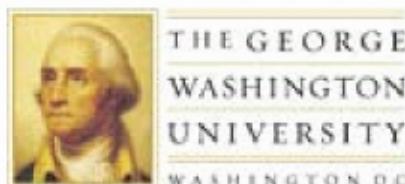


The Burger Court Opinion Writing Database

United States v. Midwest Video Corp.
406 U.S. 649 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



18
Gone joined to PS 5/7
JUN 1

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Marshall
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: JUN 1 1972

No. 71-506 -- United States v. Midwest Video Corp.

Recirculated: _____

MR. CHIEF JUSTICE BURGER, concurring.

This case presents questions of extraordinary difficulty and sensitivity in the communications field as the opinions of the divided court of appeals and our own divisions reflect. As Mr. Justice Brennan has noted, 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 pervasive as the reach of the instrumentalities of broadcasting.

In the four decades spanning the life of the Communications Act, the courts have consistently construed the Act as granting pervasive jurisdiction to the Commission to meet the expansion and development of broadcasting. That approach was broad enough to embrace the advent of CATV, as indicated in the Court's opinion. CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.

Concededly the Communications Act did not explicitly contemplate either CATV or the jurisdiction the Commission has now asserted. However

91
To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Black
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 71-506

Recirculated: JUN 5 1972

United States et al.,
Petitioner,
v.
Midwest Video Corporation. } On Writ of Certiorari to the
United States Court of
Appeals for the Eighth
Circuit.

[June —, 1972]

MR. CHIEF JUSTICE BURGER, concurring in the result.

This case presents questions of extraordinary difficulty and sensitivity in the communications field as the opinions of the divided Court of Appeals and our own divisions reflect. As MR. JUSTICE BRENNAN has noted, 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 pervasive as the reach of the instrumentalities of broadcasting.

In the four decades spanning the life of the Communications Act, the courts have consistently construed the Act as granting pervasive jurisdiction to the Commission to meet the expansion and development of broadcasting. That approach was broad enough to embrace the advent of CATV, as indicated in the plurality opinion. CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.

Concededly the Communications Act did not explicitly contemplate either CATV or the jurisdiction the Commission has now asserted. However Congress was well aware in the 1930's that broadcasting was a dynamic instrumentality, that its future could not be predicted, that scientific developments would inevitably enlarge the role and scope of broadcasting and that in consequence

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M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 17, 1972

MEMORANDUM TO THE CONFERENCE:

In No. 71-506 - U.S. v. Midwest Video

Corp., I will in due course circulate a
dissent.

W. O. D.

The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3M
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice O'Connor

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-506

Circulation:

5/18/72

Please:

United States et al., } On Writ of Certiorari to the
Petitioner, } United States Court of
v. Appeals for the Eighth
Midwest Video Corporation. } Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The policies reflected in the opinion of the Court may be wise ones. But whether CATV systems should be required to originate programs is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted.

CATV captures TV and radio signals, converts the signals, and carries them by coaxial cables into communities unable to receive the signals directly. In *United States v. Southwestern Cable Co.*, 392 U. S. 157, we upheld the power of the Commission to regulate the transmission of signals. As we said in that case:

“CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals.” *Id.*, at 163.

To : The Chief
Mr. Justice Black
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-506

Circulate:

Recirculated:

United States et al.,
Petitioner,
v.
Midwest Video Corporation. } On Writ of Certiorari to the
United States Court of
Appeals for the Eighth
Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST concur, dissenting.

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1, 2, 4
To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Pet. J.

No. 71-506

United States et al., Petitioner,
v.
Midwest Video Corporation. } On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST concur, dissenting.

The policies reflected in the opinion of the Court may be wise ones. But whether CATV systems should be required to originate programs is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted.

CATV captures TV and radio signals, converts the signals, and carries them by microwave relay transmission or by coaxial cables into communities unable to receive the signals directly. In *United States v. Southwestern Cable Co.*, 392 U. S. 157, we upheld the power of the Commission to regulate the transmission of signals. As we said in that case:

"CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals." *Id.*, at 163.

20
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Douglas, A. A.

SUPREME COURT OF THE UNITED STATES

circulated:

Recirculated: 6-3

No. 71-506

United States et al.,
Petitioner, } On Writ of Certiorari to the
v. } United States Court of
Midwest Video Corporation. } Appeals for the Eighth
Circuit.

[June 7, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST concur, dissenting.

The policies reflected in the plurality opinion may be wise ones. But whether CATV systems should be required to originate programs is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted.

CATV captures TV and radio signals, converts the signals, and carries them by microwave relay transmission or by coaxial cables into communities unable to receive the signals directly. In *United States v. Southwestern Cable Co.*, 392 U. S. 157, we upheld the power of the Commission to regulate the transmission of signals. As we said in that case:

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Please sign me
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Brennan
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Bre

SUPREME COURT OF THE UNITED STATES

5-17-77 ✓

No. 71-506

Recirculation

United States et al., } On Writ of Certiorari to the
Petitioner, } United States Court of
v. } Appeals for the Eighth
Midwest Video Corporation. } Circuit.

[May —, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Community antenna television (CATV) was developed long after the enactment of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151, as an auxiliary to broadcasting through the transmission of radio signals by wire to viewers otherwise unable to receive them because of distance or local terrain.¹ In *United States v. Southwestern Cable Co.*, 392 U. S. 178 (1968), where we sustained the jurisdiction of the Federal Communications Commission to regulate the new industry at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *id.*, at 178, we observed that the growth of CATV

¹ "CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers." *United States v. Southwestern Cable Co.*, 392 U. S. 157, 161 (1968). They "perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.*, at 163.

June 2, 1972

RE: No. 71-506 - United States v. Midwest Video Corp.

Dear Chief:

I think your opinion conveys the message you said at lunch yesterday you hoped it would. I don't see any inconsistency between our two opinions; indeed, I'd have no difficulty joining you except that I guess that's not protocol. If you still think your objective will be better accomplished by not joining me, I expect you'll want to send yours to the Reporter so that he can revise the Headnote to indicate that the judgment is supported by two opinions, mine for Byron, Thurgood, Harry and me, and yours. In that event also you may want to change the reference to "The Court's opinion" at page 1, second paragraph, fifth line and "The Court's rejection" at page 2, second full paragraph, first line.

Sincerely,

WD

The Chief Justice

WD
JUN 2 1972
ORR

pp. 19-20, 22
and stylistic
changes throughout

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

No. 71-506

Recirculated: 6/6

United States et al.,
Petitioners,
v.
Midwest Video Corporation. } On Writ of Certiorari to the
United States Court of
Appeals for the Eighth
Circuit.

[June 7, 1972]

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN joined.

Community antenna television (CATV) was developed long after the enactment of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151, as an auxiliary to broadcasting through the transmission of radio signals by wire to viewers otherwise unable to receive them because of distance or local terrain.¹ In *United States v. Southwestern Cable Co.*, 392 U. S. 157 (1968), where we sustained the jurisdiction of the Federal Communications Commission to regulate the new industry at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *id.*, at 178, we observed that the growth of CATV

¹ "CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers." *United States v. Southwestern Cable Co.*, 392 U. S. 157, 161 (1968). They "perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.*, at 163.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 18, 1972

No. 71-506, U.S. v. Midwest Video Corp.

Dear Bill,

I should appreciate your adding my name
to your dissenting opinion in this case.

Sincerely yours,

P.S.
P.J.

Mr. Justice Douglas

Copies to the Conference

3
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 23, 1972

joined 5/17

Re: No. 71-506 - United States v.
Midwest Video Corp.

Dear Bill:

Please join me.

Sincerely,

bw

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 17, 1972

Re: No. 71-506 - U. S. v. Midwest Video Corp.

Dear Bill:

Please join me.

Sincerely,


T.M.

Mr. Justice Brennan

cc: Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 23, 1972

Re: No. 71-506 - U.S. v. Midwest Video Corp.

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Brennan

cc: The Conference

LM
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 19, 1972

Re: No. 71-506 United States v. Midwest Video

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

L. Lewis

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 19, 1972

No. 71-506 - United States v. Midwest Video

Dear Bill:

Please join me in your dissent in this case.

Sincerely,

W

Mr. Justice Douglas

Copies to the Court