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Whose Intent?  
A Study of Administrative Preemption: State Regulation Of Cable Television

Mark I. Wallach*

The doctrine of preemption developed in response to the conflicts produced by concurrent state and federal assertions of regulatory jurisdiction. Traditional preemption analysis has emphasized an inquiry into the intent of Congress to occupy an area exclusively. The author, however, expresses the view that the search for congressional intent has led courts away from consideration of intent to preempt as expressed by federal administrative agencies themselves. He therefore constructs a two-level intent model, which recognizes both statutory and administrative intent as factors in preemption. The author proceeds to apply this model to resolve some of the more perplexing preemption questions arising from simultaneous federal and state regulation of CATV.

I. INTRODUCTION

A dramatic escalation of both the number and sophistication of cable television facilities has led several states and numerous municipalities to initiate regulation of CATV operations. This regulation may be divided into two categories: franchising and operational regulation. Encouraged by the tremendous potential for both community service and monetary reward, local com-

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CATV (Community Antenna Television), for the purposes of this article, denotes the reception by a television set of signals via a coaxial cable rather than over the air. Although it may be contended that the term CATV is no
communities began early in the development of CATV to assume an active role in the franchising of CATV systems. Until quite recently, however, there has been very little interest on the part of most states in entering the field of CATV franchising, despite strong arguments in favor of the assumption by state authorities of this franchising role. More typically on the state level, it is operational regulation of CATV that has begun to appear. Although it stems from legitimate state concern over the direction of the growth of the CATV industry, such regulation becomes the source of considerable consternation when it overlaps with the emerging scheme of federal regulation in the CATV field.

When, in 1971, it issued its Third Report and Order on Community Antenna Television Systems and subsequently promulgated a set of regulations in accordance with that Report, the Federal Communications Commission (FCC) set forth an extensive system of regulation of many aspects of the cable television industry. One fundamental issue raised by this development is the extent to which these regulations preempt state efforts to regulate CATV. That is, may the states now legitimately regulate cable television at all? If so, to what extent does the existence of federal regulation effectively limit the scope of state regulation? This article is directed to the resolution of these questions.

Critical to the analysis of preemption of state CATV regulations is the initial recognition that there are two modes of federal action that may displace state power in a given area. Federal action in this regard may be manifested either by statute alone or through the workings of a statutorily created administrative agency. Any preemption of state authority by FCC regulations is clearly of the latter type. However, while the body of law outlining various tests for preemption solely by federal statute is both substantial and well-

longer appropriate, since the local "community" is not exclusively serviced, that generally accepted term will be used throughout this article. For an introduction into the technology of CATV, see Sloan Commission Cable Communications, ON THE CABLE: THE TELEVISION OF ABUNDANCE 11-22 (1971).

2. Local franchise agreements have largely failed to reach broad issues such as programming and technical standards. See Rivkin, supra note 1, at 1462-83. Furthermore, although some municipalities have entered franchise agreements that purport to control rates, channel use, or technical standards, these attempts have generally not been upheld by the courts, and many CATV companies are able to evade regulation altogether. See Note, Regulation of Community Antenna Television, 70 Colum. L. Rev. 837, 850-51 (1970).

3. See note 1 supra.
reasoned, judicial examination of administrative preemption suffers from a basic analytical confusion. The root cause of this confusion seems to be that the courts, when faced with questions of potential preemption by federal administrative regulation, have borrowed heavily in their analyses from cases dealing with preemption by federal statutes alone. Such parallelism, however, proves to be wholly inappropriate as a basis for analysis of administrative preemption.

II. A FRAMEWORK FOR ANALYSIS

To determine the true preemptive effect of FCC action upon state regulation of CATV, a basic model for preemption in the context of administrative action, generally, must be constructed. Such a model must then be applied to the realm of CATV. As background, however, it is necessary to outline the basic statutory preemption analysis.

A. Preemption by Self-Executing Statutes

Over the years, courts have had little difficulty in discovering the existence of preemption by statutes where the state regulation in question directly conflicted with the explicit terms of a "self-executing" federal statute. The most common question arising in cases of self-executing statutes is whether an actual conflict exists between the regulation attempted by the state and the federal policies embodied in the federal statute. This question generally requires reviewing courts to construe both the statutes and regulations involved, searching above all for the intention of Congress. As long as the intended federal regulation is within the reach of congressional power—an assumption to be made throughout this dis-

6. See notes 8-31 infra and accompanying text.
7. See, e.g., San Diego Unions v. Garmon, 359 U.S. 236 (1959), discussed in text accompanying notes 81-83 infra, in which the court searched desperately for a congressional intent within the Taft-Hartley Act as if it were dealing with a self-executing statute.
8. The term "self-executing statute" is used throughout this article to mean a statute that requires no administrative action to become effective. That is, a self-executing statute does not contemplate administrative regulations or depend for execution on policy decisions by an administrative agency.
9. All preemption discussions must begin with the constitutional basis for the doctrine: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. Const. art. VI.
cussion—a clear intention on the part of Congress will suffice to preempt conflicting state action. As a corollary, when congressional intent is not clear, and it is possible to construe the federal action as not creating a conflict between the statutes, courts have often refused to find an intent to preempt state regulation. Thus, in *Huron Cement Co. v. Detroit*, Justice Stewart restated a previous formulation of the preemption test:

In determining whether state regulation has been preempted by federal action, “the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.”

Courts faced with state regulation that purports to parallel or complement a system of federal legislation have had more difficulty in deciding whether preemption has occurred. One of the fields of greatest judicial activity on this subject, especially in recent years, has been patent and copyright law. Although the patent area is complicated by the constitutional prescription of congressional authority, the lines of analysis pursued by the Supreme Court are applicable to most cases of parallel state regulation.

The major statement of the Court on patent preemption has appeared in *Sears, Roebuck & Co. v. Stiffel Co.*, where the Court struck down an attempt by Illinois unfair competition laws to provide protection to inventors that went beyond that offered by the federal patent laws. Speaking for the majority, Justice Black stated: “Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.” Justice Black’s reference here was to the purpose, or intention, of Congress in designing the federal patent laws; even though not explicitly in actual conflict with the federal

11. *Id.* at 443.
14. *Id.* at 231. In *Stiffel*, Illinois attempted to protect the inventor of a popular pole-lamp which had been declared unpatentable under federal law. Even though no finding of patent infringement was possible, the Illinois court was willing to find unfair competition in the exact duplication of the Stiffel design by Sears, Roebuck & Co.
statutes, a state regulation will be preempted if it appears to contradict the intent the Court attributes to the Congress. A companion case to Stiffel, Compco Corp. v. Day-Brite,\textsuperscript{16} re-emphasized this aspect of the preemption doctrine, pointing out that a state might find various ways of protecting inventors and the public without contradicting the intent of Congress. The Stiffel rationale was again applied in Lear, Inc. v. Adkins\textsuperscript{16} to bar state court enforcement of private agreements to guarantee royalties on unpatented devices.\textsuperscript{17}

In the copyright area, the Supreme Court, in Goldstein v. California,\textsuperscript{18} purported to distinguish the Stiffel line of decisions on the ground that failure to legislate in a particular area demonstrated a lack of congressional intent to "draw a balance" between competing objectives, which could have excluded state regulation.\textsuperscript{19} Chief Justice Burger, speaking for the majority, concluded that:

In regard to mechanical configurations, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free. The application of

\textsuperscript{15}376 U.S. 234 (1964).
\textsuperscript{17}See Note, The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Pre-Emption Doctrine, 71 COLUM. L. REV. 1444 (1971). While agreeing that "the primary responsibility for deciding whether a state should be permitted to act within a sphere of congressional competence should therefore be left to Congress," id. at 1449, the Note goes on to propose a balancing test, comparing the impact of state action on the achievement of federal policy objectives with the importance of the state policy embodied in the state statute. This balancing test, however, seems to rest on the uncertainty of Congress' intent in areas not specifically covered by existing patent and copyright legislation; that is, in those areas where congressional intent could not be directly determined from the face of the statute, or even from a clear expression in the legislative history. The Note suggests that a court considering expansion of the Stiffel doctrine proceed by weighing the effect of such an extension on state powers. If Congress feels that this balance does not fairly reflect its policy, it is, of course, free to address the subject specifically.

\textsuperscript{18}412 U.S. 546 (1973).
\textsuperscript{19}Goldstein reviewed a California statute making it a criminal offense to "pirate" sound recordings produced by others. Although the petitioners sought to apply the Stiffel doctrine, the Supreme Court, over a strong dissent from Justice Douglas, seemed to treat copyright cases differently from patent cases. It should be noted that federal copyright protection had been extended to sound recordings in 1972.
state law in these cases to prevent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn and thereby necessarily gave way under the Supremacy Clause of the Constitution. No comparable conflict between state law and federal law arises in the case of recordings of musical performances. In regard to this category of "Writings," Congress has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act.20

Outside the patent field, preemption doctrines for self-executing statutes have developed around the central theme of discovering the intent of Congress. In this vein Justice Butler spoke for the Court in Missouri Pacific Railroad Co. v. Porter:21

Its [Congress'] power to regulate such commerce and all of its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction.22

This formulation, however, ignores the crucial question of precisely what Congress did intend; to say that Congress intended "to enter a field of regulation" is merely to say that it did legislate some form of regulation in that field. An intention to preempt, however, must rest on congressional intent to regulate exclusively—to occupy totally—the field in question. Thus, a blanket rule that even complementary state regulation is automatically preempted is probably over-restrictive of state action.

Twenty-two years after Porter, the Supreme Court applied such a purposive test in California v. Zook.23 Specifically rejecting the assertion that "coincidence is as ineffective as opposition,"24 Justice Murphy focused the issue of intent on "whether Congress intended to make its jurisdiction exclusive."25 Faced with a silent statute and an absence of relevant legislative history, the Court noted that "we know that normally congressional purpose to displace local laws must

20. 412 U.S. at 569. On the other hand, it could be argued that Goldstein implies a limitation of the Stiffel line to the patent field, reducing its usefulness in other situations of federal preemption.
22. Id. at 346.
24. Id. at 729.
25. Id. at 731.
be clearly manifested." The Zook Court took this concept of intent to its logical extreme. As evidence of a lack of congressional intention to oust state authority, the court noted that there had been no existing state laws to displace at the time of passage of the statute in question. Under the Zook formulation intent is an active concept not to be inferred except on strong evidence of a congressional purpose inconsistent with complementary state regulation.

The most complete and therefore most authoritative statement to date of the tests to be applied to complementary or parallel state regulation in the face of a self-executing congressional statute is found in *Florida Lime & Avocado Growers, Inc. v. Paul.* In that case, the Supreme Court was asked to decide whether a California statute could constitutionally exclude from California markets avocados that had been certified to be marketable by a federal marketing order issued pursuant to congressional statute.

Justice Brennan, speaking for the majority, noted "[t]hat the California statute and the federal marketing orders embody different maturity tests is clear. However, this difference poses, rather than disposes of the problem before us." Looking first to its substance, he asked whether the state regulation actually obstructed the objectives that motivated the congressional action and found that "there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field." Thus the Court promulgated a two-pronged test for preemption by self-executing statutes: Either a "natural conflict" between the subject matters of the state and federal regulations must exist, or Congress must have clearly and unmistakably evinced its intention to bar state regulation, inconsistent or not.

It is clear that in the field of self-executing federal statutes preemption of state regulation is grounded on the statute itself. If the subject matter of the federal statute inherently contradicts the state law, as determined by statutory construction, then the supremacy

26. *Id.* at 733. Zook sustained a California law penalizing interstate carriers operating without an ICC permit. The dissent called this holding novel in that it allowed a state to impose an additional punishment for a federal offense without congressional authorization.
27. 336 U.S. at 735.
29. *Id.* at 141.
30. *Id.*
31. *Id.* at 146.
clause clearly invalidates the state action. If, however, there is no such conflict, then the intention of Congress to bar further state regulation must either explicitly appear in the statute or be deducible from that statute in order to effect preemption.

When the statute is ambiguous with respect to the intent of Congress in a specific area, then it is proper to look to the competing federal and state interests involved, as the Supreme Court did in *Stiffel* and its progeny. Thus, even though a powerful state interest will not defeat preemption in the face of a clear statement of congressional intent, or a blatant contradiction of the federal statutory purpose, such an interest might have a useful role in balancing the competing federal considerations when some ambiguity as to congressional intention is present. This central concept of intent is clearly relevant in resolving questions of preemption by a self-executing federal statute. Where, if not to the statute and its legislative history, could a court turn for guidance in such cases?

**B. Preemption by Administrative Action**

Contrary to the easy assumptions of some courts, however, the congressional intent test of *Florida Avocado Growers* is not necessarily a useful or meaningful concept when applied to the actions of a federal administrative agency. A fundamental reason for the failure of this analogy is that there are several ways in which an administrative agency might react to a grant of power from the Congress. If it determines to respond actively to a given problem, the federal agency can actually devise and implement a regulatory scheme for the area in question, or it can attempt to preempt the area without active regulation. Should an agency decide not to exercise its authority, it may opt simply to ignore the subject area—non-regulation—or may act to renounce or decline its jurisdiction, perhaps in the hope that a state or another agency will assume responsibility for the area.

When, and insofar as, an agency determines actively and actually to regulate an area of commerce placed within its jurisdiction by Congress, the courts have found no difficulty in applying the supremacy clause, just as in the case of a self-executing statute. In

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32. Such ambiguity might result because the statute in question did not fully contemplate the problems that might eventually arise in that field. This situation was present in *TV Pix v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), where the fact that the expansion of cable television had not been predicted by Congress affected the court's treatment of preemption. See notes 70-80 infra and accompanying text.
such a situation the only real question becomes whether the agency does, in fact, have power over the area and if so, whether it is actively and legitimately exercising it. If these tests are met, the agency's regulation is normally seen by courts as an extension of the Congress' will and power. This is the essence of the "delegation of power" question, which raged over administrative agencies in their early years and which has been largely settled in favor of legitimizing agency regulation. According to the standard argument in such cases of active regulation, the Congress' intent is to allow such regulation. The agency is merely carrying out Congress' intent. Contrary state regulation would contravene the expressed intent of Congress that the agency have power over the field. Consequently, the question of preemption of state regulation is determined according to the same rules applied to conflicts with self-executing statutes.

This approach has been used by the Supreme Court to decide a preemption case involving the FCC. In Radio Station WOW, Inc. v. Johnson, a fraternal benefit society leased its radio station to a corporation formed to operate the station. After application to the FCC for consent to transfer the license, but before FCC approval had been obtained, the society sued in state court to set aside the lease for fraud under a state law. The FCC subsequently approved the transaction and the transfer was made. The Commission, moreover, conceded a lack of jurisdiction over the state issue of fraud. The Supreme Court of Nebraska, however, set aside the lease and license, prompting defendants to protest that Nebraska was preempted from jurisdiction by the FCC. On certiorari, the Supreme Court affirmed, holding that:

... if the State's power over fraud can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest which led to the granting of a license, the principle of fair accommodation between State and federal authority, where the powers of the two intersect, should be observed.

33. In TV Pix v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), it was stated in dictum that active FCC regulation of a field within its jurisdiction would definitely preempt state regulation.


35. See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).


37. 144 Neb. 406, 13 N.W.2d 556 (1944).

38. 326 U.S. at 132.
This "principle of fair accommodation" is nothing more than an attempt to interpret agency action in the same way a court might construe statutory language and to avoid finding a conflict that would preempt state action unless such a conflict is inherent in the character of the federal action.39

On the other hand, when a federal administrative agency has no immediate plans for the exercise of its regulatory mandate, its response has commonly been nonregulation, unaccompanied by any expression of intent either to preempt or to permit state regulation. One occasion for such nonregulation has been during that period between the grant of power to the agency and the final creation of a regulatory program by the agency. This "interval" concept has frequently been utilized by courts faced with preemption issues.40

One early case that struggled with the nonregulation question was *Napier v. Atlantic Coast Line Railroad Co.*41 in which Justice Brandeis confronted the issue whether the Boiler Inspection Act, delegating power over interstate locomotive equipment to the Interstate Commerce Commission, precluded state requirement of safety equipment that was not required by the ICC. Even though the Court found that the ICC "had made no other requirement inconsistent with the state legislation,"42 it believed that fact to be without legal significance.43 Following classic preemption doctrine, Justice Brandeis recited that the only relevant inquiry was "the construction of the Act delegating the power."44

The purpose of the statutory construction in *Napier* was to ascertain the intent of Congress. Thus Brandeis continued, "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads us to that conclusion."45 Since Congress had not explicitly expressed an

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39. A second type of active agency response to a grant of regulatory power, preemption without regulation, is far from being a common phenomenon. In fact, the assertion of authority to so respond by the FCC in the area of leased access cable television channels is of sufficient novelty to create serious theoretical problems. Since there do not appear to be any decided cases on point, the resolution of these problems must await the creation of a model capable of application to preemption without regulation, and will consequently be considered at length later in this article.

40. See text accompanying notes 54-56 infra.

41. 272 U.S. 605 (1926).

42. Id. at 613.

43. Id.

44. Id.

45. Id.
intent to preclude state regulation, the Court might have interested itself in the possible intent of the ICC to leave the area unregulated or, in fact, to allow state regulation until it should decide to enter the field. Nevertheless, the presumed intent of Congress was regarded as controlling notwithstanding that the execution of that intent had been delegated to an administrative agency.

Considerably later, in Garner v. Teamsters Local 776, the Supreme Court was still concerned with discovering in an unclear statute signs of Congress’ intentions to permit or prevent state regulation. Justice Jackson framed the problem as he saw it: “The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.”

In the area of preemption questions involving state regulation that possibly conflicts with federal administrative agencies, the labor area has been the most thoroughly fought-over battlefield in recent decades. One of the most explicit and therefore most important decisions in this field is Bethlehem Steel Co. v. New York State Labor Relations Board. There, the National Labor Relations Board failed to exercise jurisdiction over foremen’s bargaining units despite a Supreme Court determination that it possessed such a power. Meanwhile, the state labor relations board attempted to establish its own jurisdiction so that the area might not be left wholly unregulated. Justice Jackson noted that “Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action.” In other words, any appeal to

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46. 346 U.S. 485 (1953).
48. 346 U.S. at 488.
49. Frequent amendments and modifications of the controlling statute, the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970), have made a reality of the concept of congressional will in many specific areas; at the same time, however, the volume of labor preemption cases has tended to develop issues with their own momenta and points of dispute. Thus, while no modern discussion of preemption by administrative action could ignore the labor field, care must be taken in attempting to draw legal conclusions that retain their vitality when transferred to other fields.
51. Id. at 771.
the intent of Congress would be largely synthetic—that is, what can be inferred about Congress' intent? Or, more appropriately, what might Congress have intended had it considered the issue?

In the *Napier* case, the Court found a grant of "general power" to the ICC over the subject matter in question and held such a grant sufficient to oust state jurisdiction. However, approaching the same situation with greater sophistication in *Bethlehem*, the Court noted that:

When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action *if it is clear that Congress has intended no regulation except its own.*

The effect of this language is to create a qualification restricting cases of automatic preemption to instances in which Congress has clearly indicated its intention to preserve exclusive federal regulatory jurisdiction. As a result, only a finding by a reviewing court that Congress intended to exclude all other regulation in the field will lead to a holding of automatic preemption.

The *Bethlehem* Court went on to discuss the "interval" situation, where "Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body." In such a situation, "this Court has usually held that the police power of the state may be exercised." A similar result will obtain, said the Court, "if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment . . . ."

In contrast, the Court suggested that "the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such [federal] regulation is appropriate or approved pursuant to

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52. *Id.* at 773 (emphasis added).

53. In such a case, however, the intent of the agency is clearly of little importance. Thus, the *Bethlehem* Court surveys various situations in which congressional intent may or may not be inferred. 330 U.S. at 773-74. Cf. Note, *Overlapping Federal and State Regulation of Labor Relations*, 15 U. CHI. L. REV. 362 (1948).

54. 330 U.S. at 773.

55. *Id.* at 774.

56. *Id.*
the policy of the statute."57 This passage, however, sounds a good deal more illuminating than it is. The question remains, how are courts—or litigants—to distinguish between a declination to act that carries the force of a "ruling" that no state regulation is appropriate, and one that frees state action in a separable or distinct segment of the matter? In this regard it is useful to note the comments of Professor Powell on the significance of congressional failure to act:

Now congress has a wonderful power that only judges and lawyers know about. Congress has a power to keep silent. Congress can regulate interstate commerce just by not doing anything about it. Of course when congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking. If congress keeps silent about the interstate commerce that is not national in character and that may just as well be regulated by the states, then congress is silently silent, and the states may regulate. But if congress keeps silent about the kind of commerce that is national in character and ought to be regulated only by congress, then congress is silently vocal and says that the commerce must be free from state regulation.

These two constitutional speakings have been reported from time to time by different justices and sometimes by the same justice in the same opinion.58

The message, of course, is that congressional silence frequently says nothing at all about congressional intentions to preempt or not to preempt state regulation. Something more is often required by the courts.

In Bethlehem the Court cites the absence of any "administrative concession"59 by the NLRB that the matter was beyond its authority and notes that "[n]either did the National Board ever deny its own jurisdiction over petitions because they were by foremen."60 In essence, the Bethlehem Court is groping for a "second stage" of indicia to apply when the intent of Congress is clearly unascertainable. What the Court finds, through the failure of the NLRB to take certain actions, is a kind of "negative intent" on the part of the agency. Al-

57. Id.
60. Id.
most as an afterthought, Justice Jackson mentions that the NLRB "asserts, and rightfully so . . . its power to decide whether these foremen may constitute themselves a bargaining unit." While this factor is not given decisive weight by the Court, it carries within it the germ of a potential solution to the problem of preemption by administrative agencies: ascertaining the intent of the federal agency.

Preemption questions have previously arisen in the context of the operations of the Federal Communications Commission outside the realm of CATV regulation. The most prominent of these opinions is *Head v. New Mexico Board of Examiners in Optometry*, in which the Supreme Court considered whether the Federal Communications Act had ousted normal state jurisdiction over the regulation of advertising content in radio or newspaper communications. The majority opinion, by Justice Stewart, recognized the state's interest in the "protection of the public health" through such regulation, and further noted that "this case in no way involves the Commission's jurisdiction over technical matters such as frequency allocation, over which federal control is clearly exclusive."

There seemed little question, however, that the FCC had the "authority to promulgate general regulations concerning the subject of advertising for the guidance of broadcasters." The question was, once more, whether the existence of this unexercised power preempted state regulation. Faced with a lack of conclusive evidence on the question of congressional intent, the Court nonetheless concluded that:

The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accom-

61. *Id.* at 776.
63. *Id.* at 430 n.6.
64. *Id.* at 431.
65. The first question the Court posed was whether Congress intended the FCC exclusively to occupy the field in question. The Court answered in the negative, saying, "Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." 374 U.S. at 430, citing California v. Zook, 336 U.S. 725, 731 (1949). Indeed, the concurring opinion of Justice Brennan offers persuasive historical evidence that Congress did not specifically intend the FCC to regulate such matters and in fact granted the FCC no useful sanctions for policing minor infractions until 1960. 374 U.S. at 433-37.
panied by no substantive standard other than the "public interest, convenience, and necessity."\(^6\)

Another factor that influenced the majority in *Head* was the absence of any indication that the FCC had any intention of regulating such advertising practices.\(^6\) The Court, however, contented itself with noting the lack of "any conflict between this state law and the federal regulatory system,"\(^6\) and upheld the validity of the New Mexico statute.\(^6\)

Finally, in *TV Pix, Inc. v. Taylor*,\(^7\) a three-judge panel was asked to analyze precisely the question of possible preemption of the CATV area by the FCC. *TV Pix* is probably not determinative of this question today because the nature of the FCC's asserted authority over cable television has changed radically since 1968, the year when *TV Pix* was decided; however, the opinion by Judge Thomp-

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66. 374 U.S. at 431.
67. The second question in the Court's analysis was whether the state regulation conflicted with any existing FCC regulation: in other words, has the FCC positively expressed an intent to preempt the field? Again the Court found no conflict with federal regulations. This approach, however, raises the critical problem of predictability in the absence of FCC regulation. Two principal guidelines, of course, are congressional intent and circumscription of valid fields for state control, both discussed previously. Addressing the effect of FCC intent on preemption, the Court, relying on *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), noted: "In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area ... .'" 374 U.S. at 430. Justice Brennan's concurring opinion offers evidence that the FCC specifically did not intend to regulate the field in question. *Id.* at 441. The test applied by the majority seems to require that in order to preempt state regulation, FCC intent must be expressed by actual regulation.
68. *Id.* at 432. Justice Brennan, in concurrence, did recognize that the test of "congressional intent exclusively to occupy the field, is apposite but the requisite evidence is lacking." *Id.* at 443. He, too, professed to find a "congres-
sional design to leave standing various forms of state regulation," *id.*, but fi-
nally rested his agreement with the finding of the majority on the absence of "conflict either in purpose or in operation between the state and federal regulations involved." *Id.* at 445. Having recognized at the outset that his quest for "congressional intent" was futile, Justice Brennan seems, like the majority, to have reached an intuitive judgment without clearly articulating the basis for his finding.
69. The *Head* approach to preemption considers both congressional intent and agency intent, as expressed positively by regulation in determining the scope of state power. While the state may not regulate areas of the law "requiring national uniformity," 374 U.S. at 430, it may regulate areas of more local concern provided that it is not preempted there by expressions of congressional or FCC intent.
son is worthy of note as much for the originality of its mode of analysis as for its affirmance by the Supreme Court.

Initially, it is important to recognize that there was no question that the cable operations being discussed in TV Pix were fully interstate in nature, and of the type determined to be within the FCC’s jurisdiction by the Supreme Court in United States v. Southwestern Cable Co. The question before the TV Pix court was whether, despite their limited authority over cable television recognized by Southwestern, the states retained the authority to franchise and regulate certain local incidents of cable television operations as they then existed.

The opinion first treated the issue whether state regulation itself constituted a burden on interstate commerce, and was thus, without more, unconstitutional. Not surprisingly, the court found that the regulation did not burden interstate commerce, concluding that “[w]e do not view the subjects of regulation contemplated by the Nevada statute . . . as being of the character demanding national uniformity.”

The court subsequently addressed the preemption question directly, beginning with a quotation from Head to the effect that case-by-case judgments must be made in determining preemption under the Federal Communications Act. The relevant considerations in answering the preemption question were then set forth: “(1) whether the breadth of the Congressional delegation of legislative power to the federal agency encompassed power to regulate all aspects of the community antenna business, and (2) whether it included a delegation of the power to preempt or not to preempt, within the discretion of the agency.”

In view of the traditional character of the first consideration, it is the second criterion that draws attention. Nevertheless, the Court backed away from developing the potentialities of the latter by concluding that “we view the Federal Communications Act as

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71. 392 U.S. 157 (1968); see notes 98-100 infra and accompanying text.
72. The local incidents that the Nevada statute sought to reach included a requirement of “just and reasonable rates” for service and a demand for “safe and adequate service, equipment and facilities.” Nevada Community Antenna Television System Law, Nev. Rev. Stat. § 711.150 (1971).
73. 304 F. Supp. at 463.
74. Id. at 464.
75. Id. at 465.
76. If, as the courts have so often announced, the sole and determinative factor in preemption questions is the will of Congress, what is the source of the agency’s “discretion” to preempt or not to preempt?
the kind of legislation where Congress has delegated to the executive agency not only the power to regulate in a certain broad area of national interest but the power of supersession as well.\textsuperscript{77} This would seem to contract the meaning of the "discretion to preempt" concept. It is hardly surprising that a valid regulation promulgated by the FCC would supersede contrary, or even complementary state regulation, under established preemption doctrines. Such an interpretation is strengthened by the following passage: "Thus, whether preemption has in fact occurred, invalidating the Nevada Community Antenna Television System Law under the Supremacy Clause of the Constitution, depends on whether the Federal Communications Commission has, in fact, regulated in this area and not upon whether it has the power to do so."\textsuperscript{78} This makes the judgment an all-or-nothing proposition: if no FCC regulation, then no preemption; if FCC regulation, then preemption. It does not, however, answer the crucial question of what for preemption purposes constitutes "regulation."

Having pronounced this incomplete test, the TV Pix court transcended it. Noting the restricted efforts at cable television regulation made by the FCC up to that time the court quoted from an FCC Notice of Proposed Rule Making:

Third, in the event that it is ultimately determined that the Commission has jurisdiction over all CATV systems, we do not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises. Apart from the areas in which the Commission has specifically indicated concern and until such time as regulatory measures are proposed, no Federal preemption is intended.\textsuperscript{79}

In other words, while not declining jurisdiction over these areas, the FCC intended no preemption of state regulation; this clearly cannot be derived directly from the statute. The TV Pix court, though, declined to regard this statement as an agency construction of its enabling statute, preferring to "view these pronouncements of the FCC only as irrefutable evidence of the absence of present intent to regulate and preempt state authority in the field of CATV franchises, rates and service."\textsuperscript{80} By tying "regulate and preempt" together, the court appeared to maintain fidelity to its test which

\textsuperscript{77} 304 F. Supp. at 465.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 466 n.4, \textit{citing} Notice of Inquiry and Notice of Proposed Rule Making, April 22, 1965, 1 F.C.C.2d 453, 466, at ¶ 32 (1965).
\textsuperscript{80} 304 F. Supp. at 466.
found preemption only in actual regulation. Having granted importance to the intent of the FCC, however, how would the TV Pix court have dealt with an FCC intent to preempt that was not accompanied by actual regulation?

The Supreme Court suggested an answer to this question in *San Diego Unions v. Garmon.* In that case, the National Labor Relations Board had declined to rule on a labor conflict that fell clearly within its congressional grant of authority. The California Supreme Court then held that in the face of the NLRB's refusal of jurisdiction, the California state courts gained jurisdiction over the controversy, from which they would normally be preempted. The Supreme Court reversed on the grounds that the regulated area was clearly within the congressional grant of authority to the NLRB, and that the NLRB had not clearly expressed an intent to cede jurisdiction to the state.

Thus, a two-stage intent model is suggested for determining preemption questions in regard to administrative agencies. At the first


82. The failure to rule apparently resulted because the amount of interstate commerce involved did not meet the Board's monetary requirements. *Id.* at 238.

83. The Court stated that "the failure of the Board to define the legal significance under the Act of a particular activity does not give the states the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." *Id.* at 246.

Therefore, had the NLRB clearly expressed its intention not to assume jurisdiction, California would not have been preempted from operating in a field that had been granted to the NLRB by an act of Congress. The Court is primarily concerned here with avoiding potential conflict between state and federal regulation and not with rigidly maintaining the boundaries of NLRB jurisdiction.

It is important to note that the facts in this case put it on the fringe of NLRB jurisdiction, outside of the normal area of NLRB regulation as defined by its monetary cut-off point. It is questionable whether the Court would allow the NLRB to cede an issue of national importance to state jurisdiction. With issues of merely local impact, however, the NLRB has only to clarify its position by some positive action in order to cede jurisdiction to the states. *Cf.* International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), which considers the effect of congressional regulation on issues of great local importance.

Such expressions of NLRB intent might have to be determined on a case-by-case basis, unless the NLRB was willing to cede an area of local importance to state authority permanently. Although the Court does not expressly consider this point, it can be inferred from the Court's stress on the importance of maintaining a clear distinction between areas of state and federal regulation.
stage the question is whether Congress intended to grant broad and flexible powers to the agency over the general area of regulation at issue. If so, then the second question is posed: has the agency demonstrated, clearly and unambiguously, its own intent to preempt the field, either by regulating or by declaring its intention that preemption should occur? By recognizing the need for this second stage, courts can avoid the artificial and confusing attempts to discern the intent of Congress where no clear intent exists.84

Under this model, once authority is delegated to an administrative agency, it is the intent of the agency, and not that of Congress, that is relevant to preemption as long as the agency does not exceed its legal authority. The model recognizes that unless agencies have the ability to establish the parameters of their regulation in both negative and positive terms, to prevent interference with their policies as well as to promote those policies, their ability to execute effectively the scheme of regulation that they deem to be appropriate will be severely limited. Thus, agencies should be understood to have the ability to exclude state regulation of some specific area of commerce without acting affirmatively to affect such commerce. The proposed model closely resembles a syllogism: if an agency has legitimate power over an area of commerce; and if it has expressed an intent to exclude state regulation of that area; then state regulation should be deemed to be preempted, whether the agency has actually regulated or not. Since it is the expression of agency intent latent in actual regulation that is frequently and correctly regarded as significant by courts, that intent is equally useful when presented explicitly, removing any need to derive it from the content of regulation.

Recognition that agency intent to preempt is controlling, in the absence of explicit statements in the enabling statute, does not place regulated industries at the unbridled mercy of the agency. By admitting that within their jurisdictions agencies have the power to determine the scope of their preemptive effect, judicial review does not abdicate either procedural or substantive protections otherwise available. State regulatory power is not really diminished. Not only will

84. This model assumes, of necessity, that the actual regulation decided upon by the agency not only is within the scope of its mandate from Congress, but also is consistent with basic constitutional limitations, as well as other congressional legislation. The determination of the validity of a particular agency action must be made through construction of the statute that underlies the agency's authority. What the two-stage intent model is meant to accomplish is not the determination of regulatory validity, but rather the preemptive effect of valid agency regulation.
an agency expression of intent not to preempt free the state to regulate where a more unguided court might find "occupation of the field" by Congress, but also an agency expression of intent to preempt can exclude state action only within the sphere legitimately subject to federal agency regulation.

Thus, the model follows the interests in "fair accommodation" between state and federal authority previously seen as vital by the Supreme Court; it will tend to prevent findings of preemption in the absence of agency regulation, unless the agency itself opposes state regulation. Furthermore, few federal agencies have shown tendencies toward overextension of their powers; conservatism and insufficient innovation—which may themselves help account for the lack of a clear formulation of the problem of preemption by administrative action to date—have been more common. Indeed, in view of the frequently limited manpower, energy, and other resources of federal agencies, a presumption might develop that a positive expression of intent to preempt without regulation is necessary to bar state action. In any event, congressional action is available to correct results that exceed, or deplete, Congress' conception of the agency's power and reach.

The ultimate lesson, though, as the TV Pix decision illustrates, is that courts have often looked, at least covertly, to agency intent when faced with an absence of congressional expression. By obscuring that operation behind the screen of a purported search for the intent of Congress, however, courts have made their actions less comprehensible and hence less predictable for both agencies and regulated industries. Nowhere is that uncertainty more apparent than in the cable television industry today. With this background in mind, the remainder of this article will attempt to apply the "two-stage intent" test to the cable television industry and to the FCC's regulation of that industry.

85. See discussion of TV Pix, notes 70-80 supra and accompanying text.
86. See text accompanying note 38 supra.
87. For example, the Labor Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. §§ 141 et seq. (1970), was amended by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.), in order to direct the NLRB to assert jurisdiction over all disputes that met the amended Act's standards. Previously the NLRB had been arbitrarily declining jurisdiction in cases that it felt were insubstantial, and the amendment was designed to eliminate this discretion. See 1959 U.S. Code Cong. & Ad. News 595, 2318.
88. Before proceeding, it is worth examining a fourth kind of preemption problem of a rather special nature and attempting to apply the two-level intent
III. STATE REGULATION OF CABLE TELEVISION

A. The "Intent of Congress"

There has been no direct expression of congressional intent regarding cable television. The Federal Communications Act which governs the communications field, became law in 1934, long before cable television came into existence, and later amendments to that statute have omitted any mention of cable television, although Congress has debated giving the Federal Communications Commission

model to its solution. In this situation an administrative agency actively attempts to renounce or decline its jurisdiction over an area of commerce where it has been specifically empowered to act. The only major case in this area is Guss v. Utah Labor Board, 353 U.S. 1 (1956). A somewhat unusual case, Guss sought to determine whether the grant of jurisdiction to the NLRB by Congress "has completely displaced state power to deal with such matters where the Board has declined or obviously would decline to exercise its jurisdiction but has not ceded jurisdiction pursuant to the proviso to § 10(a) of the National Labor Relations Act." Here, atypically, there existed a specific provision in the Act providing a mechanism whereby the NLRB could cede jurisdiction to a state agency over certain aspects of labor relations under certain conditions. Despite an apparent willingness on the part of the NLRB to allow some of its jurisdiction to remain totally unexercised, the Court through Chief Justice Warren purported to find an intent of Congress not to allow state regulation. In his words, here "we find not only a general intent to pre-empt the field but also the proviso to § 10(a), with its inescapable implication of exclusiveness." 353 U.S. at 10.

The question becomes, does the Guss decision conform to the two-level intent model proposed herein? Here, in contrast with most agency preemption situations, there was an explicit prescription by Congress for cession of jurisdiction by the NLRB. Normal canons of statutory construction easily allow the Court's conclusion that these provisions were meant to be exclusive—a legitimate expression of Congress' intent that the NLRB have the power to decline authority only as set out in the statute. Having found such a determinative expression of congressional intent, the Guss Court correctly declined to afford the intent of the agency any role whatever in determining state preemption. The second stage of intent—that of the agency—is obviously relevant only where the Congress has not directly expressed itself on the particular question involved.

If there had been no specific proviso to the National Labor Relations Act, then the inquiry as to the agency's intent, under the two-level intent model, would have become relevant. In such a situation, the agency's willingness to allow state regulation would, in most cases, be determinative; its intent to exclude state regulation, despite its own inaction, would be accorded equal weight. Thus, under this model, any attempt by an administrative agency to decline or renounce its jurisdiction over a particular area of commerce, accompanied by some clear indication of an intent not to preempt state regulation, should be accepted by the courts, in the absence of a specific contrary indication from Congress.

explicit authority over the industry. Nonetheless, this general statute has been construed by the courts to provide a basis for federal regulation of cable television.

The Act, however, is of such breadth, conferring such nebulous powers, that it requires considerable judicial construction. One approach to such problems of construction was suggested in Farmers Education and Cooperative Union v. WDAY, Inc. In that case the Supreme Court addressed the question of whether section 315 of the Act granted radio and television stations federal immunity from liability under state law for libelous statements broadcast under the federal "equal time" doctrine since the station owners had no direct control over such broadcasts. Noting that Congress had failed to grant such immunity specifically, Justice Black, speaking for the Court, commented, "And more than balancing any adverse inferences drawn from congressional failure to legislate an express immunity is the fact that the F.C.C.—the body entrusted with administering the provisions of the Act—has long interpreted Sec. 315 as granting stations an immunity." Such a view of the FCC's powers reflects the Court's willingness to defer to the agency in the construction of the terms of the Federal Communications Act, in the absence of a clear expression of congressional intent.

The FCC has, in the past, made similar pronouncements about its authority over cable television. During the 1950's and early 1960's the FCC appealed to Congress for guidance in dealing with the new phenomenon of community antenna television. Originally, the FCC expressed serious doubts as to its power over cable trans-
missions in the absence of explicit legislation. Congress, however, did not respond, and the FCC, faced with continuing congressional inaction, began to regulate the retransmission of broadcast signals over cable. Such authority was validated in *United States v. Southwestern Cable Co.* There the Supreme Court limited its decision by holding 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." 

Thus, the *Southwestern* decision purported to develop a test for FCC jurisdiction over cable operations: whether the regulation in question was "reasonably ancillary" to broadcast responsibilities. From the standpoint of uncovering the intent of Congress as inferred by the courts, this standard seems to represent the view that cable television regulation is subsumed under Congress' intent that broadcast signals be comprehensively regulated by the FCC. The extent to which this secondary intent applies is not clear, however, from the *Southwestern* formulation. It should be noted that *Southwestern*, like the cases that followed, was concerned solely with the FCC's power over cable television; none were preemption cases, and thus none were directed towards uncovering the FCC's expressed intent.

The next major decision attempting to elucidate the nature of the FCC's power over cable television was that by Circuit Judge (now Chief Justice) Burger in *General Telephone Company of California v. FCC.* Although this case dealt with the rebroadcast of over-the-air television signals, a question previously faced in *Southwestern*, General Telephone attempted to challenge further the FCC's

96. See Rivkin, supra note 90, at 1479 n.17.
99. Id. at 178. A more detailed history of early cable television, and of the meaning of the initial court decisions discussing the scope of the FCC's power over cable, can be found in the comprehensive articles by Rivkin, supra note 90, and by Barnett, *State, Federal and Local Regulation of Cable Television, 47 Notre Dame Law. 685 (1972).*
100. This failure was pointed out recently. "The Court offered neither a test for determining the Commission's responsibilities for broadcast television nor a method for deciding whether regulations are 'reasonably ancillary' to those responsibilities." Note, *Cablecasting: A Myth or Reality—Authority of the F.C.C. to Regulate Local Program Origination on Cable Television, 26 Rutgers L. Rev. 804, 810-11 (1973).*
jurisdiction. Seeking to have its cable activities classified as "common carriage" under Title II of the Act, General Telephone claimed exemption from the FCC's authority under various provisions of Title II designed to remove entirely intrastate telephone lines from FCC control. In describing the powers that the Federal Communications Act granted to the FCC, the court stated that:

Our evaluation of the Commission's interpretation of the scope of its jurisdiction must take into account the Act's broad purposes and objectives. We cannot ignore specific exemptions and limitations which narrow its regulatory powers, but neither can we overlook that Congress sought to establish a pervasive jurisdiction over broadcasting. The Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole.\textsuperscript{103}

This broad construction by the court of the FCC's powers over broadcasting and over the interpretation of the FCC's own jurisdiction is echoed throughout the \textit{General Telephone} opinion. In holding that the FCC was acting within the intent of the Act in determining that intrastate lines were merely links in an interstate chain, the court pointed out that "[i]ts [the FCC's] interpretation of its grant and its application are entitled, of course, to great deference. The Petitioners have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission."\textsuperscript{103} The court buttressed such deference to the FCC with the observation that "[t]his is particularly appropriate when the reviewing court preliminarily views the interpretation as one directed at achieving the reasonably authorized purposes of the legislation in question."\textsuperscript{104}

At the same time it denied General Telephone's claim of purely intrastate activity, the court of appeals also refused to find that cable retransmission entitled General Telephone to common carrier status, which would have made available various intrastate exemptions from FCC authority. Once more, the court appealed to the purpose of the Act, and deferred to the conclusion of the administrative agency entrusted with carrying out that purpose.\textsuperscript{105}

The most recent, and most expansive judicial statement on the FCC's powers over cable television under the Federal Communica-

\textsuperscript{102.} 413 F.2d at 398.
\textsuperscript{103.} \textit{Id.} at 401.
\textsuperscript{104.} \textit{Id.} at 403.
\textsuperscript{105.} \textit{Id.} at 402.
tions Act is *United States v. Midwest Video Corp.* Specifically, *Midwest Video* was concerned only with the validity of the FCC's broadcast origination rule requiring owners of cable systems that receive over-the-air signals to originate some programming over their cable systems, if such systems exceed a specific size. In 1972 this requirement was incorporated into a broad scheme of regulation of many nonbroadcast aspects of cable regulation, which were not technically before the Court in *Midwest Video*.

It was thus within the limited context of a challenge to the origination requirement that a plurality of the Court, in validating that requirement as reasonably ancillary to the FCC's other responsibilities for broadcasting, mandated a broad scope for interpretation of FCC jurisdiction. Excerpting from the FCC's *Notice of Proposed Rulemaking*, the Court agreed that the Commission's "concern with

106. 406 U.S. 649 (1972). By the time *Midwest Video* was decided, the FCC had determined to extend its regulation of cable into the nonbroadcast aspects of the industry. At least some of the activities sought to be regulated involved signals sent to subscribers through the cable without ever having been sent over the air.

Much of the legal analysis which follows depends upon the distinction between "rebroadcast" and "cablecast" television signals delivered to subscribers over cable systems. Cable television began as "Community Antenna Television," whose only function was to capture television broadcasts that had been sent over the air and transmit them over the cable to subscribers who would otherwise have difficulty receiving them clearly. Later, this same system was used to import distant television signals not otherwise receivable in the cable system's community. Both of these activities involved use of broadcast signals, and thus were subsumed under the rationale of *General Telephone*, which held them part of an indivisible chain of interstate commerce.

In recent years, however, it has become apparent that, having "wired" a home television receiver as part of a cable system, the cable owner has the capacity of delivering programming and other services over the cable to the subscriber without capturing television signals from over the air. This is the meaning of the term "cablecasting." Such programming can originate in a studio owned and/or managed by the cable owner and may thus involve no obvious use of interstate commerce. As will appear below, it is such cablecasting that was held by the Supreme Court in *Midwest Video* to lie within the authority of the FCC to regulate as "ancillary" to its broadcast responsibilities, at least for as long as the cable system is used to receive over the air signals as well. *See* text accompanying notes 106-123 *infra*. For one argument that FCC authority might extend to cablecasting by a system with no over the air reception, if that system was interconnected with other cable systems in a "network," *see* text accompanying notes 111 & 112 *infra*.


108. Since Midwest acknowledged that it did not want to cablecast and hence lacked standing to attack the new FCC rules regulating cablecasting voluntarily undertaken, the Supreme Court had no opportunity to consider the validity of those regulations. 406 U.S. at 657 n.14.
CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies."\textsuperscript{109} The Court further acknowledged, this time quoting from \textit{Southwestern}, that "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities."\textsuperscript{110}

In addition, though the parties to \textit{Midwest Video} did not directly challenge FCC jurisdiction over local, intrastate cablecasts, the Court did deal with that question as raised by the State of Illinois as amicus curiae. In a lengthy and broadly phrased footnote, the Court held that "in any event, CATV operators have, by virtue of their carriage of broadcast signals, necessarily subjected themselves to the Commission's comprehensive jurisdiction."\textsuperscript{111} In addition, relying on arguments from Professor Barnett, the Court stated: "The devotion of CATV systems to broadcast transmission—together with the interdependence between that service and cablecasts, and the necessity for unified regulation—plainly suffices to bring cablecasts within the Commission's § 2(a) jurisdiction."\textsuperscript{112} Such a broad reading of FCC authority over cablecasting would arguably also suffice to validate the more comprehensive program of regulation that followed the origination requirement.

Though the concurring opinion of Chief Justice Burger reflects his hesitation in conceding the FCC's authority to require program origination, the scope of jurisdiction over CATV that he attributes to the FCC is nonetheless extensive. He states that "Congress could not anticipate the advent of CATV when it enacted the regulatory scheme nearly 40 years ago. Yet that statutory scheme plainly anticipated the need for comprehensive regulation as persuasive as the reach of the instrumentalities of broadcasting."\textsuperscript{113} Though he stresses the need for a new expression of congressional intent regarding cable television so that basic policies are "not left entirely to the Commission and the courts,"\textsuperscript{114} Chief Justice Burger concludes that "until Congress acts, the Commission should be allowed wide latitude . . . ."\textsuperscript{115}

\textsuperscript{109} \textit{Id.} at 653.
\textsuperscript{110} \textit{Id.} at 661.
\textsuperscript{111} \textit{Id.} at 663 n.21.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 675.
\textsuperscript{114} \textit{Id.} at 676.
\textsuperscript{115} \textit{Id.}
From an analytical point of view, perhaps the most telling of Chief Justice Burger's remarks was his statement: "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 persuasive powers, and the Commission has generations of experience and 'feel' for the problem." The point is, of course, that the Chief Justice, throughout his opinion, appreciates the FCC's legitimate authority to regulate whatever phase of CATV operations it deems in need of such regulation; while he may feel that the origination requirement is economically unsound or favors one mode of communication over another, it should not be struck down—if only because it is an expression of FCC intent to exercise its power to regulate CATV.

Even the dissent, written by Justice Douglas, grants the FCC broad powers over nonbroadcast cable operations. The only real ground of disagreement is over the power of the Commission to require origination, not to regulate it once it has been voluntarily undertaken. Thus, near the end of his dissent, Justice Douglas declares that "[t]he fact that the Commission has authority to regulate origination of programs if CATV decides to enter the field does not mean that it can compel CATV to originate programs." Although the Supreme Court's decision was a close one, it should not be read as limiting the extent to which the Court has validated the FCC's regulation of nonbroadcast cable television activities; such regulation has now been held to be within the powers Congress intended to grant to the FCC in the Federal Communications Act.

Indeed, that the Supreme Court decision in Midwest Video should be read as an endorsement of the FCC's entire program of

116. Id.
117. These were among the arguments advanced in the court of appeals opinion. United States v. Midwest Video Corp., 441 F.2d 13 (8th Cir. 1971).
118. One critique of the Midwest Video decision, Note, supra note 100, has approached it as a "fleshing out" of the vague test laid out in Southwestern. The Note states that "the opinion, in relating the 'reasonably ancillary' test to the rule in question, stated that the validity of the Commission's action depended on whether a specific cable regulation would further the achievement of long-established regulatory goals in television broadcasting." Id. at 812 (footnote omitted). Since these goals are put forward in the Federal Communications Act itself, it is entirely reasonable to regard any FCC regulation that pursues such goals as expressing the will of Congress. In other words, any FCC regulation of cable television that is upheld under the Southwestern-Midwest Video standard should be treated as equivalent in preemptive force to the intent of Congress.
119. 406 U.S. at 680.
regulation of cable television was predicted by the one author cited by the Court:

While the rules announced in the *Letter of Intent* are not themselves involved in the *Midwest Video* case, they raise essentially the same questions with respect to the FCC’s authority to regulate the local incidents of cable, and it seems likely that the forthcoming decision will settle the question of the Commission’s power to adopt the intended rules.\(^{120}\)

Another author has viewed *Midwest Video* as “[removing] a major barrier to the development by the FCC of a comprehensive cable television regulation, opening the way for major growth in the industry.”\(^{121}\) The author also points out the extent to which *Midwest Video* defines the FCC’s “mandate under the Communications Act of 1934.”\(^{122}\) By making FCC jurisdiction over nonbroadcast aspects of cable depend on their effects on broadcast television, he has stated that “the Supreme Court has widened the ‘reasonably ancillary’ test to its logical limits. The Court has breached the line of legal *cum* political uncertainty that has restricted FCC action, so that future efforts to curb the exercise of the FCC’s expanded powers will require deliberate legislative initiatives.”\(^{123}\)

What conclusions, then, should be drawn from these three decisions as to the intent of Congress regarding preemption of state regulation of cable television? Clearly, the deciding courts have not found the sort of “pervasive control” in the Federal Communications Act of 1934 that would absolutely oust all state regulation.\(^{124}\) Rather, the courts have envisioned agency flexibility as the goal of Congress. The FCC is seen as having the power to regulate or not regulate cable activities, as it chooses. Broad, flexible powers over the subject area entrusted to the FCC are combined with the power

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121. Rivkin, *supra* note 90, at 1485.
122. *Id.* at 1487.
123. *Id.* at 1500.
124. The most recent judicial statement regarding the parameters of federal regulatory jurisdiction over CATV was by the Supreme Court in National Cable Television Ass’n, Inc. v. United States, 94 S. Ct. 1146 (1974). In that case the Court noted that “the power to regulate, though not in the form of granting licenses, extends to the promulgation of regulations requiring the compulsory origination of programs by CATV. . . . [T]hese CATV’s, however, are not under the exclusive oversight of the Commission. Local governments and even some states provide permits or franchises to CATV’s, including right of way for the cables used.” *Id.* at 1148.
to regulate its own jurisdiction within the limits of the power delegated to it.

The two-level intent model proposed earlier therefore can be applied to the FCC's regulation of cable television. That is, for preemption purposes, an analysis of the intent of Congress is only of academic importance; Congress has effectively been found to have delegated both the regulation of the area and the definition of congressional intent to the FCC. Thus, it is the intent of the agency that will govern preemptive effects on state regulation, and it is that intent that must be isolated and examined.

B. The "Intent of the Agency"

The history of FCC regulation of cable television is complex and unusual. A brief review of FCC regulation is important to set the stage for the more recent expressions of FCC policy toward cable. In the period preceding 1965, confusion reigned in all jurisdictions regarding the proper authority, if any, to assume regulatory responsibility over the new community antenna television industry. The FCC announced its own belief in its inability to deal with the industry without some further Congressional mandate. Congress, however, remained silent.

Finally, in 1965, the FCC began to assert regulatory authority over cable TV and issued its First Report and Order on Rules re Microwave-Served CATV which initiated some regulation over microwave transmissions used as parts of a system of signal distribution involving cable. In 1966, the Second Report and Order on CATV extended this regulation to include cable operations that did not use microwave transmissions. This regulation involved a highly restrictive approach, which attempted to limit the ability of cable systems to "import" distant television signals into communities otherwise unable to receive them, and which was based on the Commission's fears of damage to the broadcasting industry—especially to UHF stations, for which the FCC has shown special solici-

125. See Rivkin, supra note 90, at 1495-1501.
126. See note 95 supra and accompanying text.
127. See Rivkin, supra note 90, at 1479 n.17.
129. 2 F.C.C.2d 725 (1966).
130. For example, the Commission stated that "[t]he new UHF stations face a difficult road; we would expect, with the passage of time and thus the build-up of all-channel sets and related endeavors that these new operations would be successful. But if CATV, with 12- or 20-channel capacity can obtain very substantial numbers of subscribers in these same markets . . . the UHF stations might face a very difficult hurdle." Id. at 774.
tude. Then, in 1972, in its *Third Report and Order on Community Antenna Television Systems*, the FCC lifted these restrictions on the retransmission of broadcast signals to a large degree. At the same time the Commission began to deal with the nonbroadcast aspects of cable, under an avowed purpose of promoting program origination over cable lines, beyond the simple rebroadcast of television signals.

There is no question that the FCC program of comprehensive regulation of cable retransmission of television signals has preempted any possible state regulation in this area. However, in the relatively new field of nonbroadcast origination, the FCC has not said that CATV is the type of industry that requires uniform regulation and *total* preemption of state or local initiative. The 1972 Rules thus reflect no intent on the part of the FCC to occupy the entire field of cable television—as evidenced both by the partial nature of the regulation announced in the 1972 Rules and by the specific regulatory duties reserved for state and local authorities by those rules.

What, then, are the actual parameters of FCC regulation of nonbroadcast cable television activity? Regulation is certainly the best expression of the FCC's intentions regarding preemption of state regulation. Such intentions may be supplemented, however, by various other indicia of FCC intent.

The rules promulgated by the FCC for regulation of nonbroadcast channels consist of several distinct components. Before

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132. 36 F.C.C.2d 143 (1972).
133. These 1972 Rules proposed by the FCC have been issued in final form at 47 C.F.R. §§ 76.1-.617 (1973).
135. *See* note 106 *supra*.
137. These positive reservations of regulatory authority to local agencies focus principally on the franchising process. *See* notes 179-81 *infra* and accompanying text.
138. A cable attached to a home television receiver normally has a multi-channel capacity; that is, it is capable of carrying a number of separate channels to the receiver. Both broadcast signals that are retransmitted over the cable and signals originated in a cable system's own studio and then sent di-
the 1972 Rules were announced, the FCC had already taken some halting steps in the direction of regulating nonbroadcast channels. The most controversial of these was the "broadcast origination" requirement,¹⁴⁰ which produced the Midwest Video litigation.¹⁴¹ As the Court noted in Midwest Video, the FCC had suspended the origination requirement pending final judgment on its validity.¹⁴² As originally issued, this requirement would have compelled all cable systems with more than 3,500 subscribers to transmit to their customers at least some programming not consisting of rebroadcast television signals. However, even after the Commission's power to promulgate the requirement was upheld in Midwest Video, the origination requirement was left, and still remains, in a state of suspension.¹⁴³

What, then, is the preemptive effect of a formally suspended regulation, which had been validly promulgated by an administrative agency? Specifically, during the period of suspension, can states or local authorities take it upon themselves to require program origination by cable systems?¹⁴⁴ There are three possible interpretations of the suspension for intent purposes: First, the agency directly over the cable are carried by a cable in the same way: both occupy individual channels on the cable. Since broadcast channels have been preemptively regulated by the FCC, see notes 132-34 supra and accompanying text, discussion has focused on FCC regulation of nonbroadcast channels. It should be noted that rebroadcast of television signals is, in many cable systems, a highly profitable business, whereas "cablecasting" is a new and relatively untried venture for cable owners. Many cable systems are operated by personnel with relatively low levels of technical sophistication, who might well prefer not to involve themselves in the complications of studio operation required by cablecasting. Thus, the question who will regulate cablecasting and what they will require or expect of the cable owner is of particular interest to the various segments of the cable industry.

¹⁴⁰. *Id.* § 76.201(a).
¹⁴¹. *See* text accompanying notes 106-10 supra.
¹⁴⁴. An interesting question in this regard is whether states can require program origination by some party other than the system owner. Even the suspended FCC regulation, in final form, permits the requirement to be met, as the Supreme Court noted, by "programming of others." According to the Midwest Video opinion, the cable operator is not precluded "from cablecasting programs produced by others" in satisfaction of the program origination requirement. 406 U.S. at 653 n.6. In addition, since the "program origination" channel is not formally one of the access channels described in the FCC regulations, it is not at all certain that the regulations are meant to apply to it. *See* Barnett, *supra* note 99, at 748.
may simply intend the regulation to take effect but desire a delay because of enforcement difficulties or policy disputes within the agency; secondly, the suspension may indicate a belief on the part of the agency that, for the present, no one should regulate the area involved; finally, the agency may intend the suspension to indicate that states and localities are free to regulate.

It should be realized that the third possibility is the least likely interpretation of the suspension of the regulation. Furthermore, suspension of a regulation should not be deemed equivalent to cancellation or withdrawal of the regulation. Therefore, no more state regulation should be permitted over program origination as previously required than would have been allowed if the regulation had not been suspended.145

Another distinct component in the nonbroadcast channel regulatory scheme of the 1972 Rules is the provision for cable systems in communities “located wholly outside of all major television markets.”146 The final FCC regulations announce that no such system “shall be required by a local entity to exceed the provisions concerning the availability and administration of access channels contained in paragraph (a) of this section.”147 Such a formulation seems intended to allow some state regulation of non-major-market cable systems, within the limits of FCC regulation of access channels in major markets; a state may regulate less than, or as much as, the FCC has chosen to regulate, but no more. In addition, the FCC regulations make it clear that non-major-market systems are not required to make any access channels available, but that doing so will subject them to several of the FCC access channel regulations.148

The question from a preemption viewpoint is what “exceeding” the FCC provisions means. Can such state regulations as are prom-

145. An interesting question in this context is whether states could prohibit program origination by the cable owner. Since alternative means of satisfying the requirement, had it not been suspended, were provided in the requirement itself, such a prohibition might not be found to conflict directly with the federal regulation, as long as the alternative means were not blocked. Under the two-level intent model, the proper inquiry for a reviewing court would be whether the FCC intended that the cable owner, rather than the state or local authority, ought to have the ability to choose between the alternative means of satisfying the program origination requirement. If it read the provision in the context of the other access channel regulations, a court might well find an intention to preserve the choice in the cable owner; but this result cannot be predicted with certainty.

146. 47 C.F.R. § 76.251(b) (1973).
147. Id.
148. 47 C.F.R. §§ 76.251(a), (b) (1973).
ulgated for non-major-market systems be different in nature from the FCC regulations? Some guidance is available in the wording of FCC regulations that are specifically made applicable to non-major-market systems that choose to provide access channels. One such regulation includes the proscription that "no local entity shall prescribe any other rules concerning the number or manner of operation of access channels . . . ."\textsuperscript{149} This evidences an intent on the part of the FCC that state regulation of non-major-market channels be similar to, and no more involved than, the FCC regulation contemplated for major-market access channels. Such an intent contemplates a relatively small scope for any state "experimentation," which seems likely to be confined to minor variations on the FCC regulatory theme, and provides the states with the obvious option of not regulating at all.

The actual scheme of FCC regulation for access channels in major-market cable systems is quite detailed, but not unclear.\textsuperscript{150} Its general method is to divide nonbroadcast channels into various categories, with separate sets of rules provided for each type of nonbroadcast channel. An enforcement mechanism is provided at the outset: carriage of broadcast signals, the traditional and frequently profitable activity of cable television systems, is made contingent upon compliance with the rules for nonbroadcast channels.\textsuperscript{151} Further, a minimum channel capacity for all cable systems of 20 channels is required.\textsuperscript{152}

Another general requirement of the access channel regulations is the "one-to-one" requirement.\textsuperscript{153} This rule requires that for each channel actually used by the cable system for retransmission of broadcast signals, one nonbroadcast signal channel be made available. In addition, each system is required to "maintain a plant having technical capacity for nonvoice return communications."\textsuperscript{154} While few cable systems today actually have any use for two-way capacity, this requirement is seen as a hedge against future technological developments.\textsuperscript{155}

\textsuperscript{149} Id. § 76.251(a)(11)(iv).
\textsuperscript{150} Id. §§ 76.251(a), (c).
\textsuperscript{151} Id. § 76.251(a).
\textsuperscript{152} Id. § 76.251(a)(1). This requirement, on its face, poses another interesting question of FCC intent: Can a state or local agency require more than 20 channels? The preemptive effect of all these regulations is discussed in text accompanying notes 164-66 infra.
\textsuperscript{153} 47 C.F.R. § 76.251(a)(2) (1973).
\textsuperscript{154} Id. § 76.251(a)(3).
\textsuperscript{155} There is available today the technology to install two-way voice com-
A number of specific channels are required by the rules for designated purposes. These include a "non-commercial public access channel available on a first-come, nondiscriminatory basis," an "education access channel," a "local government access channel," and a residual category designated "leased access channels." The listing of designated channels is followed by the "N + 1" rule, which provides for expansion of the system in any of the designated categories when use of such channels becomes relatively intense. Operators of cable systems are instructed to "exercise no control over program content" on any of the designated categories of channels. In addition, such operators are prohibited from charging for the use of the education and local government access channels for 5 years after commencing service and from ever charging for the use of one public access channel, except for studio production costs for presentations exceeding 5 minutes.

A set of operating rules for the access channels is also provided. These rules require system operators to "establish rules requiring first-come nondiscriminatory access" and prohibit various sorts of commercial uses for the public access channels. Similar requirements are imposed on the educational access channels, whereas the leased channels are freed from the restrictions on commercial use. Finally, state and local regulatory authorities are notified: "Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels."

Communication capacity in cable television systems. However, such capacity would far exceed in cost the benefits from it presently envisioned, especially in view of the nearly universal two-way voice capacity already supplied by the telephone system. A nonvoice return capacity, on the other hand, is easily within the reach of relatively inexpensive modern technology. It provides the opportunity for various consumer services that may soon develop, such as direct polling of viewer preferences and the ability to order products being shown on the television screen. At the same time, however, it raises the problem of the grave potential for invasion of privacy inherent in two-way capacity systems, especially the more sophisticated versions required for two-way voice capacity.

157. Id. § 76.251(a)(8).
158. Id. § 76.251(a)(9).
159. Id. § 76.251(a)(10).
160. Id. § 76.251(a)(11)(i).
161. Id. § 76.251(a)(11)(ii).
162. Id. § 76.251(a)(11)(iii).
163. Id. § 76.251(a)(11)(iv). It is clear that this rule was meant to apply to both state and local authorities. The Commission's purpose in promul-
On its face, this last rule appears to be in the nature of a declaration of preemption of regulation directed at the designated access channels. One authority believes this to be their intent: "The 'access' provisions of the intended rules . . . do purport to preclude action in the same area by state or local authorities."\(^{164}\) Another recent study of the 1972 Rules discusses the rationale behind this apparent intent:

The Commission has decided that national regulation of cablecasting is necessary to promote these goals. By preempting local regulation of cablecasting the FCC has placed "local origination" under national pressures and restraints, rather than permitting channel uses to be based on the needs and interests of each locality.\(^{165}\)

Under a preemption doctrine restricted to searching for the intent of Congress or the shape of actual regulation, such an attempt to preempt might appear confusing in its effect. However, under the two-level intent test, it is apparent that actual regulation by an agency is of preemptive importance only insofar as it is evidence of the agency's intent to preempt the field. Thus, the existence of a clear statement of agency intent, such as this declaration of preemption, should have the same preemptive effect as a more detailed set of agency regulations that left less room for experimentation by the cable operator. The intent of the FCC is unambiguous: the exclusion of state and local regulation attempting to "prescribe any other rules concerning the number or manner of operation of access channels."\(^{166}\)

There exist however other possible indicia of FCC intent, not apparent from the face of the 1972 access channel rules, which may prove relevant in evaluating the preemptive effect of those rules on state and local regulation of cable television. For example, there is some evidence that the 1972 Rules, particularly the one-to-one


\(^{165}\) Note, *supra* note 100, at 819.

\(^{166}\) See note 163 *supra*. 

gating § 76.251(a)(11)(iv) is explained in ¶ 131 of the Cable Television Report and Order, 36 F.C.C.2d 143, 193 (1972). "There remains the issue of whether also to permit state or local regulation of these channels where not inconsistent with federal purposes. We think that in this area a dual form of regulation would be confusing and impracticable. Our objective of allowing a period of experimentation might be jeopardized if, for example, a local entity were to specify more restrictive regulations than we have prescribed. Thus, except for the government channel, local regulation of access channels is precluded. If experience and further proceedings indicate its need or desirability, we can then delineate an appropriate local role." Obviously, a "dual form of regulation" will occur if either state or local authorities attempt to regulate access channels.
rule, are not being fully enforced. Does such nonenforcement go to the strength of the FCC's intent to preempt? Or does it suggest doubts about the reality of such intent, or perhaps a change in that intent since the promulgation of the 1972 Rules? Or does nonenforcement indicate the existence of a situation where inadequate manpower has prevented the FCC from actively policing all of its requirements? It is clear, in any event, that nonenforcement does not create an "interval" situation. Since the responsible agency has issued regulations, there is nothing to wait for.

If, however, the analysis of the "formally suspended" regulation requiring program origination is accepted then nonenforcement cannot be regarded as having any effect on preemption. Such a conclusion follows a fortiori from the realization that something equivalent to formal repudiation is required to contravene the presumption of agency intent established by the promulgation of regulations. Even though there may be indications that the agency is reconsidering its initial regulations, there still remains the very real possibility that it may still intend to exclude state and local regulation, even in the absence of its own presence. This is precisely the case with the declaration of preemption regarding additional operating rules for the access channels.

One enlightening indication of FCC intent is the Final Report of the FCC Cable Television Advisory Committee on Federal/State-Local Regulatory Relationships (Advisory Committee Report). Although the recommendations of the Committee are not binding on the FCC, they do expose a cross section of opinion on the proper contours of cable television regulation. The Advisory Committee Report, written largely by representatives of the cable industry, "endorses the FCC in its present rules providing for a period of experimentation regarding channel access under solely Federal guidelines.”

168. See notes 54-56 supra and accompanying text.
169. See notes 144-45 supra and accompanying text.
170. FCC CABLE TELEVISION ADVISORY COMMITTEE ON FEDERAL/STATE-LOCAL REGULATORY RELATIONSHIPS, FINAL REPORT (1973) [hereinafter cited as ADVISORY COMMITTEE REPORT]. It is important to distinguish this Report from the Report of the Office of Telecommunications, the Whitehead Report. The Whitehead Report recommended a national policy of creating common carrier status for cable systems owners; neither report has been acted upon by either the Congress or the Commission. The common carrier approach is generally feared by the cable industry, which believes that such status would limit future profits from cablecasting.
171. ADVISORY COMMITTEE REPORT 23.
tal preemption by the FCC of all facets of cable television regulation, with the notable exception of franchising. The cable industry, as represented in the Advisory Committee Report, seems to fear state regulation, preferring the approach taken in the FCC 1972 Rules, which place control of access channels in the hands of the cable owner. Such an expression of opinion is useful for preemption purposes, however, only to the extent that as it actually influences the behavior of the Commission, a consideration that remains indeterminate.

A final source of additional insight into the FCC's intent is the body of reported decisions by the FCC on matters related to cable regulation. Two recent decisions by the Commission are of special interest in determining the FCC's intended scope of its 1972 Rules. The first of these is Riverside Cable Corp., which dealt with section 76.11(a) of the Commission's rules on cable television, which provides that "[n]o cable system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission." In Riverside a new cable operator had begun construction of his system without obtaining such a certificate and a competing system sought an order to halt construction on that ground. In holding that a certificate was not required until the new system attempted to begin actual operations, the Commission observed that "the rules adopted in . . . Cable Television Report and Order . . . are geared to become operative only with the carriage of broadcast signals . . . " Although this language does not necessarily speak to the FCC's power to require a certificate before the carriage of broadcast signals, it is certainly a relevant administrative interpretation of the FCC's rules. It should be noted that the Riverside case dealt with a single operator not yet under FCC control in any respect. Another pertinent FCC decision is Sterling Manhattan Cable Television, Inc. v. New York Telephone Co. There, the telephone company had begun to distribute movies to hotels through its own cable systems, which were entirely intrastate; no retransmission of broadcast signals was engaged in or contemplated. Under such circumstances, the FCC decided not to demand certification for these cable operations under the 1972 Rules, stressing both the entirely intrastate character of

174. 42 F.C.C.2d at 783.
175. 38 F.C.C.2d 1149 (1973).
the operation, and the absence of any carriage of broadcast signals.

Taken together, do Riverside and Sterling hold that the FCC could not restructure its regulatory system to reach a cable operator with no broadcast channels? No clear answer to this question is apparent, but at a minimum, these decisions demonstrate an FCC intent not to engage in such regulation at this time. Under the existing structure of FCC regulation of nonbroadcast aspects of cable television, a cable operator who chooses not to retransmit broadcast signals would probably lie outside the scope of FCC regulation and would consequently not be protected from state or local regulation by the blanket of federal preemption.176

C. Consequences for State Regulation

The FCC has specifically reserved several aspects of regulation of cable television operations for state and local authorities.177 Most prominent is the franchising process, the procedures for which may be prescribed by a state or local regulatory authority.178 As Professor Barnett points out the FCC has not incorporated any suggested procedures for franchising into its rules. Consequently, "it seems essential that the state regulatory scheme embody such requirements."179 Thus, it is clear that, far from being preempted, state franchising procedures are explicitly permitted by the FCC's intentions as expressed in the 1972 Rules.180

176. One rationale implicitly accepted by the Supreme Court in Midwest Video could provide a basis for FCC regulation of cable operators with no broadcast channels. See United States v. Midwest Video Corp., 406 U.S. 649, 662 n.21 (1972), and Barnett, supra note 99, at 727. While the potential for a nonbroadcast cable network, linking together the programming of cable operators across the nation without using broadcast television signals, is not covered by the 1972 Rules, it is almost certainly within the scope of the agency's regulatory power. But since the FCC's present intention to preempt or not is of primary significance under the two-level intent test, such activities should not be held to be preempted under the 1972 Rules.

177. See notes 134-37 supra and accompanying text.

178. 47 C.F.R. § 76.31 (1973); see also Barnett, supra note 99, at 737.


180. In the original Letter of Intent issued by the FCC, the Commission expressed an intention to require state or local regulation in those areas finally reserved for state or local action in the actual 1972 Rules. Had the initial approach been retained, interesting questions would have been raised about the impact on federalism of such requirements. Steward Mach. Co. v. Davis, 301 U.S. 548 (1936), indicates that a statute that called "for a surrender by the states of powers essential to their quasi-sovereign existence" would be declared invalid, id. at 593, and such an argument might well be made against a require-
Other segments of the cable television industry are also left open to state and local regulation. The FCC Rules establish a 15-year "guideline for duration of cable franchises" which is declared to be a "requirement of 'reasonableness that may vary with the particular circumstances.'"\(^{181}\) Therefore, the duration of cable franchises is left at least partially to state or local authorities. Another aspect of cable systems specifically left to local authorities is "supervising the service rendered by the cable system and regulating the rates."\(^{182}\)

However, one topic apparently left unsettled by the FCC 1972 Rules is the regulation of transfers of control of cable systems. Ownership of cable television systems by parties already involved in ownership of related media is an area of some confusion under the existing FCC Rules. The Commission has adopted a rule "prohibiting cross-ownership between the cable system and the television station."\(^{183}\) Nevertheless, the question whether to prohibit ownership of cable systems by owners of local newspapers has not yet been resolved. Professor Barnett explains why such a cross-ownership restriction might be desirable: "Ownership of the cable system by the newspaper whose monopoly it challenges would seem unlikely to promote development of the system in . . . respects that are so critical to the public interest in cable."\(^{184}\)

The question arises, then, whether a state is preempted from establishing a newspaper-cable television cross-ownership restriction by the FCC's inaction on the subject to date. What type of FCC intent would be relevant to a finding of preemption here? Would the mere failure to adopt such a restriction on a national basis suffice to preempt state regulation, or would an explicit prohibition of cross-ownership restrictions beyond those established by the FCC be required?

It is useful in this regard to consider newspaper cross-ownership restrictions as falling into the "interval" category of preemption problems.\(^{185}\) In an interval situation, where the agency's intentions are

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181. 47 C.F.R. § 76.31(a)(3) (1973); see also Barnett, supra note 99, at 781.
182. 47 C.F.R. §§ 76.31(a)(4), (5) (1973); see also Barnett, supra note 99, at 752.
183. 47 C.F.R. § 76.501(a)(2) (1973); see also Barnett, supra note 99, at 795.
185. That the FCC may be considering adopting such a rule would be the
ambiguous, it is relevant to determine whether the area sought to be regulated by the state is separable from other regulated areas.\textsuperscript{186} In addition, such an ambiguous situation indicates a need for balancing the supposed need for national uniformity with whatever state or local interest is asserted.\textsuperscript{187}

Under the interval-situation analysis it is unlikely that a court would find that a state has been preempted from establishing its own newspaper cross-ownership restriction—at least until the FCC resolves its own inquiry into this area. The economic implications of cross-ownership alone should be sufficient to grant states temporary regulatory power over this area in the absence of FCC action. In addition, states would logically bear the burden of ensuring that their citizenry did not hear the same owner’s viewpoint expressed in all the available media. Thrown into the balance, these factors speak strongly for permitting state regulation of cross-ownership in the present interval situation. An alternate route, however, has been indicated for reaching this same result which effectively by-passes preemption considerations. This argument runs as follows:

While an FCC decision not to adopt the newspaper-cable rule would be ill-advised, no reason appears why it should preclude the adoption of such a rule or policy on the part of state or local entities, as N.Y.C. and Massachusetts have done. If the FCC is not going to “set out comparative criteria to govern the selection process,” but is going to leave that choice to the state or local government, it should not attempt to prohibit their use of this one particular comparative criterion, a consideration that has peculiar local impact and is not contrary to any significant federal policy on which the FCC’s negative decision could be based.\textsuperscript{188}

It is important to note that such an argument carries any weight only for so long as the FCC does not prohibit state cross-ownership restrictions and does not promulgate a new rule setting out “comparative criteria” in the franchising selection process.

A further issue of general applicability and significant ambiguity is that of franchise fees payable to municipalities by cable systems. The FCC 1972 Rules establish a maximum of 3 to 5 percent of gross revenues for such charges, with a showing of “reasonableness”

\textsuperscript{187} See notes 54-61 \textit{supra} and accompanying text.
\textsuperscript{188} Barnett, \textit{supra} note 99, at 803 (footnote omitted).
required for charges exceeding 3 percent.\textsuperscript{189} What, however, would be the effect of a state’s setting a flat fee per subscriber to be paid by the cable owner to both the state and the franchising municipality? One of the considerations behind such a flat fee is the prevention of deals between cable owners and municipalities, which freeze out smaller operators by “auctioning off” franchises to the highest bidder.\textsuperscript{190} The question that remains unanswered is whether the FCC’s limit would supersede the normally lower rate of the state fee.\textsuperscript{191} A solution is to submerge the problem in the franchising process, making the franchise fee one of the factors considered by the state authority in “deciding in the first instance whether to endorse applications to the FCC.”\textsuperscript{192} Assuming that a state’s flat fee lies within the bounds of the FCC rule, since the FCC has not attempted to set actual rates itself, there should be no finding of conflict between the two authorities, absent some new expression of FCC intent to the contrary. The FCC has no apparent interest in letting fees be determined by municipalities, rather than the state.

A final aspect of state cable regulation posing potential preemption problems stems from the desire, on the part of some states, to grant CATV common carrier status.\textsuperscript{193} To accomplish this goal a state may attempt to separate ownership of cable systems from ownership of programming.\textsuperscript{194}

It would appear, however, that any such separation by a state is

\begin{footnotes}
\item[189] 47 C.F.R. § 76.31(b) (1973); see also Barnett, supra note 99, at 804.
\item[191] The Supreme Court recently decided the case of National Cable Television Ass’n, Inc. v. United States, 94 S. Ct. 1146 (1974), which dealt with a different aspect of FCC fees. Acting under 31 U.S.C. § 483(a) (1970), the FCC had set a schedule of fees to cable system owners to cover the cost of FCC regulation. Since the Court, per Justice Douglas, held that part of the value of regulation redounds to the benefit of the public, it remanded the proceeding to the Commission for redetermination of the fees. This action has no effect on the franchise fee limitations set by the FCC in its 1972 Rules.
\item[192] Barnett, supra note 99, at 805.
\item[193] See notes 101-05 supra and accompanying text.
\item[194] See note 144 supra. Indeed, such an attempt has recently been made in the Massachusetts Community Antenna Television Commission Proposed Draft Regulations (Mar. 20, 1974), where the Commission seeks to distinguish "licensee" and "cableserver." As proposed, "the licensee shall be responsible for the technological performance of the cable system," \textit{id.} § 4.0, while "[e]ach cableserver shall be responsible for the non-technological performance of his channel." \textit{id.} § 4.1(A). It should be further noted that the Proposed Draft Regulations provide that the cableserver alone shall be liable in any action brought under federal or state law based on the content of programming. \textit{id.} § 4.1(B).
\end{footnotes}
precluded by considerations of federal preemption. In directing its attention to such a separation of ownership provision contained in regulations proposed in Massachusetts, the majority in the Advisory Committee Report noted that "[i]n the majority's judgment, such action directly contravenes 47 C.F.R. 76.201 and earlier Commission determination that common carrier status for CATV would be inappropriate." Even the minority, more friendly to state regulation, observed that "[t]hese policies have not yet been embodied or even proposed for embodiment in concrete regulations, and any that are will obviously have to dovetail with existing FCC regulation . . . ." Of course, these comments are not conclusive but the Advisory Committee Report does offer a rationale for its opposition to the Massachusetts policy:

    In practical effect, this means that CATV cannot prepare for, or finance, program originations in Massachusetts without contemplating extensive legal defense costs to contest state law, and long delays during which CATV will violate the spirit and perhaps the letter of applicable federal law. Whatever CATV does in Massachusetts, it loses.

A similar conclusion has been reached by one author:

    Since the FCC's order would manifestly conflict with state and local regulation aimed at achieving carrier status, mandatory origination preempts critical areas of cable service from state control and forecloses the prospect that state regulation might effectively classify cable systems as carriers.

There are several possible responses to these arguments, one based on the assertion that the proposed Massachusetts regulations are not actually in conflict with the FCC 1972 Rules, others relying on some "affirmative" consideration to validate the Massachusetts approach despite conflict with the FCC Rules. All, however, are founded upon misunderstandings of the fundamental nature of the preemption doctrine as applied to administrative agencies.

    The affirmative responses admit the conflict between state and FCC regulatory approaches, but seek to uphold the state regulation nonetheless. These can be dealt with briefly. Professor Barnett suggests that conflict with the actual language of the FCC rules might not necessarily trigger a finding of federal preemption, since

196. Id. at 88 (Minority Report).
Massachusetts-type regulation "would be designed to multiply and enhance the non-broadcast uses of the system, and would thus be 'not inconsistent with federal purposes.'" Nevertheless, such considerations are relevant only in the absence of a clear expression of federal intent; examinations of what purposes supposedly lie behind federal regulations are useful only in construing ambiguous language, not in by-passing clear expressions of regulatory intent. If actual conflict between the FCC and Massachusetts Community Antenna Television Commission regulatory approaches does exist, then examinations of underlying federal purposes will not save the state regulation from preemption. It is up to the federal agency in the formulation of its regulations to determine whether it intends to allow state variations not inconsistent with its purposes.

A second affirmative response is to justify variation from the federally mandated regulatory pattern through a rationale of "experimentation." Its proponents assert that such a response gains particular force from the FCC's pronouncement that its own rules are meant to be experimental; in this view, the Massachusetts variant is but another experiment in the larger federal pattern. *United Telegraph Workers v. Federal Communications Commission* (the *Mailgram* case) could be interpreted as supporting such a conclusion. In that case a cooperative effort between Western Union and the Postal Service that arguably violated statutory restrictions was approved, partly on the grounds that this involved an experiment that did not contravene the purpose of the statute. The argument in support of experimentation, however, ignores the considerations of the intent model in agency preemption. It is one thing to construe an ambiguous statute to allow a federal agency to conduct an experiment unforeseeable at the time the statute was passed; it is quite another to disregard a clear pronouncement of agency intent to deny cable owners common carrier status. The experimentation argument apparently would have a reviewing court ask whether the FCC should sanction other experimental approaches to regulation of cable beyond its own. The relevant inquiry, however, is whether the FCC actually intends to allow regulatory approaches of the sort being advanced as experimental.

201. 436 F.2d 920 (D.C. Cir. 1970).
202. Further, the *Mailgram* case was not one dealing with a conflict between federal and state power, but rather with the restrictions placed upon a federal agency by a federal statute.
Thus, the critical fact to be dealt with in responding to a preemption claim is the FCC's own declaration of preemption:

Except on specific authorization, or with respect to the operation of the local government access channel, no local entity shall prescribe any other rules concerning the number or manner of operation of access channels.203

It is not necessarily the content of regulations like those proposed in Massachusetts that conflicts with the FCC's expressed intentions, but rather their very existence. Assuming that Massachusetts is a "local entity" within the meaning of the FCC Rules,204 any attempt, by that or any other state, to prescribe the "manner of operation of access channels" would appear to conflict with the FCC Rules and therefore be preempted.

More particularly, the General Lease and Utilization Requirements205 of the proposed Massachusetts Community Antenna Television Commission regulations, which establish the separation of the cable owner from the provision of programming and services over the cable, seem to be attempts to regulate the manner of operation of the nonbroadcast channels to which they apply. Although one should not infer a condemnation by the FCC rules of the separation policy, the preemptive impact of the declaration of preemption is to bar all state regulation of cable activity that relates to the operation of access channels. Under the FCC Rules, such decisions are to be left to the cable owner.206 The intention of the FCC to preempt state regulation in this area is clearly subject to change, and some specific expression of such a change, under the two-level intent model, should suffice to bar a finding of preemption. However, absent such a decision by the FCC, any reviewing court should find a regulation that separates ownership of cable systems from control over programming to be invalid.

IV. CONCLUSION

The two-level intent model for preemption by federal administrative agencies provides a means for resolving the occasionally novel questions raised by the FCC's unusual regulatory approach to nonbroadcast channels in cable television systems. Those few ambiguities that still remain are, on the whole, implicit in the language

203. 47 C.F.R. § 76.251(a)(11)(iv) (1973); see note 163 supra.
204. See note 163 supra.
of the 1972 Rules themselves. However, as the FCC becomes more certain of the approaches it intends to take toward cable television, it should become less complicated for states to determine their proper role in the regulatory structure. Of course, there always remains the possibility of specific congressional legislation on cable, which could make the plans and intentions of the FCC irrelevant. Until such legislation is passed, the two-level intent model appears to be the most useful analytical tool in the area of cable television regulation.