# FEDERAL OVERSIGHT OF STATE AND LOCAL REGULATION OF SATELLITE EARTH STATIONS: UNIFORMITY THROUGH PREEMPTION?

## I. INTRODUCTION

The development of satellite technology as an alternative to over-the-air broadcasting of television programming created great hope within the communications industry.[1] Satellites were to provide cable television networks with a low cost conduit to enable an increase in the number of nationwide cable subscribers.[2] Satellites would enable Ted Turner, for example, to market his Ultra High Frequency (UHF) station in Atlanta to cable systems across the country.[3] Since 1974, the three major broadcast networks[4] have employed satellites to connect their affiliates. Radio stations now use satellite-delivered program sources as well.[5]

In the wake of increasing technological developments, Direct Broadcast Satellite (DBS) systems emerged.[6] DBS systems provide a mecha-

1. D. LE DUC, BEYOND BROADCASTING, PATTERNS IN POLICY AND LAW, 95 (1987). The growth of satellite technology has been ongoing since the early 1960's. *Id.*

2. *Id.* at 98.

3. *Id.*

4. The three major networks have traditionally been ABC, NBC and CBS.

5. D. LE DUC, *supra* note 1, at 100.

6. *Id.* at 100. Satellite systems which distribute television programs are similar to long distance relay systems. The programming is transmitted by an "uplink" to the satellite, which reflects the signal back to earth in a receivable form. An antenna then receives the signal and converts it for viewing over a television set. The size of the receiving antenna, known as a "satellite earth station" or "dish," because of its concave, oval shape, varies with the frequency of the signal to be received. The antenna must

nism for direct transmission of video and audio signals to viewers' homes through a satellite antenna receiving system, commonly called a satellite dish.[7] The Federal Communications Commission (FCC) began to regulate DBS systems in 1982, based on a finding that such systems had great potential to provide viewers in remote areas with improved reception as well as additional, specially tailored sources of programming.[8] Estimates suggested that by 1983 more than 200,000 families would be private dish owners.[9]

## II. FEDERAL OVERSIGHT

In 1979, the FCC removed a licensing requirement for satellite dishes.[10] Within the next few years, the cost of the dishes dropped dramatically.[11] With this reduction in cost came an increase in the number of consumers purchasing dishes.[12] This increase in the number of dishes created a conflict between the FCC and local zoning boards. While the FCC acknowledged that municipal zoning boards were justified in regulating communications structures, the FCC's interest in maintaining the interstate distribution of communications, it claimed, would outweigh those justifications.[13]

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have a direct line-of-sight to the orbiting satellite in order to receive the signal. Law offices of Brown & Finn, Washington, D.C., THE SATELLITE EARTH STATION ZONING BOOK 1 (1983). In 1976, a professor of electrical engineering at Stanford University built the first known satellite dish antenna, or earth station. White & Laurie, *The Evolving Legal Status of Home Satellite Earth Stations*, 8 COMM. & L. 57, 63 (1986).

7. THIRD BIENNIAL COMMUNICATIONS LAW SYMPOSIUM, INTERNATIONAL SATELLITE TELEVISION: RESOURCE MANUAL FOR THE THIRD BIENNIAL COMMUNICATIONS LAW SYMPOSIUM 247 (1983). For a recently published discussion of the potential for direct broadcast satellites to replace current communications systems, such as cable and broadcast television, see S. LUTHER, THE UNITED STATES AND THE DIRECT BROADCAST SATELLITE (1988).

8. Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, 47 Fed. Reg. 31,555 (to be codified at 47 C.F.R. parts 2, 94 and 100). The Commission, however, had regulated domestic satellites since the passage of the Communications Satellite Act of 1962. 47 U.S.C. § 701 (Supp. V 1987).

9. THE SATELLITE EARTH STATION ZONING BOOK, *supra* note 6, at iii.

10. D. LE DUC, *supra* note 1, at 99.

11. Wigand, *The Direct Satellite Connection: Definitions and Prospects*, 30 J. COMM. 140, 143 (1980). The cost of a complete dish antenna package prior to the FCC's deregulation rule in 1979 was $14,900, which included the cost of the license and construction permit. *Id.*

12. D. LE DUC, *supra* note 1, at 99.

13. Common Carrier Services: Preemption of Local Zoning and Other Regulation

The FCC's authority to regulate satellite telecommunications rests in the language of the Communications Act of 1934.[14] The FCC's authority to preempt state law or local regulation is based on the Constitution's supremacy clause.[15] Although the FCC recognized that zoning regulations are traditionally the responsibility of local governments, it was concerned that local regulation could limit access to the greater range of television programming available from satellite antennas.[16] In 1984 the Supreme Court held,[17] however, that the FCC may preempt state regulation:

a) [W]hen Congress has expressed a clear intent to preempt sate law;[18]

b) [W]hen it is clear that Congress has intended through substantial legislation to occupy an entire field of regulation, thus leaving the states unable to supplement the federal law;[19]

c) [W]hen it becomes impossible to comply both with the state and federal regulation, or when the state obstructs the objectives Congress set out to meet in enacting the regulation.[20]

### A. *Prelude to Limited Preemption*

In 1984 the "Chicago dish moratorium ordinance" prevented United Satellite Communications, a company marketing television subscription services through satellite dishes, from selling its product in Chicago.[21] United Satellite and other companies petitioned the FCC for a

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of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519, 5522 (to be codified at 47 C.F.R. pt. 25).

14. 47 U.S.C. §§ 151-611.

15. U.S. CONST., art. VI, cl. 2. *See infra* notes 16 - 19 and accompanying text (criteria for preempting state and local laws); *see also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (Supreme Court addressed criteria by which federal law may preempt state or local law).

16. Preemption of Local Zoning Regulation of Receive-Only Satellite Earth Stations, 50 Fed. Reg. 13,986-88 (to be codified at 47 C.F.R. Ch. 1) (proposed April 9, 1985). The FCC chose to introduce an overall policy rather than rule on particular ordinances hoping that the general approach would suffice to keep local officials compliant with FCC objectives. *Id.*

17. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

18. *Id.* at 699 (*citing* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

19. *Id.* (*citing* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

20. *Id.* (*citing* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)). For a comprehensive discussion of the FCC's basis for preemption, see Sorell, *Federal Preemption of State and Local Zoning Regulation of Satellite Earth Stations*, 9 COMM. & L. 31 (1987).

21. *FCC Rules on Dish Antenna Zoning*, Zoning News, May 1985, at 1. Zoning

declaratory ruling preempting the local regulation.[22] The FCC responded by issuing a Notice of Proposed Rule Making,[23] in which it asserted its authority to preempt local regulations which interfere with the distribution of interstate communications or interfere with its objectives in the promotion of satellite services.[24] The FCC thus promulgated what it termed a rule of "limited preemption," namely, that:

> State and local zoning or other regulations that differentiate between satellite facilities are preempted unless such regulations:
> a) Have a reasonable and clearly defined health, safety, or aesthetic objective; and
> b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite-delivered signals by receive-only antennas or to impose costs on the users or such antennas that are excessive in light of the purchase and installation cost of the equipment.[25]

### B. *Response to Limited Preemption*

It was unclear to what extent the FCC had preempted local zoning regulations,[26] and the rule became both a source of concern and confusion. By what standard would a court determine the reasonableness of a municipal restriction?[27] What would signify a "clearly defined health, safety or aesthetic objective?"[28] Commentators argued that the vagueness of the standards would result in increased litigation and inconsistent judicial review.[29] Moreover, in 1987 the FCC denied a petition from the National Association of Broadcasters requesting that the FCC reconsider its previous rule making and expand the scope of the

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News is a monthly supplement to LAND USE LAW & ZONING DIGEST, published by the American Planning Association.

22. 50 Fed. Reg. at 13,987.

23. *Id.* at 13,986.

24. *Id.*

25. 47 C.F.R. § 25.104 (1988).

26. Sinderbrand, *Zoning Communication Facilities: FCC Preemption*, 39 LAND USE L. & ZONING DIG. 3, 5 (1987).

27. *Id.*

28. *Id.*

29. Comments of the National League of Cities, 51 Fed. Reg. 5519, 5521 (1986). Other commentaters opposing preemption argued that the FCC did not provide sufficient evidence of federal interest to rebut the presumption of validity given to local regulation of local concerns. Comments of Brooks Satellite, Inc., *Id.* at 5520.

policy to other types of antennas.[30] The FCC declined, arguing that it limited the rule to satellite receivers specifically, and that expansion would require other proceedings.[31]

Those commenting on the rule found it suspect in light of the FCC's stated objective of preempting local dish regulations.[32] One observer noted that, by preempting regulations that discriminate only against satellite dishes, the FCC appeared to be preventing municipal planners from enacting ordinances that benefitted other forms of communications without interfering with competition.[33]

The commentator favored the FCC's interest in supporting municipal powers generally, but questioned the use of a "differentiation" test.[34] Under this test, a municipality may enact an ordinance which differentiates between dishes and other antennas while still complying with the preemption order. The resulting ordinance must place no unreasonable burdens on the owner and must be a legitimate use of the police power.[35] The FCC will preempt the ordinance if the municipality cannot sufficiently support its reasons for differentiating satellite dishes from other antennas.[36] The "differentiation" test, the commentator argued, merely suggests that land use planners will become more clever in drafting ordinances in such a way as to avoid preemption.[37]

The American Planning Association (APA)[38] similarly found that the final rule would prohibit cities, concerned that the dishes would detract from the number of cable subscribers, from giving competitive

30. *In Re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 2 F.C.C. RCD. 202 (1987).

31. *Id.*

32. See *supra* note 29. Specifically, the National League of Cities, on behalf of many of its members, argued that the FCC was improperly interfering, that it did not have authority to preempt under the Communications Act, that local remedies were available and adequate, and that preemption would result in unreasonable administrative burdens on cities. *Id.* at 5520.

33. Sinderbrand, *supra* note 26, at 5.

34. *Id.*

35. *Id.* The FCC believed that the discrimination element "serves an important function in reserving some traditional power for local communities to determine their aesthetic character." *In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 2 F.C.C. RCD. at 16.

36. Sinderbrand, *supra* note 26, at 5.

37. *Id.*

38. 51 Fed. Reg. at 5521. The APA proposed that the FCC might avoid the indefinite language of the proposed rule by reviewing on a case-by-case basis only those ordinances where one type of communication facility gets benefits that others do not. *Id.*

advantages to cable companies.[39] The APA interpreted the FCC's action as intended to produce a rule providing "uniform" and "equal" treatment of dish antennas along with that of radio and broadcast television antennas.[40] The APA argued that the rule was unnecessary in light of local appeal procedures available to aggrieved dish owners.[41] Additionally, it found that the FCC had provided no support for its view that bans on dish antennas were pervasive nationwide.[42] The APA, however, appeared satisfied with the FCC's decision to remove itself from further involvement in individual zoning complaints. Namely, a dish owner seeking FCC review of a local ordinance would have to first exhaust other legal remedies.[43]

Other comments suggested that the rule was not well adapted to achieving the FCC's objective of uniformity for satellite dish regulations.[44] Difficulty arose again with the "differentiation" test.[45] One observer, noting that FCC Commissioner Mimi Dawson partially dissented from the final rule,[46] agreed with her that the rule appeared to intentionally create a "loophole" that would actually allow a complete prohibition on all types of antennas, so long as the ordinance would not differentiate between satellite dishes and other types of antennas.[47] This would seem to frustrate the FCC's aim of protecting satellite technology against other forms of communications, such as cable television.[48] Moreover, the courts would have to carefully scrutinize a potential prohibition on all types of antennas in light of the first amendment.[49] It would appear that, with respect to the FCC's unclear

39. Zoning News, *supra* note 21, at 2. The APA was concerned that the rule would "likely generate only lengthy and expensive litigation. . ." *Id.*

40. *FCC Limits Dish Regulation*, Zoning News, February 1986, at 2.

41. *Id.* at 1.

42. *Id.* at 2.

43. *Id.*

44. Sorell, *supra* note 20, at 45.

45. *Id.* at 44. Sorell notes that while the FCC rule applies only to ordinances that "differentiate," it proposes to broadly interpret the term, reaching ordinances that implicitly as well as explicitly treat satellite antennas and other types differently. *Id.* See 51 Fed. Reg. at 5523 for a discussion of the applicability of non-federal regulations.

46. 51 Fed. Reg. at 5526. Dawson dissented in part, stating that the FCC's decision allows municipalities to "ban all antennas or to discriminate against TVROs in effect." *Id.* at 5527.

47. *Id.*

48. *Id.* Dawson commented that the FCC action left the issue "hopelessly confused." *Id.*

49. Sorell, *supra* note 20, at 45. *See also* Mangel, *Home Satellite TV Viewers: Pi-*

standards, courts would have to settle disputes on a case-by-case basis and thus would provide little in the way of regulatory uniformity.[50]

### C. *Preemption in the Courts*

Even before United Satellite Communications sought a declaratory rule making from the FCC,[51] frustrated dish owners were successfully challenging local ordinances in local courts.[52] In 1984, the city of Coral Gables, Florida, impermissably discriminated between satellite dishes and antennas for radio and broadcast television reception.[53] A Florida Circuit Court found that the ordinance, which only banned the use of satellite dishes only, bore no "substantial relationship" to protecting the public health, safety or general welfare of the city's residents.[54] Moreover, although the city's aesthetics objective was permissible, the court found no aesthetic difference between dishes and other allowable television and radio antennas. For this reason, the court held the ordinance to be unconstitutional.[55]

In the first year of the preemption policy's existence only one court applied the policy to what the FCC would arguably view as a classic preemption situation. In *Minars v. Rose*,[56] the Appellate Division of the New York Supreme Court reviewed a decision by the zoning board in Hempstead, New York.[57] The board had denied an application for a permit to construct a satellite dish on a residential rooftop.[58] The zoning board found that the dish was not "customarily incidental" to a single family home,[59] and was precluded by the ordinance.[60] Therefore

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*rates or Just Aiming in the Right Direction?*, 10 COMM. AND L. 31, 37 (1988) (discussing the potential for charges that cities are "threatening" first amendment rights to receive information).

50. *Id.*

51. Sorell, *supra* note 20, at 46.

52. *See, e.g.*, City of Bloomfield Hills v. Gargo, 178 Mich. App. 163 (1989), 443 N.W. 2d 495; Hunter v. City of Whittier, 209 Cal. App. 3d 588, 257 Cal. Rptr. 559 (1989).

53. Horgan v. City of Coral Gables, No. 83-42793 CA 22, Moreira v. City of Coral Gables, No. 84-07793 CA 22 (11th Cir. Fla., June 18, 1984) (order granting judgement for plaintiffs) (on file with author).

54. *Id.*

55. *Id.*

56. 123 A.D.2d 766, 507 N.Y.S.2d 241 (1986).

57. *Id.*, 507 N.Y.S.2d at 241.

58. *Id.*

59. *Id.* Many ordinances include clauses defining what types of uses are "inciden-

the board denied the Minars' application.[61] The court held that the board's finding effectively restricted the use of satellite dish antennas from the district.[62] The Court then reasoned that the FCC's recently promulgated policy plainly preempted any ordinance which "effectively bans or unreasonably restricts the installation of satellite dish antennas in certain use districts".[63] After overruling the board's decision, the court remanded the matter to the board for reconsideration of the application in light of the preemption rule.[64]

Almost a year after the *Minars* decision, the Superior Court of New Jersey, Appellate Division, heard an appeal from corporations that use satellite communications for their businesses. In *L.I.M.A. Partners v. Borough of Northvale*,[65] the plaintiffs' businesses required the use of satellite dish antennas both for transmission of their services as well as for reception of information on consumer credit reports.[66] The plaintiffs' properties were located in what the city defined as a "light industrial zone."[67] Although the city had not expressly banned satellite dishes in the district, the regulation implicitly prohibited the dishes by omitting them as an allowable use.[68]

The zoning board in Northvale had granted the plaintiffs variances in 1981 and 1983,[69] but in 1984 the board ordered them to stop using the antennas. The board held that the plaintiffs' uses were neither per-

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tal" or "accessory" to the ordinary use of land. An ordinance may list illustrations of what a zoning board considers an "accessory" use. If a zoning board finds a dish antenna to be accessory, the board will allow it. If not, the party may not construct the dish. THE SATELLITE EARTH STATION ZONING BOOK, *supra* note 6, at 10.

60. 123 A.D.2d at 767, 507 N.Y.S.2d at 242. The ordinance prohibited satellite dishes as an accessory use. *Id.*

61. *Id.*

62. *Id. But cf.* Ross v. Hatfield, 640 F. Supp. 708 (D. Kan. 1986) (no preemption where plaintiff challenged enforcement of a restrictive covenant prohibiting installation of satellite dishes outside the home).

63. *Id.*

64. *Id.* at 767, 507 N.Y.S.2d at 242.

65. 219 N.J. Super. App. Div. 512, 530 A.2d 839 (1987).

66. *Id.* at 514, 530 A.2d at 840.

67. *Id.*

68. *Id.* at 515, 530 A.2d at 840. The antennas in the matter were substantially larger than those purchased for residential purposes, approximately 35 feet in diameter and 35 feet in height. *Id.* at 514, 530 A.2d at 840.

69. *Id.*

mitted nor sanctioned by the previously issued variances.[70] While the plaintiffs' appeal was pending, the FCC released its preemption rule.[71] The Appellate Division subsequently noted that the rule did not preempt local zoning of satellite dish antennas entirely.[72] Based on the plain language of the zoning ordinance, however, the court was unable to determine whether the city was "differentiating" between satellite antennas and other types of antennas.[73] The court did note, however, that the city had informally allowed the construction of some antennas, and provided variances for others.[74] Citing *Minars v. Rose*, the court remanded the issue to the trial court for further consideration.[75] The parties settled, however, thus denying the trial court the opportunity to review the preemption issue.[76]

The United States District Court for the District of New Jersey recently analyzed the preemption rule in *Van Meter v. Township of Maplewood*.[77] In *Van Meter* the plaintiffs purchased an antenna which they could only place on their roof.[78] At the time of purchase, they were aware of a zoning ordinance governing the installation of satellite dishes.[79] The ordinance required installation of the dish in the plaintiffs' backyard.[80] After requesting a variance, which the township subsequentlty denied, the plaintiffs learned of the FCC's preemption rule. Because they believed that it overruled the zoning prohibition, they installed the dish on their roof.[81] After the township handed them a citation, the Van Meters filed suit arguing that the FCC action pre-

70. *Id.* The plaintiffs were interested in installing a third dish on the property in question. *Id.*

71. *See supra* note 16.

72. *L.I.M.A. Partners*, 219 N.J. Super. App. Div. at 517, 530 A.2d at 841. The trial court decided, however, that the ordinance did violate the first amendment by prohibiting the installation of the dishes. *Id.* The court made this determination prior to the promulgation of the rule.

73. *Id.* at 522, 530 A.2d at 844.

74. *Id.* at 521, 530 A.2d at 844.

75. *Id.* at 521, 530 A.2d at 844.

76. L.I.M.A. Partners v. Borough of Northvale, Consent Judgment of Settlement and Dismissal with Prejudice, January 21, 1988. (on file with author)

77. 696 F. Supp. 1024 (D. N.J. 1988).

78. *Id.* at 1025-26.

79. *Id.* at 1026.

80. *Id.*

81. *Id.*

empted the ordinance.[82]

The court analyzed the FCC rule in light of the Maplewood ordinance.[83] It found that the ordinance did differentiate satellite dish antennas from radio or broadcast television antennas. Further, the ordinance imposed an unreasonable burden on dish owners.[84] The ordinance did, however, exhibit what the court considered to be a "reasonable, clearly defined health, safety or aesthetic objective."[85] Notwithstanding the legitimate purpose of the city's regulation, the court determined that the FCC action preempted the local ordinance.[86]

Throughout its preemption analysis, however, the court reserved judgment, for lack of proper jurisdiction, on the issue of the FCC's statutory authority to issue such a rule.[87] The defendants challenged the legality of the FCC's order, and for the purposes of its discussion, the court assumed that the FCC had the requisite authority.[88] It directed the defendants to seek review from the FCC should they so desire, and deferred further proceedings until the resolution of the issue before the FCC.[89]

## III. THE FUTURE OF FEDERAL PREEMPTION

The number of privately owned dish antennas now exceeds 1.6 million.[90] The cost of satellite dishes has increased with the onset of the "scrambling" of satellite signals by cable companies.[91] Moreover, po-

82. *Id.* The plaintiffs brought their action under 42 U.S.C. § 1983 (1982). *Cf.*, Gabriel v. City of Palos Heights, No. 867 Civ. 0520 (N.D. Ill. Dec. 8, 1987) (dealer of antennas sought relief under 42 U.S.C. 1983 seeking declaratory judgement that, *inter alia*, the FCC order preempted a local ordinance which discouraged the purchase of satellite dishes).

83. *Van Meter*, 696 F. Supp. at 1029-32.

84. *Id.* at 1030.

85. *Id.* at 1029.

86. *Id.* at 1032.

87. *Id.* at 1029.

88. *Id.*

89. *Id.* The defendants do not anticipate appealing the rule to the FCC, and informed the court of their decision by letter dated October 26, 1988. (letter on file with author)

90. *In re* Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, 2 FCC RCD. 1669 (1987), *citing* Satellite Times, December 24, 1986, at 1. The average cost of a unit at that time was $2,400.00. *Id.*

91. Mangel, *supra* note 49, at 35. Fearing a substantial loss of potential subscribers through the sales of private dish antennas, cable programmers adopted a technology by

tential litigation costs are a deterrent to purchasing a satellite dish. Further, with the pervasiveness of cable television wiring, it is often easier to subscribe to cable services. It is also likely that, aside from pending litigation, disputes will increase.[92]

Municipal planners will also become more comfortable with the rule's language. What remains in doubt, however, is whether the planners will seek either to conform to or circumvent the preemption policy. Many cities have revised their applicable ordinances, and the straightforward preemption analysis of *Minars v. Rose*[93] and *Van Meter v. Township of Maplewood*[94] may soon become superfluous. It is improbable that such actions will result in the uniformity that the FCC envisioned. Most likely, courts will resolve disputes on a case-by-case basis with vague and unproven standards. Therefore, uniformity of regulation is not likely to result.

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which their satellite signals would be "encrypted" or "scrambled" in order that viewers with dish antennas would not be able to bypass the cost of subscribing to the service. The dish owner would, in turn, have to purchase a "descrambling" device (known as a decoder) in order to receive the scrambled signal. In March 1987, the FCC completed a substantial investigation into the scrambling issue. *See supra*, note 89. It concluded that cable companies have a valid public interest in protecting their businesses from "theft of service" by home satellite dish owners. 2 FCC RCD. at 1701. But the FCC determined that "government intervention into the home satellite dish market [with respect to scrambling was] neither necessary nor wise" in part due to the still early history of the home satellite dish industry. 2 FCC RCD. at 1702.

92. An interesting episode is taking place in Washington, D.C., where the Zoning Commission has proposed an ordinance that "differentiates" within the meaning of the preemption rule. The Zoning Commission, however, is expected to argue that federal preemptions will not apply because the Commission is a congressionally created entity. *See* Memorandum of August 30, 1988, from Deputy Corporation Counsel, Government of the District of Columbia, to Chairperson, Zoning Commission (memorandum on file with author).

93. See *supra* notes 56-64, and accompanying text.

94. See *supra* notes 77-89, and accompanying text.

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