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The Invalidation of Mandatory Cable Access Regulations: *FCC v. Midwest Video Corp.*

Examining whether the FCC has the jurisdictional power to require the top one hundred cable markets to dedicate four of their channels for certain uses, the author traces the legislative and case law histories of the FCC's jurisdictional grant of power from Congress. Analyzing a recent U.S. Supreme Court opinion holding that the FCC does not possess the jurisdictional power to make such an order to the cable markets, the author points to the growing need for broad and flexible powers required by the FCC if it is to cope with modern telecommunication technology. Thus, concludes the author, the FCC order should have been upheld by the Supreme Court.

I. INTRODUCTION

In the recent case of *Federal Communications Commission v. Midwest Video Corporation*,¹ the Supreme Court of the United States addressed the question of whether the Federal Communications Commission (FCC)² had the authority to promulgate rules requiring designated cable television companies (cable)³ to provide channels for public access. The Court, in an opinion written by Mr. Justice Byron White, held that the regulations⁴ in

1. 99 S. Ct. 1435 (1979).

2. In 1934, Congress, at the urging of President Franklin D. Roosevelt, passed legislation creating an agency with authority broad enough to govern all aspects of the media. The legislation was passed under the authority contained in the Commerce Clause. U.S. CONST. art. 1, § 8, cl. 3. The FCC is guided by the broad Congressional mandate contained in the Federal Communications Act of 1934 and has power to promulgate rules that carry the force of law. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (current version at 47 U.S.C. § 151-155 (1937)). "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act." *Id.*

3. Cable systems are described as, "A video image is transmitted through a coaxial cable from a central transmission point to interconnected homes or offices. At no time is the signal beamed through the air." Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 134 (1976).

4. The regulations questioned provide that:

Any cable television system having 3500 or more subscribers shall comply with the following requirements respecting channel capacity: (1) Min-

question impermissibly extended beyond the boundaries of the FCC's authority.⁵

The majority's decision identified the controlling issue to be "whether these rules are 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting,' and hence within the Commission's statutory authority."⁶

imum channel capacity. Each system shall have at least 120 MHz of bandwidth (the equivalent of 20 television broadcast channels) available for immediate or potential use for the totality of cable services to be offered.

47 C.F.R. § 76.252 (1978).

Any cable television system having 3500 or more subscribers, shall comply with the following requirements respecting the number and designation of access channels: (a) *Public access channel.* The operator of each such system shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis; (2) *Educational access channel.* The operator of each such system shall maintain at least one specially designated channel for use by local educational authorities; (3) *Local government access channel.* The operator of each such system shall maintain at least one specially designated channel for local government uses; (4) *Leased channel access.* The operator of each such system shall maintain at least one specially designated channel for leased access uses. In addition, other portions of its non-broadcast bandwidth, including unused portions of the specially designated channels, shall be available for leased uses. On at least one of the leased channels, priority shall be given part-time users.

47 C.F.R. § 76.254 (1978).

Any cable television system having 3500 or more subscribers, shall comply with the following requirements respecting the provision of access services: (a) *Equipment requirement.* The operator of each such system shall have available equipment for local production and presentation of cablecast programs other than automated services and permit its use for the production and presentation of public access programs. The operator of such system shall not enter into any contract, arrangement or lease for the use of its cablecasting equipment which prevents or inhibits the use of such equipment for a substantial portion of time for public access programming. (b) *Program content control.* The operator of each such system shall have no control over the content of access cablecast programs; however, this limitation shall not prevent it from taking appropriate steps to insure compliance with operating rules described in paragraph (d) of this section.

47 C.F.R. § 76.256 (1978).

5. "In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded those limits in promulgation its access rules." 99 S. Ct. at 1445. The Court supported its decision by emphasizing that previously:

Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3(h) of the Act stands as a firm Congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. We now reaffirm that view of § 3(h): the purpose of the provision and its mandatory wording preclude Commission discretion to compel broadcasters to act as common carriers, even with respect to a portion of their total services.

Id. at 1444 n.15. See note 11 *infra*.

6. 99 S. Ct. at 1437. The Court limited its discussion solely to answering this

The Court addressed two concerns in determining the scope of the FCC's authority. The first concern was whether the FCC had jurisdiction over cable systems.⁷ The second question dealt with the regulations requiring cable systems to assume common-carrier responsibilities.⁸ With these two issues providing the determinative rationale, the Court, in a six to three decision,⁹ decided that the rules were not "reasonable ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting";¹⁰ and, therefore, were not within the FCC's jurisdictional mandate.¹¹

FCC v. Midwest Video is significant inasmuch as it establishes the Court's intention to prohibit further jurisdictional expansion of the FCC over cable—an established and substantial communications medium of rapidly increasing importance.¹² Furthermore,

main issue, refusing to discuss any of the other issues present. The Court stated that:

The court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. The Court of Appeals intimated, additionally, that the rules might effect an "unconstitutional taking" of property or, by exposing a cable operator to possible criminal prosecution for offensive cablecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forgo comment on these issues as well.

Id. at 1446 n.19.

7. *Id.* at 1439. See also text accompanying note 8 *infra*.

8. 99 S. Ct. at 1441. See also text accompanying note 9 *infra*.

9. 99 S. Ct. at 1441. Justice Stevens filed a dissenting opinion, in which Justices Brennan and Marshall joined. The majority opinion was filed by Justice White, in which Chief Justice Burger and Justices Stewart, Blackmun, Powell, and Rehnquist joined.

10. *Id.* at 1436 (quoting *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968)).

11. The Court felt that because the Communications Act prohibited the placement of common-carrier obligations on broadcasters, any attempt to do so was illegal. 99 S. Ct. at 1445. The Court based this decision on their interpretation of § 3(h) of the Communications Act which stated:

'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this [Act]; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151-155 (1937)).

12. Current figures indicate that approximately 20% of the nation's population is hooked up to over 4000 cable systems. Harwood, *Tuning In On the New TV Technology*, PLAYBOY, Oct. 1979, at 218. Many experts feel that the combination of

the case adamantly refused to impose common-carrier obligations,¹³ however slightly, on cable operators; and also demonstrated the necessity of immediate Congressional clarification concerning the scope of the FCC's jurisdiction.¹⁴

This note will first examine the background and development of the case; second, discuss and analyze the case and its implications; and finally, suggest that, in the future, less restrictive reasoning should be utilized when dealing with the perpetually changing technological environment of cable television.

II. BACKGROUND

The foundation of the FCC's asserted jurisdiction over cable television is based on the Communications Act of 1934 (Act).¹⁵ The statute, which remains essentially unchanged today,¹⁶ was promulgated by Congress in order to regulate the rapidly accelerating technological capabilities of the broadcast industry. This legislation was created for the purpose of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communications service."¹⁷

Understandably, the Act does not expressly provide for the regulation of cable, as cable was not introduced to any significant extent until the 1950's.¹⁸ However, as the Court emphasized in the instant case,¹⁹ "it is clear that Congress meant to confer 'broad authority' on the Commission"²⁰ in order to enable it to maintain adequate control of the anticipated rapid evolution of communication technology.²¹

cable, pay, and home video tape will rapidly increase in importance, thus slashing the amount of viewing Americans devote to the three major networks. Deeb, *The Man Who Destroyed Television*, PLAYBOY, Oct. 1979, at 156.

13. See note 11 *supra*.

14. 99 S. Ct. at 1446. The Court stated: "We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress."

15. Communication Act of 1934, ch. 652, § 1, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151-155 (1937)).

16. *Id.* Congress recently amended the penalty provisions of the Act to apply to cable operators. Communications Act Amendments of 1978, Pub. L. No. 95-234, § 2, 92 Stat. 33 (to be codified at 47 U.S.C. § 503(b)(2)(a)(iii)). See Comment, *FCC Regulation of Cable Television*, 54 N.Y.U. L. REV. 204 n.6 (1979). See also M. HAMBURG, ALL ABOUT CABLE 2 (1979) [hereinafter cited as HAMBURG].

17. See note 2 *supra*. See text accompanying note 22.

18. *United States v. Southwestern Cable Co.*, 392 U.S. at 162 n.12. "[Cable] systems were evidently established on a noncommercial basis in 1949." *Id.*

19. 99 S. Ct. at 1439.

20. H.R. REP. NO. 1858, 73d Cong., 2d Sess., 1 (1934). See note 60 *infra*.

21. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). This case dealt

The broad wording of the Act is responsible for the controversy surrounding the FCC's jurisdiction over cable. The Act specifies communications by wire and radio as the objects of its authority, yet cable fits in neither of these categories.²² Instead, cable systems are really a combination of both broadcasting and wire (telephone and telegraph) communications. Cable systems use wires to transmit radio and television signals into the private homes of their subscribers.²³

The cable industry grew out of the demands of viewers in remote areas who, due to the distance from major urban centers,²⁴ were unable to receive adequate broadcast signals.²⁵ At first the FCC refused to subject cable to their authority in belief that the industry was too undeveloped and localized to require supervision.²⁶ The jurisdictional impetus, however, was provided by the concern of the major networks over cable's penetration into the established viewer market, thus motivating the FCC to re-examine the scope of its jurisdiction over cable.²⁷

The networks argued that since the FCC had Congressional

with the various administrative proceedings involved in licensing a broadcast facility. The majority stated that: "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather, it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *Id.* at 138.

22. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151-155 (1937)). "The provisions of this Act shall apply to all interstate and foreign communication by wire or radio . . ." See also D. PEMBER, MASS MEDIA LAW 430 (1979) [hereinafter cited as PEMBER].

23. Essentially there are three ways to get programs on the cable system:

- 1) to use an antenna that picks up signals from the air from conventional television stations operating in the vicinity and transmit them along the cable; 2) when the signals of stations are beyond the range of even the most sophisticated antenna, to use an antenna closer to the desired signal and transmit the signal by means of a long distance microwave or cable link, which can be rented . . . ; and 3) to transmit programs originated by cable operators at their own studio facilities. This last process is called cablecasting.

Comment, *FCC Regulation of Cable Television*, 54 N.Y.U. L. REV. 205 n.12 (1979). See also note 3 *supra*.

24. Cable systems supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit distant signals to their subscribers entirely beyond the range of local antennae. 392 U.S. at 163. See also H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 488 (3rd ed. 1978) [hereinafter cited as NELSON & TEETER].

25. *Id.*

26. First Report and Order, 38 F.C.C. 683, 709 (1965).

27. 392 U.S. at 164. "Thus, 'while the [cable] industry originated in sparsely

permission to regulate both broadcasting and wire communications,²⁸ it had the authority to regulate cable since it was essentially a hybrid form of broadcasting and wire communications.²⁹ However, the FCC still refused to directly regulate the cable industry, adopting instead the alternative position that cable systems were “neither common-carriers nor broadcasters, and therefore [were] within neither of the principle regulatory categories created by the Communications Act.”³⁰

The FCC’s position that cable was outside its jurisdiction was maintained until 1962. At that time the FCC performed an abrupt about-face in the case of *Carter Mountain*,³¹ where they embraced a third position asserting indirect jurisdiction over cable.³² The decision to assert limited control over cable reflected the FCC’s concern that microwave relay towers, over which it had authority, would be used to carry non-local programs into a community, thus possibly destroying a community’s local television service.³³

The FCC felt that public interest required the support of local broadcasters and took affirmative actions to prevent these stations from being injured.³⁴ “The FCC was well on its way to con-

settled areas and areas of adverse terrain . . . it is now spreading to metropolitan centers. . . .” *Id.* See also NELSON & TEETER, *supra* note 24, at 489.

28. See notes 2 and 22 *supra*. See generally PEMBER, *supra* note 22, at 430.

29. *Id.* See note 23 *supra*.

30. CATV and TV Repeater Services, 26 F.C.C. 403 (1959). The Commission also stated that it had not been given authority over “any and all enterprises which happen to be connected with one of the many aspects of communications.” *Id.* at 429. See *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251, 254 (1958). The Commission decided that since cable was neither a common carrier nor a broadcast system it could not directly regulate it.

31. *In re Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff’d sub nom.*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 366 *cert. denied*, 375 U.S. 951 (1963).

32. Indirect jurisdiction is defined as the power of the FCC to issue permits to construct microwave radio communication systems which transmit signals to community antenna systems (cable). The FCC has the authority to weigh the net effect upon the community to be served. Communications Act of 1934, ch. 652, § 307(b), 48 Stat. 1064 (current version at 47 U.S.C. § 307(b) (1936)). “The Commission shall carry into effect the equality of broadcasting service hereinbefore directed, whenever proper, by granting or refusing licenses or renewals of licenses” *Id.* “Cable systems often use microwave relay towers to pick up television signals and move them along to the cable system. This practice smacks of broadcasting and the FCC ruled that it has the power to deny a permit for a relay system if the existing broadcasting stations and thus the public interest will be injured by increased competition from the cable system.” PEMBER, *supra* note 22, at 431.

33. The court concluded its discussion stating: “We think that the Commission justifiably concluded that the continuance of the local station served the public interest, and that it was fully warranted in imposing condition, designed to protect that station” *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 366 (1963).

34. *Id.*

trolling cable under the justification of serving the public interest by protecting existing broadcasters from competition."³⁵

The FCC moved quickly to consolidate its newly acquired jurisdiction over cable,³⁶ and in 1966, extended to all cable systems application of regulations previously restricted to a few such systems.³⁷ Although the increase in authority was challenged, the Supreme Court, in 1968, agreed with the FCC that the expansion was justified, thereby clearly establishing the authority of the FCC to regulate cable.³⁸ The Court, through Mr. Justice Harlan, stated that:

The commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. . . . The commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of [cable systems]. We have elsewhere held that we may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administration action imperative for the achievement of an agency's ultimate purpose. . . ."³⁹

More importantly, the Court also established the standard to be utilized in determining the allowable boundaries of the FCC's jurisdiction. The Court held that the Act⁴⁰ limited the authority of the FCC to control cable to that which was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."⁴¹

When this case was handed down, the FCC reversed its position. It had maintained that the regulation of cable was necessary in order to protect local broadcasters. The Commission changed its rationale, asserting that regulation was necessary to improve the nature of the communication media available to the public.⁴²

35. PEMBER, *supra* note 22, at 431.

36. NELSON & TEETER, *supra* note 24, at 489.

37. Second Report and Order on Microwave Served CATV, 2 F.C.C.2d 725 (1966). The FCC decided that the Act supplied sufficient power to enable it to regulate all cable systems. *Id.* at 728-34. It issued regulations governing the carriage of local signals, the non-duplication of local programming, and prohibited the importation of distant signals into the one hundred largest television markets. *Id.* at 781-85. Thirteen days after the FCC adopted these rules, Southwestern Cable filed a complaint challenging the authority of the FCC to promulgate such rules.

38. 392 U.S. at 157. The Court identified the issues as whether the FCC had authority under the Act to regulate cable and, if it did, whether it had the authority to issue a prohibitory order. *Id.* at 167.

39. *Id.* at 177.

40. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (current version at 47 U.S.C. §§ 151-55 (1937)).

41. 392 U.S. at 178.

42. The goal of the FCC with regard to cable was stated as being to:

In order to effectuate this goal, the FCC issued regulations requiring cable systems with 3500 or more subscribers to operate as a local outlet by originating its own programs and providing facilities for local production and presentation.⁴³ As a result, cable systems could no longer solely transmit other broadcasters' signals; they were now required to create local programming themselves.⁴⁴

In 1972, the validity of the new regulations was upheld by the Court in a five-to-four decision. Four justices, in an opinion by Mr. Justice Brennan, concluded that the "reasonably ancillary" standard⁴⁵ allowed the FCC to promulgate rules "with a view not merely to protect but to promote the objectives for which the FCC had been assigned jurisdiction over broadcasting."⁴⁶ The justices further held that the regulations were valid inasmuch as they were within the reasonably ancillary standard.⁴⁷

[R]ecognize the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . [as] might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created: "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges"

U.S. v. Midwest Video Corp., 406 U.S. 649, 654-55 (1972) [hereinafter *Midwest I*].

43. The rules in question required: "[N]o CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." *Id.* at 653-54 (quoting 47 C.F.R. § 74.1111(a)). Cablecasting was defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." *Id.* at 653 n.6 (quoting 47 C.F.R. § 74.1101(j)). Note that the FCC repealed these rules in 1974, explaining that:

Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been the expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation.

99 S. Ct. at 1441 n.8 (1979) (quoting from Report and Order, 49 F.C.C. 2d 1090 (1974)).

44. PEMBER, *supra* note 22, at 432.

45. See note 41 *supra*, and accompanying text. In *Midwest I*, Justice Brennan filed the majority opinion in which Justices White, Marshall, Blackmun, and Burger joined. 406 U.S. at 650. Justice Douglas filed a dissenting opinion in which Justices Stewart, Powell, and Rehnquist joined. *Id.* at 677.

46. *Id.* at 667. See note 42 *supra*, for a statement of goals. The Court further stated that: "The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided with suitably diversified programming." *Id.* at 669.

47. *Id.* at 670. "In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is 'reasonably ancillary' to the effective perform-

Precedent established in cases dealing with the extent of the FCC's authority had solidly established the FCC's jurisdiction over cable. However, instead of pausing for a moment to observe the effect of its new regulations, the FCC decided to continue expanding the scope of its authority in an attempt to further improve the communication facilities and opportunities available to the public.⁴⁸

In 1972, the FCC issued a comprehensive set of cable regulations entitled the *Fourth Report and Order*.⁴⁹ This legislation, the genesis of the rules now under scrutiny, imposed "mandatory access" regulations by requiring the top one hundred cable markets to dedicate four of their channels for public, governmental, educational, and leased access.⁵⁰

With the *Fourth Report* regulations providing the stimulus, Midwest Video challenged the FCC,⁵¹ claiming the new rules violated the "reasonably ancillary" standard established in *Southwestern*.⁵² In 1978, the Eighth Circuit held that the controversial regulations did indeed exceed the permissible boundaries of the FCC's authority.⁵³ The court stated that:

[T]he Commission has no jurisdiction within its statutory grant, under the broadest view of the grant, to force free public access rules upon broadcasters, or to make broadcasters into common carriers, power to impose such access rules on cable television systems cannot be reasonably ancillary to the effective performance of the Commission's various responsibilities for regulation of television broadcasting.⁵⁴

Later that year the Supreme Court granted the FCC's petition for certiorari⁵⁵ and upheld the Eighth Circuit's determination that

ance of the Commission's various responsibilities for the regulation of television broadcasting."

48. See note 49 *infra*.

49. Fourth Report and Order on Cable Television Service, 37 Fed. Regs. 3251 (1972), *modified*, Cable Television Report and Order, 54 F.C.C.2d 207 (1975) [hereinafter Fourth Report] (reflected a reassessment of the 1972 access regulations and extended the compliance deadline from 1977 to 1986).

50. See note 4 *supra*, for the present rules in question which evolved from the rules questioned in *Midwest I*.

51. 99 S. Ct. 1435 (1979).

52. See note 10 *supra*, and accompanying text.

53. *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 99 S. Ct. 1435 (1979) [hereinafter *Midwest II*].

54. 571 F.2d at 1040. The court concluded that the goal of access was created by the FCC and therefore was not supported by any language of the Act or the objectives endorsed by the Court in *Midwest I*. *Id.* at 1040-43. Chief Judge Markey neatly summarized this conclusion by stating, "jurisdiction is not acquired through visions of Valhalla." *Id.* at 1045.

55. 99 S. Ct. 77 (1978).

the access rules were not reasonably ancillary to the FCC's authority.⁵⁶

III. THE CASE

The majority opinion in *FCC v. Midwest Video Corp.*, identified two interrelated issues as the underlying, determinative basis for their decision that the 1972 mandatory access rules were not reasonably ancillary to the performance of the FCC's statutory duties. As previously discussed,⁵⁷ the Court first questioned whether the FCC had jurisdiction over cable; and if so, the extent of that authority.⁵⁸ The Court then considered whether the imposition of the access rules exceeded this jurisdiction by placing common-carrier obligations on cable operators.⁵⁹

The Court's initial discussion of the jurisdictional question acknowledged that the FCC possessed jurisdiction over cable. The Court based this conclusion on the series of cases, discussed above, delineating the scope of the FCC's powers arising under the Act. The Court noted that although the Act pre-dated the development of cable, Congress had intended the power to be flexibly wielded in order to satisfactorily control the unpredictable directions of future communication advancements.⁶⁰

The Court then discussed the two contrasting jurisdictional is-

56. See text accompanying note 79 *infra*.

57. See 99 S. Ct. at 1439. See also text accompanying note 7 *supra*.

58. As the previous background discussion points out, it was fairly well established that the FCC did have jurisdiction over cable. The real question was whether this jurisdiction was sufficient to permit the application of the Fourth Report regulations. See note 49 *supra*. In *Midwest I*, the Chief Justice wrote that, in his opinion, the FCC's origination rules, "strains the outer limits" of the FCC's authority, and though not fully persuaded that the correct decision had been made, decided to defer his judgment. 406 U.S. 649, 676 (1972). See also note 43 *supra*, and accompanying text.

59. 99 S. Ct. at 1441.

60. 99 S. Ct. at 1439. "But it is clear that Congress meant to confer 'broad authority' on the Commission." *Id.* (quoting H.R. REP. NO. 1850, 73d Cong., 2d Sess., 1 (1934)). Justice Brennan's majority opinion in *Midwest I* stated:

We cannot construe the Act so restrictively. Nothing in language of [2(a)], in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. . . . Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us 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." Thus, underlying the whole Act is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.

406 U.S. at 660-61. Note also that the FCC had asked Congress to issue appropriate legislation in order to clarify its jurisdiction over cable. "Such legislation was in-

sues presented by the case.⁶¹ The FCC relied on Mr. Justice Brennan's position in *Midwest Video I*,⁶² that such regulations would "further the achievement of long established regulatory goals by increasing the number of outlets for commercial self-expression and augmenting the public's choice of programs and types of services."⁶³

In opposition, the respondents attempted to show that the regulations deprived cable operators of editorial control by refusing to grant them authority in the selection of the individual public users or the type of programming chosen by these individuals.⁶⁴ Additionally, respondents claimed that the loss of editorial discretion represented, in effect, an attempt to impose common-carrier regulations on the cable industry—a status the respondents alleged was clearly prohibited by the Act.⁶⁵

After considering both arguments, the Court endorsed *Midwest Video's* position that the regulations violated the Act; adding, in closing, that any future jurisdictional expansion or clarification depended specifically upon Congressional action.⁶⁶

The crux of this decision was the Court's belief that the rules imposed common-carrier obligations on cable operators. A cable common-carrier was defined as one who "makes a public offering to provide communication facilities whereby all members of the public who choose to employ such facilities may communicate or transport intelligence of their own design and choosing."⁶⁷

roduced in the Senate in 1959, favorably reported, and debated on the Senate floor. The bill was, however, ultimately returned to committee." 392 U.S. at 165.

61. 99 S. Ct. at 1441.

62. *Id.* See notes 42 and 43 *supra*, and accompanying text.

63. *Id.*

64. *Id.* Note also that the respondents (*Midwest Video*) argued that the access regulations were an intrusion on cable system operations qualitatively different from the impact of the rules upheld in *Midwest I*. *Id.* *Midwest I* dealt with regulations requiring cable operators to assume program origination responsibilities similar to those imposed on TV broadcasters. 406 U.S. at 653-54. The present case dealt with regulations requiring cable operators to provide designated channels solely for the public use. See note 4 *supra*. The difference was that under the prior origination rules the broadcaster still maintained editorial control. This enabled it to escape being labeled a common-carrier. 99 S. Ct. at 1441.

65. *Id.* at 1442. See also notes 5 and 11 *supra*. The Court noted that the FCC itself had acknowledged that the access requirements compelled common-carrier obligations. 99 S. Ct. at 1442.

66. *Id.* at 1446.

67. *Id.* at 1442. See also note 11 *supra*. The Act states that: "[N]othing in this [act] shall be construed to apply or to give to the Commission jurisdiction with respect to (1) charges . . . in connection with intrastate communication . . ."

In support of the conclusion that the rules imposed common-carrier responsibilities, the Court focused on three particular elements of the regulations.⁶⁸ The Court appeared to equate the rule requiring cable operators to provide designated channels on a first come, nondiscriminatory basis with the section defining the common-carrier as one who “makes a public offering to provide communication facilities” to “all members of the public”⁶⁹ Next, the majority pointed out that the rule prohibiting the cable operator from asserting any editorial control over program content paralleled the definition’s provision for allowing a member of the public to transmit “intelligence of their own design and choosing.”⁷⁰ As the final element, the Court noted that the rules prescribing what cable operators could legally charge for the use of their equipment was consistent with the Act’s definition of a common-carrier.⁷¹

The majority reasoned that because the FCC was explicitly directed by the Act to not treat persons engaged in broadcasting as common-carriers, any imposition of common-carrier obligations, however limited, unequivocally exceeded the permissible boundaries of the FCC’s authority.⁷²

The majority then discussed the 1973 case of *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*⁷³ in support of its position. *CBS* dealt with the question of whether a broadcast licensee was required to accept paid editorial advertisements.⁷⁴ The Court held that the broadcasters could not be forced to accept such advertisements, concluding that the broadcaster had broad editorial privileges⁷⁵ and that “Congress specifi-

Communications Act of 1934, ch. 652, § 2(b), 48 Stat. 1064 (current version at 47 U.S.C. § 152(b)).

68. See notes 4 and 11 *supra*, and accompanying text.

69. 99 S. Ct. at 1442.

70. *Id.* The Court also noted that a common-carrier does not “make individualized decisions, in particular cases, whether and on what terms to deal.” The majority then decided that the rules “plainly imposed common-carrier obligations on cable operators.” *Id.*

71. 99 S. Ct. at 1446. The FCC argued that no matter what characterization was given to the rules, it had the authority to issue them as long as they promoted the objectives of the FCC. See note 62 *supra*, and accompanying text. The Court countered that the rules were invalid due to the strong legislative intent to prohibit the placement of any common-carrier obligations on broadcasters, supporting with reference to the explicit order in the Act. See notes 5 and 11 *supra*.

72. *Id.*

73. 412 U.S. 94 (1973).

74. *Id.* The case also stands for the proposition that the broadcaster’s first amendment rights are not absolute, but must be balanced against those of the viewing public. Note, *Midwest Video Corp. v. FCC, The First Amendment Implications of Cable Access*, 54 IND. L.J. 111 (1978).

75. 99 S. Ct. at 1445. The Court noted in support of its contention that the cable operator was a broadcaster:

cally dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.”⁷⁶

The majority, in the principal case, relied on the *CBS* opinion to illustrate and strengthen its opinion that although the Act provided the FCC with broad supervisory powers, the FCC did not have unlimited authority.⁷⁷ On the contrary, the Court held that Congress had intended to restrict the FCC's ability to pursue goals of public access at the expense of the broadcaster's journalistic freedom.⁷⁸ The Court summarized its position by stating:

The language of section 3(h) is unequivocal; it stipulates that broadcasters shall not be treated as common carriers. As we see it, 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common carrier obligations on broadcast systems. The provision's background manifests a congressional belief that the intrusion worked by such regulations on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. It is difficult to deny, then, that forcing broadcasters to develop a “nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through § 3(h) of the Act.”⁷⁹

IV. ANALYSIS OF THE COURT'S OPINION

The holding announced in this case clearly illustrated the Court's conviction that section 3(h) of the Act represented a strong Congressional intent to prohibit the imposition of common-carrier obligations on broadcasters. As a result, the Court felt it had no other choice than to rule that the regulations violated the

That limitation is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, “both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide.”

The Court also noted that because Congress had restricted the FCC's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting, the controversial access rules were necessarily void. *Id.*

76. 412 U.S. at 105.

77. 99 S. Ct. at 1444. The Court also pointed out that the only limitation on cable systems came about through the FCC's power over broadcasting and not by a stipulation in the Act. *Id.*

78. *Id.* at 1445.

79. *Id.* at 1444.

Act and therefore, could not possibly be reasonably ancillary to the FCC's duties.⁸⁰

The Court viewed its responsibility as to enforce the Act, not to create new legislation. Consequently, as a direct result of the Act's language prohibiting the placement of common-carrier obligations on broadcasters, the Court was unable to consider the potential usefulness and desirability of such regulations. Simply stated, the Court's hands were tied.

In closing, the Court acknowledged the dilemma raised by its decision.⁸¹ As a result, it requested the aid of Congress in adopting additional, clarifying legislation.⁸² The Court apparently believed that without the FCC providing direction in the area of cable television, given its unpredictable future advances, a vacuum of control could result—possibly one ill-equipped to deal adequately with the challenges presented by modern technology. Because the Act provided sufficient evidence of the intent of Congress to establish controls on the communications industry,⁸³ the Court felt it was up to the Legislature to revise the Act in order to allow the FCC to pursue new directions.⁸⁴ The burden of clarification now rested squarely upon the shoulders of Congress.

There are several main policy areas which should be considered in determining the desirability of access rules. These policy areas will be examined from a historical perspective, as well as their likely future impact to provide assistance in evaluating the propriety of the regulations.

The first area of discussion considers the possibility that some of the factors the Court previously found persuasive in validating the Fairness Doctrine might also be used to support the validity of the questioned cable access rules.⁸⁵

80. *Id.* See also notes 6 and 11 *supra*.

81. The Court noted that the series of previous cases had generally endorsed the power of the FCC to promulgate rules related to reaching its goals of increased outlets and diversified programming and that it might be possible in the future to devise an acceptable access obligation. Nonetheless, the Court felt duty bound to uphold the law as contained in the Act unless, and until, Congress decided to otherwise declare such regulations were permissible.

82. 99 S. Ct. at 1446. However, note that the dissent asserted that since Congress had chosen not to enter the controversy, this should be interpreted as signaling Congress' desire to leave questions such as these to the experienced judgment of the FCC. *Id.* at 1448.

83. *Id.* at 1445. The Court stated that it was "unable to ignore Congress' stern disapproval evidenced in § 3(h) of negation of the editorial discretion . . ." *Id.* at 1445.

84. *Id.* at 1448.

85. The Fairness Doctrine was first recognized in 1949. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Under this doctrine, the broadcaster must give coverage to public issues, and the coverage must be fair. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969).

The Fairness Doctrine requires broadcasters to devote a reasonable percentage of their possible "air" time to the coverage of public issues,⁸⁶ and also requires the coverage be fairly balanced.⁸⁷ In 1969, these requirements were upheld by the Court.⁸⁸ The Court ruled that inasmuch as a limited number of channels were available, the impossibility of allowing everyone who desired to broadcast necessitated extensive regulation.⁸⁹ In recognizing the broadcaster's right to editorial control, the ruling further extended the public's right to an "uninhibited marketplace of ideas," and that "it is the right of the viewer and listeners, not the right of the broadcasters, which is paramount."⁹⁰ As a result of this reasoning, the Court decided that the FCC was justified in infringing on the broadcaster's rights in order to insure the exposure of contrasting viewpoints.⁹¹

This position was reaffirmed by the Court in the 1972 *CBS* case⁹² when it continued to emphasize the position that the rights of the public took precedence and that the need for balanced presentation of public issues was satisfied only when everything

86. See note 85 *supra*. See also PEMBER, note 22 *supra*, at 417. Of primary concern is public affairs programming and controversial public issues. *Id.* "Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues . . ." 395 U.S. 367, 382 (1969).

87. PEMBER, note 22 *supra*, at 415.

88. 395 U.S. 367 (1969). The Fairness Doctrine regulations are found in 32 Fed. Reg. 10303, *amended*, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362.

89. The unanimous Court strongly emphasized the scarcity of broadcast channels as one basis of the FCC's authority to regulate in this area. Note, *Midwest Video Corp. v. FCC; The First Amendment Implications of Cable Television Access*, 54 IND. L.J. 109, 110 (1978). An important question is how the Court circumvented Congress' prohibition of imposing common-carrier obligations on broadcasters. In answering this question, the Court stated that: "Certainly, our construction of § 3(h) does not put into question the statutory authority for the fairness doctrine obligations sustained in *Red Lion Broadcasting Co. v. FCC*, . . . The fairness doctrine does not require that a broadcaster provide common carriage; meeting fairness doctrine obligations the 'licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be presented, and the spokesmen for each point of view.'" 99 S. Ct. 1444 n.14 (1979) (citations omitted).

90. 395 U.S. at 390. The Court noted that it was the purpose of the first amendment to preserve an uninhibited marketplace where the truth would always prevail. *Id.*

91. Note, *Midwest Video Corp. v. FCC: The First Amendment Implications of Cable Television Access*, 54 IND. L.J. 109, 110 (1978).

92. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) [hereinafter *CBS*].

of importance had been said.⁹³ In conclusion, the Court noted that although broadcasters could not be forced to accept paid political advertisements, the FCC might, in the future, "devise some kind of limited right of access that is both practicable and desirable."⁹⁴

A second area of concern regards the possibility that the access rules could potentially impose too great a financial burden on the cable operators. As noted, the original access rules required certain cable systems to develop a twenty channel capacity with four of those channels reserved for public access.⁹⁵ Realizing that these regulations could cause unjustified economic hardships on cable, the FCC decided to amend the rules in order to make them more reasonable.⁹⁶ These 1976 amendments extended the compliance deadline to 1986, providing that until public demand existed for all four access channels, the cable operator could limit his operation to fewer channels, and that if the cable system had insufficient channels operating, it could satisfy the access requirement by providing portions of the available channels for access use.⁹⁷ These changes, accompanied by the statute which limited the application of these rules to the larger cable systems,⁹⁸ significantly alleviated the potential economic burden on cable operators.

A third area affecting the determination of the desirability of access requirements, is the advisability of further governmental involvement with a private industry. Presently the government, through the FCC, is heavily involved with the regulation of one-channel broadcasters in order to insure that crucial public issues are presented and representative viewpoints exposed.⁹⁹ This reg-

93. *Id.* at 122.

94. *Id.* at 131.

95. The original access rules questioned in *Midwest I* required all cable operators in the top 100 television markets to design their systems to include at least twenty channels and to dedicate four of those channels for public, governmental, educational, and leased access. See note 4 *supra*.

96. Report and Order, 59 F.C.C.2d 294 (1976).

97. (b) Until such time as there is demand for each channel full time for its designated use, public, educational, governmental, leased access channel programming may be combined on one or more cable channels. To the extent time is available therefor, access channels may also be used for other broadcast and nonbroadcast service except that at least one channel shall be maintained exclusively for the presentation of access programming as required

(c) if insufficient activated channel capacity is available to provide one full channel for shared access programming the system operator shall provide whatever portions of channels are available for such purposes.

47 C.F.R. § 76.254 (1976).

98. The limitation to systems having 3500 or more subscribers insures that the cable operator will have sufficient income to provide the necessary facilities and equipment modifications. Also, since the rules require cable operators to build expandable systems, this may save the operator future expense.

99. See note 85 *supra*. Although the FCC does no monitoring of the stations

ulation is necessary due to one-channel systems providing a limited amount of time for the discussion of public issues. As a result of there being a limited amount of time available, it is conceivable that the only viewpoint presented would be that of the station's management. Because of this possibility, the FCC is continually having to monitor different stations throughout the country in order to insure that they are satisfying the balanced presentation requirements of the Fairness Doctrine.

However, with regard to cable systems, such involvement would be unnecessary if the mandatory public access requirements were imposed on cable systems. The rules were designed to guarantee that the public received diverse programming by providing free access to anyone who wished to speak on an issue.¹⁰⁰ The availability of free television exposure would undoubtedly provide an irresistible lure, thus encouraging the expression of a multitude of differing viewpoints.

The result would be that the government would not have to monitor cable systems in order to insure that they were complying with the Fairness Doctrine. This would considerably reduce the amount of possible governmental involvement and, as a direct consequence, cause a reduction in the amount of governmental expenditures.

The fourth area concerns the definition of a common-carrier. A common-carrier, in a communications context, is generally defined as any communication facility which allows any member of the public to freely broadcast upon demand.¹⁰¹ With television and radio broadcasters, such a definition made sense and, taken in light of the accompanying prohibitory legislation, is clearly justified. Broadcast systems which only possess one channel on which to transmit must, out of necessity, be provided with broad editorial powers over the type and origin of programming broadcast over its sole channel. To allow the imposition of nondiscriminatory public access requirements would place obvious and potentially crippling burdens on the broadcaster and, foreseeably,

for violations of the Fairness Doctrine, it does adjudicate the validity of viewer complaints. In 1973, approximately 2400 complaints were received. *PEMBER, supra* note 22, at 422.

100. The idea is that if there was not a scarcity of channels, then diversity would develop naturally. In *CBS*, Justice Stewart stated that it was the scarcity of channels which necessitated regulation in order to guarantee diverse programming. 412 U.S. at 135 (1973).

101. *See* note 67 *supra*.

allow such a one-channel system to become monopolized by the wealthy and influential.¹⁰²

In contrast, the cable industry currently possesses the technological capability to install as many as eighty channels.¹⁰³ For the future, technophiles predict that, with the advent of laser-ray carriage of television signals, cable systems will have a virtually unlimited quantity of channels,¹⁰⁴ although most cable systems presently begin with only twelve channels.

Since the access requirements only pertain to a maximum of four channels out of twenty, a simple computation confirms that, at the most, 20% of the system's potential would be affected by the access requirements, thus leaving the cable operator with control of not less than 80% of possible "air" time.

If a one-channel broadcaster was required to reserve 20% of the channel's possible "air time" for public access, the channel could theoretically lose one-fifth of its present revenue production capability. Broadcasters generally rely on commercials to generate their income. Consequently, a decrease in the number of commercials shown causes a decrease in the amount of income realized. Conceivably the broadcaster could produce the same level of revenue by increasing the frequency or length of commercial breaks by 20%. However, a possible result of such an action would be the alienation of viewers unaccustomed to the increase in commercial time.

In contrast, if a cable system reserved four out of twenty channels for public access, it would still be able to provide sixteen other channels for private commercial use. Simply stated, the cable systems could more easily accommodate the access requirements without the threat of diminished income.

However, the majority, in *Midwest Video*, ruled that although these regulations conceivably created only a limited common-carrier obligation, they had to be equated with the establishment of complete common-carrier responsibilities because the Act prohibited common-carrier duties in any form.¹⁰⁵

The more realistic position in the future would be to interpret the access obligation as creating a limited common-carrier status,¹⁰⁶ one that pertains to only a small portion of cable's total

102. 412 U.S. at 123 (1973).

103. The cable industry now possesses the technology to allow the conveyance of up to 40 channels through a single cable. This capability could easily be increased to 80 channels. See note 16 *supra*, at 206 n.22.

104. See Field, *Laser Video Is Intriguing, But Is It Useful?*, N.Y. Times, Sept. 18, 1972, at 37, col. 3.

105. See note 78 *supra*, and accompanying text.

106. By "limited common-carrier" responsibilities, it is meant that a broad-

service capability. This construction would recognize the obvious differences between broadcasters with only one channel, and cable, with a potentially unlimited channel capacity.

The final area of consideration involves the trend of previous cases questioning the extent of FCC jurisdiction. It has been indicated above that as early as 1968, the Court recognized that the FCC had the authority to regulate cable.¹⁰⁷ Subsequent cases steadily expanded the scope of this jurisdiction.¹⁰⁸ The Court held that the FCC had sufficient authority to regulate cable television "with a view not merely to protect, but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting."¹⁰⁹ Although the Court's decision in *Midwest Video* invalidated the access rules because they imposed common-carrier obligations, the rules were nonetheless designed to promote the objectives of the FCC by establishing more outlets for community expression and also increasing the diversity of programming.¹¹⁰

Mr. Justice Stevens pointed this out in his dissenting opinion in which he criticized the Court for substituting its own judgment for that of the FCC, emphasizing that "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."¹¹¹ This policy will undoubtedly be influ-

caster could conceivably be deemed a common-carrier with respect to only a portion of its service capability, e.g., cable where there could possibly be thousands of channels within one cable service and only two or three of these channels would be reserved for common-carrier duty. Note also that Circuit Judge Wilkey recognized this contention as a viable option when he stated in his opinion: "Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." *National Association of Regulatory Commissioners v. FCC*, 174 U.S. App. D.C. 374, 381, 533 F.2d 601, 608 (D.C. Cir. 1976). The Court could, in the future, hold that the reasoning employed to justify the prohibition of common-carrier status on television and radio is not logically transferrable to cable. The House of Representatives acknowledged this possibility in 1975 by approving of one full-access channel and one leased access channel, but questioned the value of two other channels in view of the costs to the cable operators. STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE FOREIGN COMMERCE, 94TH CONG., 2D SESS., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE 9 (Subcomm. Print 1976).

107. *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

108. *U.S. v. Midwest Video Corp.*, 406 U.S. 649 (1972).

109. *Id.* at 667. See note 46 *supra*.

110. *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

111. 99 S. Ct. at 1448 (1979). The dissent also claimed that the majority had ministerially interpreted the meaning of the common-carrier statute contained in the Act.

ential in any future consideration concerning the validity of cable access requirements.

V. CONCLUSION

The FCC, in order to effectively fulfill its statutory responsibilities, must be afforded a broad and flexible base of authority in order to satisfactorily cope with the incredible growth of modern telecommunication technology. Earlier cases recognized this as a valid and necessary requirement. In *Midwest Video*, however, the Court held that the access rules in question impermissibly extended the statutory boundaries of the FCC's jurisdiction by placing common-carrier obligations on cable—a status the Court felt was clearly prohibited by the Act.

Recognizing the need for reappraisal, the Court asked Congress to provide additional legislation in order to provide better guidance for the courts, and to match present needs and technological capabilities in a meaningful and beneficial manner. Thus, the real issue submitted is whether the access rules should be permitted in future legislation.

The answer appears to be in the affirmative. The involvement of the government in broadcasting and the Fairness Doctrine's imposition on broadcast regulations supports this contention. The fact that previous cases have consistently expanded the scope of the FCC's authority, going as far as recognizing the possibility of future access requirements is also supportive of this reasoning. Additionally, the FCC has usually been allowed to promulgate and apply its own policies unless they were clearly illegal. The steps taken by the FCC to insure that the rules will not become too burdensome from a financial viewpoint, provides additional support for the possibility of future access rules. Finally, the uniqueness of cable, with its unlimited channel capability, largely destroys the validity of the rationale for prohibiting the

Justice Stevens, in his dissenting opinion, stated that there was nothing in the statute or its history which the exercise of powers otherwise within its statutory authority because a "lawfully imposed requirement might be termed a 'common carrier obligation.'" *Id.* at 1447. Justice Stevens thought that the Court should follow the construction of a statute by those charged with its execution unless there were compelling indications that it was incorrect. *Id.* Chief Justice Burger commented in *Midwest I*: "I am not fully persuaded that the Commission has made the correct decision in this case But the scope of our review is limited and does not permit me to resolve this issue as perhaps I would were I a member of the Federal Communications Commission. That I might take a different position as a member of the Commission gives me no license to do so here. Congress has created its instrumentality to regulate broadcasting, has given it pervasive powers, and the Commission has generations of experience and 'feel' for the problem. I therefore conclude that until Congress acts, the Commission should be allowed wide latitude" 406 U.S. at 676.

placement of common-carrier requirements on broadcasters. The total of all these considerations clearly points to the conclusion that the effects of the mandatory cable access regulations are outside the type of occurrence Congress intended to prohibit.

As the Court stated, "conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."¹¹²

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112. 99 S. Ct. 1435, 1444 (1979).

