

Federal Regulation of Cable Television and the Role of Local Government

VIEWPOINT

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Senator Barry Goldwater's (R-AZ) recently introduced cable television bill (S. 2172), is an excellent illustration of the growing conflict between two cherished conservative principles: deregulation of industry on the one hand, and state rights and home rule on the other hand. The bill provides for a deregulation of leased access channel rates, removes present restrictions on cable cross-ownership by broadcasters and networks, and abolishes the cable Fairness Doctrine. Yet within this relative liberalization, the proposed legislation firmly establishes the FCC as the primary source of jurisdiction over cable television regulation, and prohibits local or state rules that are in conflict with the Federal ones. Local governments will not be able to impose rate regulation other than on basic services, and will not be able to tax cable operator's revenue (the so-called "franchise fee") by more than an FCC-established maximum percentage. Even where the bill provides for a restriction on cable operators—a minimum number of leased channels and a 10 percent public access channel requirement—it is done within the primacy of Federal rules over local ones. Similarly, it is Washington which graciously grants the cities the right to own the cable network buried under their own streets. But being in the nature of a right extended, it could presumably also be withdrawn at any time.

The question therefore arises: whatever happened to the goals of local autonomy, championed by conservatives like Sen. Goldwater? The answer is that the trend toward deregulation has created strange new alliances on this issue. Liberals have now become sometimes enamored with "home rule" and "states' rights," a long-time suspect code words.

Consider, for example, Rep. Stephen J. Solarz (D-NY), a liberal congressman from Brooklyn, who, on the subject of federal restriction of rent controls, exclaimed: "I never expected to end up an advocate of state's rights, but this provision is a clear violation of the principle of home rule."

The conflict between deregulation and decentralization applies to cable regulation as well as to other forms of government controls. Some general observations are herefore in order.

The proponents of deregulation usually assume that their actions lessen the interference of government with business, and that they also reduce the powers of central government. Yet neither of these expectations may be fulfilled, because of

the way in which state and local regulation can offset Federal deregulation.

With increasing withdrawal from certain areas of regulation, states and local government, which for several decades have played only a supporting role, have become confronted with new responsibilities and demands for regulatory action. The problems that Federal rules were enacted to remedy usually still exist and calls for a governmental response, and organized groups advocate state and local regulations to replace some of the abolished Federal laws. Hence, local and state rules are likely to emerge in many instances.

It would seem that there is nothing wrong with a decentralized system of state and local regulations, but it must be recognized that this may lead to a more restrictive regulation than before. For example, if Federal rules on the disposal of nuclear wastes are abolished but states are free to enact their own laws, they may attempt to push the undesirable activity onto other states. As this process goes on, the overall strictness of state regulation may become greater than it had been under Federal standards.

In the cable field, localities may require increasingly burdensome franchise fees as a relatively popular way of alleviating their budget problems. They would observe the fees that their neighboring communities are able to collect successfully, and raise their own levies. Hence, one could expect an upward drift in these fees.

A second problem is that the imposition of a multitude of state and local standards can be highly inefficient for business operations. If, for example, each state enacted its own automobile emission rules, as California did, increased car production costs can result. Similarly, widely divergent technical standards and requirements for cable television by different localities would create production inefficiencies.

Even where state regulation does not exceed previous Federal standards and where uniformity is no problem, it may still undercut the intentions behind Federal deregulation. For example, if the national policy on communications is to rely as much as possible on competition, state and local regulatory laws may undermine that goal.

One way to maintain Federal policy in the face of local regulation is by having courts

declare the state laws inconsistent with Federal law and thus in violation of the Supremacy Clause. Yet the net effect of that approach is a net increase in Federal powers. In the past, state laws could exist as long as they did not contradict existing Federal rules. But now courts have started to give Federal agencies the power, if they declare that their policy is *not* to regulate, to prevent states and local governments from exercising their own controls.

Federal deregulation of an industry can thus lead to the emergence of local rules that are more onerous to business than the previous Federal regulations. Alternatively, it can result in the strengthening of Federal powers over state actions. This runs counter to the goal of enhancing the role of local governments. Instead of the states and localities gaining more powers under the "new federalism," they may end up subject to new restrictions on their activities, as the Goldwater bill demonstrates. Deregulation of private business can thus lead to an *increased* regulation of another form: that by the Federal government over lower levels of government. As policy goals, one may not realize deregulation and decentralization simultaneously, and advocates of deregulation must consider this trade-off. ■