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CABLE TELEVISION'S JURISDICTIONAL DISPUTE

Sheila Mahony*

It is claimed by representatives of the cable television industry and some of the industry's regulators that cable television is, or may be in the future, subjected to over-regulation by zealous municipal and state officials, and that there ought be only one nonfederal level of regulation. This article will examine the legality, and particularly the constitutionality, of the proposals to deal with the "problem" of three-tier regulation; it will not examine the merits of those proposals. Such examinations are better made by economists, political scientists and policy analysts of disciplines other than the law.

A good deal of the current thinking concerning the problem of three-tier cable television regulation envisages federal authorities controlling certain features of cable systems (for example, signal carriage), excluding all nonfederal involvement, while a single nonfederal authority would regulate other enumerated interests (for example, franchisee selection) under a program dictated either by Congress or by the FCC upon explicit congressional directives. The primary objectives of a cooperative regulatory program of this sort are clarification of uncertain jurisdictional boundaries and elimination of burdensome and misguided state and local regulation.

It is the thesis of this article that neither the FCC nor Congress has the authority to specify how a power inherent in the state is to be exercised, nor the authority to designate the locus of such power, and that neither the FCC nor Congress has the power to confer such power upon a nonfederal level of government. Additionally, the cooperative regulatory programs which Congress has enacted in other areas afford no precedent for such a program for cable television and, indeed, are demonstrably ill-suited to cable television at this time.

I. ORIGINS OF THE THREE-TIER PROBLEM

An examination of the three-tier problem requires consideration of the legal arrangements which prevailed in cable's early days. From the onset, a crucial step in the establishment of a cable system has been to obtain a

franchise from the local government of the area in which the system was to be built. Undoubtedly, some entrepreneurs simply strung their wires without any legal authorization, but such cases were not the rule. The prevailing practice has been to obtain local permission in the form of a franchise to use the streets.

As an increasing number of localities were approached for franchises, sophistication in dealing with cable entrepreneurs grew. This greater sophistication eventually took two forms. One was a heightened awareness of the franchising authority's responsibility to its citizens in conferring monopoly rights, which led to franchise provisions placing a limit on the duration of the grant, controlling rates, and imposing service obligations. The other was a heightened awareness of the local official's opportunity for corrupt personal gain. Occurrences of bribery and extortion spread. In the most celebrated case, the former chairman of the industry's trade association was convicted of bribery. Whether such corruption was rife within the industry or whether the instances which came to light were rare is not relevant here. The important point is that it became a common assumption that corruption of and by local officials was widespread. That assumption significantly altered the governmental response to cable.

Bribery charges were closely followed by a surge of activity at the state level. Although the creation of state cable commissions was rarely accompanied by formal statements that suspicion of local corruption was a reason for their existence, in retrospect it is an inescapable conclusion that the two were associated. To be sure, there were other factors which prompted this state action. In some states, a different sophistication—concern over the consequences of spawning monopolies with little or no check in the local franchises upon their power to abuse their monopoly status—was also a factor in the deliberations of the state legislatures. Also, it should not be forgotten that the state commissions were legislated into existence during the "blue sky era", when the hopes and dreams about the promise of this new technology were being fed by the industry, foundation executives, and the academic community. There was also a popular view that the public sector had been short-changed in the allocation of broadcast frequencies and that


2. This article is not directed at those situations in which the state agencies alone franchise and regulate cable television, with no local authority established to award franchises (Nevada, Connecticut, Alaska, Vermont, Rhode Island, and Hawaii). In such cases, there is, of course, only two-tier regulation. Rather, the discussion focuses upon the states which created a third regulatory tier, such as Massachusetts, New York, New Jersey, Minnesota, and Delaware. The leaders were Massachusetts and New York, which created their commissions in 1971 and 1972 respectively.
regulation of the television industry somehow had been inadequate. Thus, the instinct was to create a state role early in the development of the cable industry in the hope that abuses would be foreclosed before they could become entrenched.

The federal government's role grew during this period as well. The FCC proceeded from an expression of "doubtful" authority to regulate cable systems in 1958, to a denial of common carrier microwave service to transmit signals to a cable system on a theory of preventing adverse impact upon a television station in 1962, to the promulgation of program exclusivity rules and carriage requirements in 1965 and 1966, to the implementation of a "freeze" on the importation of any new distant signals into the top 100 television markets in 1968, to the adoption of comprehensive regulations in 1972 and piecemeal amendments since then. In the course of this evolution, the Commission in 1969 required cable systems with 3,500 or more subscribers to originate programming, shortly thereafter instituted a procedure for waiving the requirement, and later suspended the requirement by following the Eighth Circuit's determination that the Commission had no authority to impose it. The Commission continued the suspension in effect following the Supreme Court's reversal of the Eighth Circuit's decision because of uncertainty as to the wisdom of the rule, and

6. Cable systems not fed by microwave were subjected to such rules by the Second Report and Order on CATV, 2 F.C.C.2d 725 (1966), 47 C.F.R. §§ 74.1101-09 (1970) (now 47 C.F.R. §§ 76.51, 76.91 (1974)).
ultimately abandoned the rule in its entirety in 1974\textsuperscript{16} — all in the course of five years. Against this background of hesitation, uncertainty and reversal, the FCC instituted a proceeding to deal with the problem of three-tier regulation which in its estimation, is counterproductive, causes delays, and is imprecise, unclear, and obstructive.\textsuperscript{17}

II. PROPOSALS TO RECTIFY THE PROBLEM

The first official recognition that a problem involving intergovernmental relations in cable television regulation might arise occurred in 1970 when the FCC observed that “actions have been taken in the cable field without any overall plan as to the Federal-local relationship.”\textsuperscript{18} The Commission then outlined three possible approaches: “federal licensing of cable systems, maintenance of its existing regulatory program, and [f]ederal regulation of some aspects, with local regulation of others under federal prescription of standards for local [jurisdictions].”\textsuperscript{19} The FCC opted for the last approach. In its 1972 Cable Television Report and Order,\textsuperscript{20} the Commission took the position that a comprehensive licensing system would be overly burdensome. Because of the local jurisdictions’ involvement in the provision of cable to their residents, the Commission decided upon a plan for “deliberately structured dualism” which would encompass minimum criteria for franchises with enforcement at the federal level in the certifying process.\textsuperscript{21} In addition, however, it indicated some concern about how its plan for “deliberately structured dualism” would work out in practice, and voiced the intention of seeking the advice of a special committee composed of representatives of a number of interested groups in order to determine the proper allocation of regulatory responsibility.\textsuperscript{22} Thus the Federal-State/Local Advisory Committee (FSLAC) was created to advise the Commission on the question of the proper allocation of regulatory jurisdiction among the three levels of government.

The Steering Committee’s report (FSLAC Report) was issued in September 1973.\textsuperscript{23} The Steering Committee was in unanimous agreement that

\textsuperscript{16} See Report and Order on Cable Television Service, 49 F.C.C.2d 1090, 1108-09 (1974).
\textsuperscript{17} Notice of Proposed Rulemaking and Inquiry, 49 F.C.C.2d 1199 (1974) [hereinafter cited as 1974 Notice and Inquiry].
\textsuperscript{19} Id. at 52.
\textsuperscript{20} 36 F.C.C.2d 141 (1972).
\textsuperscript{21} Id. at 207.
\textsuperscript{22} Id. at 210.
\textsuperscript{23} The Final Report of the Steering Committee of the FCC Cable Television Advisory Committee on Federal/State-Local Regulatory Relationships is available for
duplicative regulation was undesirable. But the unanimity ended there. The Steering Committee was divided into two camps as to how or whether the objective of nonduplication could be achieved. The majority position was that the Commission ought to permit no more than one nonfederal regulatory partner, accomplishing this by "redelegating"certain "local" functions to the most local level of government and giving states a reasonable period of time within which to adopt state legislation implementing this plan, after which, in the absence of state action, the FCC should exercise exclusive jurisdiction.25 The minority position was that while cities and states may differ as to an appropriate allocation of nonfederal regulatory authority, "they are competent to resolve those differences by themselves,"26 and that there is no federal power, arising from the commerce clause, to limit or control the intra-state allocation of regulatory jurisdiction.27

A. Commission Action

In response to the disparity of views within its advisory committee, the Commission initiated a rulemaking proceeding.28 It agreed with the FSLAC that duplication should be avoided because of both the interference with federal objectives and the "possibility of obstruction of interstate commerce."29 There is no doubt that excessive duplication of regulatory functions might obstruct interstate commerce. The FCC objectives which might be frustrated by duplication, however, were not enunciated. The Commission stated:

We are considering the adoption of any appropriate action or regulation that would prevent such an obstruction while at the same time maintain the rightful prerogatives of the States (and localities as entities of the State) to adopt necessary regulations. Such regulations could, for instance, take the form of rules limiting

$8.75 from the National Technical Information Service at 5285 Port Royal Road, Springfield, Virginia, 22151, Order No. PB 2230147 [hereinafter cited as FSLAC Report].

24. How the Steering Committee's majority conceived of a "redelegation" function working was not made clear. The absence of any precedent whatever for such a mechanism posed no obstacle to the majority. Nor did it cause the majority any apparent concern that the Constitution does not countenance either delegations of functions by the federal government to state or local governments or delegation from Congress to administrative agencies or to any other body. The proposal, however, is obviously unlawful. See note 49 & accompanying text infra.

25. See 1974 Notice and Inquiry, supra note 17, at 1201-03 for a further elaboration of the majority position.


27. Id. at 95.


29. Id. at 1209.
specific duplication of tasks such as certification, non-conforming reporting forms, systems of accounts, etc. Alternatively, a program of cooperative review and approval of diverse non-federal regulatory structures could suffice similar to the ones already in place under the National Gas Pipeline Safety Act of 1968 and the Federal Railroad Safety Act of 1970. "Joint Board" proposals such as we already have with the State Regulatory Commissions in the area of common carrier matters will also be considered.\(^\text{30}\)

Thus, the Commission was considering the adoption of an explicitly cooperative regulatory program which would delineate spheres of exclusive authority. While the Commission sought comments regarding its authority to regulate the type of nature of nonfederal regulatory programs, it did seem to assume that such power exists.\(^\text{31}\) That proceeding is now concluded,\(^\text{32}\) with no action having been taken. Although the Commission's decision concedes that jurisdictional impediments exist, it terms them "not necessarily insurmountable."\(^\text{33}\)

The Commission's authority to regulate cable television systems is not explicitly conferred by the Communications Act. In United States v. Southwestern Cable Co.,\(^\text{34}\) the Supreme Court had its first occasion to rule on the FCC's power over cable. It held cable systems to be engaged in interstate commerce,\(^\text{35}\) and it found that section 152(a) of the Communications Act,\(^\text{36}\) which makes the Act's provisions applicable to "all interstate . . . communication by wire or radio," permitted the FCC to regulate cable television systems. But the authority confirmed by that decision was "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."\(^\text{37}\) Thus, Southwestern held that the FCC may impose restrictions upon cable systems to the extent necessary to effectively carry out the FCC's explicit regulatory responsibilities regarding broadcasting. The Commission's cable jurisdiction was limited to that which was reasonably ancillary to its broadcast jurisdiction.

\(^{30}\) Id.

\(^{31}\) The power of Congress to authorize the FCC to take corrective action is coextensive with its power to take corrective action itself and is discussed below in connection with the discussion of the OTP bills under which Congress itself would act. See pp. 881-82 infra.


\(^{33}\) Id. at 34612.

\(^{34}\) 392 U.S. 157 (1968).

\(^{35}\) Id. at 167-69.


\(^{37}\) 392 U.S. at 178.
The Commission's authority under *Southwestern* cannot reasonably be argued to extend to restrictions on the type or nature of nonfederal cable regulation. Were the FCC's jurisdiction over cable plenary, perhaps the argument could successfully be made. Overlapping or even excessively duplicative regulation of cable systems would have no bearing upon the FCC's broadcast responsibilities. Absent an ancillary effect upon the Commission's broadcast responsibilities, *Southwestern* would not support an assertion by the FCC of jurisdiction over nonfederal cable regulation.

Nor does the Supreme Court's second cable television decision, *United States v. Midwest Video Corp.*, support the proposed FCC action. The Court in *Midwest Video* narrowly upheld the FCC rule which requires cable systems with 3,500 or more subscribers to originate programming. The plurality opinion stated that the *Southwestern* rationale had not limited the FCC to cable regulation designed only to prevent adverse competitive impact upon television stations, stating: "the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." The Court found that achievement of broadcasting regulation's long-established goals of "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services" was furthered by the origination rule. Thus the rule was reasonably ancillary to the effective performance of the Commission's jurisdiction over broadcasting.

*Midwest Video* can fairly be said to have extended the *Southwestern* rationale from one of jurisdiction intended to prevent cable systems from doing harm to television stations, to one of jurisdiction intended to require cable systems to promote legislative goals for television. It is difficult to conceive how any action to restrict nonfederal regulation of cable systems could fall within the rationale of *Midwest Video*.

It might be argued that the imposition of nonfederal requirements which either cause duplication of effort by the cable system, mandate procedures

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39. *Id.* at 667.
41. Although it is not discussed here in depth, the infirmity of the proposed restriction on nonfederal regulation may be equally applicable to the current rules which delineate certain provisions that must be included in local franchises if the cable system is to receive a certificate of compliance. A certificate of compliance is required before a cable system can "commence operations or add a television broadcast signal to existing operations." 47 C.F.R. § 76.11 (1975).
different from the FCC's for achieving the same or similar objectives, or require the cable system to take action that federal authorities believe should be taken at the initiative of the system alone, will impose costs on cable systems which may leave them without sufficient resources to fulfill other FCC requirements. The Commission has, in effect, embraced the argument that the cost of nonfederal regulation may frustrate the achievement of federal goals and in 1974, it stated its determination that "excessively duplicative regulation does endanger the accomplishment of federal objectives." This excessive cost argument, however, is broad enough to cover many items in a cable system's budget which would not be influenced by federal regulations. If the FCC has the authority to preclude cable systems from adhering to a state commission's rule which the Commission concludes is duplicative on the ground that adherence would require expenditures which would be more usefully spent in other ways, the same rationale would justify a determination that travel and entertainment budgets could also frustrate the achievement of national goals and therefore serve as a predicate for FCC intrusion into such matters. Clearly a theory so broad is untenable.

It is not here suggested that burdensome state regulation should be tolerated. The point is that the FCC is not aggrieved by such regulation and has no responsibility for challenging it. A cable system which is subjected to burdensome state regulation has available to it a judicial challenge on the ground that the regulation amounts to an undue burden on interstate commerce. A number of courts have entertained similar allegations in different contexts. In each of these cases, a state or local regulation was held to be an unconstitutional burden on interstate commerce, and in none of them was it deemed necessary for a federal agency to involve itself in the matter by taking action to limit the state or local action. Whether a particular nonfederal regulation is burdensome is a question which may properly be entertained by the courts and is an inappropriate subject for FCC comment. The FCC may, if properly authorized, determine that particular subject

42. See 1974 Notice and Inquiry 1209.

43. The only way the Commission could possibly fashion a rule regarding nonfederal regulation would be to preclude cable systems from honoring certain types of rules. Certainly the Commission would not attempt to impose any rule directly on nonfederal authorities, since it has no direct jurisdiction over them. Its jurisdiction to impose requirements on cable systems is the only device available to accomplish a limitation on nonfederal regulatory activity. Such a rule, therefore, must be in the form of a restriction on cable systems performing certain activities.

matters are of national interest and on that basis preempt nonfederal regulation thereof. But short of preempting, it has no jurisdiction.

B. Congressional Action

A more difficult question is what Congress can do with regard to the problem of three-tier regulation. Since cable television systems are engaged in interstate commerce, they are an appropriate subject of congressional action under the commerce clause. Congressional action may take the form of direct regulation by Congress or delegation to the FCC of power to regulate. However, Congress lacks authority to prescribe how the powers it has not either assumed for itself or delegated to the FCC can be exercised by state and local governments.

Of course, Congress may, pursuant to its commerce clause powers, preempt nonfederal regulation by occupying the entire field, by preempting only inconsistent nonfederal activity, or by preempting and delegating to the FCC plenary jurisdiction. However, Congress cannot delegate to the states the power to regulate interstate commerce, and it obviously cannot dictate how nonfederal authorities may achieve nonfederal goals, nor may it dictate how nonfederal powers in achieving those goals may be allocated between the states and their political subdivisions. If the national interest in cable television is such that Congress wishes to articulate a set of federal goals for the medium as well as the means of enforcing them (such as delegation to the FCC), it is the duty of Congress to articulate that authority, formulate the national objectives and devise a federal enforcement mechanism. But it may not tell states how they must achieve objectives that Congress does not declare to be national goals.

One might respond, however, that there are numerous precedents involving regulatory sharing between the federal government and states or cities or both, and that cooperative regulatory schemes have been created and have operated well in the past decade. Close examination of such cooperative schemes is instructive. Four such precedents are relevant.

46. E.g., Western Union Tel. Co. v. Boegli, 251 U.S. 315 (1920).
50. Several important examples are the National Gas Pipeline Safety Act, the Federal Railroad Safety Act, the Food Stamp Act, the Occupational Safety and Health Act and the 1970 Amendments to the Clean Air Act, each of which is outlined and contrasted to proposals for cooperative cable regulation in section IV infra.
mechanisms, however, discloses that none of them presents a precedent for congressional action that would allocate nonfederal regulatory powers regarding cable television. To evaluate this problem, it is first appropriate to explore the concrete proposals for congressional action which have been put forth by the White House Office of Telecommunications Policy (OTP).

In January 1974, the President's Cabinet Committee on Cable Communications issued a report recommending, *inter alia*, "a carefully structured dualism of governmental oversight."\(^5\) OTP responded with two proposed bills. The first (OTP I) appeared in April 1974.\(^5\) It provided that no person could operate a cable system without a license from a cable licensing agency having certain powers, among them the "sole and exclusive authority over cable systems in the state, or political subdivision thereof, to enforce the standards and requirements" of a section of the bill which set out a "cable licensing program" to be followed by the nonfederal cable regulator.\(^5\) In other words, it mattered not whether a state or a city carried out the cable licensing program, so long as only one of them did so within any particular territory. This would have permitted a state to be the sole franchising (or licensing) authority throughout a state, or would have allowed a state to stay out of the area completely, having delegated all such authority to its political subdivisions. OTP I would also have permitted a state to decide to be the licensing authority in all but its largest cities, but to delegate to such cities authority to carry out the entire licensing program. It would *not* have permitted cities to issue franchises while state commissions enforced cross-ownership restrictions or imposed interconnection requirements.

In response to comments and suggestions received on OTP I, OTP redrafted its legislative recommendations and proposed a new bill (OTP II) in January 1975. It provides that a state or political subdivision "may adopt [regulations] consistent with the exclusive grants of authority" contained in the bill.\(^5\) It defines a "cable licensing authority" as "any state, county, municipality or any political subdivision . . . that is empowered by law to authorize by license, franchise, permit or other instrument of authority, the construction and operation of a cable system within the jurisdiction of such

\(^{51}\) CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 40 (1974).

\(^{52}\) The proposed bill was circulated for comment to interested federal agencies and departments and to other interested parties in May 1974 but was not formally introduced in Congress. See Letter from Clay T. Whitehead, Director, Office of Telecommunications Policy, to United States Senate, April 18, 1973, on file at the Senate Committee on Commerce, United States Senate.

\(^{53}\) Id.

\(^{54}\) OTP II § 104(c) (on file at OTP).
agency." Section 301 of OTP II provides that a cable licensing authority "shall have exclusive authority under state law to execute and enforce the provisions of Section 303 and adopt all other rules, regulations, and procedures . . . as are consistent with" the bill. Section 303 provides that the "licensing authority shall . . . adopt procedures providing for the imposition of sanctions" in the event of a violation of the terms of the license, grant nonexclusive licenses, assure certain channel capacity, and so forth.

OTP II is designed to assure that there is only one nonfederal agency which will perform all of the nonfederal functions enumerated in the bill. The explanatory memorandum accompanying the proposed bill states that "[t]itle III is intended to establish in a single non-Federal entity the authority to regulate all aspects of cable system construction or operation that are particular to such systems, except as otherwise specified in the bill." The memorandum explains that a section was added "to make clear that the licensing authority has the power to impose sanctions for violations of all terms of the license." Thus, OTP II would explicitly delineate which functions are federal interests, and which are nonfederal, and allocate to each governmental entity exclusive jurisdiction in its own sphere.

To the extent that the OTP bills purport to confer power on a nonfederal agency, the proposals are unique. While there are numerous examples of federal-nonfederal regulatory cooperation, they all rest upon the assumption that the nonfederal partner performs acts within its state-conferred authority. There are other examples of federal action which have nullified obstructionist or inconsistent state or local actions, but no precedent has been found in which Congress has declared that there is a national interest in having certain functions performed by a nonfederal agency with a concomitant conferral of the powers appropriate to perform them. No such precedent has been found because Congress has no constitutional authority to confer power on any but a federal agency.

III. THE FRANCHISE POWER

Before considering the scope of Congress' power to preempt, displace or otherwise interfere with the exercise of state or local powers, it is useful to consider what those powers are. The principal power exercised by local

55. Id. § 105(f).
57. Id. at 11-12.
governments over cable systems is the power to franchise. In addition, regulatory power—an exercise of police power as distinguished from franchise power—is exercised where state cable commissions exist, but that power in every case assumes the existence of, and builds upon, franchise power. A franchise is the sine qua non for a lawful cable television operation.68

A franchise69 represents authority to occupy the public streets for a publicly beneficial service not inconsistent with the public's use of the streets.60 Without the grant of the franchise, the encroachment upon or use of the streets would amount to a trespass.61 A franchise generally has been defined as "a grant by or under the authority of government, conferring a special and usually a permanent right to do an act or a series of acts of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved."62 In City of Owensboro v. Cumberland Telephone & Telegraph Co.,63 the Supreme Court held that a franchise conferred property rights in perpetuity since its duration was not limited by the grant itself, nor by the general law of the state, nor by the franchising authority's charter powers.

In England, and later in colonial America, the ownership of the public thoroughfares, including navigable waters and roads, was held by the King in

58. The cases cited in this section are New York State and Supreme Court decisions. The franchise law enunciated long ago by the New York Courts seems to comport with the law in most other jurisdictions. One reason, of course, is that New York was a financial and industrial leader at the turn of the century, and many of the disputes which fostered the growth of franchise law occurred in New York before they occurred elsewhere. In addition, the theories enunciated in the New York cases have been explicitly or implicitly approved by the Supreme Court. See, e.g., Russell v. Sebastian, 233 U.S. 195 (1914); City of Queensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58 (1913).

Most franchise law in this country dates back to the early days of railroad, telephone, and telegraph companies. Since little new law has evolved since the advent of cable television, the cases cited here, although quite old, are nonetheless controlling.

59. The term franchise is used here to denote a "special franchise" or "secondary franchise" as opposed to a "general franchise." A general franchise gives a corporation its existence, the rights it derives from its incorporation; a special franchise confers the right to use and occupy the public streets. See City of New York v. Comtel, Inc., 57 Misc. 2d 585, 594 n.3, 293 N.Y.S.2d 599, 607 n.3, (Sup. Ct.), aff'd, 30 App. Div. 2d 1049, 294 N.Y.S.2d 981 (1968), aff'd on opinion of trial court, 25 N.Y.2d 922, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969).

60. See Milhau v. Sharp, 27 N.Y. 611 (1863).


63. 230 U.S. 58 (1913).
trust for the people. That sovereign power, which included the power to authorize ferries and bridges across rivers, tolls upon roads and piers, and wharves in navigable waters, evolved into the concept that states are trustees for the people. The states through their legislatures exercised those powers which had previously been exercised by the King.\textsuperscript{64}

As a general rule, the present source of the franchise power rests in the state.\textsuperscript{65} If the state has not delegated the power to its political subdivisions, as it may constitutionally do in many states, the state legislature retains the power.\textsuperscript{66} Usually, the only limitation upon the state's power to delegate franchise power is in its constitution. In \textit{Wilcox v. McClellan},\textsuperscript{67} the New York Court of Appeals found that the authority of the legislature to confer the power upon local authorities was unrestricted with the exception of railroad franchises to which certain conditions were imposed by the constitution. Thus, the legislature could withdraw the power from one local council and confer it upon another local body; alternatively, the legislature could retain the power itself, since its authority to delegate or not is unrestrained.\textsuperscript{68} As a result, the legislature can designate one franchising authority and "chang[e] it from time to time as the public interest may require . . . ."\textsuperscript{69} The power may be delegated conditionally by imposing requirements such as the procedures which must be followed in granting a franchise and the restrictions which must be imposed upon the grantee.\textsuperscript{70} Thus, the franchise power is inherent in the state because it is the sovereign,\textsuperscript{71} and that power may not be conferred by the federal government.\textsuperscript{72}

Several conclusions can be drawn from the foregoing. The power to award

\textsuperscript{64} See People \textit{ex rel. Howell v. Jessup}, 160 N.Y. 249, 54 N.E. 682 (1899), in which the court held that powers conferred by the king's representatives were undisturbed by subsequent actions of the state.


\textsuperscript{67} 185 N.Y. 9, 77 N.E. 986 (1906).


\textsuperscript{69} Wilcox \textit{v. McClellan}, 185 N.Y. 9, 18, 77 N.E. 986, 987 (1906).


a cable television franchise, if not delegated by the state legislature to a political subdivision, is held by the state.\(^7\) When delegated to a political subdivision, the power may be restricted by explicit directions as to both what procedure should be followed in awarding it\(^7\) and as to what terms must be included in the franchise. The state may withdraw the power and itself be the franchising authority, or it may withdraw it from one body and designate a different local agency as the franchising authority. It may also retain some power itself and delegate a portion to a local body (the equivalent of a delegation with conditions). The state may also delegate the power to some of its political subdivisions but retain the power with respect to all other regions of the state. It is within the context of this sovereign state power that the proposals which have been made for an explicitly cooperative state-federal regulatory program must be viewed.

Although the Supreme Court’s decisions which indicate that Congress cannot interfere in the allocation of such state responsibility\(^7\) make the OTP proposals immediately suspect, more recent examples of federal-state cooperative regulation may be regarded as precedent for the validity of the OTP

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73. The FCC has adopted a policy which undermines this rule; the Commission will award a certificate of compliance and thus authorize the carriage of broadcast signals, despite the lack of any local franchise, in situations in which there is apparently no authority to franchise. Reconsideration of Cable Television Report and Order, 36 F.C.C.2d 326, 366 (1972); Leacom, Inc., 50 F.C.C.2d 381 (1974). The foregoing discussion demonstrates that there is always authority to franchise; thus the FCC policy proceeds on a mistake of law. The Commission's policy arises out of a difficult dilemma: when the state and its political subdivisions disclaim authority to franchise, yet indicate their desire for (or at least their lack of objection to) a cable system in the community, should the FCC withhold broadcast signal authority? Perhaps not. This is undoubtedly why the policy was adopted. Yet the Commission's policy is founded upon a fiction. The cases cited above indicate that whether the city attorney knows it or not, some state or local body has franchise power; if it hasn't been delegated to the political subdivision, it inheres in the state and may be exercised by the state legislature. Thus the Commission is, in every such case, condoning an implicit violation of state law.

74. For example, Iowa's home rule provisions for municipalities requires a referendum. IOWA CODE § 364.2(4) (1975). In New York City, the procedure spelled out by the state specifies how many days notice there must be after publication of the terms of the grant and the award thereof, describes the types of publications in which notice must be given, provides a measure for compensation to the city by the grantee, and spells out the maximum duration of the grant. NEW YORK CITY CHARTER, ch. 14. The same conditions are not necessarily applicable to other political subdivisions in New York State; the powers of other local governments are specified in city charters, and statutes of general applicability. See People's Cable Corp. v. City of Rochester, 70 Misc. 2d 763, 334 N.Y.S.2d 972 (Sup. Ct. 1972), aff'd, 41 App. Div. 2d 585, 340 N.Y.S.2d 883 (1973), in which the court invalidated a "license" which purported to confer franchise rights that had not been awarded in accordance with the city charter's franchising procedure.

75. See cases cited note 49 supra.
proposals. But as the following examination demonstrates, none of these cooperative regulatory programs is sufficiently analogous to cable television to be of legal significance.

IV. COOPERATIVE REGULATORY SCHEMES

In many areas of the law, the federal government has regulated in a manner expressly designed to cooperate with state and local regulatory efforts. Such cooperative regulatory programs have increased in number during the past decade. Since cable proposals are intended to establish an explicit cooperative relationship between the federal and nonfederal regulators, it is worthwhile to examine such programs in other areas to determine whether any of them supplies a precedent or model for the cable proposal. The FCC has already expressed the view that models are provided by the Natural Gas Pipeline Act and the Federal Railroad Safety Act. The other possible precedents examined here are in the areas of food stamps, occupational health and safety, and clean air.

A. The Natural Gas Pipeline Safety Act

The Natural Gas Pipeline Safety Act of 1968 provides for the establishment and enforcement of safety standards for the transportations of gas via interstate pipeline. The statute provides that after a two-year interim period during which the Secretary of Transportation may adopt as the federal standards any state standards in force on the effective date of the statute, the Secretary shall adopt federal standards to apply to all interstate facilities. State agencies are expressly permitted to adopt more stringent standards for intrastate facilities which are compatible with the federal standards, but not with regard to interstate facilities. The Act does not apply to pipeline facilities within a state when the safety standards and practices applicable to same are regulated by a State agency (including a municipality) which submits to the Secretary an annual certification that such State agency [has appropriate regulatory jurisdiction], has adopted each Federal safety standard... established under this chapter as of the date of the certification; is enforcing each such standard; and... has authority to require record maintenance, reporting and inspection... 

76. See 1974 Notice and Inquiry.
78. Id. § 1672(a)-(b).
79. Id. § 1672(b).
80. Id. § 1674(a).
Additionally, the state's law must provide for injunctive and monetary sanctions substantially as provided for in the Act. 81 Another section provides that when such an annual certification is not received, "the Secretary is authorized by agreement with a State agency (including a municipality) to authorize such agency to assume responsibility for, and carry out on behalf of the Secretary" specified record maintenance, inspection and monitoring functions. In such cases, enforcement is entirely a matter for the federal authorities. 82

The field of safety standards for interstate pipeline facilities is thus preempted by the Act, while regulation of intrastate facilities is left to the states, as it must be, if the intrastate activity does not affect an area of interstate commerce which is regulated by Congress under the commerce power. 83 States or municipalities may regulate interstate facilities only if they adopt the entire gamut of federal standards and have the power to enforce them as Congress has directed that such standards be enforced. States may also agree to keep records of and inspect interstate facilities on the Secretary's behalf. And if a state chooses to take no regulatory action under the Act, the federal authorities must do so.

If the Act is to serve as a model for federal-nonfederal cooperation in regulating cable television, it is not the sort of cooperative regulatory program that has been enunciated by either the FCC or OTP. The FCC has always taken the position that certain matters, such as franchisee selection and determination of franchise areas, should be left to the discretion of nonfederal authorities for decision, not just for enforcement. 84 OTP envisions nonfederal authorities having jurisdiction to decide and enforce in a large number of areas, exclusive of federal jurisdiction or review. 85 OTP and the FCC agree that nonfederal action should not be a matter of state option under which the federal authorities may step in where no state or local action is taken. 86

The Natural Gas Pipeline Safety Act provides for total federal preemption, but permits (it does not mandate) nonfederal adoption and enforcement of standards arrived at and promulgated by federal authorities alone. Thus, "the Federal government has invited the states to participate in the program by voluntarily undertaking the indispensable task of inspection." 87

81. Id.
82. Id. § 1674(b).
85. See OTP Report ch., 3 at 25.
86. See generally id.; 1974 Notice and Inquiry 1206-07.
A state may not, however, disagree with even a single federal standard if it wishes to have any regulatory role, since there is no decisional discretion whatever at the nonfederal level. The Act is not a model for avoiding duplicative regulation, since only one set of standards is contemplated. It would appear, then, that this Act provides little precedential support for a system of shared regulatory powers which has been proposed for cable television.

B. The Federal Railroad Safety Act

The Federal Railroad Safety Act of 1970 provides that the Secretary of Transportation shall prescribe federal safety regulations for all areas of railroad operations. The Act includes a saving clause permitting states to adopt standards in addition to the federal safety standards:

A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The statute also provides for state participation in carrying out investigative and surveillance activities on an annual certification basis much like that found in the National Gas Pipeline Safety Act. But this portion of the Railroad Safety Act fails to provide a precedent for sharing decisional powers regarding cable television regulation.

The saving clause follows a declaration of policy that railroad safety regulation "be nationally uniform to the extent practicable" and provides for the continuation in effect of state regulations until a federal regulation covering the same subject matter is adopted. The clause was interpreted in Donelon v. New Orleans Terminal Co., which held invalid standards adopted by parish officials in Louisiana on the ground that the clause permits only state action. The Court stated:

[W]e do not have before us an attempt by the State of Louisiana to regulate safety; rather, we have before us individual officials of a parish government . . . .


89. Id. § 431(a).
90. Id. § 434.
91. Id. § 435.
92. Id. § 434.
93. 474 F.2d 1108 (5th Cir. 1973).
We do not purport to suggest . . . that the State of Louisiana, acting through its Attorney General, could not bring this same common-law suit to enjoin unsafe railroad practices. Nor do we intimate here that the Louisiana Legislature, or some duly delegated agency acting for the State, could not establish standards under § 434's second exception . . . ; [We] hold only that these individual officials are without authority under the Federal Railroad Safety Act of 1970 to require the Railroad to meet any safety standard beyond those provided for in the national act.94

Thus, Donelon eliminated the possibility of regulatory action initiated at the local level, while leaving open the possibility of action by a duly delegated agency of the state which might well be a local government.

The saving clause, as interpreted by Donelon, may provide some precedent for cooperative regulation regarding cable television. One of the important goals of the various cable television proposals is avoidance of duplicative regulation. The OTP bills seek to achieve this goal by providing that only one nonfederal government may regulate in the areas designated to be nonfederal functions. Since Donelon held that Congress may designate the states as its nonfederal partners regarding railroad safety, presumably Congress could designate the states as its regulatory partners regarding cable television. Donelon does not, however, stand for the proposition that Congress could designate cities, towns, village and counties as its nonfederal partners, and it is widely believed that these political subdivisions are the more appropriate loci of nonfederal authority over cable systems.95

The Federal Railroad Safety Act is also defective as a precedent in that it leaves to a state the determination of whether it wishes to regulate regarding local hazards. The "state option" feature of this and other cooperative regulatory programs fatally flaws their applicability to cable television. Under the Federal Railroad Safety Act, if a state opts not to regulate regarding local hazards, these hazards will remain and the trains will continue to run. In the regulation of cable television, however, short of an assertion of preemptive federal licensing power, without nonfederal franchising action, the cable operator lacks authority to build and there will be no cable television. And even if a preemptive federal licensing power were asserted, the question becomes when such power would be exercised. Any cable proposal which includes optional state or local action must necessarily assume that, in the absence of state or local action, federal jurisdiction will be fully sufficient to authorize the use of local streets, will legally take the place of a franchise, and will confer sufficient authorization to construct the

94. Id. at 1112-13.
95. See FSLAC Report, supra note 23, at 11.
system. There is considerable doubt that Congress has this power, and wholly apart from the legal infirmities of such a program, the political difficulty of defining when federal licensing should preempt state and local determination—or the lack thereof—argues strongly against such a proposal. It is suggested, therefore, that the limited nature of the precedent afforded by the Federal Railroad Safety Act, and the impracticality of any cooperative regulatory program that permits a state option, effectively eliminate it as a model for cable regulation.

C. The Food Stamp Program

The Food Stamp Act of 1964 authorizes the Secretary of Agriculture to formulate and administer a food stamp program to be operated by state agencies at their request. Costs incurred by the state agencies are partially reimbursed by the federal government. The state agency must have submitted by January 1, 1974, a plan of operation specifying the manner in which the program will be implemented in every political subdivision of the state, unless it was impossible or impractical to do so for any political subdivision.

The Food Stamp Act appears to provide a twofold precedent for cable television regulation. First, like the Federal Railroad Safety Act, it appears to designate the states as the nonfederal partner in implementing the program. The analogy is limited, however, since it does not purport to confer the jurisdiction to perform the actions contemplated by the Act, as OTP would have Congress do in the area of cable television. All states may lawfully operate welfare programs, such as the distribution of food stamps. Thus, designation of the state alone as the nonfederal partner affords no jurisdictional precedent.

Second, the statute commands participating states to provide a plan for operating the program throughout the state (except when impossible or infeasible).
impracticable). The translation of the statutory plan to cable would be a program under which states would implement nonfederal franchising only upon approval of federal authorities as to the manner in which the local incidents of cable, those not preempted by the federal authorities, would be handled. Failure to conform to the approved plan would result in a denial of federal cooperation, which under the Food Stamp Act takes the form of financial assistance102 and for cable television would be federal permission to carry broadcast signals. This sort of program would eliminate the confusion that allegedly exists now as to the locus of franchising authority within certain states. However, since states participate in the food stamp program only on request, it is a state option program and its analogy to cable television has the fundamental defect of being an optional program with doubtful federal authority to act in cases in which the state declines the option.

D. The Occupational Safety and Health Act

The Occupational Safety and Health Act of 1970103 (OSHA), authorizes the Secretary of Labor to prescribe detailed standards to assure safe and healthful working conditions for workers in businesses affecting interstate commerce.104 The statute permits states to assert jurisdiction over any occupational safety or health issue with respect to which there is no federal standard.105 Thus, it does not "occupy the field." The Act further provides that states may present to the Secretary a plan for assuming responsibility for developing and enforcing standards governing matters that are the subject of federal standards.106 A state may choose to regulate regarding some hazards and not others; as to any hazards which it decides not to regulate, federal standards continue to apply. Moreover, in areas governed by federal standards for which a state assumes responsibility, the state standards may be more stringent than the federal. One of the elements of the state plan must be the provision for the development and enforcement of standards which are "at least as effective in providing safe and healthful employment ... as the standards promulgated under" the Act.107 Upon approval of a state plan, the Secretary's jurisdiction is considerably limited.108 If a state fails

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102. Cf. Tucker v. Hardin, 430 F.2d 737 (1st Cir. 1970); Jay v. United States Dep't of Agriculture, 441 F.2d 574 (5th Cir. 1971).
104. Id. § 655(a).
105. Id. § 667(a).
106. Id. § 667(b)-(c).
107. Id. § 667(c)(2).
108. See id. § 667(e).
substantially to comply with its plan, the Secretary may withdraw approval of the plan, but the withdrawal is subject to review in a United States Court of Appeals. Upon withdrawal, federal jurisdiction is reimposed. But while the plan is in effect, the state substantially displaces federal authority.

OSHA's approach to state option programs is unique in its displacement of federal jurisdiction. Similar programs provide that states may choose to regulate regarding certain carefully specified subjects, with federal authority over all other subjects remaining in force. OSHA, on the other hand, through financial assistance for development and enforcement of state plans, encourages states to assume full responsibility for implementing state-national objectives in the occupational safety and health field. If Congress could articulate national objectives for cable television, their implementation could be left to the states. To supplant in large measure the FCC's cable television jurisdiction with state implementation of national objectives would likely reduce the anti-competitive restrictions currently imposed on the cable industry by the FCC. It could be argued that such a program ignores a need for national uniformity in communications and the consequent desirability of a central regulatory body to articulate and implement such uniformity, but the same argument could have been made against OSHA by large manufacturers with nationwide operations. And while OSHA is not without its detractors, the program has not failed because of its lack of uniformity.

Of course, the OSHA model is far from a perfect solution for cable television. Because OSHA leaves to the states the option to act or not, its analogy to cable would mean the option of franchising or not, which means the states could ignore the federal program entirely if they so chose. Moreover, it is unlikely that Congress would grant financial assistance for nonfederal regulation of cable television, a factor which has probably figured prominently in the positive state response to OSHA. However, its restriction on federal regulation, and provision for a large role for the nonfederal partner, is an idea that deserves far more attention in the discussion of ways to resolve the problem of two or three levels of government regulating cable television.

109. Id. § 667(f).
110. Id. § 667(g).
111. OSHA's legislative history indicates that the states would not be prevented from taking over and administering their own programs once the state plan is approved. S. Rep. No. 91-1282, 91st Cong., 2d Sess. 18 (1970). The Act, however, does not provide for total displacement of federal authority, although it is substantial.
television with diverse and conflicting objectives. OSHA suggests that incremen-
tal preemption by the federal government is not the only answer, and
indeed may be an entirely wrong approach to take.

E. The Clean Air Act—1970 Amendments

The Clean Air Act Amendments of 1970\textsuperscript{114} direct the Administrator of
the Environmental Protection Agency to promulgate national primary and
secondary ambient air quality standards, the implementation and enforce-
ment of which is to be accomplished by the states pursuant to EPA-approved
plans.\textsuperscript{115} Unlike the cooperative regulatory schemes, this Act appears to
mandate the submission of state plans by providing that

\begin{quote}
[e]ach State shall . . . adopt and submit to the Administrator,
within nine months after the promulgation of a national primary
ambient air quality standard . . . . a plan which provides for imple-
mentation, maintenance, and enforcement of such primary stand-
ard in each air quality control region . . . within each State.\textsuperscript{116}
\end{quote}

It might be argued that despite this mandatory language the statute leaves
states the option of not submitting a plan, since section 1857c-5(c) (1)
provides that the Administrator shall adopt a plan if the state fails to do so.
Although the legislative history appears to support this view,\textsuperscript{117} the Supreme
Court has viewed the language as mandatory. In \textit{Train v. Natural Resources
Defense Council, Inc. (NRDC)},\textsuperscript{118} the Court reviewed the history of
federal-state cooperation in air pollution abatement efforts, beginning with a
1955 allocation of federal funds to conduct research and to provide technical
assistance to state and local governments, and reaching 1967 when Congress
reiterated that air pollution control was primarily a problem for state and
local governments, but one over which federal authorities were given wider
supervision and enforcement roles.

In 1970, Congress dramatically increased the federal role in pollution
control by empowering the EPA Administrator to promulgate standards. The
1970 amendments, however, explicitly reserve for the states the primary
responsibility for assuring air quality within their geographical confines. The
\textit{NRDC} Court reasoned that “[t]he difference under the Amendments was
that the States were no longer given any choice as to whether they would
meet this responsibility. For the first time they were required to attain air

\begin{footnotes}
\item[115.] \textit{Id.} § 1857c-4, c-5.
\item[116.] \textit{Id.} § 1857(c)-5(a)(1) (emphasis added).
\item[117.] See 3 U.S. CODE CONG. & ADMIN. NEWS, 5356 (1970).
\item[118.] 421 U.S. 60 (1975).
\end{footnotes}
quality of specified standards, and to do so within a specified period of
time." This statement appeared with no citation, no reasoning, and no
explanation of why it contradicts the long line of cases that hold Congress
may not confer power on states, may not allocate intrastate powers, and may
not issue commands to states.\footnote{120} In view of the weight of authority to the
contrary, the statement must be viewed as inadvertent error.\footnote{121}

Even assuming that the 1970 Clean Air Amendments, as interpreted in
NRDC, furnish some sort of precedent, a question arises as to the applicabil-
ity of the precedent to cable television. The Clean Air Amendments require
the states to ensure compliance with federal standards. The objective was to
assure that air quality throughout the nation met specified minimum health
standards by a certain date. To that extent, the analogy holds for cable
television. Conceivably, Congress could decide that it was in the national
interest for cable systems to perform pursuant to federal standards and
guidelines and that such performance should be achieved within a fixed time
period. But because of the vastly different subject matter the analogy fails.
The failure of the states to meet their responsibility for assuring clean air
gave the matter some urgency, and was the reason for mandating state
action. It is hard to imagine that Congress or the Court could be convinced
that the meeting of certain objective criteria by cable systems within a
limited number of years assumes the same kind of urgency it attached to the
program which was to assure that air would not be harmful to health.

Nor has it been demonstrated that state and local governments, whose
failure to assure clean air lent urgency to that legislation and prompted the
mandating of state action, have failed to meet their responsibilities with
respect to cable television franchising and regulation. Thus the history of
state regulatory neglect that led to the 1970 enactment of the Clean Air
Amendments and their imposition of mandatory regulatory responsibilities
on the states cannot be analogized to cable television.

The Clean Air program certainly has not removed regulatory and jurisdic-
tional uncertainties, and the amendments have spawned considerable litiga-
tion and case law dealing with variances from state plans. Before the
Supreme Court ruled on the Georgia plan in \textit{Train v. Natural Resources}
\footnote{119} \textit{Id.} at 64-65.
\footnote{120} \textit{See} cases cited note 49 \textit{supra}.
\footnote{121} The doctrine of \textit{Steward Machine Co. v. Davis}, 301 U.S. 548 (1937), that a
state can be tempted, but not coerced, into acting could not have been overturned so
cavalierly. \textit{See also} \textit{Kentucky v. Dennison}, 65 U.S. (24 How.) 66 (1890), in which Mr.
Justice Taney, discussing the Constitution's extradition provision, which is phrased in
mandatory terms, states that "the Federal Government, under the Constitution, has no
power to impose on a state officer, as such, any duty whatever, and compel him to
perform it..." \textit{Id.} at 107.
Defense Council, the circuit courts of appeal were split three ways on the issue of a state’s authority to grant variances from its plan. Analogous legislation on cable television, intended to eliminate confusion, would more likely have the unintended consequence of generating similar litigation and result in endless regulatory uncertainty and complexity.

Yet the Clean Air Amendments furnish the only example that has been found of congressional imposition of regulatory responsibility on a nonfederal level of government. If the Clean Air Amendments are used as a model for cable television regulation, Congress must decide that the nonfederal responsibility is always the state’s (a policy which has been opposed by the FCC, OTP and FSLAC); that if a state doesn’t submit an appropriate plan for regulating cable television systems in accordance with stated national goals, the federal government, presumably the FCC, will be empowered to do the state’s job (a matter of dubious legality); and that it is worth the expenditure of considerably more resources than are currently expended by the FCC on cable television regulation to review state plans, monitor their enforcement, and step in when violations occur. Congress would probably not view duplicative regulation of cable television as an issue whose resolution is worth such fiscal and political commitments. Indeed, because of the considerable legal and regulatory complexities presently associated with cable television, the effort should be to simplify cable regulation, not to complicate it enormously by patterning legislation on the Clean Air Amendments.

What does the foregoing tell us about cooperative regulatory schemes? In situations in which Congress may exercise commerce clause powers, it may do more than it has traditionally done, such as to preempt a field and regulate it by statute or delegate the regulatory authority to a federal agency. Congress may decide that certain powers are best exercised by state or local governments, and it may encourage nonfederal action by designating the state as its nonfederal regulatory partner. It may encourage nonfederal regulation by funding state agencies which propose a regulatory plan that accords with the congressional objectives and receives federal approval. It may encourage nonfederal regulatory initiatives by declaring that standards more exacting than federal standards will be permitted.

In all of these cases, however, the state is not required by Congress to act. The NRDC dictum to the contrary must be construed as error. Congress may say that if a state wishes to act it must act in a certain way or else the

122. 421 U.S. 60 (1975).
124. See note 121 & cases cited note 49 supra.
federal authorities will act, but it may not confer on states the power to act in the manner in which states may confer power on their political subdivisions, nor may it compel states to exercise their sovereign powers.

Finally, as possible analogies to cable television, the schemes that have been examined fail to solve the perceived problem. First, they merely show that Congress may designate the state, not a more local level of government, as the nonfederal partner. Most of the serious comment on the "three-tier problem" is to the effect that the more local the nonfederal partner the better. Thus, the only available resolution to the problem contradicts widely accepted policy recommendations as to the optimum regulatory structure.

In addition, each of the statutes examined provides that the federal power shall apply in the event that a state decides either not to act at all, or not to act in accordance with congressional determinations as to how the nonfederal regulatory functions should be performed. This article has not examined every aspect of the legality of a federal authority granting franchises, but the analysis undertaken indicates that Congress, and in turn the FCC, may not franchise. Even if the power may be preempted from the states and assumed by the federal government, it is inconceivable from a practical standpoint that the FCC could perform the entire job. There are thousands of communities left to be franchised. The FCC simply lacks the resources to conduct franchise hearings in every community for which new franchise applications are submitted, renewal hearings when existing franchises expire, revocation hearings when serious violations occur, and hearings to determine whether fines should be imposed in the event of less serious violations. Additionally, Congress would be reluctant to appropriate the massive funds that would be needed to execute those tasks.

Assuming that, for purely practical reasons, the FCC would not be given fully preemptive franchise power, the question arises whether Congress might adopt a cooperative regulatory program under which it would empower the FCC to franchise when a state decides not to act in accordance with congressional objectives. Again, it is doubtful that there is any federal franchising authority. But even assuming that such authority exists, practical arguments, as well as political ones, again suggest that such a proposal is unsound. The difficulty of defining when a state's failure to act requires that a federal authority should fill the void is not an insignificant obstacle.

Should the federal government act when the state invites it to, when the state disclaims authority to franchise, when there is a dispute between the state and a political subdivision (or between two political subdivisions, such as a county government and a city located within the county) as to who has
franchise power, or when a franchising authority refuses to grant or to renew a new franchise? Should the federal authority enforce franchises when the grantor refuses? Should the federal authority grant regional franchises even though a portion of the region is already franchised? Should the federal authority grant a new franchise when an existing locally awarded franchise is lying fallow? Reasonable arguments can be made pro and con each of the foregoing questions, indicating that there are few, if any, clear-cut cases in which a state should be considered to have opted not to act so that the federal authority should step in to fill the gap. Absent a clearly defined policy on that issue (which would be virtually impossible to formulate), a cooperative regulatory program like those examined should not be enacted for cable television.

V. Conclusion

The argument has been widely made that jurisdictional boundaries among federal, state and local governments need to be more clearly drawn and that cable’s state and local regulators are burdening the industry. Thus, it has been argued that Congress ought to draw the lines explicitly and enact legislation establishing a cooperative regulatory program to assure that nonfederal involvement in cable television will not be burdensome.

This proposed solution, however, is not the only answer. If in fact there is a lack of clarity as to which level of government has authority to act in a given situation and if states and localities have imposed burdensome regulation upon cable systems, our legal system affords a remedy. Conflicting jurisdictional claims may be presented in court for an adjudication as to which claimant is correct. If the FCC claims to have preempted an aspect of cable regulation, and a franchising authority, disputing the FCC’s authority to preempt, imposes an obligation in conflict with the FCC rule, the cable system may litigate the matter and have a court determine which government’s regulation applies. Such disputes are constantly before the courts, and as the preceding analysis demonstrates, there is no advantage in having disputes about cable television regulation resolved by legislation rather than by litigation.

Similarly, if state or local regulation of cable systems is burdensome, the cable systems may challenge it as an unconstitutional obstruction of interstate commerce. Such challenges are not new to the courts and may be brought by cable systems just as they have been brought by other interstate entrepreneurs in the past. No problems have been articulated that cannot be resolved within the existing legal system, and therefore no need has been shown for legislation establishing a comprehensive program which delineates jurisdictional boundaries with precision.
Two final observations must be made on the comprehensive, explicitly cooperative regulatory programs, and their inapplicability to cable television. First, in each case, the cooperative regulatory program was more than a regulatory program. For food stamps, clean air and OSHA, the programs were also, and perhaps primarily, funding devices for either feeding people, channeling funds through the states to pollution sources or carrying out federal inspection and enforcement objectives. Such additional objectives are not present for cable television, and without them, the need to impose an artificial and inflexible structure on regulatory relationships has not been demonstrated.

Secondly, for each of the comprehensive programs, the objectives are relatively simple and uncontroversial ones about which a political consensus existed. There should be no quarrel with the objectives of feeding hungry people, purifying the air or providing the nation's workers with a safe working environment. No such consensus exists regarding cable television. There is not a single objective for cable television around which a political consensus could develop, and certainly nothing as uncontroversial as the objective of feeding the hungry. It may well be that such comprehensive programs, because of their all-inclusive nature, may be workable only in an area about which there is such a consensus.

Cable television is a relatively new phenomenon. We are not yet in a position to predict its rate of growth, what services cable systems ought to be providing, whether cable systems ought to fill very different social needs in urban as opposed to rural areas, or which attributes of monopoly ought to be prevented and which permitted. Until some consensus emerges about questions such as these, cable television ought not be restrained by a static structure allocating regulatory authority. Perhaps in five years, as some of these questions start to be resolved, there will be very different regulatory objectives for cable television. It would be a mistake to establish exclusive spheres of regulatory interest now, particularly when any real grievances about burdensome regulation and jurisdictional conflict may be resolved without creating a static hierarchy of interests.