpart for the Eighth Circuit,<sup>2</sup> and the United States Supreme Court,<sup>3</sup> have substantially curtailed the power of the FCC to regulate the growth of cable television. Such regulation has proved to be a very complicated and extended saga of FCC activity,<sup>4</sup> one measure of which was the extraordinary justification for publishing a per curiam opinion in *Home Box Office, Inc. v. FCC*: "not because it has received less than full consideration by the court, but because the complexity of the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the panel."<sup>5</sup>

Both the per curiam opinion for the D.C. Circuit<sup>6</sup> and the opinion of Judge Markey<sup>7</sup> for the Eighth Circuit are extended treatments of the complicated administrative and constitutional issues raised. Conversely, the opinion by the Supreme Court treated a very narrow aspect of these problems.<sup>8</sup> The thrust of this article is primarily to

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1. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

2. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), aff'd 99 S.Ct. 1435 (1979) [hereinafter cited as *Midwest Video*]. The Supreme Court's treatment of these issues will be discussed in notes 168-201 *infra* and accompanying text. The focus of this article remains on the treatment of similar issues at the level of the United States courts of appeals.

3. 99 S.Ct. 1435 (1979).

4. See, e.g., the diary of FCC activity with respect to subscription television, in *Home Box Office*, 567 F.2d at 17 n.5. For an excellent article and citations to the enormous amount of literature in the area of cable television see, *The F.C.C.'s Cable Television Jurisdiction Deregulation by Judicial Fiat*, 30 U. FLA. L. REV. 218 (1978).

5. 567 F.2d at 17 n.1.

6. Wright, MacKinnon, circuit judges, and Weigel, district judge, sitting by designation.

7. Chief judge of the Court of Customs and Patent Appeals, sitting by designation, Stephenson and Webster, circuit judges. Judge Webster is currently the Director of the Federal Bureau of Investigation.

8. For a discussion of the Supreme Court opinion, see part VII of this article.

question the propriety of parts of the two courts of appeals' decisions, both in constitutional law and administrative law. The treatment by the Supreme Court only emphasizes some of the issues raised herein.<sup>9</sup> In particular, all of the decisions raise significant questions about the capacity of the administrative agencies and/or Congress and the courts to deal with increasingly complicated technical, economic, legal, and political problems. Each of the cases deals with administrative rulemaking, and in particular with rules having potentially far ranging impact upon the social, political and personal life of large segments of the American public.

This article will first discuss these courts of appeals decisions with reference to their treatment of the scope of the jurisdictional grant by Congress to the FCC. It will be argued that inadequate deference was given the FCC's own determination that it possessed jurisdiction to rulemake, and that neither decision adequately reflects considerations of the appropriate locale for decisionmaking. The question of which of the courts, congress or the agencies is the proper locus of decisionmaking is explored and a conceptual framework suggested based upon the idea of institutional competence. There are serious risks associated with improper assignment of the locale for decision. Moreover, these court opinions exemplify the danger of misuse of one of the judiciary's most powerful institutional strengths, a search for justification. Courts may demand so many additional levels of justification and consistency from the agencies that in practical terms no agency can ultimately rulemake. This danger is particularly acute with such complicated issues as the ones treated in these cases. Yet, only the dissent in the Supreme Court closes with the primary issue, who ought to decide.

The core question is twofold, encompassing first legal, and second policy considerations. First, to what extent has Congress delegated power to the FCC to regulate the development of cable television. Second, does Congress and/or the FCC have the capacity as institu-

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9. In the majority of cases, review of significant rulemaking activity by federal agencies stops at the level of the various courts of appeals. Thus only one of these decisions was reviewed by the Supreme Court. Moreover, the Supreme Court's treatment of the decision reviewed dealt only with a small part of the decision below. The remainder, including significant holdings on jurisdictional issues, as well as the style of analysis by both courts of appeals, remains as precedent for other courts of appeals to follow. The limited Supreme Court review of one of the court of appeals decisions is treated below at part VI.

tions to shape authoritatively *at this moment* an industry so caught up in flux. Judge Markey, for example, described the FCC rules on mandatory access as, "consistently and continually revised, unenforced, withdrawn, waived and abandoned."<sup>10</sup> The core consideration in the policy context of such a statement is whether it indicates the need for Congressional intervention or, alternatively, indicates the health and vitality of the administrative process.

### I. THE ACCESS DISPUTE

The dispute in *Midwest Video Corp. v. FCC*<sup>11</sup> centered on the major changes in cable television regulations promulgated by the FCC in its *1976 Report*.<sup>12</sup> These changes dealt with the right of access to a cable television system by persons other than the owners of the system. The three major changes in these rules accomplished by the *1976 Report* were:

(1) The access rules were no longer applicable to a system depending upon whether or not the system was located within the top 100 marketplaces for television. Instead, the rules were applicable to systems with 3500 or more subscribers.<sup>13</sup>

(2) A prior requirement that all cable television systems must have the capacity to carry 20-channels was extended from March 31, 1977 until June 21, 1986 for most, but not all, existing systems.<sup>14</sup>

(3) Four public access channels were required only of systems bearing sufficient capacity and demand for full-time access. Other systems could conglomerate access on one or more channels.<sup>15</sup> The four channels were to include one education channel and one local government channel to be offered without charge for the first five years.<sup>16</sup>

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10. *Midwest Video*, *supra* note 2, at 1033 n.17.

11. *Midwest Video*, *supra* note 2.

12. *Report and Order in Docket No. 20508*, 59 F.C.C.2d 294 (1976) [hereinafter cited as *1976 Report*].

13. *Midwest Video*, *supra* note 2, at 1033-34, *1976 Report*, *supra* note 12, at 303-06 (citing 47 C.F.R. § 76.252-56 (1976)).

14. *Midwest Video*, *supra* note 2, at 1033-34, *1976 Report*, *supra* note 12, at 321-24 (citing 47 C.F.R. § 76.252(b) (1976)).

15. *Midwest Video*, *supra* note 2, at 1034, *1976 Report*, *supra* note 12, at 314-16 (citing 47 C.F.R. § 76.254 (1976)).

16. 47 C.F.R. § 76.256(c)(1) (1976). Judge Markey, in *Midwest Video*, *supra* note 2, at 1034,

These rules were challenged in *Midwest Video* as: "(1) inadequately supported by the record (2) beyond the jurisdiction of the Commission (3) violative of the free speech clause of the first amendment and (4) violative of the due process clause of the fifth amendment."<sup>17</sup>

The Eighth Circuit, per Judge Markey, held that the dispositive issue was the jurisdictional issue and invalidated the regulations<sup>18</sup>

listed the major rules as follows:

- (1) that operators of cable systems having 3500 or more subscribers designate at least four channels for access users, one channel each for public access, education access, local government access, and leased access. 47 C.F.R. § 76.254(a).
- (2) that, until demand exists for full time use of all four access channels, access programming may be combined on one or more channels. 47 C.F.R. § 76.254(b).
- (3) that at least one full channel for shared access be provided, but if a system had insufficient activated channel capacity on June 21, 1976, it could provide whatever portions of channels are available for such purposes. 47 C.F.R. § 76.254(c).
- (4) that at least one public access channel be forever supplied without charge. 47 C.F.R. § 76.256(c)(2).
- (5) that a reasonable charge for production costs may be charged for live studio programs longer than five minutes. 47 C.F.R. § 76.256(c)(3).
- (6) that operators establish rules providing for access on a first-come, nondiscriminatory basis and prohibiting the transmission of lottery information, obscene or indecent matter, and commercial and political advertising. 47 C.F.R. § 76.256(d)(1) (on public channel). 47 C.F.R. § 76.256(d)(2) (on educational channel).
- (7) that cable operators exercise no other control over content of access programs. 47 C.F.R. § 76.256(b).
- (8) that educational and local government access be offered without charge for the first five years. 47 C.F.R. § 76.256(c)(1).
- (9) that operators establish rules for leased access channels on a first-come, nondiscriminatory basis, requiring sponsorship identification and an appropriate rate schedule, with no control over program content except to prohibit lottery information and obscene or indecent material. 47 C.F.R. § 76.256(d)(3).
- (10) that each cable supply equipment and facilities for local production and presentation of access and lease programs. 47 C.F.R. § 76.256(a).
- (11) that equipment in new cable systems have a capacity of two-way, nonvoice communication and a minimum of 20 channels. 47 C.F.R. § 76.252(a).
- (12) that cable systems in operation within a major television market before March 31, 1972, and other systems in operation before March 31, 1977, shall have ten years from the effective date (June 21, 1976) of the *1976 Report* to comply. 47 C.F.R. § 76.252(b).

17. *Midwest Video*, *supra* note 2, at 1029.

18. *Id.* at 1035. The Eighth Circuit also dealt with the issue of whether the FCC had not impermissibly made the cable systems into common carriers. That issue became the dispositive issue in the view of the United States Supreme Court. See notes 168-204 *infra* and accompanying text. However, that part of the opinion by Judge Markey received little emphasis in the context of the entire decision. It takes up only two of the thirty-four pages of the decision by the Eighth Circuit. See *Midwest Video*, *supra* note 2, at 1050-52.

“because: (1) the [FCC] statute provides no jurisdiction; (2) the regulations are not ‘reasonably ancillary’ to the Commission’s responsibilities for regulation of broadcast television; (3) objectives do not confer jurisdiction; (4) the Commission’s ends do not justify its means; (5) the means are forbidden within the Commission’s statutory jurisdiction.”<sup>19</sup>

Although the Supreme Court affirmed the Eighth Circuit’s decision, it did so without discussing this part of the opinion.<sup>20</sup>

## II. THE *Home Box Office* DISPUTE

This case dealt with the “pay cable” rules promulgated by the FCC in its Second Report and Order,<sup>21</sup> which had the effect of

19. *Id.* at 1035.

20. *FCC v. Midwest Video Corp.*, 99 S.Ct. 1435 (1979). The Supreme Court review of this decision will be dealt with below at part VII.

21. The “pay cable” rules are set forth in *Home Box Office, Inc. v. FCC*, 567 F.2d at 18-19 n.8 (quoting 17 C.F.R. § 76.225 (1975)) as follows:

Cable television system operators or channel lessees engaging in origination or access cablecasting operations for which a per-program or per channel [sic] charge is made shall comply with the following requirements:

(a) Feature films shall not be cablecast by a cable television system subject to the mandatory signal carriage requirements of Subpart D of this Part 76, except as provided in this paragraph.

(1) A feature film may be cablecast if—

(i) The film has been in general release in theaters anywhere in the United States for three (3) years or less prior to its proposed cablecast;

(ii) A conventional television broadcast station licensed in the market of the cable television system holds a present contractual right to exhibit the film. For purposes of this subdivision, a television station affiliated with a television network will be deemed to hold a present contractual right to exhibit a film if the network to which it is affiliated holds such a right;

(iii) The film has been in general release in theaters anywhere in the United States for more than ten (10) years prior to its proposed cablecast and the film has not been exhibited in the market of the cable television system over conventional television for three (3) years prior to its proposed cablecast. Once a film has been cablecast in the market pursuant to this subdivision, or broadcast on a subscription basis pursuant to § 73.643(a)(1)(iii), such film may thereafter be cablecast in the market without regard to its subsequent exhibition over conventional television;

(iv) The film is in a foreign language;

(2) Feature films otherwise excluded by this parag[r]aph may be cablecast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market of the cable television system, or that the owners of the broadcast rights to the films, even absent the

existence of subscription television, would not make the films available to conventional television.

(3) Every cable television system operator or channel lessee engaging in origination or access cablecasting pursuant to this paragraph shall maintain, or cause to be maintained, for public inspection a file listing the title of the film, the date on which it was cablecast and the provision of this paragraph pursuant to which it was cablecast. When a feature film is cablecast pursuant to paragraph (a)(1)(ii) of this section, the station or network serving the market and holding a present contractual right to exhibit the film shall be specified. These files shall be retained for a period of two years.

(b) Sports events shall not be cablecast live by a cable television system subject to the mandatory signal carriage requirements of Subpart D of Part 76, except as provided in this paragraph.

(1) A specific event may be cablecast if the event has not been broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast. If a regularly recurring event takes place at intervals of more than one year (e.g., summer Olympic games), the event shall not be cablecast if it has been broadcast live over conventional television in the market during any one of the ten (10) years preceding the proposed cablecast.

(2) New specific sports events that result from the restructuring of existing sports shall not be cablecast until five (5) seasons after their first occurrence. Thereafter, subscription cablecasts shall be governed by paragraph (b)(1) of this section.

(3) The number of non-specific events which may be cablecast in any given season shall be determined as follows:

(i) If less than twenty-five (25) percent of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during each of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast.

(ii) If twenty-five (25) percent or more of the events in a category of non-specific events were broadcast live over conventional television in the market of the cable television system during any one of the five (5) seasons preceding the proposed cablecast, the number of events in the category cablecast shall not exceed fifty (50) percent of the number of events in the category not broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast. However, if the number of events in the category to be broadcast in the current season is a reduction from the number of events broadcast in that season among the preceding five (5) seasons when the largest number of events in the category were broadcast, the number of events in the category which may be cablecast pursuant to this subparagraph shall be reduced in proportion to the reduction in events broadcast.

(c) Not more than ninety (90) percent of the total cablecast programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but absent a showing of good cause, the percentage of such programming hours may not exceed ninety-five (95) percent of the total cablecast programming hours in any calendar month.

sharply curtailing the ability of a cable caster<sup>22</sup> to present feature films and sports programs if a special charge is made for this material, i.e., the idea of the home box office.<sup>23</sup> In addition, the rules limited to ninety percent the time that may be spent on movies and sports programs and barred commercial advertising on cable channels on which a direct viewer charge is placed.<sup>24</sup>

These rules were challenged as a major, unexplained and hence arbitrary change of prior Commission policy.<sup>25</sup> The circuit court held: that the power of the FCC to regulate cable television extends only "to the extent 'reasonably ancillary' to the Commission's jurisdiction over broadcast television;"<sup>26</sup> that the purposes of such regulation are limited at the outer boundary by allowing the Commission to achieve "long established" goals or the protection of its "ultimate purposes;"<sup>27</sup> and that this standard is not met by the Commission's rules which prevent "siphoning" of feature films and sports material from conventional broadcast television to pay cable in the absence of sufficient demonstration that the Commission's objectives are ones "for which the Commission could legitimately regulate the broadcast media."<sup>28</sup> Moreover, the Commission failed to explain adequately why it was concerned with "siphoning"<sup>29</sup> or indeed that siphoning will cause harm.<sup>30</sup> The Commission also failed

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(d) No commercial advertising announcements shall be carried on subscription channels during such operations except before and after such programs for promotion of other programs for which a per-program or per-channel charge is made.

47 C.F.R. § 76.225 (1975), as amended by Second Report and Order, 40 F.R. 52731 (1975), 35 RADIO REG.2d (P. & F.) 767 (1975).

22. The origination of signals on a cable television system.

23. These rules only applied if a cable system also carried signals broadcast over the airways. 47 C.F.R. §§ 76.5(a), 76.225 (1975).

24. For purposes of this article the entire issue of subscription broadcast television stations (over the air broadcasting which can only be received by viewers for a fee or charge) has been ignored. Rules similar to the rules cited above in footnote 21 were also promulgated by the F.C.C., 47 C.F.R. § 73.643 (1975) as amended by Second Report and Order in Docket 19554, 40 F.R. 52731 (1975), 35 RADIO REG.2d (P. & F.) 767 (1975). Those rules were upheld in *Home Box Office, Inc. v. FCC*, 567 F.2d at 18 (1977).

25. *Home Box Office, Inc. v. FCC*, 567 F.2d at 17-18 (1977).

26. *Id.* at 26.

27. *Id.* at 28.

28. *Id.* at 34. The court notes that in oral argument the vocabulary of the Commission had changed from the pejorative "siphoning" to the more neutral term "migration." *Id.* at 21 n.20.

29. *Id.* at 36-37.

30. *Id.* at 39.



to demonstrate adequately a basis for its conclusions relating to various anti-trust issues.<sup>31</sup> In addition, although challenged on various first amendment grounds and held not to be content regulations,<sup>32</sup> the court held the no-advertising rules, the ninety percent rules and the sports and feature film rules were not sufficiently justified on the record as serving an important and substantial government interest.<sup>33</sup> In any case, due process required setting aside the results of the informal rulemaking in this case because of widespread *ex parte* contacts with commissioner or commission employees.<sup>34</sup>

### III. THE JURISDICTIONAL GRANT TO THE FCC

Underlying the general and a number of the specific holdings of the decisions are all three courts' doubts that Congress has conferred as broad a scope of power upon the FCC to regulate CATV, as the FCC has asserted. In two earlier cases the United States Supreme Court, however, had upheld the power of the FCC to assert jurisdiction over some aspects of CATV.

In the first case, *United States v. Southwestern Cable*,<sup>35</sup> a very narrow issue was presented to the Court. The FCC had promulgated various rules regulating the rights of CATV stations to import distant television signals into the top 100 television markets<sup>36</sup> and requiring CATV systems to carry the signals of stations located in the service area of a CATV system. The validity of the specific rules was not an issue, but only whether the FCC had the authority under the

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31. *Id.* at 40-43. The court found that the Commission inadequately resolved traditional antitrust objections to the strengthening of broadcasters' monopoly over the feature films and sports broadcasting industries. Further, the Commission failed to take into account the negative impact of the rules on its otherwise long-standing policy favoring diversification of control of programming choices. The court also failed to justify how the public interest considerations which underlie the rule outweigh the public interest considerations in support of unfettered competition.

32. *Id.* at 49.

33. *Id.* at 49-50.

34. *Id.* at 57. The Commission provided a 60 page document in response to the *sua sponte* order by the court. The document indicated numerous contacts by each of the 15 parties before the court as well as with members of Congress, members of the trade press and representatives of various performing arts groups. *Id.* at 52. See especially *Id.* at 52 nn.108 & 109. Circuit Judge MacKinnon concurred specially on this part of the opinion at 61.

35. 392 U.S. 157 (1968).

36. *Id.* at 162-67.

Communication Act to regulate CATV systems, and if so whether it had the specific authority in the case to issue the prohibitory order restraining importation of a television signal from Los Angeles into the San Diego area pending hearing.<sup>37</sup> The Court ruled that the Communications Act of 1934<sup>38</sup> granting the FCC authority to regulate broadcasting and other communications "amply suffice[s] to reach respondents' [CATV] activities"<sup>39</sup> and rejected arguments that such importation within California was not interstate. Moreover, the Court rejected the argument that the FCC lacked power to regulate CATV because the FCC had unsuccessfully sought guidance from Congress about its authority to regulate CATV.<sup>40</sup> Instead, the Court characterized the requests of Congress as merely evidence of uncertainty about authority as well as "understandable preference for more detailed policy guidance than the Communication Act now provides."<sup>41</sup> The opinion emphasized that in 1934 Congress had acted in a field "both new and dynamic" and therefore gave the Commission, "a comprehensive mandate," with, "not niggardly but expansive powers."<sup>42</sup> Therefore, "the Commission reasonably concluded that regulatory authority over CATV is imperative if it is to perform with effectiveness certain of its other responsibilities."<sup>43</sup> The Commission thus acted properly to *protect* the effectiveness of its regulatory policies with respect to UHF and educational TV broadcasters,<sup>44</sup> for the unregulated explosive growth of CATV had jeopardized the policy of encouraging both UHF and educational

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37. *Id.* at 166-67.

38. 47 U.S.C. §§ 151, 152(a) and 153(a), (b) (1976).

39. 392 U.S. 157, 168 (1968).

40. *Id.* at 170.

41. *Id.* The Court noted that the 1966 request for legislation requested Congress to "confirm [the Commission's] jurisdiction and . . . establish such basic national policy as it deems appropriate." *Id.* at 170 n.31 (quoting H.R. REP. No. 1635, 89th Cong., 2d Sess., 16 (1966)). The one time Congress did take affirmative action regarding cable television was in the context of the revision of the Copyright Act, 17 U.S.C. § 11 (1976). The impact has been in part to reverse the results of a number of Supreme Court decisions such as *Teleprompter Corp. v. C.B.S.*, 415 U.S. 394 (1974). The results of the congressional intervention were aptly described by Professor Gorman: "The cable-television provisions are by far the most lengthy and complex provision of the new Copyright Act. They must be perused to be believed, if not understood." Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856, 878 (1978).

42. 392 U.S. at 173 (citing *N.B.C. Co. v. United States*, 319 U.S. 190, 219 (1943)).

43. *Id.*

44. *Id.* at 176.

TV.<sup>45</sup> Moreover, Congress endorsed both these purposes.<sup>46</sup> The Court then stated:

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions not inconsistent with law," as "public convenience, interest or necessity requires." 47 U.S.C. § 303(r). We express no views as to the Commission's authority, if any, to regulate CATV under other circumstances or for any other purposes.<sup>47</sup>

In the second case, *United States v. Midwest Video Corp.*,<sup>48</sup> the Supreme Court once again upheld the power of the FCC in a limited area of regulation of CATV. In this case, the Supreme Court dealt with the FCC rules requiring that CATV systems with 3,500 or more subscribers originate programming themselves.<sup>49</sup> Justice Brennan announced the judgment of the Court (three other justices joined his opinion) which held the rules within the Commission's power were "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."<sup>50</sup> Earlier in the opinion Justice Brennan noted that the Commission's concern was "not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies."<sup>51</sup> Justice Brennan asserted that:

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45. *Id.* at 175.

46. *Id.* at 174-75.

47. *Id.* at 178.

48. 406 U.S. 649 (1972).

49. On October 24, 1969, the Commission adopted a rule which provided that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." *Id.* at 653-54 (quoting 47 C.F.R. § 74.1111(a), *revised on other grounds*, 47 C.F.R. § 76.201(a) (1972)).

50. *Id.* at 663.

51. *Id.* at 653 (quoting from 15 F.C.C.2d 417, 422 (1968)).

[T]he Commission's legitimate concern in the regulation of CATV is not limited to controlling the competitive impact CATV may have on broadcast services. *Southwestern* refers to the Commission's "various responsibilities for the regulation of television broadcasting."

These are considerably more numerous than simply assuring that broadcasting stations operating in the public interest do not go out of business . . . . Since the avoidance of adverse effects is itself the furtherance of statutory policies, no sensible distinction even in theory can be drawn along those lines. More important, CATV systems, no less than broadcast stations . . . may enhance as well as impair the appropriate provision of broadcast services. Consequently to define the Commission's power in terms of the protection, as opposed to the advancement, of broadcasting objectives would artificially constrict the Commission in the achievement of its statutory purposes and be inconsistent with our recognition in *Southwestern* "that it was precisely because Congress wished, 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' . . . that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.'"<sup>52</sup>

Justice Brennan described the critical question as whether the Commission reasonably determined that the origination rule would further the achievement of long established regulatory goals.<sup>53</sup> The Court found that the Commission's determination was reasonable.<sup>54</sup>

Chief Justice Burger, however, cast the deciding vote in that case and asserted in his concurring opinion:

[T]he Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.<sup>55</sup>

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52. *Id.* at 664-65.

53. *Id.* at 667.

54. *Id.* at 668.

55. *Id.* at 676 (Burger, C.J., concurring).

The Chief Justice expressed his doubts about the correctness of the decision by the Commission, but deferred to the Commission's "generations of experience" and "feel" for the problem.<sup>56</sup>

Justice Douglas wrote the dissenting opinion<sup>57</sup> which asserted that: "Compulsory origination of programs is . . . a far cry from the regulations of communications approved in *Southwestern Cable*."<sup>58</sup> In particular, origination requirements required CATV owners to invest in new equipment and an entirely new and different cast of personnel.<sup>59</sup> Justice Douglas also asserted: "The upshot of today's decision is to make the Commission's authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee."<sup>60</sup>

#### IV. THE STANDARD IN THE COURTS OF APPEALS

Both the courts of appeals in *Home Box Office*<sup>61</sup> and in *Midwest Video*<sup>62</sup> interpreted these decisions by the Supreme Court as marking the outer parameters of the power of the FCC. The *Home Box Office* opinion interprets the Supreme Court decisions as allowing the Commission to act only for ends for which it could also regulate broadcast television, and to go no further than to regulate to achieve "long established" goals or to protect its "ultimate purposes."<sup>63</sup> Both courts of appeals also emphasize the importance of the "reasonably ancillary" standard.<sup>64</sup>

The opinions by the courts of appeals, however, display a cramped reading of the Supreme Court opinions in *Southwestern*

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56. *Id.*

57. Justices Stewart, Powell and Rehnquist joined in that dissent.

58. 406 U.S. at 647-48 (Douglas, J., dissenting).

59. *Id.* at 648.

60. *Id.* at 681.

61. 567 F.2d at 28.

62. *Midwest Video*, *supra* note 2, at 1038.

63. 567 F.2d at 28. Judge Markey described the mandatory access, channel construction and equipment availability rules as ones that "burst through the outer limits of the Commission's delegated jurisdiction." *Midwest Video*, *supra* note 2, at 1038.

64. *Midwest Video*, *supra* note 2, at 1037-40; 567 F.2d at 27 ("reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968))).

*Cable*<sup>65</sup> and *United States v. Midwest Video*.<sup>66</sup> Moreover, this article will argue that all four opinions evidence inadequate deference to the determinations of the FCC as to its own jurisdiction.

#### A. *The Cramped Reading of the Supreme Court Opinions*

First, it is most important to recognize that the decisions of the Supreme Court in both earlier cases resulted in a finding that jurisdiction exists. Thus, the Supreme Court needed to consider only the existence of jurisdiction in those particular cases. The Court did not reach, for it did not need to, the outer parameters of FCC jurisdiction. As Justice Brennan asserted in *United States v. Midwest Video*, *Southwestern* sustained the jurisdiction, "of the Federal Communications Commission to regulate the new industry, at least to the extent 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.'"<sup>67</sup>

Second, both decisions by the courts of appeals appear to place great weight in their analyses upon the concurring opinion of Chief Justice Burger in *United States v. Midwest Video*.<sup>68</sup> Judge J. Skelly Wright of the D.C. Circuit, however, has accurately described the "*United States v. Midwest Video* precedent [as] . . . not as fragile as my brethren appear to believe."<sup>69</sup>

Judge Wright further observed:

It is of course true that the Chief Justice, whose vote determined the outcome in [*United States v.*] *Midwest Video*, expressed his feeling that "the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions

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65. 392 U.S. 157 (1968).

66. 406 U.S. 649 (1972).

67. *Id.* at 650-51 (emphasis added).

68. See note 55 *supra* and accompanying text.

69. *National Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.2d 601, 630 (D. C. Cir. 1976) (dissenting opinion). The case invalidated FCC regulations governing cable system leased access channels that provide two-way, point-to-point, non-video communications. Circuit Judge Wilkey wrote the opinion invalidating the regulations on two grounds: (1) for failing to meet the "ancillary to broadcasting" standard; and (2) for falling within the bar of 47 U.S.C. § 152(b) (1976). Section 152(b) denies the Commission authority over intra-state common carrier applications. Circuit Judge Lumbard concurred solely on the basis of the first ground. Circuit Judge J. Skelly Wright dissented on both grounds.

of the Commission and the courts." . . . Yet this expression of doubt was sandwiched among paragraphs explaining the need to allow the Commission "wide latitude" in the absence of congressional action to accommodate the terms of the Communications Act to new developments in the field of communications. Moreover, the decisive factor for the Chief Justice was that cable systems are "dependent totally on broadcast signals . . ." By "interrupt[ing] the signal and put[ting] it to their own use for profit, they take on burdens, one of which is regulation by the Commission."<sup>70</sup>

The context of both of these decisions by the Supreme Court, however, is the examination of the scope of congressional delegation to the FCC. In that context, the most important text is not that of the opinions of the Supreme Court, but rather the statutory text. The language of section 2(a) (now section 152(a)) of the Communications Act,<sup>71</sup> is broad and has been recognized by the Supreme Court as a grant of regulatory power.<sup>72</sup> That section provides in part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States and to all persons engaged within the United States in such communication . . ." <sup>73</sup> "[Given] . . . the evidence of congressional intent that [t]he Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,"<sup>74</sup> a narrow reading of the power of the FCC appears out of place.

While the language used by Chief Justice Burger in his concurrence in *United States v. Midwest Video*<sup>75</sup> appears to sanction a narrow reading, it is important to recognize the practical result of the holding. *United States v. Midwest Video*<sup>76</sup> held that the FCC

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70. National Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d at 630 (quoting Burger, C.J., in *United States v. Midwest Video*, 406 U.S. at 675-76).

71. 47 U.S.C. § 152(a) (1976).

72. See *United States v. Midwest Video*, 406 U.S. at 660, where Justice Brennan asserts that *Southwestern* so held.

73. 47 U.S.C. § 152(a) (1976).

74. 406 U.S. at 659-60 (quoting from *United States v. Southwestern Cable Co.*, 392 U.S. at 167-68).

75. 406 U.S. 649. See also, note 48 *supra* and accompanying text.

76. *Id.*

had the power to require that cable owners originate programming. This meant that the cable owner was required not only to have the facilities at the head end of a cable system to video tape performances but also to assure that some performances actually occur.

Throughout most of its history cable television has had one primary function: the retransmission of signals and programming already available over the air. However, cable television offers through a large number of channels the capacity to feed additional programming into homes. To do this will cost money, both for the additional equipment necessary at the head end of the cable system, and also for the actual programming to be transmitted. Of these factors, the latter is the more significant.

The cost of the head end equipment is substantial, but reasonable in light of the size of systems to which the requirements apply. Comments in response to the notice of proposed rulemaking in *United States v. Midwest Video* indicated that the cost of the equipment required an annual outlay of less than \$21,000 for black and white systems and less than \$56,000 annually for color systems.<sup>77</sup> To put this in perspective, the requirement applied only to systems of 3,500 subscribers and above. The Commission calculates that such a system would have revenue of approximately \$300,000 per year at the prevailing charge rate of \$6.50 per month.<sup>78</sup> This works out to a

77. 406 U.S. at 671. Justice Douglas wrote in dissent in *United States v. Midwest Video*:

Compulsory origination of programs is, however, a far cry from the regulation of communications approved in *Southwestern Cable*. Origination requires new investment and new and different equipment, and an entirely different cast of personnel.

. . . .

. . . The idea that a carrier or any other person can be drafted against his will to become a broadcaster is completely foreign to the history of the Act, as I read it.

. . . There is not the slightest clue in the Act that CATV carriers can be compulsorily converted into broadcasters.

The plurality opinion performs this legerdemain by saying that the requirement of CATV origination is "reasonably ancillary" to the Commission's power to regulate television broadcasting. *Id.* at 677-80 (citations omitted).

In a footnote, Justice Douglas refers to the portion of the opinion by Chief Justice Burger that, "reaches the same result by saying, 'CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.'" *Id.* at 680 n.2. The idea is that the cable owner, as a price of taking the broadcast signal and retransmitting it, must also "take the bitter with the sweet." (Justice Rhenquist's words in *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974)).

78. 3,500 subscribers x \$650/month x 12 months = \$295,750. To obtain 3,500 subscribers,



cost per subscriber of less than fifty cents per month for a black and white system. The access rules and the minimum twenty channel capacity rules apply to similar size cable systems.<sup>79</sup>

However, the potentially most significant costs involve the production of programming to fulfill the program origination requirement. It can easily cost \$500 to produce a single hour of programming.<sup>80</sup> Yet the Eighth Circuit in *Midwest Video*<sup>81</sup> quite clearly considered that the mandatory access rules went far beyond the issues involved in *United States v. Midwest Video*.<sup>82</sup> The plain fact, however, is that if there is cable capacity to carry the access channels,<sup>83</sup>

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a system must, in general, serve a community having a population of 25,000 or more. 1976 Report *supra* note 12 at 303.

79. See note 13 *supra*, and especially 47 C.F.R. §§ 76.252(a), 76.254(a) (1978).

80. The cost of program production of broadcast quality can easily reach far higher figures. The show "Wonderwoman," for example, costs \$150,000 per hour. For cheaper production, \$50,000-75,000 is a reasonable figure. Non-broadcast quality production can be far cheaper. But, at the minimum, an hour of programming requires about one work day and, with free help, will cost \$500. The Catholic Television Network in Chicago charges \$550 per hour for equipment, studio, and production area. It could easily take a full day of work, however, to end up with an hour of tape [i.e. \$3,000 plus]. Telephone interviews with Jim Kosub, Video Director, Media Services, Loyola University of Chicago, and with the Catholic Television Network, Chicago (June 7, 1978). One of the most important variables in cost is the time of the people needed to do the production, both to operate cameras and other equipment, and to serve as actors, writers, etc. Most cablecasters depend largely upon public access groups to produce what they put on the cable. Such groups depend upon volunteers, and beg, borrow or rent equipment to videotape their productions.

81. *Midwest Video*, *supra* note 2, at 1039. "But that form of 'access' [in *United States v. Midwest Video*] was not the *mandatory* access required by the present rules. Nor did that form of 'access' involve the extensive and expensive construction, and equipment purchase and installation, required by the present rules." *Id.*

82. 406 U.S. 649.

83. The rules would require that many systems convert from 12 to 20 channels. There is also a greater per-mile cost for new construction of a 20 channel system as opposed to a 12 channel system. The cost of conversion may range from \$200 per mile (replacement of one component in the cable), up to \$5,000 to \$7,000 per mile for complete replacement of the plant in rural areas. Replacement of the plant in densely populated metropolitan areas will be more complex and more costly. However, an overall industry estimate is \$1,500 per mile either to replace or to modify the line amplifiers including any necessary splice repairs. Variables that may render these estimates less than precise are the quality and complexity of the plant equipment already in place; the extent to which the increase in bandwidth affects attenuation and thereby necessitates amplifier spacing changes and splicing repairs; and the difficulties involved as population density increases, i.e. rural versus metropolitan replacement. Interviews with David G. Reiser, Assistant Director of Engineering, National Cable Television Association, in Washington, D.C. (Dec. 12, 1978); and Arthur A. Kraus, Cable System Operator, Rockdale Cable T.V., in Joliet, Illinois (Dec. 12, 1978). It is hard to understand, however, why the cable system operators are so concerned about the 20 channel rule, for the current

the costs imposed by the mandatory access requirements are comparable with those approved by the Supreme Court in *United States v. Midwest Video*.<sup>84</sup> The rules require the channels be made available free of charge.<sup>85</sup> Reasonable charges are permitted for the use of equipment except in cases of live public access programs not exceeding five minutes in length.<sup>86</sup> Thus, it would appear that except for the channel capacity requirements, a reasonable case can be made that the access rules are actually far less questionable than the requirement of cablecasting approved in *United States v. Midwest Video*.<sup>87</sup> Yet there is no detailed discussion in *Midwest Video* regarding why the requirement of building systems with 20 channel capacity exceeds the scope of the jurisdiction recognized by the Supreme Court in *United States v. Midwest Video*.<sup>88</sup>

To the extent that the reason for this conclusion is revealed in the *Midwest Video* opinion, it would appear in the one paragraph:

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demand is for installation of 35 channel systems. A substantial majority of the new systems now being sold are 35 channel capacity ones. Interviews with Richard Taylor, Regional Sales Manager, C.-Cor Electronics, Inc. (major equipment supplier), in State College, Pennsylvania (Dec. 19, 1978), and Kevin J. Leddy, Research Project Manager, National Cable Television Association, in Washington, D.C. (Dec. 22, 1978).

84. 406 U.S. 649. The economic impact of compliance with the 20 channel rule would mean an average of about 65 cents per month additional costs per subscriber. This is only slightly higher than the 50 cents per month per subscriber figure used by the Commission in *United States v. Midwest Video*. See note 79 *supra*, and accompanying text. This 65 cents per month figure is based on the following assumptions: 14,500,000 subscribers to cable television nationwide, 4,100 systems, 285,000 miles of cable in place, and an average monthly fee of \$6.50. When subscribers are divided by systems, the average number of subscribers is 3,600 per system. This is only slightly above the FCC cut off point for the application of the rules. The average number of miles of plant per system is 70 miles. The average monthly expense for building or converting to 20 channel from 12 channel is \$2,380, computed as follows: \$1,500 amortized monthly over seven years at 11% interest = \$33.90/month; rounding to \$34/month times 70 miles equals \$2,380 additional cost per month. Average monthly revenue equals \$6.50 times 3,600 which equals \$23,400. (The \$6.50 figure is conservative since it is based on data current at 1976. See *1976 Report* at 303). Additional monthly expense divided by average monthly revenue equals \$2,380/\$23,400, or approximately 10 percent. Ten percent of the \$6.50 average charge is 65 cents. National Cable Television Developments, National Cable Television Association (NCTA), Washington, D.C., updated by telephone interview with Kevin J. Leddy, *supra* note 83. This is based on the NCTA year end estimates. The current estimate is that the average fee charged per month is \$7.00.

85. 47 C.F.R. § 76.256(c)(1) (1978).

86. *Id.* Cable systems have often leased surplus channels at a dollar a year. Telephone interview with Jim Kosub (June 6, 1978), note *supra* 80.

87. 406 U.S. 649.

88. *Id.*

The *1976 Report* nowhere states, and the Commission nowhere argues, that these rules were created and applied to cable systems to protect a broadcast station's "contour" as in *Southwestern*; or to require, as in . . . [*United States v. Midwest Video*], the origination of programs, like broadcasters do; or to govern an activity involving the airwaves; or to protect the growth of broadcast television; or to protect the public interest in continued broadcast television services; or to protect broadcasting against "unfair competition" from cable, or to allow the Commission "to perform with appropriate effectiveness" its responsibilities for broadcast television.<sup>89</sup>

In an appended footnote the court distinguished between the FCC's purposes of the channel capacity rules "to promote the expansion of communications services as well as the expansion of the public's access thereto," and the FCC's purposes involved in the rules limiting broadcast programs retransmittable to cable consumers, "to insure that the interest of the public in maintaining a healthy commercial television structure will not be undermined."<sup>90</sup> The only explanation for such distinction is that the court was asserting that the legitimacy of the rules turned not on the financial burden they created for the cable industry, but rather upon the legitimacy or illegitimacy of the purposes of the FCC regulation. Later the court makes clear that it believes that this is "[t]he effective performance of the Commission's various responsibilities for the regulation of television broadcasting."<sup>91</sup>

However, the reference to the FCC's purposes taken from the *1976 Report* is a reference to a part of the report where the FCC appears to be trying to explain why the access and minimum channel rules are not being applied to smaller systems.<sup>92</sup> Earlier in that same report the FCC asserted:

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89. *Midwest Video*, *supra* note 2, at 1038.

90. *Id.* at 1038 n.30. The court failed to quote any part of the first sentence of ¶ 105 which refers in part to "larger cable systems," and later to "cable systems in general." *1976 Report*, *supra* note 12, at 326.

91. *Midwest Video*, *supra* note 2, at 1038 (quoting *United States v. Southwestern Cable*, 392 U.S. at 178).

92. The FCC Report is ambiguous at this point. In particular, it is not clear that the central point in the Eighth Circuit's view of the case was intended to be handled in the last collection of "Additional Matters" considered at the tail end of the lengthy *1976 Report*.

[W]e believe [the rules] can, if properly used, result in the opening of new outlets for local expression, aid in the promotion of diversity in television programming, act in some measure to restore a sense of community to cable subscribers and a sense of openness and participation to the video medium, aid in the functioning of democratic institutions, and improve the informational and educational communications resources of cable television communities.<sup>93</sup>

Later in that same report the FCC asserted that it believed the rules under consideration "will further the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs and that as such they are within the scope of the Commission's regulatory authority over cable television systems that has been upheld by the Supreme Court."<sup>94</sup>

The FCC appears to believe that its statutory power includes the power to encourage the available communication options in local communities, and that its access and minimum channel rules will facilitate that charge. The Court, however, construes the Commission's power narrowly to limit it either to direct regulation of CATV or to regulation for the purpose of protection of over-the-air broadcasting.<sup>95</sup> The opinion by the Court is quite explicit about this: "[I]t is a 'reasonably ancillary' standard we apply, and it is the 1976 Report rules we review."<sup>96</sup>

### B. *Application of the Reasonably Ancillary Standard*

In both *Home Box Office*<sup>97</sup> (the siphoning case) and in *Midwest Video*, the failure of the FCC to justify its regulations in terms of the reasonably ancillary standard was stressed. If there is any significant difference with respect to this issue between the two circuits, that difference is that the D.C. Circuit in *Home Box Office* asserted that the problem was that the FCC failed to sufficiently justify the

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93. 1976 Report, *supra* note 12, at 296 (in regard to the access rules).

94. *Id.* at 298.

95. *Houston E. and W. Tex. Co. v. United States*, 234 U.S. 342, 353 (1914) (The Shreveport Rate Case) (recognizing the authority of the Interstate Commerce Commission to "foster and protect interstate commerce . . .").

96. *Midwest Video*, *supra* note 2, at 1039.

97. 567 F.2d 9.

anti-siphoning rules.<sup>98</sup> That court recognized that, “[b]ecause our holding is so limited, it is possible that the Commission will, after remand, be able to satisfy the jurisdictional prerequisites for regulating pay cable television.”<sup>99</sup> The decision in *Midwest Video* leaves no such opening. “However attractively the Commission’s objectives are interpreted, reinterpreted, or repackaged, regulatory actions forbidden as means to achieve them within its statutory jurisdiction cannot be considered ‘reasonably ancillary’ to that jurisdiction.”<sup>100</sup>

Nor is the quarrel just with the means chosen, for the opinion elsewhere states, “the [FCC] Act, however broadly read, contains no objectives so broad as to encompass whatever is necessary to get everybody on television. If that major foray be a legitimate goal, it must be established not by the Commission or the courts, but by Congress.”<sup>101</sup>

This last comment leads to the central issue in these cases—the interrelationship between Congress, the FCC, and the courts. The relationship between the courts and the FCC is basically controlled by the scope of review. The D.C. Circuit recognized that the scope of review to be applied in these cases is that contained in section 706 of the Administrative Procedure Act (APA).<sup>102</sup> Close examination reveals that APA section 706(2)(A) primarily controls. It provides that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>103</sup> Since the regulations involved in these cases were not regulations required to be made on the basis of a record, the “substantial evidence” test of APA section 706(2)(E) does not apply.<sup>104</sup>

The difference between these two tests is obscure, to say the least.

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98. *Id.* There is irony in the fact that at one point the court cites the channel access rule held invalid in *United States v. Midwest Video* as a basis for striking down the rule involved in *Home Box Office, Id.* at 34.

99. *Id.* at 34.

100. *Midwest Video*, *supra* note 2, at 1048.

101. *Id.*

102. 567 F.2d at 35 (interpreting 5 U.S.C. § 706(2)(A)-(D) (1976)).

103. 5 U.S.C. § 706(2)(A) (1976).

104. 5 U.S.C. § 706(2)(E) (1976).

Professor Davis, for example, finds at least four different views about the relationship of the two tests in recent Supreme Court decisions.<sup>105</sup> It is not even clear which is to be considered the more stringent standard of review.<sup>106</sup> Whatever the relevance of the precise verbalisms, the most crucial question is what the courts do with these tests, and in particular, in cases such as *Midwest Video*, the question becomes how to apply the scope of review standard in a situation of rulemaking when that rulemaking involves guesses about the future. To be certain, those who profess to know the future are either fools or charlatans; however, the FCC has been told to make rules based upon its judgment of the impact those rules may have in the future. While jurisdiction is neither acquired through "visions of Valhalla"<sup>107</sup> nor through "rhetoric in praise of objectives,"<sup>108</sup> it is conferred through statutes. *Midwest Video* deals with a situation in which the FCC has determined in its informed, expert opinion that it does have jurisdiction.

It is possible to agree with Professor Jaffe that "[i]n judicial review, the court must evaluate the relevance and weight of expertness,"<sup>109</sup> without agreeing that it is proper for the court to substitute its judgment about the wisdom of action by the agency. Whatever the meaning of the verbalisms about scope of review, it is clear that the substitution of judgment is at the core of what the courts are *not to do* on review. The court's opinion in *Midwest Video* contains such strong and vivid language that it is hard to emerge from reading it without believing that there is some degree of substitution of judgment. The temptation to do this, for judges with "strong policy

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105. K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 649-52 (1976) [hereinafter cited as K. DAVIS].

106. *Compare* *Abbott Laboratories v. Gardner*, 387 U.S. 136, 143 (1967) (the substantial evidence test affords "a considerably more generous judicial review than the arbitrary and capricious test available in the traditional injunctive suit"), *with* *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974) ("The District Court properly concluded that, though an agency's finding may be supported by substantial evidence . . . it may nonetheless reflect arbitrary and capricious action.") *But see* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 324 (1978) (substantial evidence subjects informal rulemaking to greater scrutiny).

107. *Midwest Video*, *supra* note 2, at 1045.

108. *Id.* at 1042.

109. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*, 579 (abridged student ed. 1965).

commitments,"<sup>110</sup> as Professor Davis describes them, may be irresistible on occasion.

The traditional conception has been that on review, so long as the controversy centered upon issues of law, such as interpretation of language, the opinion of the courts was to be primary. However, when the issues became ones involving issues of fact, the expertise of the agency deserved deference. The most difficult area of dispute then became the area of "fact-law" distinctions.<sup>111</sup> The determination of the jurisdiction of an agency as specified by statute appears at first blush to be an issue of law, and thus an issue in which the controlling voice ought to be judicial. However, a closer examination reveals that the interrelationship between fact and law becomes so significant that some deference ought to be accorded the agency determination as to its own jurisdiction.

Moreover, the practical impact of a determination based upon the absence of jurisdiction is far more drastic than a "remand to the agency to do it right."<sup>112</sup> The best parallel area of law is that of a determination by the Supreme Court that some statute is unconstitutional because it violates the due process clause of the United States Constitution.<sup>113</sup> That disenables both the states and the federal government from acting at all. The abortion decisions illustrate such a situation. A whole area of potential regulation by state and federal government was thereby written beyond regulation.<sup>114</sup> There is, to be sure, less of an impact when the determination is based upon a finding that the federal statute does not confer jurisdiction. Congress can, and may, amend the statute to alter the determination. By contrast, in the constitutional decision, the only recourse is a constitutional amendment.

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110. K. DAVIS, *supra* note 105, at 654, § 29.01.

111. See W. GELLHORN AND C. BYSE, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 427-84 (6th ed. 1974); L. JAFFE AND N. NATHANSON, *ADMINISTRATIVE LAW, CASES AND MATERIALS* 978-1018 (4th ed. 1976).

112. "Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . . not simply because the court is unhappy with the result reached." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519, 558 (1978) (citations omitted).

113. See the concurring opinion by Justice Jackson in *Railway Express Agency v. New York*, 336 U.S. 106, 111-13 (1949).

114. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 9 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

However, a remand to Congress in a significant number of situations may be tantamount to a guarantee of no regulation, for Congress may simply not act for a large number of reasons. Professor Wechsler in another context aptly described the situation:

National action has . . . always been regarded as exceptional in our polity, an instrument to be justified by some necessity, the special rather than the ordinary case . . . . Even when Congress acts, its tendency has been to frame enactments on an ad hoc basis to accomplish limited objectives, supplanting state-created norms only so far as may be necessary for the purpose. Indeed, with all the centralizing growth throughout the years, federal law is still a largely interstitial product, rarely occupying any field completely, building normally upon legal relationships established by the states.<sup>115</sup>

When Congress has acted, however, thereby overcoming inertia, logrolling, and other myriad forms that political group opposition might take, and reached by that action some consensus embodied in a law, then that action and consensus deserve the widest scope of application. As Justice Holmes put it, "the Fourteenth Amendment does not enact Herbert Spencer's Social Statics,"<sup>116</sup> but neither does the Administrative Procedure Act enact "deregulation" as social policy.

One of the major reasons for the establishment of administrative agencies is an attempt to allow experts to decide various complicated technical questions. Obviously, this was one of the factors which led to the creation of the FCC. The complex, confusing regulatory problems in *Home Box Office* and *Midwest Video* exemplify the wisdom of such a decision.<sup>117</sup> The ability of Congress to deal with such a remand decreases as the technicality of the issues increases and the size of the interested pressure groups decreases. Moreover, practically speaking, the likelihood of the Congress deciding to do something depends on its members' individual (and staff) ability to judge the wisdom of the position taken by the FCC. The virtual impossibility of determining the impact of the FCC rules in these

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115. Wechsler, *Political Safeguards of Federalism*, in *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 185, 187 (1963).

116. *Lochner v. N.Y.*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

117. See notes 16-21 *supra* and accompanying text.



cases precludes such judgments. Ultimate responsibility for the absence of any regulation thus rests on the shoulders of the courts, and usually the United States courts of appeals, since the Supreme Court will intervene but rarely.<sup>118</sup>

However, it may be argued that this misses the entire point. A declaration that an agency has acted beyond its scope of authority, as granted by the statute, only reflects the appropriate deference to the legislative consensus reflected in the statutory scheme. This power to police the agencies through the *ultra vires* principle is the essence of the ability of the courts to control administrative excess. Moreover, regulation of cable television is an area in which Congress reached no consensus, for Congress never specifically legislated cable television.<sup>119</sup>

That response is, however, only to reflect the question in a way not unlike the treatment of the question of judicial review in *Marbury v. Madison*.<sup>120</sup> The crucial question is not whether action beyond the authority of the Constitution or statute (in *Midwest Video*) is permissible; all agree it is not. The crucial question is, who determines whether the action is beyond the authority?<sup>121</sup> Such determinations are anything but clear cut.<sup>122</sup> If one recognizes that they are questions of degree,<sup>123</sup> one should also recognize that many observers claim to have discerned the total bankruptcy of the non-delegation doctrine with respect to Congress.<sup>124</sup> For the courts of

118. Note in this connection the denial of certiorari by the Supreme Court and the subsequent withdrawal of the rule in the *Home Box Office* case. 434 U.S. 829 (1977), *petition for rehearing denied*, 434 U.S. 988 (1977), rule withdrawn, Dec. 23, 1977, 42 Fed. Reg. 64348.

119. See note 41 *supra* and accompanying text. As a result, a Senate Subcommittee Report, *Cable Television: Promise versus Regulatory Performance*, Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 94th Congress 2d Sess. (1976), describes the FCC as having backed into regulation of cable television because of its potential negative impact on conventional broadcasting at 27.

120. 5 U.S. (1 Cranch) 368 (1803).

121. See Judge Gibson, in *Eakin v. Raub*, 12 Serg. & Rawl 330 (Pa. 1825).

122. Compare the opinion by Justice Chase in *Hylton v. United States*, 3 U.S. (3 Dall.) 150, 153 (1796), "but if the court have such power [judicial review] I am free to declare, that I will never exercise it but in a very clear case." Judge Learned Hand once wrote, "So much of what we do is not a case of *barbara celarent* anyway; but of more or less." Letter from Learned Hand to Felix Frankfurter (March 30, 1949), *quoted in* Freedman, *Review, Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 329 n.113 (1976).

123. Jaffe, *Book Review*, 14 VILL. L. REV. 773 (1969) (K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY*).

124. See for example the Section titles in 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d

appeals to seize on the ultra vires version of the non-delegation doctrine, raises the specter of the practice condemned by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*<sup>125</sup> but under a different and more dangerous rubric. The agencies would prefer to have a crack at proper regulation on remand, under additional procedural requirements, than to be powerless to act in what they perceive to be the public interest. And if Congress fails to catch the ball on remand, or juggles it for a number of years, the public interest may be irretrievably prejudiced.

The impact of that upon cable television regulation is clear. If the 20 channel rule cannot be applied until Congress speaks, then whole cable systems may be built that turn out to disserve the public interest several years down the road. Mandatory access may stimulate demand and produce substantial commercial viability years earlier than would otherwise occur. No one knows. But like the decision by Robert Moses not to reserve a median strip down the expressway towards John F. Kennedy airport in New York to permit future construction of a rapid transit line, the decision is in the practical world irreversible.<sup>126</sup> As Justice Rehnquist stated for the Court in *Vermont Yankee*:<sup>127</sup>

Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision

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ed. 1978): § 3.6, Supreme Court Indifference to and Acquiescence in Delegation with No Standards; § 3.7, Supreme Court Participation in Delegation of Power without Meaningful Standards; § 3.5, Valid Delegation without a Standard and without an "Intelligible Principle." Another scholar has described the necessary standards as "ceremonial incantation." Wade, *Anglo-American Administrative Law: Some Reflections*, 81 L.Q. REV. 357, 372 (1965).

125. 435 U.S. 519 (1978) (where the Court commanded the courts of appeals to refrain from requiring additional procedural devices in administrative rulemaking proceedings subject to A.P.A., § 553).

126. R. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 920-58 (1974) (Chapter 40, *Point of No Return*).

127. 435 U.S. at 557-58.

to develop nuclear energy, but it is Congress or the states within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function.

A reasonable argument could be made that the reasoning of Justice Rehnquist applies to the cable television area as well. By the time of the decisions by both courts of appeals in these cases, both Congress by its inaction and the Supreme Court by its action have approved FCC exercises of power in the area. It is hard to justify writing certain squares of the game board off limits without a very strong case.

#### V. THE GENERAL RELATIONSHIP-INSTITUTIONAL STRENGTHS

One way to frame the issues is to approach them from the viewpoint of institutional competence. What, if any, special justifications do the Congress, courts or agencies have to review and control certain kinds of determinations? To approach the area from such a viewpoint, one must start with the identification of the areas of strength of each of the various competing institutional claimants.

The easiest area to define is the agency's strength—a claim at expertise and specialized knowledge with respect to the field of regulation. Associated with this is the ability (through the use of large staffs) to sort through the masses of data that may be relevant and to base judgments upon that data in the light of "industry" experience. Congress generally lacks this sort of strength. However, Congress does possess at least two institutional strengths. First, it represents individual constituents and their viewpoints, and second, it has great powers of legitimization. The latter reflects the perception that not only should decisions be correct, but just as importantly they should be perceived as legitimate. The strengths of the judicial system include the appearance of impartiality, also a kind of legitimization. More important, however, in this context is the role of the courts as a decision-maker with particular skill in the examination of reasons and justifications for regulatory activity.

Application of these generalizations in the context of delegation problems is far from simple. Several cases may illustrate some aspects of the problem. If an issue is likely to involve broad public interest, and to appear relatively simple, a remand to Congress may be justifiable. For example, the decision in *Alyeska Pipeline Service*

*Co. v. Wilderness Society*<sup>128</sup> effectively remanded to Congress the issue of allowing the award of attorneys' fees in civil rights actions. Congress responded rather rapidly through statutory amendment to section 1988 of Title 42.<sup>129</sup> Both wide public interest and the simplicity of the issue in terms of policies of racial justice, drew on Congress's special claims to institutional competence.

*Kent v. Dulles*<sup>130</sup> and *National Cable Television Association*<sup>131</sup> reflect similar situations involving an issue likely to have wide public interest and a surface appearance of simplicity. In *Kent*, the issue was the validity of regulations promulgated by the Secretary of State which required passport applicants to "subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party."<sup>132</sup> Because of the possibility of serious constitutional questions, the Court refused to find that Congress had authorized such a regulation.<sup>133</sup> In *National Cable Television Association*, the issue involved the authority of the FCC to impose fees on cable television systems based upon the number of subscribers. The statutory language quite clearly authorized the FCC to consider in assessing these fees the value to the public of the regulation.<sup>134</sup> The Court indicated that if all that was being considered was the value to the recipient of the regulation, then there was no problem.<sup>135</sup> However, fees based on the value of the regulation to the rest of society smacked of taxation.<sup>136</sup> Because the Court saw constitutional issues lurking in the background, it interpreted the statutory language narrowly so as not to permit a tax.<sup>137</sup> If Congress

128. 421 U.S. 240 (1975).

129. 42 U.S.C. § 1988, as amended by Act of Oct. 19, 1975, Pub. L. No. 94-559 § 2, Stat. 2641.

130. 357 U.S. 116 (1958).

131. 415 U.S. 336 (1974).

132. 17 Fed. Reg. 8013 (1952).

133. 357 U.S. 116, 130 (1958).

134. 31 U.S.C. § 483a (1970):

[T]he head of each Federal agency is authorized by regulation . . . to prescribe therefore such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served*, and other pertinent facts . . . .

The statute is a general one and not limited to FCC activities.

135. 415 U.S. at 341.

136. *Id.*

137. *Id.* at 342.

wanted to delegate the power to tax, it would have to say it more explicitly than already set forth in the statute. In both cases then, the Court adopted the remand principle. However, in both cases, the issue was relatively simple. One could expect Congress to make the underlying policy choice in both cases, and consequently derive some better idea of the direction that the courts were to follow.<sup>138</sup> In both cases, large numbers of people were directly affected by easily understood regulatory systems.

In all three cases, the remand to Congress left the agency with clear policy alternatives from which to choose. The congressional action in *Alyeska Pipeline* and the inaction subsequent to *Kent* and *National Cable Television Association* provided substantial guidance to the courts about the wisdom of the direction that the Supreme Court had taken. Thus, the results in a practical sense evidenced use of the institutional strengths of Congress in what it can do itself, as well as what it can be expected to tell other constitutional actors (the courts and agencies) about their functioning.

Another interesting instance of reference from one constitutional actor to another was the promulgation of the Federal Rules of Evidence. After some eleven years of study by judges, Congressmen, lawyers and other interested parties, the Supreme Court established the new Federal Rules of Evidence on November 20, 1972.<sup>139</sup> Justice Douglas dissented on two grounds. First, he doubted that Congress had given the Supreme Court the power to promulgate rules of evidence.<sup>140</sup> Second, he noted that the Court had neither written the rules, supervised their writing, appraised them on their merits, weighed the pros and cons, nor ought to have done these things.<sup>141</sup> Justice Douglas said, "We are so far removed from the trial arena that we have no special insight, no meaningful oversight to contribute."<sup>142</sup> Congress reacted by passing a statute prohibiting the rules from becoming effective before Congress approved them.<sup>143</sup> After

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138. In neither of these cases did Congress act.

139. 56 F.R.D. 183 (1972).

140. *Id.* at 185.

141. *Id.*

142. *Id.* Justice Douglas continued, "The Rules of Evidence—if there are to be some—should be channeled through the Judicial Conference whose members are much more qualified than we to appraise their merits when applied in actual practice." *Id.* at 185-86.

143. 28 U.S.C. § 2071 (1973).

further consideration by committees in the House and Senate, Congress amended in part the prior version and enacted them into law.<sup>144</sup> At the same time, Congress answered the first objection of Justice Douglas by clarifying the power of the Court to promulgate such rules.<sup>145</sup> In addition, the Congress reversed the relationship of congressional action towards rulemaking by the Court. With one exception,<sup>146</sup> unless Congress acts affirmatively either to delay or to postpone the imposition of an amended rule, the amended rule automatically goes into effect.<sup>147</sup> "We determined . . . that while requiring affirmative congressional action was appropriate to this first effort at codifying the Rules of Evidence, it was not needed with respect to subsequent amendments which would likely be of more modest dimension."<sup>148</sup> The possibility that worthwhile amendments might languish because of the press of business in Congress was specifically recognized by both the House and Senate reports.<sup>149</sup>

The Federal Rules of Evidence rulemaking process thus evidences recognition by two of the constitutional actors of their own institutional handicaps. Justice Douglas saw that the minimal experience of the Supreme Court in the realm of trial proceedings disintitiled it from claiming special competency in formulating rules of evidence about such proceedings.<sup>150</sup> Congress recognized by contrast that it had the competence to set the basic direction of policy in the new code of evidence, but that future action should primarily be entrusted to the agency (the Supreme Court in this instance).

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144. Pub. L. 93-595, 88 Stat. 1929 (1975).

145. 28 U.S.C.A. § 2076 (Supp. 1978).

146. "Any . . . amendment creating, abolishing, or modifying a privilege shall be approved by Act of Congress." *Id.*

147. *Id.*

148. S. REP. NO. 93-1277, reprinted in 28 U.S.C.A. Fed. R. Evid. 799, 818 (1975).

149. *Id.* at 818; H. REP. NO. 93-650, reprinted at 28 U.S.C.A. at 823, 839 (1975).

150. The Supreme Court routinely, however, considers appeals containing focused questions about particular rules of law. Rarely does it legislate in a manner so as to promulgate broad schemes of rules. When it does, it can expect criticism. *E.g.*, the abortion decisions, *Roe v. Wade*, et al, cited in note 114 *supra*. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Tribe, *Forward: Towards a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973), for just a sample of some of the articles which followed the abortion cases.

Intervention by Congress *sua sponte* in the context of Federal Rules of Evidence may be explained by the relative clarity and broad popular interest in the proposals.<sup>151</sup> Thus Congress can and will intervene when public pressure raises sufficient doubt about the propriety or wisdom of particular "agency" action. Other examples of such intervention by Congress include the ban on cigarette advertisements on television<sup>152</sup> and the prohibition of a ban on the sale of saccharin.<sup>153</sup>

These examples are useful in illustrating the viability of "legislative review" and also in illustrating the kinds of issues that Congress rightly or wrongly believes itself primarily competent to review. The fact that Congress has not spoken directly about certain subjects may mean that it perceives that it has little to say, or that congressional energy is better spent elsewhere.

When the courts themselves are having difficulty coping with massive agency records and complicated sets of issues, it is difficult to see what can be accomplished by a remand to the legislative

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151. This is not to say that congressional intervention in this area has gone uncriticized. See Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 1 (1974). The authors asserted: "Court procedure can best be regulated by the judiciary, the governmental branch most familiar with it, and the Supreme Court's prestige and general supervisory role make it the logical rulemaking body." *Id.* at 38. To support this conclusion the authors cite: lack of staff, the press of other business, politics, and the opportunity for more reflective consideration in the context of the advisory committee scheme employed by the court. *Id.*

152. *Banzhof v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) (under the Fairness Doctrine television stations that carried cigarette advertisements were required to devote a "significant amount of time" to warning the public about the hazards of cigarette smoking.) By the Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335 (1970), Congress banned cigarette advertisements from television after Jan. 1, 1971. The FCC then indicated it would no longer be concerned if a station failed to carry anti-smoking ads. *Cigarette Advertising-Antismoking Presentations*, 27 F.C.C.2d 453 (1970), *sustained in Larus and Bros., Co. v. FCC*, 447 F.2d 876 (4th Cir. 1971). *But see* the discussion by Judge J. Skelly Wright in dissent in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 587-89 (D.D.C. 1971), where he indicated that the reason for the passage of the ban on television cigarette advertisements was the belief by the tobacco industry that anti-cigarette advertisements were having a devastating effect on cigarette consumption. For further background see, H. LINDE AND G. BUNN, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES*, 915 *et seq.* (1975). It is hard to determine whether this is a victory or a defeat for advocates of the merits of the legislative process.

153. Pub. L. 95-203, 91 Stat. 1451 (1977). For the legislative history, see [1977] U.S. CODE CONG. & AD. NEWS, 3921 *et seq.* Congress required that any proposed changes in the law regarding saccharine be brought to Congress first by the Secretary of Health, Education and Welfare. See note following 21 U.S.C.A. § 343 (Supp. 1979).

body. The questions involving the 20 channel rule and the access rule are not simple. Nor is the "siphoning" issue a simple issue.

#### VI. THE *Home Box Office* REMAND: SEARCH FOR CONSISTENCY OR A HOBGOBLIN HALF WAY TO VALHALLA?

The treatment by the Court of Appeals in the *Home Box Office* case of the "anti-siphoning" rules differs from *Midwest Video* in that the *Home Box Office* court permitted the FCC to try again to justify the anti-siphoning rules.<sup>154</sup> In particular the court stated: "[W]e do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the Commission would legitimately regulate the broadcast media."<sup>155</sup> Although the opinion is a bit obscure, it appears to have disturbed the court that the Commission failed to demonstrate the consistency of its anti-siphoning rules as implicit entertainment format regulation in which case the FCC withdrew from scrutiny of the entertainment formats of various station licensees.<sup>156</sup> In effect, what the court said is that it requires logical consistency (or explained inconsistency) between the apparent differences between the results of two massive rulemaking proceedings. This smacks of "judicial intervention run riot."<sup>157</sup> It is not obvious why there is a connection between the decision not to scrutinize an individual station license transfer from one holder to another based upon whether hard rock or classical music will be broadcast, and a determination that it might not serve the public interest if all major feature films, or the world series, etc., were bought from free commercial television by cable interests.

*Vermont Yankee* clearly prohibits the continued importation of new procedural requirements by the United States courts of appeals in rulemaking, and thus would appear to raise questions about that part of the *Home Box Office* decision that imported a no *ex parte* communications procedure into rulemaking.<sup>158</sup> However, the agen-

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154. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 34 (1977).

155. *Id.*

156. *Entertainment Formats*, 60 F.C.C.2d 858 (1976).

157. *Vermont Yankee Power Corp. v. Natural Resources Defense Council*, 435 U.S. at 1218.

158. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51 (1977). The court made a passing remark in regard to *ex parte* communications that is revealing.



cies can still be the object of continued overintervention by the courts through either of two techniques. First, issues can be framed as jurisdictional issues, and thus allow courts to use the remand to the legislature route as commanded in *Midwest Video*. Alternatively, the court can claim to employ what is admittedly judicial expertise and sharply scrutinize the justifications articulated by the agency. A sequence of remands to the agency can become the rubric behind which the court hides its policy disagreements. At some point the agency is likely to give up trying.<sup>159</sup> Two related passages illustrate this last point. The *Home Box Office* court said:

We have similar difficulties with the second cardinal assumption of the Commission, i.e., that "siphoning" would lead to loss of film and sports programming for audiences not served by cable systems or too poor to subscribe to pay cable . . . . To reach such a conclusion the Commission must assume that cable firms, once having purchased exhibition rights to a program, will not respond to market demand to sell the rights for viewing in those areas that cable firms do not reach. We find no discussion in the record supporting such an assumption. Indeed, a contrary assumption would be more consistent with economic theory since it would *prima facie* be to the advantage of cable operators to sell broadcast rights to conventional television stations in regions of the country where no cable service existed.<sup>160</sup>

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Even if the Commission had disclosed to this court the substance of what was said to it *ex parte*, it would still be difficult to judge the truth of what the Commission asserted it knew about the television industry because we would not have the benefit of an adversarial discussion among the parties.

*Id.* at 55. The court thereby indicated how accustomed it was to look upon proceedings in front of it as adjudicatory and adversarial. In addition, the court may have indicated that it, the court, expects to be able to judge the truth of what the Commission knows about the television industry. Since the most important factor in this rulemaking proceeding is probably a judgment about the future, one has difficulty imagining how the court is to determine the "truth" of that future.

159. The Three Sisters Bridge Controversy may be viewed with interest. See *D.C. Federation of Civic Ass'ns v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970), *cert den.*, 405 U.S. 1030 (1972); *D.C. Federation of Civic Ass'ns v. Airis*, 391 F.2d 478 (D.C. Cir. 1968). In concurrence, Chief Justice Burger indicated reluctance to grant the writ because it would take almost a year to decide. Chief Justice Burger then invited Congress again to act in the controversy, "even to the point of limiting or prohibiting judicial review of its directives in this respect." 405 U.S. at 1031. The words "in this respect" were added later by the Chief Justice. See Strong, *Three Little Words and What They Didn't Seem to Mean*, 59 A.B.A.J. 29 (1973).

160. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 39 (1977).

With all due respect, the assumption made by the court has little relevance to what the Commission was talking about. The Commission's view of the "evils" of siphoning clearly anticipated intermixed areas where cable systems served some households, and other households in the same community were served only by broadcast media. In that context, it is simply silly to postulate that a cable owner will sell to the competing commercial broadcast station rights to sports shows or movies that are a major reason for subscribing to cable.

The next paragraph by the court displays similar gaps and flaws in reasoning:

We find the Commission's argument that "siphoning" could lead to loss of programming for those too poor to purchase cable television more plausible. Here again, however, we find that the Commission has not documented its case that the poor would be deprived of adequate television service and, worse, that the Commission, by prohibiting advertising in connection with subscription operations, has virtually ensured that the price of pay cable will never be within reach of the poor.<sup>161</sup>

This paragraph requires the Commission to resort to multiple gazes at the crystal ball. The failure of the Commission to document its position regarding the deprivation of adequate television service for the poor is not surprising, for that relates to future happenings. Moreover, the Commission would have to engage in even more speculation about the nature of the advertising market for cable television, likely rates, etc. The court must itself be postulating that advertising could potentially make a difference. That seems doubtful.<sup>162</sup>

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161. *Id.*

162. The question turns upon the marketplace economics that would obtain after some sort of a shakeout in the marketplace. One (1974) estimate of the value of a subscriber to cable television put the value at \$60 per year, as compared to \$45 per year of a viewer to a broadcast station. L. ROSS, *ECONOMIC AND LEGAL FOUNDATIONS OF CABLE TELEVISION* 20 (1974). If for no other reason than wise marshalling of the limited staff resources of the FCC, a slow approach to adopting new rules regarding the market support of commercial stations makes sense. Were the Commission considering a new license, an existing licensee in a given geographical area is permitted to raise the issue that there is not sufficient economic potential to support the additional station. Herbert P. Michels (WAUB) 17 RAD. REG. (P&F) 557 (1958) made it clear that a cost of this is risking the existent license. Few objectors are likely to risk this. Subsequently, these particular proceedings were terminated at the request of all parties, Atom

All that one can reasonably expect from an agency that is charged with regulation of such a complicated, rapidly changing area as cable television, is signs of administrative vitality. The FCC's rule-making activity described by Judge Markey as "consistently and continually revised, unenforced, withdrawn, waived and abandoned"<sup>163</sup> can be seen as describing the activity of a vital agency, trying to do its best in a difficult area.

An excellent example of this vitality, and the determination of reasons to abandon regulation by the FCC, occurred in the FCC's *Second Report and Order*.<sup>164</sup> There the Commission determined to withdraw its rules to prohibit the siphoning of "series" programming.<sup>165</sup> The FCC observed that its perception of the developing subscription television industry and conventional television markets has convinced it that siphoning is unlikely to occur even if there are no regulations.<sup>166</sup> On the other hand, the FCC also noted that: "It cannot be disputed that feature films and to a lesser degree sports events now constitute almost the entire quantity of subscription programming. The supply of this programming is relatively fixed vis-a-vis both the conventional and the subscription television markets."<sup>167</sup> Thus they refused to eliminate the restrictions on feature film and sports events siphoning.

#### VII. A HOT BUTTER KNIFE THEORY OF JUDICIAL DECISION MAKING: *Midwest Video* IN THE U.S. SUPREME COURT

In *FCC v. Midwest Video Corp.*,<sup>168</sup> the Supreme Court, by a vote of six to three, upheld the determination of the Eighth Circuit.<sup>169</sup>

Broadcasting Corp. (WAUB) 17 RAD. REG. (P&F) 560d (1960). Subsequently, the FCC took some of the bite out of this requirement by agreeing that it would not advance the date of renewal for an existing licensee. John Self 24 RAD. REG. (P&F) 117 (1963). Allowing cable television to compete for limited advertising revenue could require an enormous number of serious licensing determinations. In theory, a cable caster might end up with a major "license" for a particular area. At the most, the issue seems suitable for limited experimentation in various kinds of television and cable marketplaces.

163. See note 10 *supra* and accompanying text.

164. Second Report and Order in Docket 19554, 40 F.R. 52731, 35 RAD. REG. (P. & F.) 2d 767 (1975).

165. The television show "Wild Kingdom" is an example of "series" programming.

166. Second Report, *supra* note 164, at 770-71.

167. *Id.* at 771.

168. 99 S.Ct. 1435 (1979).

169. *Midwest Video*, *supra* note 2.

The decision, however, turned not upon the jurisdictional issue but upon the finding that the mandatory access rules "relegated cable systems *pro tanto*, to common-carrier status."<sup>170</sup> "The access rules plainly impose common-carrier obligations on cable operators."<sup>171</sup> While ignoring most of the issues dealt with by the Eighth Circuit, the opinion for the Court by Justice White traced the history of congressional considerations of whether common carrier status ought to be mandated for broadcast stations.

The Court had most recently considered that issue in *Columbia Broadcasting System, Inc. v. Democratic National Committee*.<sup>172</sup> In that case, the Court rejected a claim that a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak on issues important to them violated the Communications Act of 1934 or the first amendment. *Columbia Broadcasting* arose out of the refusal of a radio station to sell time to Business Executives' Move for Vietnam Peace (BEM) to air a series of one minute spot announcements expressing BEM views on the Vietnam war. The Court traced the history of the Communications Act with respect to congressional intent as to whether broadcast carriers were to be common carriers. "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on nonselective basis to all persons wishing to talk about public issues."<sup>173</sup> Instead, after extended debate, Congress adopted section 3(h) stating that, "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."<sup>174</sup>

The discussion of this issue in *Columbia Broadcasting* reveals that the central concern of Congress was the limited number of airways available, and the difficulty of administering such a system. Senator Dill, for example, noted: "When we enter this field we must determine how much to give to the Catholics probably and how much to the Protestants and how much to the Jews."<sup>175</sup> Fear both

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170. 99 S.Ct. at 1441-42 (footnote omitted).

171. *Id.* at 1442 (footnote omitted).

172. 412 U.S. 94 (1973).

173. *Id.* at 105.

174. 48 Stat. 1066, as amended 47 U.S.C. § 153(h) (1968).

175. 412 U.S. at 108-09 n.4, quoting 78 CONG. REC. 8843. See also the discussion by Senator

of censorship as well as of administrative difficulties inherent in allocating a scarce and limited resource appears to be the core concern of Congress. However, it is not clear that this fear relates to cable systems considering the excess capacity wrought by 20-channel systems.

However, the opinion by Justice White for the Court in *FCC v. Midwest Video* not only found that the regulations made the cable systems into common carriers within the terms of the Act, but also determined that there was an extension on the past opinions of the Supreme Court in CATV cases. Control by the cable systems on content and composition was seen by the Court as having been removed by the access rules. The Court-approved mandatory origination rules were interpreted as only ensuring that the cable operators would satisfactorily meet community needs within the context of their undertaking.<sup>176</sup> The cable system retained full editorial responsibility. The Court thus rejected the FCC argument that it was only trying to seek objectives that had been approved before. Justice White wrote for the Court, "But [this argument] . . . overlook[s] the fact that Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting."<sup>177</sup> The Court reaffirmed the view expressed in *Columbia Broadcasting* "that section 3(h) embodies a substantive determination not to abrogate a broadcaster's journalistic independence for the purpose of . . . furnishing members of the public with media access."<sup>178</sup> Although Justice White conceded that the text of section 3(h) does not explicitly limit the regulation of cable systems,<sup>179</sup> the opinion raised a slippery slope argument—the jurisdiction of the Commission under section 2(a) would be "unbounded."<sup>180</sup> Moreover, the Court refused to defer to the expertise of the agency in interpreting its own statute in the absence of Congressional guidance.<sup>181</sup> Justice White

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Dill and others at 67 CONG. REC. 12502-04 (1926), which indicates, as well, concern with equity in allocation of such time as is available.

176. 99 S.Ct. at 1441.

177. *Id.* at 1445.

178. *Id.* at 1444 n.15.

179. *Id.* at 1444.

180. *Id.*

181. "Though the lack of congressional guidance has in the past led us to defer — albeit

then quoted the "strains the outer limits" of Commission authority language of Chief Justice Burger's concurrence in *United States v. Midwest Video*, and noted the outright rejection of a broad right of access for the public to broadcast stations.<sup>182</sup>

Justice Stevens, joined by Justices Brennan and Marshall, wrote a strong dissent. He noted that in the opinion of the dissenters the mandatory access rule was less burdensome than the mandatory origination requirement approved by the Supreme Court in *FCC v. Midwest Video*.<sup>183</sup> The Commission abandoned the mandatory origination rule in 1974 because it found the mandatory access rule less burdensome.<sup>184</sup> This was not surprising, since, as is argued above, one of the most significant restrictions of cable systems expansion is the cost of such programming.<sup>185</sup>

However, the major thrust of the dissent is that section 3(h) is not a limit upon Commission powers which otherwise would be within its statutory authority, and, in any case, the term common carrier does not accurately apply to the mandatory access rules. "[T]he Court has misread the statute."<sup>186</sup>

Section 3(h) provides:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.<sup>187</sup>

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cautiously — to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited." *Id.* at 1445. Justice Stevens later responded to this by stating: "In past decisions interpreting FCC authority under the Communications Act, 'we [have been] guided by the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" "Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 121, (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381.) 99 S.Ct. at 1447 (Stevens, J., dissenting).

182. See note 55 *supra* and accompanying text.

183. 99 S.Ct. at 1446 (Stevens, J., dissenting).

184. *Id.* at 1446 n.2.

185. See notes 77-88 *supra* and accompanying text.

186. 99 S.Ct. at 1446 (Stevens, J., dissenting).

187. 47 U.S.C. § 153(h) (1968).

Section 3(h) is inapplicable, according to Justice Stevens, because it is not in a section of the Communications Act imposing restrictions upon the FCC's power, but rather is in a definitional section.<sup>188</sup> Moreover, "the Conference Report 'noted that the definition does not include any person if not a common carrier in the ordinary sense of the term'."<sup>189</sup> Nor is this the first mandatory access rule before the Supreme Court, for in the first of the cable system cases, *United States v. Southwestern Cable Co.*,<sup>190</sup> the rules at issue required free carriage of any broadcast station into whose viewing area competing signals were imported. With respect to these "free carriage stations," there was absolutely no editorial discretion retained by the cable system.

Moreover, a central theme of the dissent is that the approach adopted by the Supreme Court had been rejected by the FCC. Justice Stevens quoted the FCC:

So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow "common carrier" in nature. The proper question, we believe, is not whether they fall in one category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest—but whether the rules adopted promote statutory objectives.<sup>191</sup>

The dissent agreed that this was the appropriate response. Moreover, it went on to say that the *Columbia Broadcasting* case "relied upon almost exclusively by the majority, is not to the contrary."<sup>192</sup>

We emphasized, as does the majority here, that "Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access" . . . . But we went on to conclude: "That is not to say that Congress' rejection of such proposals must be taken to mean that Congress is opposed to private

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188. 99 S.Ct. at 1446-47 (Stevens, J., dissenting).

189. *Id.* at 1447 n.3 (quoting H.R. CONF. REP. NO. 1918, 73d Cong., 2d Sess. 46 (1934)).

190. 392 U.S. 157 (1968).

191. 99 S.Ct. at 1448 (Stevens, J., dissenting) (quoting 59 F.C.C.2d at 299).

192. *Id.*

rights of access under all circumstances. *Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require.*"<sup>193</sup>

The core of the dissent then, is a coda to the theme of this article: that maximum discretion has been accorded to the FCC by Congress, so as to allow experimentation with different approaches. Neither the Supreme Court, nor the various courts of appeals, should interfere with the experimental process dictated by the complexities of regulation in an imperfect world except on the clearest of evidence. The Supreme Court chose to base its decision on the combination of a doubtful definition of "common carrier," and a case aptly distinguished by Justice Stevens for the dissent. The result is that whenever the Court chooses to label some regulations as "tantamount to common carrier" or "common carrier" regulations, the FCC has no jurisdiction. Even more striking in context is the fact that although the Eighth Circuit did discuss the common carrier issue as apparently a minor part of the decision,<sup>194</sup> the Supreme Court failed to consider many of the issues considered more important by the lower court. It is almost as if the courts wield statutory terms of magic import, "jurisdiction," and "common carrier," just as Siegfried wielded the magic sword Nothung. If the regulatory problems become too complex, it is simpler to cut through them.

Moreover, the legislative language in context is "common carrier for hire," not just common carrier.<sup>195</sup> As Justice Stevens noted in his opinion,<sup>196</sup> common carrier was intended to be understood in the ordinary sense of the term. The textual terms "for hire" only emphasize this ordinary sense meaning, for the fear of overcharging the public was one of the principal reasons for separate regulation of common carriers by the common law. *Munn v. Illinois*<sup>197</sup> traced the regulation of common carriers back to the third year of the reign of William and Mary in which the charges of common carriers were

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193. *Id.* (citation omitted) (emphasis in original).

194. *Midwest Video*, *supra* note 2, at 1050-52.

195. See note 187 *supra* and accompanying text.

196. 99 S.Ct. at 1447 (quoting H.R. CONF. REP. No. 1918, 73d Cong., 2d Sess. 46 (1934)).

197. 94 U.S. 113, 129-30 (1877).



regulated. The preamble to the act stated: "And whereas divers wagoners and other Carriers, by Combination amongst themselves, have raised the Prices of Carriage of Goods in many places to excessive rates, to the great injury of the Trade . . . ." <sup>198</sup>

Two elements appear to constitute the core of common carrier status: (1) compensation be paid to the carrier (which is normally regulated to be at a reasonable level), and (2) there be an obligation to take all comers. However, that obligation to carry extends only so far as certain types of goods are concerned, goods that the carrier normally carries. <sup>199</sup> A carrier who normally carries only people cannot be forced to carry a load of coal as well. The peculiarity of a common carrier of goods is that he is bound to convey the goods of any person who offers to pay his hire. <sup>200</sup>

Within the context of this definition of common carrier, *Columbia Broadcasting* <sup>201</sup> dealt with whether Congress had forced the holders of broadcast licenses to hold themselves open to serve all comers. Justice Stevens wrote that the *Columbia Broadcasting* decision meant that Congress did not so mandate, but said nothing about whether or not the FCC might not try out some system of allocation of rental time on broadcast stations for such purpose. Indeed, the "Fairness Doctrine" <sup>202</sup> is an excellent example of just such an assertion of power by the FCC. However, in the case of the Fairness Doctrine, the right to reply involves free time, not rental time. This doctrine was upheld by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*. <sup>203</sup> However, in one of the earliest cases before the FCC dealing with common carrier status and cable television, the FCC emphasized that without an element of compensation, cable television stations were not common carriers.

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

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198. W. & M. c 12; 3 Stat. at Large (Great Britain 481).

199. *Johnson v. Midland Ry.*, 4 Ex. 367 (1849), 154 E.R. Full Reprints 1254.

200. *Nugent v. Smith*, 45 L.J.C.P. 697 (1876), 1 C.P.Dec. 423, 433.

201. 412 U.S. 94 (1973).

202. 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (1978) (all identical). The Fairness Doctrine for cable systems is embodied in 47 CFR § 76.209 in substantially the same form.

203. 395 U.S. 367 (1969).

who chose to employ such facilities and to *compensate* the carrier therefore may communicate or transmit intelligence of their own design and choosing.<sup>204</sup>

Without the idea of compensation integral to the ordinary meaning of common carrier, it is difficult to see how the mandatory access rules are properly called "common carrier" rules.

As is customary with the Supreme Court in cases involving complicated rulemaking, there is no discussion of the proper scope of review by the courts of appeals.<sup>205</sup> Instead, the Supreme Court focused on a minor part of the issues considered by the court below. It may not be unfair to say that the overall impact of such treatment belies the facial message of *Vermont Yankee*<sup>206</sup> and encourages the courts of appeals to intervene deeply into agency affairs when they do not agree with the policies involved.<sup>207</sup>

#### VIII. CONCLUSION

Examination of the FCC's attempt to preside over the burgeoning cable television industry indicates a serious attempt to deal with very complicated issues. The FCC's main concern has been that cable not seriously harm the broadcast industry. With this in mind, it has attempted to control the direction and pace of development of cable television. Its reversals of policy in some cases are indications that errors appear to have been made. But they are also indications of an agency trying to do its job. It is important that the courts realize this situation, and interfere as little as possible. In *SEC v. Chenery Corp.*<sup>208</sup> the Court said: "The choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."<sup>209</sup> Part of that discretion must be exercised to determine how general the rules should be. Another part of that discretion

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204. *Frontier v. Collier*, 24 FCC 251, 254 (1958) (footnote omitted) (emphasis added).

205. See K. DAVIS, note 105 *supra* at 651-52.

206. 435 U.S. 519 (1978).

207. See Scalia, *Vermont Yankee: the APA, the D. C. Circuit, and the Supreme Court*, 1978 SUP. CR. REV. 345. See in particular the brief discussion of the *Home Box Office* case at 403-04.

208. 332 U.S. 194, 203 (1947) (*Chenery II*).

209. *Id.*

must relate to balancing the concerns of efficiency, cost, and accuracy. This may result in silly, illchosen, and wrongheaded rules at times. Truth ultimately may be subject to the Heisenberg uncertainty principle, i.e., ultimately unknowable. Courts may sometimes have to concede the same latitude towards agency activity.

As Clark Byse has recently written with particular reference to the views of the United States court of appeals in the *Vermont Yankee* context:

[S]uch a view appears to reflect insensitivity, undue self-confidence, and lack of trust in the give-and-take of the political process. To illustrate . . . insensitivity to the concerns of the agency in deploying its resources to conduct its business, undue self-confidence in the assumption that the court's procedural prescription is "best," and lack of trust in the political process in failing to recognize that Congress and the agencies do respond to representations by the public and by private interests.<sup>210</sup>

One only hopes that Professor Byse's confidence in the ability of Congress to respond appropriately is well placed more often than not. "But at some moment three or more appellate judges may sense that 'justice' is not being done. At that point they may search for a peg upon which to hang a decision."<sup>211</sup> Judges are probably pretty good at sensing injustice in the face of an individual and his individual problem standing before the bench. Their relationship to justice and complicated administrative rulemaking is far less certain.

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210. Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1804, 1832 (1978).

211. Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U. L. REV. 201, 209 (1970) (Kaufman is the Chief Judge of the Second Circuit).