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First Amendment Trump?: The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video

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"Today, the First Amendment has become a first line of legal attack."[1]

I. INTRODUCTION

The United States Supreme Court, in *Turner Broadcasting System, Inc. v. FCC* (*Turner II*), held that the 1984 Cable Communications Act's (Cable Act) must-carry provisions were constitutional regulations of the marketplace.[2] In its earlier decision, *Turner Broadcasting System, Inc. v. FCC* (*Turner I*),[3] a fractured Court determined that the must-carry provisions were content neutral and subject to an intermediate level of scrutiny but failed to ultimately determine the constitutionality of the provisions—instead remanding the case for further factual development.[4] When the case returned, Justice Breyer had replaced Justice Blackmun on the bench. Nevertheless, the *Turner II* Court again issued an occasionally caustic and severely splintered ruling, narrowly holding that laws requiring cable systems to carry local broadcast programming were content neutral. The justices strongly disagreed about the means to determine content neutrality and about the purpose of the must-carry laws. Despite acknowledging that Congress expressly designed must-carry to encourage local and educational programming and to ensure diversity of voices in the video market, a plurality of the Supreme Court said the law's purpose was to structure the economic marketplace, not to stifle or compel speech.[5] Justice O'Connor's stinging dissent challenged the Court's holding and its rationale, suggesting Justice Breyer's concurrence was actually a dissent and therefore the panel below should be reversed.[6] The fractured decision offered little guidance to lower courts seeking a consistent test to determine the constitutionality of purportedly structural regulations of media.[7]

The Supreme Court earlier rejected another opportunity to establish a

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1. Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016, 1024 n.27 (1997).

2. *Turner Brdcst. Sys.*, 117 S. Ct. 1174 (1997) [hereinafter *Turner II*]. Previously, on direct appeal from the United States District Court for the District of Columbia, the Supreme Court vacated and remanded the case for factual development of the record. Turner Brdcst. Sys., Inc. v. FCC, 512 U.S. 622 (1994) [hereinafter *Turner I*]. On remand, a three-judge panel granted summary judgment for the government and Commission. 910 F. Supp. 734 (D.D.C. 1995).

3. *Turner I*, 512 U.S. 622.

4. *Id.*

5. *Turner II*, 117 S. Ct. at 1188.

6. Justice O'Connor argued that Justice Breyer had not joined the majority because his concurrence relied on distinct, and conflicting, reasoning. *Id.* at 1208 (O'Connor, J., dissenting).

7. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997) (scrutinizing the inconsistent analysis of statutory purpose in intermediate scrutiny).

constitutional standard of review for structural regulations of telephone companies.[8] Rather than decide whether the First Amendment prohibits a federal statutory ban on telephone company provision of video to its subscribers, the Court asked the Fourth Circuit Court of Appeals to determine whether the case was made moot by passage of the Telecommunications Act of 1996 (Act or 1996 Act), which repealed the challenged provision of the Cable Act.[9] The Fourth Circuit Court of Appeals ruled the question moot and left telephone companies, like cable operators, with little understanding of their constitutional status.[10]

In the meantime, other courts face an increasing array of constitutional challenges from new First Amendment players grappling with federal regulations that distinguish among and differentially constrain the business operations and services of communications industries.[11] Courts continue to confuse the constitutional protection of communications industries and will undoubtedly cite *Turner II* just as they have cited *Turner I* as justification both to sustain and to overturn the constitutionality of media structural regulations.[12] Thus, this Article maintains that the constitutional question at the heart of the First Amendment challenges to the Cable Act ban on telephone company provision of video is not moot. Rather, this Article examines the context and content of the Cable Act-telco cases

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8. United States v. Chesapeake & Potomac Tel. Co., 116 S. Ct. 1036 (1996) (vacating and remanding for consideration of mootness).

9. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 302(b)(1), 110 Stat. 56, 124 (West Supp. 1997) (repealing 47 U.S.C. § 533 (b)).

10. United States v. Chesapeake & Potomac Tel. Co., Case No. 93-2340 (4th Cir. Apr. 17, 1996) (vacating as moot telephone company constitutional challenge to 47 U.S.C. § 533(b)). Between 1993 and 1996, more than a dozen federal courts ruled 47 U.S.C. § 533(b) unconstitutional.

11. *See* Robinson, *supra* note 1, at 1023 (suggesting the *Turner* rulings will "inspire First Amendment challenges to all manner of economic restrictions on media."); Fred H. Cate, *Telephone Companies, the First Amendment and Technological Convergence*, 45 DEPAUL L. REV. 1035, 1036 (1996) (arguing that the constitutional question is not moot because of technological convergence and industry-specific regulation); *see also, e.g.*, *NCTA OVS Appeal Focuses on Cable System Rights to Launch Service*, COMM. DAILY, Aug. 29, 1996, at 2 (discussing the NCTA constitutional challenge to FCC's open video system rules).

12. *Cf.* Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 966 (D.C. Cir. 1996) (applying intermediate scrutiny because "neither the rules nor the statute are predicated on the ideas expressed in cable programs" and sustaining the constitutionality of public, educational, and governmental (PEG) programming, leased access, and other provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C. (1994))); US West, Inc. v. United States, 48 F.3d 1092, 1100 (9th Cir. 1995) (applying intermediate scrutiny because "Congress does not appear to have enacted § 533(b) based on the content" of video programming and striking down the telephone-cable television cross-ownership ban), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996).

to explore the power of the First Amendment to eliminate structural and economic regulation of communications carriers. The consistency and speed with which lower courts affirmed telephone company First Amendment rights; struck down decades-old rules excluding telephone companies from the local video market; and ignored nearly a century of statutory and common law excluding common carriers from content control suggests the fragility of regulation of communications firms premised purely on changeable market conditions. Indeed, as Frederick Schauer argues, the First Amendment appears to be a uniquely effective tool in the legal marketplace.[13]

The effectiveness of constitutional assault on the video programming ban is illustrated by contrasting this approach with previous ineffectual economic challenges to the structural regulations. Thus, Part II outlines the long history of fruitless telephone company attempts to eliminate the ban. In juxtaposition, Part III surveys the rapid and unanimous success of First Amendment arguments against the ban. Part IV then outlines how the telephone companies reframed themselves as speakers whose opposition to the ban was constitutional, not economic. This transformation, Part V suggests, coincided with and was abetted by deregulatory initiatives of the Federal Communications Commission (FCC or Commission) and Congress. In the final Parts of the Article, the Author suggests that the power of the First Amendment is impressive but far from certain, considering court rulings may be influenced by powerful players and dominant public policy positions.

II. STRUGGLING TO ELIMINATE THE BAN

The recent use of the First Amendment to challenge the Cable Act video ban represents the latest strategy in a long-standing battle. Telephone companies had challenged the video programming ban virtually from its 1970 inception[14] as an FCC rule adopted out of fear that huge,

13. Schauer's discussion focuses on academics, but its implications for practicing lawyers and the judiciary are clear. Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 866 (1992); *see also* Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689 (1994) (arguing against a laissez-faire free speech principle because of the ability of conservatives to "use" the First Amendment to eliminate rational regulation); Frank Munger, *Sociology of Law for a Postliberal Society*, 27 LOY. L.A. L. REV. 89 (1993) (noting, in part, that powerful clients in the legal system can restructure the system to their own ends); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992) (examining the forces at play in discretionary decision making by judges faced with constitutional questions).

14. *See* United States v. Western Elec. Co., 592 F. Supp. 846, 850 n.3 (D.D.C. 1984). Telephone company waiver requests to the *Modified Final Judgment*'s line-of-business restrictions began January 26, 1984, with a request from Bell Atlantic to lease equipment.

powerful telephone companies would dominate the then-fledgling cable industry.[15] The FCC said the rule, known as the cross-ownership ban, would eliminate both the opportunity and the incentive for telephone companies to discriminate in carriage and other terms of service against independent cable video operators in favor of their own video affiliates.[16] In 1984, the Cable Act ban codified the FCC's established rule with virtually no independent fact finding.[17] The record indicates that neither the FCC nor Congress viewed the ban from a First Amendment perspective. The dominant policy intent was to promote competition and increase regulatory efficacy in a dynamic communications environment.[18]

That was followed by a January 27, 1984, BellSouth motion to offer software programs and related services; a February 8, 1984, Pacific and Nevada Bell motion to enter into foreign businesses; a February 15, 1984, NYNEX request to provide office equipment; a February 24, 1984, BellSouth request to provide communications services and equipment to NASA; and a March 20, 1984, US West request to engage in real estate transactions. *Id.*

15. Section 214 Certificates for Channel Facils. Furnished to Affiliated Community Antenna TV Sys., *Final Report and Order*, 21 F.C.C.2d 307, para. 43, 18 Rad. Reg. 2d (P & F) 1549 [hereinafter *Section 214 Final Report and Order*], *modified by Memorandum Opinion and Order*, 22 F.C.C.2d 746, 18 Rad. Reg. 2d (P & F) 1798 (1970).

16. *Id.* The 1978 Pole Attachments Act codified a portion of the FCC rule and prevented discriminatory pricing for use of telephone poles. Pub. L. No. 95-234, 92 Stat. 35 (1978) (amending the Communications Act of 1934) (codified as amended at 47 U.S.C. § 224(b)(1) (1994)).

17. H.R. REP. NO. 98-934, at 55 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4692 (reiterating the FCC's intent that the ban prevent local monopolies and encourage diverse ownership).

18. *See, e.g., The Communications Act of 1994: Hearings on S. 1822 Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong. (1994) (favoring enactment of a bill to foster development of the nation's telecommunications infrastructure); *Oversight of Cable Television: Hearings on the Oversight of the 1984 Cable Telecommunications Act Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong. (1989) (examining competition in the video programming industry); H.R. REP. NO. 102-628 (1992); S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133 (noting 11 hearings on cable television between 1989 and 1991); H.R. REP. NO. 101-682 (1990) (favoring amendment of the Communications Act of 1934 to increase consumer protection and industry competition); *see also* Cable Competition Act, S. 1068, 101st Cong. (1989); Cable Consumer Protection Act of 1989, S. 905, 101st Cong. (1989); Cable Television Consumer Protection Act of 1990, S. 1880, 101st Cong. (1990); Cable Television Consumer Protection Act of 1991, S. 12, 102d Cong. (1991); Communications Competitiveness and Infrastructure Modernization Act of 1991, S. 1200, 102d Cong. (1991) (permitting telephone provision of cable service and video programming); Communications Act of 1994, S. 1822, 103d Cong. (1994) (deregulating telecommunications and increasing competition and investment); Telecommunications Services Enhancement Act of 1994, S. 2111, 103d Cong. (1994) (deregulating telecommunications and encouraging development of a national infrastructure); National Telecommunications and Information Administration Authorization Act of 1994, S. 1883, 103d Cong. (1994) (allocating funds to promote and develop telecommunications infrastructure); Communications Competitiveness and Infrastructure Modernization Act of 1991, H.R. 2546, 102d Cong. (1991); Antitrust and Communications Reform Act of 1994, H.R. 3626, 103d Cong.

Yet the ban withstood years of FCC and congressional scrutiny and repeated telephone company claims that changed economic and market conditions eliminated the need for and utility of the ban.[19] Market changes that radically redefined telecommunications were overshadowed by policy debate between those favoring unfettered competition as the means to efficiently achieve public policy objectives and those arguing that (past and present) monopolists required heavy government oversight. The regulatory/deregulatory debate masked a similar dialectic tension between free speech and economic, structural regulation.[20] Telecommunications policy debate rarely recognized that common carriage might serve a dual function: to reduce transaction costs in the use of infrastructure and to enhance free speech.[21]

(1994) (superseding the *Modified Final Judgment* and broadly amending the Communications Act of 1934).

19. FCC, OPP STAFF REPORT, FCC POLICY ON CABLE OWNERSHIP 162 (1981); *see also*, Comm'n's Rules Concerning Carriage of TV Brdcst. Signals by Cable TV Sys., *Report and Order*, 1 FCC Rcd. 864, 61 Rad. Reg. 2d (P & F) 792 (1986), *modified by Memorandum Opinion and Order*, 2 FCC Rcd. 3593, 62 Rad. Reg. 2d (P & F) 1251 (1987); Telephone Co.-Cable TV Cross-Ownership Rules, *Notice of Inquiry*, 2 FCC Rcd. 5092 (1987); Telephone Co.-Cable TV Cross-Ownership Rules, *Further Notice of Inquiry and Notice of Proposed Rulemaking*, 3 FCC Rcd. 5849 (1988); Telephone Co.-Cable TV Cross-Ownership Rules, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781, 71 Rad. Reg. 2d (P & F) 70 (1992) [hereinafter *Cross-Ownership Second Report and Order*], *modified by Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd. 244, 76 Rad. Reg. 2d (P & F) 740 (1994); *see also, e.g.*, *Competitive Issues in the Cable Television Industry: Hearings Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, 100th Cong. (1988); *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., pts. 1 & 2 (1990); *Cable Instructional Television and S. 1200 Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. (1992); *Effects of Telecommunications Mergers: Hearings Before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, 103d Cong. (1993); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2, 106 Stat. 1460 (1992) (reforming telecommunications regulation but leaving intact the telephone-cable cross-ownership ban); and proposed telecommunications reform bills: *Cable Competition Act*, H.R. 2437, 101st Cong. (1989); *Communications Competitiveness and Infrastructure Modernization Act of 1993*, H.R. 1504, 103d Cong., (1993); *Communications Competitiveness and Infrastructure Modernization Act of 1991*, S. 1200, 102d Cong. (1991); *Cable Competition Act*, S. 1068, 101st Cong. (1989).

20. Chairman Reed Hundt, *Toward Regulation That Fosters Competition*, 47 FED. COMM. L.J. 265 (1994); *see also* Eli M. Noam, *Principles for the Communications Act of 2034: The Superstructure of Infrastructure*, 47 FED. COMM. L.J. 317 (1994) (arguing that competition between common and private carriers distorts the market and is unstable); ALFRED KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 113-71 (1971).

21. Noam, *supra* note 20, at 320. *But see* Amendment of Pt. 74, Subpart K, of the

Then, in the late 1980s, Robert Pepper pointed out the potential conflict between common carrier regulation and the First Amendment.[22] In an FCC planning paper, Pepper suggested that established First Amendment protection of cable systems might logically invalidate regulatory constraint of telephone company broadband networks if telephone companies provided cable-like content over their common carrier facilities.[23] He also questioned whether common carrier safeguards would become unconstitutional when a carrier provided content, thus foreclosing telephone companies from entering into content.[24]

Without adopting Pepper's First Amendment reasoning, the FCC formally recommended that Congress eliminate the cross-ownership ban in the early 1990s.[25] In its 1992 *Second Report and Order* on the Cable Act cross-ownership ban, the FCC told Congress that elimination, not continuation, of the ban would "promote [the Commission's] overarching goals . . . by increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services made available to the public."[26] Despite growing policy consensus that regulatory inconsistencies between private and common carriers distort economic markets and dissuade rapid development of infrastructure, Congress failed to repeal the ban.[27] In response, the FCC introduced a series of cumbersome and evolving video dialtone rule makings to permit telephone companies to provide video.[28] However, "the

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Comm'n's Rules and Regs. Relative to Community Antenna TV Sys., *Memorandum Opinion and Order*, 39 F.C.C.2d 377, para. 39, 26 Rad. Reg. 2d (P & F) 739 (1973) (noting the dual role of the telephone-cable cross-ownership rules to foster both "increased competition in the economic marketplace" and "increased competition in the marketplace of ideas").

22. FCC, OPP WORKING PAPER, THROUGH THE LOOKING GLASS: INTEGRATED BROADBAND NETWORKS, REGULATORY POLICIES, AND INSTITUTIONAL CHANGE (authored by Robert M. Pepper), 4 FCC Rcd. 1306 (1988).

23. *Id.* para. 75.

24. *Id.*

25. *Cross-Ownership Second Report and Order*, 7 FCC Rcd. 5781, para. 3, 71 Rad. Reg. 2d (P & F) 70 (1992), *modified by Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd. 244, 76 Rad. Reg. 2d (P & F) 740 (1994).

26. *Id.* para. 135. For Department of Justice support of the repeal, see Reply Comments of the U.S. DOJ, to the *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry* in CC Dkt. No. 87-266, at 44 (March 13, 1992).

27. *See* National Communications Competition and Information Infrastructure Act of 1994, H.R. 3636, 103d Cong. (1994) (approving immediate sweeping communications deregulation); H.R. REP. NO. 103-560 (1994) (finding that diversity in telecommunications is best advanced through unfettered market operation). *But see* S. REP. NO. 103-367 (1994) (urging incremental changes and retention of local and national cross-ownership rules to protect diversity in the telephone industry).

28. *See* Reporting Requirements on Video Dialtone Costs and Jurisdictional Separa-

courts [took] the lead in rearranging the telecommunications industry."[29]

III. CHANGING THE LINE OF ATTACK

Although the telephone industry had been regulated as a carrier of others' goods for most of a century,[30] by the mid-1990s, telephone companies had assaulted regulations, which confined them to serve as pure vehicles, with a barrage of lawsuits claiming a First Amendment right to provide content as well.[31] Like the cable companies before them,[32] the telephone companies chaffed at the restricted role of transporter and

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tions for Local Exchange Carriers Offering Video Dialtone Serv., *Order Inviting Comments*, 60 Fed. Reg. 35,548, *modified and adopted by Memorandum Opinion and Order*, 10 FCC Rcd. 11,292 (1995); *see also* Telephone Co.-Cable TV Cross-Ownership Rules, *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry*, 7 FCC Rcd. 300, 69 Rad. Reg. 2d (P & F) 1613 (1991) [hereinafter *Cross-Ownership First Report and Order*], *reconsideration granted in part and denied in part by Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd. 5069, 71 Rad. Reg. 2d (P & F) 66 (1992); *Cross-Ownership Second Report and Order*, 7 FCC Rcd. 5781, 71 Rad. Reg. 2d (P & F) 70.

29. Commissioner Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COMM. L.J. 39, 53 (1993); *see also*, Pacific Telesis Group v. United States, 84 F.3d 1153 (9th Cir.), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); NYNEX Corp. v. United States, Civ. No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994); Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1036, *vacated as moot*, No. 93-2340 (4th Cir. Apr. 17, 1996) (lifting the ban and permitting the regional Bell companies to offer cable and other information services). Some speculate that Chesapeake & Potomac was the regional Bell to initiate this series of parallel lawsuits because it could bring suit in the 4th Circuit "rocket docket," known for the speed with which it renders judgments.

30. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), *amended in part by* Mann-Elkins Act, ch. 309, § 7, 36 Stat. 539, 544-45 (1910), *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West Supp. 1997)). The Mann-Elkins Act subjected telephone and telegraph service to the regulatory jurisdiction of the Interstate Commerce Commission.

31. *Pacific Telesis*, 48 F.3d 1106; *BellSouth*, 868 F. Supp. 1335; *Ameritech*, 867 F. Supp. 721; *NYNEX*, 1994 WL 779761; US West v. United States, 855 F. Supp. 1184 (N.D. Ill.), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996); *Chesapeake & Potomac*, 830 F. Supp. 909; *see also USTA Wins Summary Judgment: U.S. Dist. Court Says All Telcos Can Offer Video Programming*, COMM. DAILY, Jan. 30, 1995, at 1; *USTA, OPATSCO, NCTA Win Lawsuit to Lift Cable-Phone Ownership Ban*, DAILY REP. FOR EXECUTIVES, Jan. 30, 1995, at A19; *Bell Atlantic Files Brief: Industry Gears up for Supreme Court Argument on Telco Programming Ban*, COMM. DAILY, Oct. 20, 1995, at 2.

32. *See, e.g.*, Turner Brdcst. Sys., Inc. v. FCC, 819 F. Supp. 32 (D.C. Cir. 1993), *vacated and remanded*, 512 U.S. 622 (1994), *summary judgment granted*, 910 F. Supp. 734 (D.D.C. 1995) (upholding must-carry provisions of 1984 Cable Act), *aff'd*, 117 S. Ct. 1174 (1997); Century Comm. Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *clarified by* 837 F.2d 517 (D.C. Cir. 1988); Quincy Cable Tel., Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

moved to embrace a dual function as both content suppliers and carriers.[33] To effect this shift in status, telephone companies claimed they were being unconstitutionally deprived of their right to speak by regulations the government claimed merely constrained the economic structure of the communications industry.[34]

The telephone companies' First Amendment argument arose en masse virtually overnight.[35] It followed closely upon a variety of market changes that boded ill for the continued growth of traditional telephone company services, revenues, and technological developments that enabled telephone to readily transport video programming.[36] The local telcos were asking the courts to take action "where Congress had failed or declined to adapt telecommunications law to changing technological and economic circumstances."[37] Assertions of First Amendment rights were calculated to expand the economic market of telephone companies. The telephone companies wanted to speak to their network of customers through lucrative cable video.[38]

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33. *See generally* Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329 (concluding that the First Amendment does not prohibit exclusive franchising or access requirements imposed on cable).

34. *See generally* Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989); Erin M. Reilly, Comment, *The Telecommunications Industry in 1993: The Year of the Merger*, 2 COMMLAW CONSP. 95 (1994); Eric T. Werner, Comment, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 FED. COMM. L.J. 215 (1991).

35. *See, e.g.*, *Pacific Telesis*, 48 F.3d 1106; GTE Cal., Inc. v. FCC, 39 F.3d 940 (9th Cir. 1994); Southern New Eng. Tel. Co. v. United States, 886 F. Supp. 211 (D. Conn. 1995); *BellSouth*, 868 F. Supp. 1335; *Ameritech*, 867 F. Supp. 721; *NYNEX*, 1994 WL 779761; *US West*, 855 F. Supp. 1184; *Chesapeake & Potomac*, 830 F. Supp. 909. *But see* Bert W. Rein et al., *The Constitutionality of the FCC's Television-Cable Cross-Ownership Restrictions*, 34 FED. COMM. L.J. 1 (1982) (summarizing an earlier petition for rulemaking to the FCC on behalf of a television station and asking for elimination of the ban on television and cable cross-ownership as an unconstitutional restriction of television companies' First Amendment rights).

36. *See generally* Barrett, *supra* note 29 (providing an overview of the logic and utility of current telephone-cable alliances).

37. *Ameritech*, 867 F. Supp. at 728.

38. The Supreme Court has ruled that video programming is protected speech. *See, e.g.*, Los Angeles v. Preferred Comm., Inc., 476 U.S. 488, 494 (1986) (comparing cable communications with traditional First Amendment speakers: newspapers, books, pamphlets, and public speakers); Leathers v. Medlock, 499 U.S. 439, 444 (1991) ("[Cable] is engaged in 'speech' under the First Amendment...."); LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985) (containing a thoroughly documented discussion of the original meaning of the First Amendment, and the conclusion that the amendment always allowed regulation of some forms of speech). *But see Cross-Ownership First Report and Order*, 7 FCC Rcd. 300, 69 Rad. Reg. 2d (P &F) 1613 (1991), *reconsideration granted in part and denied in part by Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd. 5069, 71 Rad. Reg. 2d (P & F) 66 (1992). Despite FCC disclaimers, the video programming distributed by tele-

The initial constitutional challenge to the Cable Act's ban on video programming came when Chesapeake and Potomac Telephone Co. of Virginia (C&P Telephone) brought suit in December 1992 against the city of Alexandria, Virginia. The city had cited the Cable Act's ban as grounds for its denial of the telephone company's request for a cable franchise to provide a competitive cable video system.[39] C&P Telephone challenged the ban as an unconstitutional denial of its right to free speech.[40]

Both the federal district and the circuit courts ruled that the so-called cross-ownership ban unconstitutionally restricted C&P Telephone's First Amendment right to free speech.[41] Both courts subjected the ban to the intermediate scrutiny test articulated in *United States v. O'Brien*[42] and found the ban failed to overcome *O'Brien*'s requirements that content-neutral regulations of speech[43] (1) further an important or substantial governmental interest; (2) that the interest be unrelated to the limitation of expression of views; and (3) that the incidental limitation of free expression be no greater than is necessary to achieve the governmental interest.[44] Both courts accepted the government's interest as important and unrelated to the content of speech, but focused on the third prong, finding that the ban was unconstitutionally overbroad.[45]

By 1995, a string of federal courts, unanimously applying intermediate scrutiny, found the ban unconstitutionally overbroad.[46] In none of these cases did the government dispute the telcos' claims that the ban abridged speech.[47] The government instead defended the ban as essential to promote

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phone companies is indistinguishable from, and in some cases identical to, that distributed by cable operators.

39. *Chesapeake & Potomac*, 830 F. Supp. at 917.

40. *Id.* at 911 (citing Cable Communications Policy Act of 1984, 47 U.S.C. § 533(b)).

41. Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 185 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1036, *vacated as moot*, No. 93-2340 (4th Cir. Apr. 17, 1996); *Chesapeake & Potomac*, 830 F. Supp. at 932.

42. *O'Brien*, 391 U.S. 367, 377 (1968).

43. *Chesapeake & Potomac*, 42 F.3d at 202 (4th Cir. 1994); *Chesapeake & Potomac*, 830 F. Supp. at 917.

44. *O'Brien*, 391 U.S. at 377.

45. *Chesapeake & Potomac*, 42 F.3d at 202; *Chesapeake & Potomac*, 830 F. Supp. at 931-32.

46. Pacific Telesis Group v. United States, 84 F.3d 1153 (9th Cir.), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); NYNEX Corp. v. United States, Civ. No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994); US West v. United States, 855 F. Supp. 1184 (N.D. Ill.), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996); *Chesapeake & Potomac*, 830 F. Supp. 909.

47. *See, e.g.*, Southern New Eng. Tel. Co. v. United States, 886 F. Supp. 211, 214 (D. Conn. 1995); *BellSouth*, 868 F. Supp. at 1338 (N.D. Ala. 1994); *Ameritech*, 867 F. Supp. at

competitive and diverse local media ownership, and to prevent telephone company anticompetitive practices. The courts dismissed government efforts to analogize the ban to laws of general application which are subject to only rational review.[48]

The courts also clearly distinguished the Cable Act-telco cases from precedents which upheld bans on newspaper and broadcasting cross-ownership.[49] The courts reiterated that the scarcity principal was the foundation for the Supreme Court's ruling in *FCC v. National Citizens Committee for Broadcasting* and provided no justification for the telephone and cable cross-ownership ban.[50]

While the courts found "a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media,"[51] they consistently cited *Turner I* [52] to hold that the government's market or antitrust concerns were insufficient to shield the law from heightened First Amendment scrutiny.[53] The courts also turned to *Turner I* to justify independent court evaluation of the facts purportedly supporting the ban.[54] The courts refused to defer to congressional judgment about the need for the ban because of vast changes in the cable television market since the ban's 1984 enactment. In addition, the congressional record failed to show independent congressional fact finding about the need for and utility of the ban.[55] In rulings focusing on the third prong of the *O'Brien* test, the courts concurred that the government had failed to prove that the ban advanced its intended goals with no greater burden on speech than necessary.[56]

728; *US West*, 855 F. Supp. at 1191; *Chesapeake & Potomac*, 830 F. Supp. at 917-18. *But see* GTE Cal., Inc. v. FCC, 39 F.3d 940, 943 (9th Cir. 1994) (holding that constitutional issue was raised untimely and reporting FCC's argument that ban was a legitimate structural economic regulation).

48. *See, e.g., Ameritech*, 867 F. Supp. at 730; *Chesapeake & Potomac*, 42 F.3d at 191.

49. FCC v. National Citizens Comm. for Brdcst., 436 U.S. 775 (1978) (upholding newspaper and broadcast cross-ownership ban); *see also* Marsh Media, Ltd. v. FCC, 798 F.2d 772 (5th Cir. 1986) (rejecting a First Amendment challenge to broadcast and cable cross-ownership rules).

50. *See, e.g.*, US West, Inc. v. United States, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996); *Chesapeake & Potomac*, 42 F.3d at 191.

51. *Ameritech*, 867 F. Supp. at 726.

52. *Turner I*, 512 U.S. 622 (1994).

53. *See, e.g., Ameritech*, 867 F. Supp. at 730 (citing *Turner I*, 512 U.S. at 640).

54. *Id.* at 734-35 (asserting the court's duty to independently assess the necessity of the ban to achieve its stated goals).

55. *Id.*; *see also*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (holding that rules that implicate First Amendment freedoms must be supported with factual evidence, not unsupported theory, hypothesis, or speculation).

56. BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994).

The courts consistently sidestepped the thorny issue of reconciliation of First Amendment freedom with common carrier regulation and judicial precedent that categorically separates common carriage from content control.[57] Only the U.S. Court of Appeals for the 4th Circuit, in affirming the lower court's *C&P Telephone* ruling, mentioned the apparent tension between established common carrier principles and the assertion of First Amendment rights by telephone companies. After concluding that physical and market characteristics of cable justified regulation and that intermediate scrutiny should be applied to the content-neutral ban,[58] the court said:

> Although common carriers are not members of "the press" insofar as 47 U.S.C. § 202 precludes them from exercising editorial control over the communications they transmit, the foregoing would nevertheless seem applicable to Section 533(b), which restricts a class of speakers from joining the press by operating, with editorial control and within certain areas, cable systems.[59]

This nonsensical statement appears to state that although Title II does not define telephone companies as protected speakers and, indeed, proscribes their exercise of editorial control over the messages they carry, the Cable Act ban nevertheless unconstitutionally restricts this "class of speakers" from exercising certain types of editorial control. The rest of the First Amendment rulings in favor of telephone companies preferred to avoid this imbroglio.

Yet at least one district court apparently would subject any regulation of telephone companies to heightened scrutiny. In dicta, the district court in *Southern New England Telephone Co. v. United States* noted that "even if the statute was directed at non-speech activity . . . it must be subjected to heightened scrutiny because it 'impose[s] a disproportionate burden upon those engaged in protected First Amendment activities.'"[60] Seemingly, then, no regulation of any aspect of the operation of a telephone company could be justified purely as rational, economic regulation.

Although the Supreme Court chose not to address the question of the extent of a telephone common carrier's First Amendment rights,[61] lower courts consistently affirmed First Amendment protection of telcos. The mere mention of the First Amendment by telcos effectively eliminated any

57. Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1036, *vacated as moot*, No. 93-2340 (4th Cir. Apr. 17, 1996).

58. *Id.* at 192-96.

59. *Id.* at 196.

60. *Southern New Eng. Tel.*, 886 F. Supp. at 217 (D. Conn. 1995) (alteration in original) (quoting Arcara v. Cloud Books, Inc., 478 U.S. 697, 704 (1986)).

61. United States v. Chesapeake & Potomac Tel. Co., 116 S. Ct. 1036 (1996).

discussion by the government of the core premise and goal of common carriage: to segregate content and carriage. Indeed, the Cable Act-telco decisions render classification as a communications common carrier virtually meaningless. By eliminating the distinction between speakers and carriers, the courts opened the spectrum of telephone regulation to constitutional challenge. In addition, the Cable Act-telco rulings may open the door to more intrusive carrier-type regulation of any speakers or communications technologies, subject only to intermediate—not strict—scrutiny.[62]

IV. REFRAMING THE PLAYERS AND THE QUESTION

A. *Challenging the Mandated Silence of Common Carriers*

Neither statute nor common law clearly defines common carrier.[63] The Communications Act of 1934, which outlines the obligations of communications common carriers, circularly defines a common carrier as

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62. *See Turner II*, 117 S. Ct. 1174, 1186, in which the Court applied intermediate scrutiny based on the plurality's opinion in *Turner I*, 512 U.S. 622, 640-41 (1994) (holding that speaker- or medium-partial regulations are always subject to some degree of heightened scrutiny). Some justices, led by Justice O'Connor, have alternatively argued that speech-related regulation of cable must be assessed under strict scrutiny standards. *Turner II*, 117 S. Ct. at 1208 (O'Connor, J. dissenting) (arguing that Justice Breyer's view of the must-carry rules as "speech enhancing" should have subjected the rules to strict scrutiny); *Turner I*, 512 U.S. at 675 (O'Connor, J., concurring in part and dissenting in part).

Intermediate scrutiny as applied in *United States v. O'Brien*, 391 U.S. 367 (1968), has been established as the appropriate standard of review for regulation of cable. Most recently, the Court adopted the *O'Brien* test in *Turner II*. When compared to strict scrutiny, the intermediate *O'Brien* test requires that regulation (1) address an "important or substantial," rather than a compelling, government interest; and (2) be narrowly tailored, rather than the least intrusive, means of achieving that interest. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (re-articulating the second *O'Brien* prong to require only that regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests"); *see also* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (holding that regulatory distinctions for media are presumptively invalid unless justified by "some special characteristic"); Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 573-579 (1980) (Blackmun, J., concurring) (warning against the expanded application of the intermediate standard). Justice Rehnquist dissented, arguing that state-created monopolies enjoy no First Amendment protection. *Id.* at 584.

63. The U.S. Code states that a "common carrier" shall be defined by common law. Statutes, however, mandate that communications common carriers, such as telephone and telegraph companies, shall provide access to anyone who can pay and shall not alter the content of the senders' messages. 47 U.S.C. § 201 (1994); *see also* FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979); National Ass'n of Reg. Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976) [hereinafter *NARUC I*] (holding that common carriers may not discriminate between two like customers); National Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d 601, 609-610 (D.C. Cir. 1976) [hereinafter *NARUC II*] (deciding that common carriers do not control the content they transmit).

"[a]ny person engaged as a common carrier for hire."[64] The FCC provided a similarly unenlightening definition when it said a common carrier is "any person engaged in rendering communication service for hire to the public."[65]

The common law is no more helpful. In *National Association of Regulatory Utility Commissioners v. FCC* (*NARUC I*), a case cited by numerous courts struggling with common carrier doctrine, the D.C. Circuit defined a common carrier firm as a firm "that engages in common carriage."[66] The *NARUC I* court also offered the functional definition that common carriage arises from "hold[ing] oneself out indiscriminately to the clientele one is suited to serve . . . ."[67] Thus, subsequent court and FCC decisions focused on whether a firm affirmatively held itself out to offer nondiscriminatory service to like customers.[68]

In general, courts and regulators agreed that regulated common carriers must provide access to anyone who can pay and may neither disseminate their own messages nor alter the content their customers send. Telephone common carriers must: 1) offer their services to the general public; 2) permit subscribers to control the messages they send; and 3) engage in interstate commerce.[69] Rather than attempt to define common carriage, courts and the FCC instead delineated conditions that justified common-carrier-type regulation. Common law established that control of common carriers is justified to minimize disruption of public property, to assure the greatest service to the greatest number of citizens, and to control monopoly power and prevent abusive business practices.[70] Thus, the 1934 Communi-

64. Communications Act of 1934, ch. 652, § 153(h), 48 Stat. 1064 (codified as amended at 47 U.S.C.A. § 153(10) (West Supp. 1997)).

65. 47 C.F.R. § 21.1 (1996). Historically, communications common carriers have been required to (1) offer their services to the general public; (2) permit subscribers to control the messages they send; and (3) engage in interstate commerce. *See generally Midwest Video*, 440 U.S. 689; Frontier Brdcst. Co., *Memorandum Opinion and Order*, 24 F.C.C. 251, 16 Rad. Reg. (P & F) 1005 (1958) [hereinafter *Frontier Memorandum Opinion and Order*].

66. ROBERT W. POOLE, UNNATURAL MONOPOLIES 43 n.7 (1985) (citing *NARUC I*, 525 F.2d at 633).

67. *NARUC I*, 525 F.2d at 641.

68. *See generally* Wold Comm., Inc. v. FCC, 735 F.2d 1465, 1471 (D.C. Cir. 1984); *NARUC I*, 525 F.2d at 641-42; *NARUC II*, 533 F.2d 601, 609 (D.C. Cir. 1976).

69. *See generally Midwest Video*, 440 U.S. 689; *Frontier Memorandum Opinion and Order*, 24 F.C.C. 251, 16 Rad. Reg. (P & F) 1005 (1958); *see also NARUC I*, 525 F.2d at 641; *NARUC II*, 533 F.2d at 609; Industrial Radiolocation Serv., *Report and Order*, 5 F.C.C.2d 197, para. 19, 8 Rad. Reg. 2d (P & F) 1545 (1966) ("The fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .").

70. *See Section 214 Final Report and Order*, 21 F.C.C.2d 307, 18 Rad. Reg. 2d (P &

cations Act contains a recurrent theme that communications carriers should be regulated to serve the public interest, convenience, and necessity.[71]

In light of this quasi-public character, free speech rights to communicate over telephone wires generally were the exclusive province of the individual users of the telephone,[72] and extensive telephone regulation was upheld as a reasonable means to advance the First Amendment right of telephone users to have nondiscriminatory near-universal service and interconnection.[73] To protect the citizens' right of free speech, regulation generally barred both the telephone system operator and the government from control of telecommunications content.[74]

Historically, then, telephone and telegraph services were common carriers[75] while broadcasting was not.[76] This distinction resulted from the

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F) 1549, *modified by Memorandum Opinion and Order*, 22 F.C.C.2d 746, 18 Rad. Reg. 2d (P & F) 1798 (1970); *see generally* 49 U.S.C. §§ 301-27 (1994); American Trucking Ass'n v. United States, 101 F. Supp. 710 (N.D. Ala. 1951) (upholding regulations of industry—as a common carrier—against constitutional challenge); *see also NARUC I*, 525 F.2d at 640-641 (discussing the historically "public character" of common carriers). For communications common carriers the concept of operation in the public interest, convenience, and necessity dominated regulation. *See* Section 214 Authorization, *Report and Order*, 98 F.C.C.2d 354, 56 Rad. Reg. 2d (P & F) 543 (1984).

71. Telecommunications Act of 1996, sec. 104, § 151, 47 U.S.C.A. 151 (West Supp. 1997); *Id.* §§ 214, 310(d); *see also* Munn v. Illinois, 94 U.S. 113 (1876) (sustaining legislative policy on rates for grain elevators and introducing the leitmotif of the "public interest").

72. Limited but notable exceptions to the autonomy of telephone callers include obscenity and harassment.

73. *See, e.g.*, Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (asserting that the First Amendment legitimately advances the free speech rights of the individual citizen against the power of media owners); Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

74. *See* WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 18-20 (1994) (examining the economic and competitive disadvantages of current common carrier regulations).

75. 47 U.S.C.A. §§ 201-29 (outlining the services and charges of wire or radio communications common carriers such as telegraph and telephone); *see also* Mann-Elkins Act, ch. 309, § 7, 36 Stat. 539, 544-45 (1910), *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West Supp. 1997)); Parks v. Alta Cal. Tel. Co., 13 Cal. 422, 424-25 (Super. Ct. Cal. 1859). Conventional wisdom holds that telephone companies held themselves out as common carriers in a quid pro quo for protected monopoly status. *But see* Roland S. Homet, Jr., *"Getting the Message": Statutory Approaches to Electronic Information Delivery and the Duty of Carriage*, 37 FED. COMM. L.J. 217 (1985) (arguing against this oft-repeated position and maintaining that telephone companies functioned as common carriers prior to monopoly status because of the logical linkage to other vital carriers of business materials, that is, trains and telegraph).

Much common carrier regulation is designed to offset market imperfections. Com-

unique market conditions of the two nascent industries, not from any explicit functional distinction between the two communications services. This experience-based categorization failed to provide explicit definitional criteria to help determine the carrier status of emerging technologies, such as cable.[77] The resulting categorical confusion was exacerbated by rapidly changing technologies and markets in the 1980s.

In response, the FCC attempted to tie common carrier regulation to actual or historical market power.[78] This approach allowed the FCC to ease regulation of select telephone providers but did little to justify the First Amendment distinction between common carriers and speakers.[79]

The absence of a clear meaning for the term "common carrier" offered courts hearing the Cable Act-telco cases an opportunity to clarify the nexus between speakers and carriers. Instead, the courts avoided the terrain of common carrier definition, ignored a basis to rule that telephone companies might not exert editorial control over their own communicative channels, and muddied established First Amendment jurisprudence.

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mon carriers, such as railroads and telegraphs, historically were viewed as natural monopolies because the high cost of installation and the limited customer base made it economically impossible for competitors to enter the market. Although competition now exists in long-distance telephone service, Regional Bell Operating Companies (RBOCs) continue to exert market power over local telephone service within their operating areas. *See* ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 95-98 (1983).

76. Communications Act of 1934, ch. 652, § 153(h), 48 Stat. 1064 (codified as amended at 47 U.S.C.A. § 153(10) (West Supp. 1997)); Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

77. *See, e.g.*, *Turner I*, 512 U.S. 622 (1994); *NARUC I*, 525 F.2d 633 (D.C. Cir. 1976).

78. *See, e.g.*, Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facils. Authorizations, *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308, paras. 100-01 (1979) [hereinafter *Competitive Common Carrier Notice of Inquiry*]; FCC MAJOR MATTERS REPORT 40 (1982); *see also* Cox Cable Comm. Inc., *Memorandum Opinion, Declaratory Ruling, and Order*, 102 F.C.C.2d 110, para. 27, 58 Rad. Reg. 2d (P & F) 1235 (1985) (applying the market power analysis to determine carrier status); International Competitive Carrier Policies, *Report and Order*, 102 F.C.C.2d 812, paras. 39-67, 59 Rad. Reg. 2d (P & F) 283 (1985) (using a market power definitional strategy similar to *Cox Cable Comm.*).

79. Phil Nichols, Note, *Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501; *see also* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971) (reasoning that although CATV systems were neither broadcasters nor common carriers, the common carrier status of telephone companies involved in CATV service was determinative); General Tel. Co. v. FCC, 413 F.2d 390 (D.C. Cir. 1969).

B. *Blurring First Amendment Categories*

Historically, the courts, Congress, and the FCC applied the First Amendment's prohibition against restraint of free speech[80] to each communications medium either through analogy to or distinction from established media.[81] A trifurcated system of First Amendment jurisprudence developed[82] wherein telephony was virtually devoid of First Amendment protection, print media was sacrosanct,[83] and broadcast and a broadening array of newer electronic technologies were somewhat free from regulation.[84]

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80. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."). While interesting, the ultimate resolution of the debate over constitutional intent is less important to this Article than is the day-to-day interpretation and application of that document to telecommunications. For relevant discussions of the philosophical underpinnings of free press in America see, for example, ELLIOT D. COHEN, PHILOSOPHICAL ISSUES IN JOURNALISM (1992); LEVY, *supra* note 38; J. HERBERT ALTSCHULL, FROM MILTON TO MCLUHAN: THE IDEAS BEHIND AMERICAN JOURNALISM (1990).

81. For a discussion of how this premise has been called into question, see, for example, DE SOLA POOL, *supra* note 75. Also, for a general discussion of the objectives of FCC licensing, see DOUGLAS H. GINSBURG ET AL., REGULATION OF THE ELECTRONIC MASS MEDIA: LAW AND POLICY FOR RADIO, TELEVISION, CABLE AND THE NEW VIDEO TECHNOLOGIES 158 (2d ed. 1991).

82. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it . . . .") (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1957)); United States v. Western Elec. Co., 673 F. Supp. 525, 586 n.273 (D.D.C. 1987) ("[C]ommon carriers are quite properly treated differently for First Amendment purposes than traditional news media." (citing FCC v. Midwest Video Corp., 440 U.S. 689 (1979); Columbia Brdcst. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973))). *But cf.* Daniel Brenner, *Telephone Company Entry Into Video Services: A First Amendment Analysis*, 67 NOTRE DAME L. REV. 97, 111 (1991) (stating that the "blurring of the lines between content and conduit reflects the reality of much of the nation's communications infrastructure"); Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071 (1992) (arguing that traditional First Amendment analysis of telcos is ill-suited to the dispute involving their attempts to provide video services).

83. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (ruling it unconstitutional to require newspapers to provide a right of reply). *But see Competitive Common Carrier Notice of Inquiry*, 77 F.C.C.2d 308 (1979); *Section 214 Final Report and Order*, 21 F.C.C.2d 307, 18 Rad. Reg. 2d (P & F) 1549, *modified by Memorandum Opinion and Order*, 22 F.C.C.2d 746, 18 Rad. Reg. 2d (P & F) 1798 (1970); Nichols, *supra* note 79.

84. *See, e.g.*, Campbell, *supra* note 82 (discussing the trifurcated regulatory system that distinguishes among newspapers, broadcast, and cable); Barron, *supra* note 73 (asserting that regulation is necessary to assure public access to monopolistic media).

Also note that certain types of speech (e.g. obscenity and libel) present separate regulatory rationales, and their regulation may not pose constitutional questions. *See, e.g.*, Miller v. California, 413 U.S. 15, 18-19 (1973) (holding that a legitimate government interest exists sufficient to prohibit dissemination of obscene material); *cf. Tornillo*, 418 U.S. 241 (holding that government-mandated access to newspaper columns violated the First

Telephone services fell outside the ambit of First Amendment jurisprudence because the telephone was treated as an essential utility, not a speaker.[85] For print, the underlying theory was that all had access to the press, and government intervention was unnecessary to effect an open-market exchange of ideas.[86] However, when speech was delivered by radio or television via the scarce and public electromagnetic spectrum, regulation which limited the owner's editorial freedom was constitutionally permissible to assure the First Amendment rights of the audience.[87]

Courts extended the broadcast regulatory model in varying degrees to other electronic media.[88] From the outset, cable was an enigma. It was a functional equivalent of television but did not rely upon the scarce spectrum.[89] Courts feared the market power of cable but likened its programming to newspaper content, a form of speech strictly protected by the First Amendment.[90]

The confusion escalated with the advent of video telephony in the 1990s. Regulatory distinctions became increasingly suspect as private and common carriers became virtually indistinguishable.[91] Differential regulation of telephone companies and cable operators seemed increasingly inequitable and conflict-ridden.[92] Video delivered over telephone lines converged the three branches of First Amendment jurisprudence and presented a new issue to the courts.

C. *Raising a New Question*

Although the FCC had spent years attempting to balance First Amendment and common carrier doctrines, references to FCC debate, or even more generally to common carrier principles, were notably absent

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Amendment); Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969) (affirming a government right to regulate access to scarce, licensed air waves); *see also* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT (1984) (presenting a graphic interpretation of the meaning of the First Amendment).

85. DE SOLA POOL, *supra* note 75.

86. *Tornillo*, 418 U.S. 241.

87. *Red Lion*, 395 U.S. 367.

88. *Turner I*, 512 U.S. 622 (1994).

89. Argued before the Supreme Court in January 1994, *Turner I* focused in part on the appropriateness of "pigeonholing any communications industry in[to] a First Amendment pecking order." Tony Mauro, *Cable Industry Case Expected to be a Landmark*, THE RECORDER, Jan. 10, 1994 at 5; *see also* Linda Greenhouse, *New Law Regulating Cable TV Gets Skeptical Response from High Court*, N.Y. TIMES, Jan. 13, 1994 at A12.

90. *Red Lion*, 395 U.S. at 389; *see also Turner I*, 512 U.S. at 637.

91. *NARUC I*, 525 F.2d 630, 642 (D.C. Cir. 1976).

92. *See* BAUMOL & SIDAK, *supra* note 74 (examining the economic and competitive disadvantages of current common carrier regulations).

from federal court decisions affirming telephone companies' First Amendment right to provide video telephony.[93] This omission severed a critical thread of policy because, prior to the mid-1990s, almost no common law precedent existed to support the assertion of editorial control by a common carrier. Indeed, prior to the 1993 ruling of the U.S. District Court in *C & P Telephone*, few courts had ever been asked to consider the extent of First Amendment protection enjoyed by a traditional common carrier when it also functioned in part as a private speaker.[94]

A handful of cases and FCC rulings suggests that a First Amendment speaker may function in part as a common carrier.[95] However, neither the courts nor the FCC had explored the implications of the reverse: allowing a regulated common carrier to assert autonomous First Amendment control over a portion of its capacity.[96]

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93. *Competitive Common Carrier Notice of Inquiry*, 77 F.C.C.2d 308 (1979); *First Report and Order*, 85 F.C.C.2d 1, 52 Rad. Reg. 2d (P & F) 215 (1980); *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981); *Second Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17,308; *Second Report and Order*, 91 F.C.C.2d 59, 52 Rad. Reg. 2d (P & F) 187 (1982); *Order on Reconsideration*, 93 F.C.C.2d 54, 53 Rad. Reg. 2d (P & F) 735 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554, 56 Rad. Reg. 2d (P & F) 1219 (1983), *vacated and remanded sub nom.* American Tel. and Tel. v. FCC, 978 F.2d 727 (D.C. Cir. 1992); *Fifth Report and Order*, 98 F.C.C.2d 1191, 56 Rad. Reg. 2d (P & F) 1204 (1984); *Sixth Report and Order*, 99 F.C.C.2d 1020, 57 Rad. Reg. 2d (P & F) 1391, *vacated and remanded sub nom.* MCI Telecomm. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985). As used herein, video telephony is a broad term that subsumes video dialtone common carrier systems and video systems operated by telephone companies that offer both programming and delivery.

94. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1036, *vacated as moot*, No. 93-2340 (4th Cir. Apr. 17, 1996) (lifting the ban and permitting the regional Bell companies to offer cable and other information services); *see also* Northwestern Ind. Tel. Co. v. FCC, 872 F.2d 465 (D.C. Cir. 1989) (declining to address an issue raised on appeal by telephone companies to have the cross-ownership ban declared unconstitutional); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994).

95. *See, e.g.*, An Inquiry Relative to the Future Use of the Frequency Band 806-960 Mhz, *Second Report and Order*, 46 F.C.C.2d 752, paras. 34-35, 30 Rad. Reg. 2d (P & F) 75 (1974), *Memorandum Opinion and Order*, 51 F.C.C.2d 938, paras. 39-44 (1975); Community Antenna TV Sys., *First Report and Order*, 20 F.C.C.2d 201, para. 16, 17 Rad. Reg. 2d (P & F) 1570 (1969) (holding that designation as a speaker and as a common carrier are not mutually exclusive); *see also* United States v. Southwestern Cable Co., 392 U.S. 157, 172 (1968) (citing respondent's argument that cable partakes of "characteristics both of broadcasting and of common carriers but with all of the characteristics of neither . . . ."); *Frontier Memorandum Opinion and Order*, 24 F.C.C. 251, para. 8, 16 Rad. Reg. (P & F) 1005 (1958) (holding that one-way cable services are not engaged in common carriage because the content is not under the control of the subscriber). *But see NARUC II*, 533 F.2d 601, 610 (D.C. Cir. 1976) (holding that two-way cable systems are common carriers if customers have explicit or implicit discretion over content).

96. *See, e.g.*, Telephone Co.-Cable TV Cross-Ownership Rules, *Fourth Further Notice*

In general, courts attempted to avoid ruling on the constitutionality of structural regulations imposed on communications industries and to rest holdings upon statutory grounds whenever possible.[97] However, in 1977 the D.C. Circuit Court in *National Citizens Committee for Broadcasting v. FCC (NCCB)*[98] upheld diversity as a sufficient justification for the newspaper and broadcast cross-ownership ban. In *NCCB*, the D.C. Circuit said regulation of the scarce broadcast spectrum was justified and did not violate the newspaper's First Amendment rights because it "neither mandates nor prohibits what may be published" and is "an attempt to enhance the diversity of information heard by the public . . . ."[99] The court called a constitutional challenge to the rule "ironic,"[100] and, in dicta that may prove prescient, warned that regulated separation of media protected the full editorial autonomy of newspapers:

> [I]t may be that newspapers can not truly be free of government interference so long as they operate government licensed broadcast stations. An unsavory fact of life is that government has the power to regulate expression by a "raised eyebrow" reminding the broadcaster of the triennial government renewal process. A newspaper opens itself up to similar intimidation by affiliation with a broadcast station.[101]

This language suggests that at least one judge believed the extension of First Amendment protection to regulated communications firms could erode the unequivocal nature of freedom of speech.

For most of the 1980s, the D.C. Circuit Court, the venue of many telephone company suits, suggested that it legally was "constrained to turn a deaf ear to these [First Amendment] complaints."[102] In a rather typical response to a 1987 First Amendment challenge to restrictions of the *Modi-*

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of Proposed Rulemaking, 10 FCC Rcd. 4617, 78 Rad. Reg. 2d (P & F) 1429 (1995).

97. *See, e.g.*, Northwestern Ind. Tel. Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987); United States v. Western Elec. Co., 774 F. Supp. 11, 12 n.2 (D.D.C. 1991) (noting that the First Amendment "argument adds nothing to the Regional Companies' claim of injury"); United States v. Western Elec. Co., 673 F. Supp. 525, 585-86 & n.273 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990); *see also* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971) (affirming, against a due process challenge, FCC requirements that banned telephone companies from providing community antenna television services unless they first offered independent CATV operators access to carriers' telephone poles).

98. *National Citizens Comm. for Brdcst.*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, 436 U.S. 775 (1978).

99. *Id.* at 954-55. While apt in many respects, this case is distinguishable at least on the ground that broadcast precedents apply uniquely to that medium characterized by spectrum scarcity. *See Turner I*, 512 U.S. 622, 638-39 (1994).

100. *National Citizens Comm. for Brdcst.*, 555 F.2d at 954.

101. *Id.*

102. United States v. Western Elec. Co., 846 F.2d 1422, 1431 (D.C. Cir. 1988).

fied Final Judgment,[103] District Court Judge Harold Greene said the challenge was without merit: "These [telephone] companies, which have never been publishers, thus cannot bootstrap their own failure to make the showing necessary for the relief of their obligations under an antitrust decree into an infringement of their First Amendment rights."[104]

The district court cited *FCC v. Midwest Video Corp.*[105] and *Columbia Broadcasting System, Inc. v. Democratic National Committee (CBS)*[106] as establishing the principle that "common carriers are quite properly treated differently for First Amendment purposes than traditional news media."[107] Both precedents, however, are readily distinguishable from telephone company constitutional challenges. In *Midwest Video*, the Supreme Court held that the FCC could not impose common-carrier-type access requirements on cable operators who enjoyed "journalistic freedom."[108] Similarly, in *CBS*, the Court affirmed that broadcasters enjoyed editorial autonomy and, consequently, could not be required to carry paid editorial announcements.[109] The cases cited by Judge Greene to establish that speech protection shall not be afforded to common carriers instead represent the opposite principle that common carrier regulation shall not be imposed on speakers.

A question more analogous to telephone company First Amendment challenges to the Cable Act ban was presented in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[110] The question before the *Central Hudson* court was whether a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. The Supreme Court answered yes and ruled that the utility had a constitutional right to promote its services through advertising.[111] But the lone dissent of Justice William Rehnquist urged that those constitutional rights be narrowly defined. Justice Rehnquist argued that "[w]hen the source of the speech is a state-created monopoly such as this, traditional First Amendment concerns, if they come into play at all, certainly do not justify the broad interventionist role adopted by the Court to-

103. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (1982).

104. United States v. Western Elec. Co., 673 F. Supp. 525, 586 n.273 (D.D.C. 1987).

105. *Midwest Video*, 440 U.S. 689 (1979).

106. *Columbia Brdcst. Sys.*, 412 U.S. 94 (1973).

107. *Western Elec.*, 673 F. Supp. at 586 n.273.

108. *Midwest Video*, 440 U.S. at 707.

109. *Columbia Brdcst. Sys.*, 412 U.S. 94.

110. *Central Hudson*, 447 U.S. 557 (1980) (ruling eight to one that a ban on promotional advertising by the state's electrical utility company did not pass intermediate scrutiny and was unconstitutionally overbroad). *But see id.* at 583 (Rehnquist, J., dissenting).

111. *Id.* at 567-68.

day."[112] In arguing against application of the First Amendment to the utility company, Justice Rehnquist warned that the Court's ruling "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee . . . ."[113]

Beginning in August 1993, a string of federal courts ignored that warning.[114] Observers echoed Justice Rehnquist and expressed fear that the extension of First Amendment protection to telephone companies would adversely affect all First Amendment speakers.[115] Mark Director and Michael Botein said the rulings might have "possible cataclysmic effects on the entire market."[116] Others said the rulings "frayed [the] fibers of social policy, economic reality, and constitutional constraint . . . ."[117] Asserting that trifurcated First Amendment jurisprudence lay in tatters, scholars urged reliance upon laws of general application, such as antitrust, to gird the ongoing transformation of the media.[118]

V. CAPITALIZING ON AN OPPORTUNITY

Antitrust rulings in telecommunications, however, also were under assault during the 1990s. Arguing that market conditions had changed vastly, the RBOCs continued to attack and wear down constraints imposed on them by the *Modified Final Judgment* that broke up AT&T in 1982.[119] For example, early in 1995 Judge Harold H. Greene[120] of the federal dis-

112. *Id.* at 585 (Rehnquist, J., dissenting).

113. *Id.* at 589 (Rehnquist, J., dissenting).

114. *See generally* Pacific Telesis Group v. United States, 84 F.3d 1153 (9th Cir.), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1037 (1996); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); NYNEX Corp. v. United States, Civ. No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994); Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 116 S. Ct. 1036, *vacated as moot*, No. 93-2340 (4th Cir. Apr. 17, 1996) (lifting the ban and permitting the RBOCs to offer cable and other information services); *see also Bell Atlantic Files Brief, supra* note 31 (quoting the Bell Atlantic brief which states that "every one of the 16 federal judges who has considered the question has concluded that the [video program ban] is invalid under the First Amendment" (alteration in original)).

115. MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW 719 (1992).

116. Mark D. Director & Michael Botein, *Consolidation, Coordination, Competition, and Coherence: In Search of a Forward Looking Communications Policy*, 39 FED. COMM. L.J. 229, 235 (1994).

117. *Id.* at 229.

118. *See, e.g.*, William E. Lee, The First Amendment, Economic Power, and Judicial Review, Presented Before the 23d Annual Telecommunications Policy Research Conference (Sept. 30-Oct. 2, 1995).

119. United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987).

120. Judge Greene was charged with oversight of the rules governing the post-

trict court in Washington, D.C., permitted one RBOC to provide long-distance video programming.[121] Telephone companies had argued that the economies of scale in a national broadband network were critical to the economic viability of telephone video efforts.[122] Some observers expected similar court rulings to allow all local Bell companies to establish nationwide video networks, but it was Congress's passage of the Telecommunications Act of 1996, not court action, that effectively extended Judge Greene's ruling to all telephone companies nationwide.[123]

Prior to the 1996 Act, amid nascent competition between telephone and cable operators, the FCC initiated inquiries to determine how best to regulate video telephony in order to minimize regulatory disparities between telephone and cable and to enhance opportunities for new services.[124] In 1995, the FCC began to expand its video dialtone rules to permit telephone entry into video programming as well as delivery.[125]

During that same period, congressional debate over the Telecommunications Act expressed an intent to broadly deregulate electronic communications firms to ensure the economic benefits of competition. Aside from the requisite number of references to diversity of voices, congressional debate did not reflect a desire to deregulate as a means to enable telephone companies to advance First Amendment interests in public discourse.[126] Policy makers instead argued that telephone competition would counteract the market power of cable monopolies[127] and speed deployment of a national broadband telecommunications network.[128]

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divestiture Bell companies.

121. Mark Landler, *Phone Companies Clear TV Hurdle*, N.Y. TIMES, March 18, 1995, at A1.

122. *Id.*

123. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)).

124. Telephone Co.-Cable TV Cross-Ownership Rules, *Fourth Further Notice of Proposed Rulemaking*, 10 FCC Rcd. 4617, 78 Rad. Reg. 2d (P & F) 1429 (1995).

125. *Id.*; For an example of early scrutiny of the cross-ownership ban, see Telephone Co.-Cable TV Cross-Ownership Rules, *Further Notice of Inquiry and Notice of Proposed Rulemaking*, 3 FCC Rcd. 5849 (1988) (holding that greater participation of telephone companies in providing cable services pursuant to appropriate safeguards created greater competition in cable television service, and therefore, in greater public interest benefits to consumers).

126. *See, e.g.*, Telephone Co.-Cable TV Cross-Ownership Rules, *Fourth Further Notice of Proposed Rulemaking*, 10 FCC Rcd. 4617, 78 Rad. Reg. 2d (P & F) 1429.

127. *Turner I*, 512 U.S. 622 (1994).

128. Clinton Administration Information Infrastructure Task Force, *The National Information Infrastructure: Agenda for Action* (visited Oct. 2, 1997) <http://sunsite.unc.edu/nii/NII-Agenda-for-Action.html>.

VI. ANALYSIS

In the 1990s, the FCC, the courts, and Congress reconceptualized telephony's regulatory status. An array of decisions transformed telephone providers from passive, nondiscriminatory conduits to active speaker conduits but failed to determine how to reconcile telephone common carrier obligations with newly established First Amendment freedoms or to distinguish between expressive and nonexpressive activities.[129] Yet it is self-evident, as Jerome Barron has noted in another context, that "not all [cable] activities are First Amendment fungible. Some [cable] activity has characteristics that should invoke First Amendment protection, but much does not."[130] The failure of policy makers to draw this difficult line may have opened regulation of all telephone activities to First Amendment attack.

Yet technological innovations during the 1990s blurred any historical bright line between media and telephony, or speech and economic activity.[131] Although First Amendment jurisprudence long had distinguished among speakers and applied different regulation to each according to its unique characteristics,[132] such distinctions became increasingly impractical as technological convergence erased any "special characteristic"[133] that distinguished one medium from another. Indeed, economic or technological distinctions between video telephony and cable systems seemed arbitrary, speculative, or capricious.

Yet regulatory barriers to telephone entry into video delivery and programming dissolved not because of a showing either that the market had changed, or that regulations no longer advanced a legitimate government economic objective, but because the courts displayed what Jerome Barron has called "modish deference to even the faintest mention of the First Amendment."[134] Lower courts consistently upheld telco First Amendment rights while ignoring common carrier precedent and govern-

129. Brenner, *supra* note 33.

130. Jerome A. Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 GEO. WASH. L. REV. 1495, 1504 (1989).

131. Section 214 Certificates for Channel Facils. Furnished to Affiliated Community Antenna TV Sys., *Memorandum Opinion and Order*, 22 F.C.C.2d 746, 18 Rad. Reg. 2d (P & F) 1798 (1970) (holding that no telephone common carrier subject to the Communications Act could supply CATV service to the viewing public in its area unless a waiver of the rules had been granted under specified conditions).

132. *See, e.g.*, Campbell, *supra* note 82 (detailing the theory and application of trifurcated First Amendment jurisprudence).

133. Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).

134. Barron, *supra* note 130, at 1504.

ment concerns about market power.[135] The FCC simply followed the courts' lead, and Congress codified the status quo.

VII. DISCUSSION

The Cable Act-telco cases embody a dramatic change in telephone company strategy, but the success of these deregulatory efforts lies in the well-documented power of the First Amendment. In recent years, prominent First Amendment scholars have decried the power of the First Amendment to stultify debate and truncate analysis in a variety of policy arenas.[136] Criticized as narrow, simplistic, and empty, First Amendment jurisprudence has been contrasted to "the kind of careful analysis of costs and benefits that is practiced in virtually every other policy field in government."[137] Indeed, scholars argue that rather than facilitate wide-open deliberations, "the First Amendment in legal and policy analysis has been . . . an analytical stopper, a chiller of discourse."[138]

The Cable Act-telco cases bear this out. The mere mention of the First Amendment foreclosed detailed exploration of the goals and effects of the Cable Act ban, or of the intents and efficacy of common carrier constraints, or of the distinction between speech and economic activities.

In the hands of the telephone companies, the First Amendment became a litigatory weapon to eliminate unwanted regulation and to redefine the battlefield of communications regulation/deregulation. Here, both the occasions for litigation and the terms of engagement reflected existing distributions of power and resources, and helped those already advantaged in other aspects of their business.[139] As "repeat players" in the litigation game, telephone companies also sought the positive externalities that would accrue from developing reputations as powerful adversaries.[140]

The questions thus raised are political. Telephone companies seek telecommunications deregulation not primarily, or even necessarily, to re-

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135. *See, e.g.*, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985); *Minneapolis Star & Tribune*, 460 U.S. 575; Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

136. *See* Schauer, *supra* note 13; Robert M. Entman, *Putting the First Amendment in Its Place: Enhancing American Democracy Through the Press*, 1993 U. CHI. LEGAL F. 61, 72; Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 951 (1993); Shiffrin, *supra* note 13, at 713; Sandra Braman, *Information and Socioeconomic Class in U.S. Constitutional Law*, 39:3 J. COMM. 163 (1989).

137. Entman, *supra* note 136, at 72.

138. *Id.* at 80.

139. *See, e.g.*, Shiffrin, *supra* note 13, at 713; Braman, *supra* note 136; Schauer, *The Political Incidence of the Free Speech Principle*, *supra* note 136, at 950-51, 957.

140. *See* Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 80 (exploring the nonrandomization of cases filed, settled, and litigated).

duce government intrusion into the communications market. Rather, deregulation is desirable because it changes the mix of government influences,[141] and shifts the locus of power toward those with power, resources, and advantage.[142] The courts resolving the questions are both an instrument and an embodiment of the existing social, economic, and political environment.[143]

In that context, the courts logically chose to construe the issue before them narrowly. Direct consideration of the constitutional question—that is, which telephone company activities truly are imbued with First Amendment rights—was not politically expedient and was not necessary to resolution of the cases at hand. Again and again, the federal courts demonstrated a willingness to view the First Amendment as a trump that obviated the need for fundamental doctrinal analysis.

By relying on the First Amendment trump, the courts failed to provide guidance on how to distinguish between economic and expressive activities, or to suggest mechanisms to replace the historical carrier/speaker dichotomy that would permit more logical determinations of the rights and responsibilities of various members of the electronic press. The courts failed to offer a useful definition for common carriers that would help clarify which communications entities qualify and under what conditions, or to determine whether common carrier status is a self-imposed condition or a regulatory mandate. The courts failed to determine what evidence is necessary to justify regulatory distinctions, or to establish the degree of deference that should be given to historical or contemporary administrative judgment when the two conflict. The courts consistently failed to demonstrate how extension of First Amendment protection to video telephony conformed with precedent or furthered the goals of free expression.

Certainly, the Cable Act-telco cases raise difficult issues. The uncertainty inherent in industries and markets undergoing rapid and extensive transformation exacerbates the difficulty of fact finding that should underlie rational, legal decision-making. Available data are largely speculative, predictive, and incomplete. Yet the decisions that spring from these data may aid or handicap the development of unforeseen services.

Thus, courts, regulators, and Congress face a conundrum. Decisions of potentially enormous impact must be made within an historical frame-

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141. *See* Entman, *supra* note 136.

142. *See* Sandra Braman, *Horizons of the State: Information Policy and Power*, 45:4 J. COMM. 4 (1995) (discussing information policy as an exercise of state power); Schauer, *The Political Incidence of the Free Speech Principle*, *supra* note 136, at 951.

143. *See, e.g.*, Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315 (1995); Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729, 737 (1992).

work ill-suited to contemporary conditions and based on partial information supplied by parties with vested interests. Moreover, technological, economic, and regulatory uncertainty increase the likelihood of error and the uncertainty of jurists.

The telephone companies, however, were certain. The telephone companies knew what could have been gained through successful litigation. They understood the failure of prior efforts to eliminate regulations based upon claims of changes in the marketplace or in technology. The telephone companies had the power, the resources, and the ability to choose to pursue their goals in the courts using the First Amendment hammer.

Exercise of power in the legal marketplace is not inherently problematic. When power arises from superior knowledge, efficiency, or quality, its exercise—even in contravention of established public policy—may increase social welfare and benefit the public. However, when power results, even in part, from government grant, the exercise of that power is unfettered from market demand. Accession to such power may undermine public policy and ill serve the public, particularly when politicization of the courts undermines the ability of the judiciary to police and protect the interests of the powerless.

It falls outside the purview of this Article to explore whether the outcome of the Cable Act-telco cases serves, or disserves, public policy objectives. Rather, the goal herein is to identify the new-found constitutional weapon of telephone companies, and to suggest that the First Amendment presents a real, and a substantial, threat to established, economic-based regulation of communications firms. The Cable Act-telco cases demonstrate the power and the efficiency of First Amendment arguments to eliminate constraints imposed by Congress, and offer a timely example of the creative use of the law to elude regulation in a rent-seeking environment.

Congress too is caught in the web of complex issues and of conflicting goals of powerful players. The Telecommunications Act solved none of the problems underlying the Cable Act-telco cases; it simply shifted the battlefield. Policy makers wishing to give the government a stronger defense against constitutional arguments seeking to unravel the Telecommunications Act should seek to justify regulations on both economic and speech grounds.

VIII. CONCLUSION

The Cable Act-telco cases effectively were over once the telephone companies transformed themselves into speakers, and the statute's market constraints into abridgements of free speech.[144] Indeed, the cases demonstrate the "strange power of speech"[145] to efficiently open markets to competitive entry when the FCC and Congress fail to deregulate.[146] The cases suggest, as Stanley Fish has noted, that "[i]n our legal culture as it is presently constituted, if one yells 'free speech' in a crowded courtroom and makes it stick, the case is over."[147] But how did the telephone companies make it stick?

That crucial question remains unanswered. The Cable Act-telco cases suggest that the power of constitutional arguments may be responsive to prevailing public policy and to gaming by industries frustrated by the glacial pace of administrative and legislative reform. *Turner I* and *II* would not dictate otherwise. For while the Supreme Court has said that the power of constitutional challenges depends upon the purpose of the challenged law (as determined by Congress), the Court did not say how to properly determine congressional purpose.[148]

Clearly then the Cable Act-telco cases could have gone the other way—as could have *Turner I* or *II*. Indeed, the Cable Act-telco cases demonstrate the absence of any grand, unifying constitutional jurisprudence. The First Amendment power is both uncertain and situational.

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144. *See* Laurence H. Winer, *The Red Lion of Cable, and Beyond?—Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT. L.J. 1, 5 (1997) (disagreeing with First Amendment challenges to economic regulations as "Lochnerizing" and arguing for presumptive application of strict scrutiny because "[w]e should not assume that we can easily or meaningfully distinguish, for First Amendment purposes, inappropriate content regulation of the media from what appears to be largely economic or structural regulation.").

145. Samuel Taylor Coleridge, *The Rime of the Ancient Mariner*, *in* THE POETICAL WORKS OF COLERIDGE, SHELLEY, AND KEATS 60-66 (Crissy & Markley 1852) (1798).

146. Robinson, *supra* note 1, at 1023 n.27 (providing an example of "the extent to which the First Amendment has become a routine part of the opposition to ordinary economic regulation." (citing Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996))).

147. Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too*, *in* DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES 231, 235 (Paul Berman ed., 1992).

148. *Turner II*, 117 S. Ct. 1174 (1997); *see also* Bhagwat, *supra* note 7 (asserting that content neutrality is determined by the purpose of the challenged law).