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Jefferson on the Internet

Nicholas Johnson*

Were Thomas Jefferson with us today, I am confident we would have "Jefferson on the Internet" in both senses.

Surely someone with his intellectual curiosity and inventive genius—everything from pens to plows—would have owned and used a computer and modem. Jefferson would be "on the Internet," with pithy comments scattered throughout a number of newsgroups.

But it would also be true in the sense that we would have an essay, if not a full length desktop-published volume, called "Jefferson on the Internet." In it, this advocate of free libraries, free education, and free speech would expound on the First Amendment requirements for Internet users: free and easy entry of their own information and ideas, along with access to those of others.

Of course, Jefferson is not on the Internet, and I am no longer on the Federal Communications Commission (FCC or Commission). But having spent seven years writing dissenting opinions as an FCC commissioner twenty years ago, the readers of this *Journal* should not be stunned to find me still at it—and still calling on Thomas Jefferson for support.

Communications technology has gone through some revolutionary changes during the intervening years, and the need for "regulation" has sometimes been altered thereby. But the basic themes and values remain, for me, unchanged.[1]

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1. Those "themes and values" are, quite simply, the underlying purposes, or consequences of the First Amendment: a robust "marketplace of ideas," facilitating a

THE ISSUE: FREE SPEECH FOR ALL?

With the page limit on this Essay it is impossible to, as the old college essay exam question put it, "define the universe and give two examples."

So I will skip the definition, and provide only one example. It is, from my perspective, the single most important telecommunications policy challenge confronting our country: preserving the freedom of speech for *all* our citizens, not just those who have $200 million or more in spare pocket change to buy their own newspaper, broadcast station, or telephone company.

Let me pose the issue as a two-tiered multiple choice question: "Should telephone companies be (a) encouraged, (b) permitted, or (c) forbidden to either (1) offer conduits for information services owned and provided by others, or (2) offer information and services, which they own, through conduits which they own, in competition with the other suppliers?"

To save the reader the trouble of skipping to something called "Conclusion" (there is none) to find my answer, I will open with the conclusion, and then undertake the task of trying to persuade a skeptical, if not hostile, readership of its correctness.

I am untroubled by the first possibility: that information services over "telephone lines" may cause cable monopolists to cut rates and improve services. I am equally untroubled that cable companies—now providing a service best described as one Dixie cup and a string—are trying to enter what has been traditionally thought of as "the telephone business." I am untroubled at the prospect of *others* offering a continuously updated, flexibly searchable database combining what we today think of as telephone book "yellow pages" with what are now newspapers' "classified ads"—notwithstanding its modest adverse economic impact on the newspaper and telephone industries.

But I am very troubled by the second possibility: that telephone companies may soon be permitted to distribute information which they *own* through their own conduits.

"search for truth," by a citizenry thereby empowered to engage in "self governing," while encouraged, through opportunities for self-expression, to "self-actualization," as they, and the more conventional media, provide a "checking value" on government and other large institutions, and a "safety valve" for those who, if denied a forum, might have chosen to express their frustrations through violence. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-9 (1970).

I think it is fraudulent to argue—as the phone companies have in full page ads—that unless they *own* the information, then our hospitals, schools, and homes will be deprived of access to it. Almost all of the information services they hype not only *can* be offered by others, but *are now* being offered by others such as Mead Data Central, CompuServe, and Dialog, along with the free resources of the global Internet and the thousands of private bulletin board systems.[2] What concerns me about the common ownership of content and conduit, of course, is the telephone company's natural desire to censor and engage in anticompetitive practices.

THE NATURAL DESIRE TO CENSOR

There is a natural and almost inevitable desire to censor or otherwise use the media to support one's interests. Children are told they should be "seen and not heard." In the workplace, Peter Senge asks, "When was the last time someone was rewarded in your organization for raising difficult questions about the company's current policies . . . ?"[3] Governments are not the only powerful institutions that try to serve their own interests through media manipulation and censorship.

My baptism by fire on this issue was ITT's proposed acquisition of ABC back in 1965-66.[4] Question: "Would ITT ever try to control ABC's coverage of the news to favor ITT's other business interests?" "Oh, no," ITT's executives would testify at hearings, and while testifying, at that very moment, their senior vice president for public relations was calling executives of the Associated Press, the *New York Times*, and the *Washington Post*, trying to change the content of the stories being filed by their reporters *about that hearing*! Efforts to manipulate media to serve one's other institutional interests is the most natural thing in the world.

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2. A classroom may not have a phone line. That's a problem. But with a computer, modem, and phone line, every student can have access to the Library of Congress and everything else publicly available to a government official or academic scientist. *See, e.g.*, Edward A. Gargon, *The Media Business*, N.Y. TIMES, Oct. 6, 1994, at D20.

3. PETER SENGE, THE FIFTH DISCIPLINE 25 (1990). Those denied opportunities for speech may find alternative means of expression. As Dr. Martin Luther King once said, "Having been denied access to radio and television we have had to write our most persuasive essays with the blunt pen of marching ranks." Dr. King believed in nonviolent solutions to grievances, but it is amazing how revolution, terrorism, or hostage-taking involves, in large part, a frustration at being silenced.

4. Compared to today's galloping global media mergers, the ABC-ITT merger looks like small potatoes indeed. But it was a big deal at the time. *See In re* Applications by ABC, Inc., *Memorandum Order and Opinion*, 7 F.C.C.2d 245, 278 (1966) (Johnson, Comm'r, dissenting), *modified by Order on Petition for Reconsideration*, 7 F.C.C.2d 336, 343 (Johnson, Comm'r, concurring), *modified by Opinion and Order of Petition for Reconsideration*, 9 F.C.C.2d 546, 581 (1967) (Johnson, Comm'r, dissenting).

"WHAT ARE YOU GOING TO SAY ON THE PHONE?"

Imagine that we're still back in the days when AT&T owned it all. You walk into the local phone company's office and ask, "Do you have any phones? I'm new in town and I'd like a phone and a line."

The clerk says, "Well, yeah, we've got some phones."

"Can I have one?"

You get a quizzical look. "Well, just a minute now," says the clerk. "Suppose, I mean just suppose, I were to go back there and get you a phone, and get you set up with a line. What kind of things might you be planning to say over the phone?"

We either laugh or cry at that because it is so totally unimaginable. It would have been illegal, contrary to custom and experience. The phone company made lines available to anybody who wanted them.[5] And you could say anything over the phone you wanted to say. There was absolutely no censorship from the telephone company.[6]

FREEDOM TO SPEAK MEANS FREEDOM TO CENSOR

Readers of this *Journal* are well familiar with the *Tornillo* case.[7] The Florida legislature had passed a law that said, in effect, that newspapers can attack politicians all they want, but when they do, they have to give the politician attacked an opportunity to respond. The *Miami Herald* attacked candidate Pat Tornillo; he sought to reply under the terms of the act; the paper refused; he took the paper to court; he won; the paper's appeals ultimately brought the case to the Supreme Court.

The Court found the statute unconstitutional, even though the paper enjoyed a dominance, if not near-monopoly, throughout its circulation area, and even though the act imposed virtually no limitation whatsoever on a newspaper owner's right to speak her or his mind.[8] Not only is a right of reply not constitutionally compelled, according to the Court's interpretation, but a state legislature's provision of such a right is constitutionally forbidden.[9] First Amendment rights belong only to those who *own* the

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5. Unlike the limited number of channels provided by today's cable companies, the phone company was required to build a new switching station whenever it came close to running out of phone lines.

6. Limitations on harassing phone calls, criminal transactions, disclosure of national security secrets, defamation, or obscenity were generally imposed and enforced by others.

7. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

8. Although the act provided for free access to the paper's pages, the Court's opinion does not hold that the result would have been different had the law provided for paid access.

9. *Tornillo*, 418 U.S. at 257-58.

media. *Their* freedom to speak comes complete with a censor's tool kit, which is certified as constitutional by no less an authority than the Supreme Court itself. Needless to say, that interpretation rather effectively excludes all but a relative handful of America's 260 million citizens from *meaningful* participation in a "marketplace of ideas."[10]

But this is neither the time nor the place to search for a court to which one could appeal a Supreme Court decision, nor to draft the brief to file once such a forum was found. *Tornillo* is the law. Moreover, it is the law not only for newspapers, but for radio and television stations,[11] cable television systems[12]—and even the billing envelopes of public utilities.[13]

FREEDOM'S LAST FRONTIER: FREE SPEECH BY PHONE

Today, the *only* remaining constitutionally protected free speech mass media for ordinary citizens are telephone networks and the postal service. Everything else has been taken from them. And once the phone companies start providing "cable television," or other information services they own, over the conduits they own, it is going to be very difficult to explain why *they* should be denied the very same censorship rights the Supreme Court has given to all other mass media.

Should the continuation of freedom's last frontier be left to the good intentions of phone companies? History suggests that would be dangerously naive.

Even the post office has not been immune from the natural human inclination to abuse the competitive advantages enjoyed by owners of both

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10. Of course, it is true that thousands of citizens are heard as guests (or call-in participants) on radio and television programs, and appear in print in newspaper and magazines' "op-ed" and letters columns. As a result, at least some small proportion of the information and ideas from the general public that are supportive of the economic and political interests of media owners and advertisers will receive widespread distribution by the media. The issue is not how much of this diversity, and entry, are permitted as a matter of grace. The issue is what happens to the information and ideas of those whom media owners wish to silence. How much confrontational and controversial diversity can be distributed via the mass media over the objection of the owners as a matter of legal right? With rare exception, the answer is none.

11. CBS, Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973).

12. *See* FCC v. Midwest Video Corp., 440 U.S. 689 (1979); *see also* Turner Brdcst. Sys., Inc. v. FCC, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994).

13. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1 (overturning rule requiring a utility to include in the billing envelope a consumer newsletter), *reh'g denied*, 475 U.S. 1133 (1986). Note that, unlike advertising-paid space, which is paid for by the speaker only if used, utility customers pay for the postage and billing envelope sent them by the utility (with its paid-for but unused space and weight) regardless of whether they are granted or denied the opportunity to use it for their own speech.

content and conduit. The early post offices delivered newspapers, and some of the first individuals to become local postmasters were newspaper publishers. Undoubtedly, they assured those concerned about this combination by saying: "Oh, we'll provide carriage to our competitors. Of course, we will." But it turned out they often did so at a higher rate, while delivering their own papers for free.

Next came the telegraph company. When the Associated Press was formed around the middle of the nineteenth century, there was not yet a submerged transatlantic cable. If an American newspaper wanted news from Europe, it would have to get it from Halifax, Canada, where it was obtained from ships' passengers. The New York City newspapers decided to run a telegraph line from Halifax to New York. To do that they had to use the lines of a telegraph company that served the east coast of the United States. Whereupon that telegraph owner developed a sudden desire to get into the newsgathering business himself, and refused to make his facilities available to the Associated Press.[14]

This is not a matter of ideology. It's a matter of an anticompetitive, self-serving, profit-maximizing strategy. Early in the twentieth century newspaper publishers became frightened that radio news promised to become a substantial competitor. At that point, the same newspaper owners who complained so loudly when excluded from the telegraph network saw nothing inconsistent in using all the anticompetitive political muscle at their command to keep the radio stations from broadcasting news.[15]

When motion picture production houses were permitted to own theater chains in which their own movies were shown, the anticompetitive abuses became so severe that an antitrust action was brought by the United States and sustained by the Supreme Court.[16]

Not surprisingly, when there is common ownership of both satellite programming services and the cable systems on which such programming is shown, it turns out that the cable company tends to use the jointly-owned programming and to lock out programming of competitors. In fact, the cable industry is as determined to stop the growth of home satellite

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14. *See* OLIVER GRAMLING, AP: THE STORY OF NEWS 20-30 (1940).

15. *See, e.g.*, ERIK BARNOUW, A TOWER IN BABEL 278 (1966); SYDNEY W. HEAD & CHRISTOPHER H. STERLING, BROADCASTING IN AMERICA 160-61 (4th ed. 1982); CHRISTOPHER H. STERLING & JOHN M. KITTROSS, STAY TUNED: A CONCISE HISTORY OF AMERICAN BROADCASTING 122-23 (1978). With the upper hand, the newspaper publishers (normally advocates of the First Amendment's guarantees) were able to exact an agreement with the radio networks that exchanged a morsel of news from the papers for the stations' agreement to cease any newsgathering operations whatsoever.

16. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

receiving dishes as the broadcasting industry had earlier been to stop the development of subscription television (STV) and cable.[17]

The point is simply that abuses have occurred, are occurring, and will continue to occur when a single firm is permitted to own both the conduit through which information flows and the information itself—in competition with others also using its conduit.

The general proposition is so intuitive, and the evidence so overwhelming, that examples from within the telephone industry itself are not really necessary. Traditionally, the phone company was not in the information business, so precise precedents are hard to come by.[18] Nonetheless, the analogous abuses that have occurred reinforce the point.

Many years ago, AT&T was fighting vigorously to prevent a little microwave company from running a line from St. Louis to Chicago.[19] AT&T felt it owned it all.[20] Today that little company goes by the name of MCI.

Neither AT&T nor MCI were then providing information over their networks of the kind at issue. But the analogy was that AT&T was both providing lines to its own individual customers and also providing connections and bulk lines to MCI, which MCI then resold to customers. AT&T was both MCI's conduit and its competitor, and the anticompetitive abuses in which AT&T engaged led to the largest antitrust judgment in history—$1.8 billion.[21]

It is not enough to say, "Ah, but we will require the conduit provider to make service available to those firms competing with it in the information business." It turns out that there are 10,000 ways to disadvantage one's competitor regardless of what the rules may be.[22] The opportunities are

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17. HEAD & STERLING, *supra* note 15, at 297-99, 318.

18. But see Judge Harold H. Greene's analysis of the First Amendment and other risks involved in AT&T's potential entry into electronic publishing. United States v. AT&T, 552 F. Supp. 131, 180-86 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

19. Microwave Comm., Inc., 18 F.C.C.2d 953, 976 (1969) (concurring opinion).

20. It was this attitude that was made famous by comedian Lily Tomlin's great line: "We don't care. We don't have to. We're the telephone company." AT&T forbade customers to attach equipment to the telephone network if supplied by other firms. *See, e.g., In re* Carterphone, *Decision*, 13 F.C.C.2d 420, *modified by Memorandum Opinion and Order*, 14 F.C.C.2d 571 (1968). It even went so far as to argue that a plastic protective cover over a phone book was a "foreign attachment" with the potential to harm the quality of network service.

21. *See, e.g.*, P. L. CANTELON, THE HISTORY OF MCI: THE EARLY YEARS 304-09 (1993); *$1.8 Billion AT&T Defeat*, L.A. TIMES, June 14, 1980, at 1.

22. We don't have time or space for the 10,000 examples, but here are some illustrations. The conduit provider has the lines up and operating that serve its customers, but it's going to take another six weeks before lines will be available for the competitor.

limited only by human imagination. We have seen it in the postal service, telegraph, radio and television, cable television, and telephone industries.

And even if the FCC wanted to regulate such abuses—which it doesn't—it wouldn't be able to. It has neither the will nor the resources. And if it had, Congress would quickly tell it to stop. So the *only* way to ensure fair competition and a diverse marketplace of ideas, in my judgment, is to prevent the merger of content and conduit in the first place.[23]

Such limitations should not be much of an economic sacrifice. Isn't it enough that telcos can suck money out of both ends of the cable—charging both information providers and recipients? In fact, I believe the case can be made that shareholders will be *better off* if their management is prohibited from combining conduit and content.

"COP KILLER" TELCOS

Sadly, few seem to care about the concerns of public interest advocates and consumers: the fear of price hikes as telcos' monopoly services are drained to subsidize competitive businesses; the frustration over an FCC that can't, or won't, regulate; and the worries over the discouragement of innovation, censorship of content, and conflicts of interest from heavy-handed, anticompetitive telcos.

Once phone companies start exercising their First Amendment rights to speak through their own conduits, there's no reason the Supreme Court won't give them the same right to censor as newspapers and broadcasters. And at that point, the only mass medium left for those 260 million Americans who do not own their own newspaper or broadcast facility will be expensive, and relatively ineffective, direct mail via the postal service.

Given the general lack of interest in the public interest in an age of greed, and the growing gap between rich and poor, perhaps a focus on shareholder interests would be more effective in making my case.

The provider's lines are functioning, but the competitor's lines went down. Everybody's lines are down, but the conduit provider's are back up in 45 minutes and it takes a day for the competitor, "Because we didn't have the parts on hand." Customers can get access to the conduit provider's information in a fraction of a second, but they have to wait 20 seconds to activate the competitor's line. To connect them, the conduit provider necessarily has to be told the name and address of all the competitor's customers. What is the first thing the conduit provider's marketing department wants to do? It wants to call up the competitor's customers and try to get them to sign up, or switch.

23. Such a limitation does not, of course, prevent an individual investor from owning a small amount of stock in two separate businesses, one providing conduits and another providing the content. The limitation only applies to a single business that is engaged in both or that controls subsidiaries so engaged.

Telco managements' interests are both clear and understandable. Adding the information business means a greater span of control and increases in executive pay and perks. It brings the excitement and glamour of socializing in Hollywood to bored, middle-aged executives.

But it turns out that *shareholders* may well have more in common with the creative community and consumers than with management.

Time Warner experienced enormous grief from rapper Ice-T's *Cop Killer* song. There were nationwide boycotts of the company's subsidiaries, bomb and death threats to corporate officers, the likes of Charlton Heston attacking management at shareholders' meetings. There was talk of criminal prosecutions. The creative community and the American Civil Liberties Union were equally outraged at the prospect of "censorship." And this was all from one song, on one CD, by one artist, with one record company, well down on the organization chart of this media conglomerate. A few little lyrics suddenly became a very big deal.[24]

There are thousands of such land mines lying about out there for a large corporation in the information business. Yet, controversies such as *Cop Killer* will go with the shareholders' territory once telcos provide content as well as conduit. Suddenly telcos will confront threats of defamation suits, copyright controversies, objections to obscenity—or anything thought "controversial"—and charges of censorship.

So long as telcos' shareholders insist that management stick to conduits—cables, fiber, and satellites—management can properly dismiss critics by saying, "We're just a common carrier; take your content concerns to providers, courts or legislatures. We won't oppose you or support you. We will comply with the law." In the process, shareholders will get rich beyond their wildest dreams or avarice.

But devastating and diverting adverse public relations is only the beginning.

(1) Does telco management really have the expertise, and time, to focus on information service businesses? One study reported non-phone operations were losing telcos $1.7 billion annually not long ago.[25] Do shareholders really want more of these losses? How about a return to shareholders on telecommunications—what management *is* supposed to

24. *See* ICE-T, *Cop Killer, on* BODY COUNT (Rhyme Syndicate Music/Emkneesea Music 1992) ("I got my twelve gauge sawed off/I got my headlights turned off/I'm 'bout to bust some shots off/I'm 'bout to dust some cops off." Chorus: "Cop Killer, it's better you than me/Cop Killer, fuck police brutality!/Cop Killer, I know your family's grievin'/(Fuck 'em!)/Cop Killer, but tonight we get even.").

25. *See* Steve Sazegari, *The Shape of Competition in the Local Loop*, BUS. COMM. REV., Mar. 1992, at 47.

know? Adding information services makes telco executives' jobs as difficult (and senseless) as assigning one manager responsibility for administering both a virtuoso violinist and a steel mill.

(2) Are shareholders willing to take the financial bath the information businesses may offer? Motion pictures can lose, as well as make, tens of millions of dollars—even for those who know the business. More videotext and interactive businesses have gone under than prospered. Why give shareholders those headaches—and losses?

(3) Getting into the information business only heightens the risk of more antitrust grief. Is this what shareholders are looking for? Is it really worth jeopardizing the solid profits from local, long distance, and cellular data and voice telephone businesses to flirt with the risks in information?

(4) Finally, shareholders' profits are maximized by expanding capacity, and filling it with as many independent information providers as possible. With a skilled sales force, and myopic focus on that goal, profits are virtually unlimited. When telcos also sell information there's an inherent conflict. Will they make more money by selling conduit space to more providers, or by hindering them and selling the telco's own information service? Resolving that confusion only slows response time and invites antitrust suits—while reducing conduit revenues, rates of expansion, and business opportunities.

There is every reason to encourage telco provision of conduits for information providers. Everyone benefits from the competitive marketplace of ideas it creates: providers, customers, and telco shareholders.

There is every reason to oppose telco provision of information services. Everyone loses, especially the shareholders.

If telco shareholders don't want their investment to chill, while being portrayed as a *Cop Killer*, it's time they told management to take a sip of Time Warner's Ice-T.

Yes, however you look at it—from Thomas Jefferson's perspective, or the purposes of the First Amendment, or the needs of 260 million First Amendment-deprived citizens, or the profit opportunities of telco shareholders—separating content and conduit not only makes lots of sense, it can make lots of dollars as well.