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## Challenging the Telco-Cable Cross-Ownership Ban: First Amendment and Antitrust Implications for the Interactive Information Highway

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# Challenging the Telco-Cable Cross-Ownership Ban: First Amendment and Antitrust Implications for the Interactive Information Highway

## **Cover Page Footnote**

J.D. Candidate, 1995, Fordham University School of Law; B.A., 1989, Yale University. The author thanks James C. Goodale, Esq., Mark S. Nadel, Esq., and the editorial board of the Fordham Urban Law Journal for their helpful comments on this Note; and the National Telecommunications and Information Administration (NTIA) and the Electronic Frontier Foundation (EFF) for giving her opportunities to learn firsthand about telecommunications policy.

# CHALLENGING THE TELCO-CABLE CROSS-OWNERSHIP BAN: FIRST AMENDMENT AND ANTITRUST IMPLICATIONS FOR THE INTERACTIVE INFORMATION HIGHWAY

As the network spreads, it is fostering both the universality and the individuality of human discourse. The Net itself, the world's fastest-spreading communications medium, is the telephone network in its most liberating, unruly, and fertile new guise.

Thus Bell's baby is freeing our understanding of the possibilities that lie in ancient words: neighborhood and meeting and information and news. It is global; it is democratic; it is the central agent of change in our sense of community. It is how, and why, we are wired. —James Gleick (author of *Chaos*<sup>1</sup>) in *Wired*<sup>2</sup>

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1. JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1988).

2. *WIRED*, Dec. 1993, at 103.

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### I. Introduction

The future development of the information highway hinges on regulatory and judicial decisions made today. This Note explores options available to decisionmakers by analyzing *Chesapeake & Potomac Telephone Co. v. United States (C & P)*,<sup>3</sup> which set an important precedent regarding a telephone company's First Amendment right to provide video programming over its own facilities in its local service area. This precedent has motivated telephone companies (telcos) across the country to emulate the Chesapeake & Potomac Telephone Company (C & P) by bringing similar suits. As a result, federal courts in California,<sup>4</sup> Maine,<sup>5</sup> Illinois,<sup>6</sup> Michigan<sup>7</sup> and Washington<sup>8</sup> are trying cases modeled on *C & P*.

3. *Chesapeake & Potomac Telephone Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 1994 U.S. App. LEXIS 32985 (4th Cir. Nov. 21, 1994) (*C & P*). The National Cable Television Association also participated as an intervenor.

4. *GTE California, Inc. v. FCC*, 1994 U.S. App. LEXIS 30324 (9th Cir. Oct. 31, 1994) (dismissing as moot a constitutional challenge to § 533(b)). Pacific Telesis Group, Pacific Bell and Nevada Bell intervened in this case.

5. *Nynex Corp. v. FCC*, 153 F.R.D. 1 (D. Me. 1994). As of December 7, 1994, the court had decided only that the New England Cable Television Association, (NECTA), a regional six-state association representing most cable operators in New England, would be permitted to intervene. *Id.* at 3.

6. *Ameritech Corp. v. United States*, 1994 U.S. Dist. LEXIS 15512 (N.D. Ill. Oct. 27, 1994) (holding § 533(b) to be an unconstitutional restraint on freedom of speech).

7. *Ameritech Corp. v. United States*, 1994 U.S. Dist. LEXIS 15512 (N.D. Ill. Oct. 27, 1994) *See supra* note 6. This consolidated case included as plaintiffs the Ameritech Corporation, Illinois Bell Telephone Company and Michigan Bell Telephone Company. Michigan Bell Telephone Company's suit, brought originally in the Eastern District of Michigan, was transferred on June 14, 1994, by United States District Judge Duggan to the Northern District of Illinois. (N.D. Ill. No. 94 C 4089).

C & P, a Bell Atlantic Corporation subsidiary providing local telephone service in Northern Virginia, claimed that the cable-telco cross-ownership ban, codified at § 533(b)<sup>9</sup> of the Cable Communications Policy Act of 1984,<sup>10</sup> infringes unconstitutionally upon its First Amendment right to freedom of expression. The Department of Justice (DOJ), joined by intervenor National Cable Television Association (NCTA), is defending the statute.

Section 533(b) contains two subsections that prohibit telcos, which are considered to be common carriers, from providing video programming within their local service areas. Specifically, § 533(b)(1) prohibits telcos from providing video programming over their own lines or through a subsidiary,<sup>11</sup> and § 533(b)(2) prohibits telcos from carrying the video programming of affiliates.<sup>12</sup> Section 533(b) is also called a "cross-ownership ban" because it prohibits telcos from "crossing" over into ownership of video programming companies in their local service areas.

On November 21, 1994, the Court of Appeals for the Fourth Circuit upheld the Eastern District Court of Virginia's decision that § 533(b) is unconstitutional under the First Amendment because it is not narrowly tailored.<sup>13</sup> As a result of its holding, the district

8. *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wa. 1994). The Washington district court followed the *C & P* district court's arguments, finding application of 533(b) to *US West* to be unconstitutional under the intermediate test of the First Amendment. *Id.* at 1191. (See *infra* parts III.A. and III.B. for discussion of how the intermediate test is selected and applied.) The Washington case, however, omitted many of the detailed arguments featured in the *C & P* decisions.

9. 47 U.S.C. § 533(b) (1984). For a full discussion of § 533(b), the cross-ownership ban, see *infra* notes 38-58 and accompanying text.

10. 47 U.S.C. §§ 521-557 (1984).

11. Section 533(b)(1) states:

It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of [the Communications Act], to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier. 47 U.S.C. § 533(b)(1) (1984).

12. Section 533(b)(2) states:

It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of [the Communications Act], to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier. 47 U.S.C. § 533(b)(2) (1984).

13. *C & P*, 1994 U.S. App. LEXIS 32985, at \*66-67 (citations omitted), and *C & P*, 830 F. Supp. at 931-32 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). See *infra* part III for a full explanation of the First Amendment aspects of the courts' holdings.

court enjoined the federal government from applying § 533(b) to prohibit C & P from transmitting over its own lines its own video programming.<sup>14</sup>

This Note argues that these courts should have found § 533(b) to be narrowly tailored because the statute is a reasonable method for Congress to address a significant problem: anticompetitive behavior in the telecommunications industry. To support this conclusion, this Note explores the antitrust concerns underlying the cross-ownership ban. Before reaching this antitrust analysis, however, Part II summarizes the background of the C & P case by discussing the significance of an interactive information highway, reviewing the regulatory history of the telecommunications industry and reporting the facts specific to C & P. Part III traces the C & P courts' First Amendment conclusion that § 533(b), the cross-ownership ban, is not narrowly tailored. Part IV, the primary focus of this Note, analyzes potential anticompetitive behavior by telcos in the noninteractive and interactive video programming transmission markets, according to the antitrust doctrine of essential facilities. Part V presents three recommendations: (i) emphasize the role of interactivity in making judicial and legislative decisions about the information highway, (ii) in C & P and other similar cases, courts should defer to Congress, especially considering the complexity of the facts pertinent to telecommunications reform, and (iii) to regulate the structure of telecommunications companies, apply the generally-applicable antitrust laws, which are less vulnerable to First Amendment challenges than industry-specific legislation, such as § 533(b).

## II. Background

### A. The Public Interest in an Interactive Information Highway

This Note is admittedly biased in favor of a fully interactive information highway, which will best serve the public interest. Exchange of ideas is necessary to assist people in interpreting their world, and adapting to it. John Stuart Mill wrote that man is "ca-

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14. The district court enjoined enforcement of the statute through a limiting injunction. At the request of the Department of Justice (DOJ), the injunction preventing enforcement of the statute was later limited to Bell Atlantic Corporations' territories. C & P, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 1994 U.S. App. LEXIS 32985 (4th Cir. Nov. 21, 1994), Amended Final Order, No. 92-1751-1 (Oct. 7, 1993). Subsections 533(b)(1) and (2) remain in effect for the other Regional Bell Operating Companies, which are therefore creating cases in their own states to challenge the statute. See *supra* notes 4-8.

pable of rectifying his mistakes by discussion and experience. Not by experience alone. There must be discussion to show how experience is to be interpreted."<sup>15</sup> In addition to the personal satisfaction of gaining wisdom about the world, people benefit from discussions about how the community should be governed. Democratic government in particular relies on ongoing public debate.

Presently, the cause of public discourse is being threatened by passive consumption of superficial broadcast and cable television programming and news.<sup>16</sup> Society should be concerned because, as Justice Louis Brandeis observed in his classic statement in *Whitney v. California*, "the greatest menace to freedom is an inert people; . . . public discussion is a political duty; and . . . this should be a fundamental principle of the American government."<sup>17</sup>

By transforming passive television viewing into interactive on-line debates, the information highway could provide new fora for Americans to engage in the public discussion that is integral to successful democratic government. If access is provided to all citizens, the information highway could provide a bridge for people to overcome physical and societal divisions, such as distance, disability, class and race.

Computer bulletin board systems (BBSs)<sup>18</sup> have been described as "perfect for cities where people are hungering for contact but afraid to meet each other on the street."<sup>19</sup> One BBS system operator described his BBS, called After Five, as "giv[ing] people an opportunity to share ideas and information. There's also been a number of good friendships formed. There's also been two couples that got married who met on our board. It's really kind of neat. In

15. JOHN STUART MILL, *ON LIBERTY* 80 (Gertrude Himmelfarb, ed., Penguin Books 1987).

16. See Lewis M. Branscomb, *Balancing the Commercial and Public-Interest Visions of the NII*, in 20/20 VISION: THE DEVELOPMENT OF A NATIONAL INFORMATION INFRASTRUCTURE 5-6 (Dep't Commerce 1994).

17. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

18. Computer bulletin board systems (BBSs) may be operated by commercial enterprises like America On-Line or by individuals. BBSs consist of computers connected to telephone lines. Using a modem, telephone line and computer, subscribers dial the telephone number for a BBS. Once connected, information is transferred back and forth through the phone lines between the BBS computer and the subscribers' computers. Subscribers can then read the information housed on the BBS computer, download information to their own computers, and exchange messages (often simultaneously) with other subscribers and the BBS system operator.

19. Constance L. Hays, *Touring the Cyberhood*, N.Y. TIMES, Oct. 9, 1994, § 13, at 1 (quoting Paul Saffo, a director of the Institute for the Future in Menlo Park, California).

fact one gal just had a baby.”<sup>20</sup> In general, special niches—or “nodes” in computer parlance—on the information highway, such as BBSs, may constitute a new form of community. They are “virtual neighborhoods of the virtual city, each defined by whom you find . . . .”<sup>21</sup> Or, maybe After Five and other BBSs are more than “virtual” communities—after all, any place that brings people together to form a family and create a new human life seems quite “real” indeed.

Community-building and democratic debate on the information highway depend on interactivity. Interactivity, however, is not being built into all aspects of the information highway,<sup>22</sup> or always discussed during public debates about the information highway.<sup>23</sup> For instance, while cable television provides multiple channels into the home, most systems do not provide subscribers with the opportunity to make their own contributions to this information flow.<sup>24</sup> The ability of ordinary people to place their own content, such as ideas and programming, on the information highway may be curtailed by companies that control the conduits. Companies that own the information highway infrastructure may prefer a captive audience that uses the information highway solely for entertainment and home-shopping purposes.<sup>25</sup> The Electronic Frontier Foundation (EFF), a public interest organization involved in information highway issues, has warned that:

None of the interactive services promised, or the diversity hoped for, will be possible with an eight-lane data superhighway rushing one-way into the home, and only a narrow footpath running out. . . . The failures of regulation and the limits of the technology, itself, have prevented broadcast and cable television from becoming the promised saviors of education or political

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20. Telephone interview with Tom Battler, systems operator of After Five, in Elkhart, Indiana, (July 1, 1992) (conducted by the author).

21. Hays, *supra* note 19, at § 13, at 1.

22. Lewis M. Branscomb, Director of the Program on Science, Technology, and Public Policy of Harvard University's Center for Science and International Affairs, has observed that “[i]t seems likely that the enormous consumer markets for electronic entertainment and for voice communication will dominate the modest resources invested in the many networks that make up the Internet and the bulletin boards and other innovative information services accessible through the Internet.” Branscomb, *supra* note 16, at 5.

23. See *infra* part V.A.

24. See *infra* part IV.A.

25. See Branscomb, *supra* note 16, at 9-10 (identifying “the enormous influence of emerging commercial markets for entertainment and shopping” as a threat that may undermine the development of public interest applications for the information highway).



life. We must act now to ensure that the information highway is more than just 10,000 more channels of what we have today—what Newton Minow might have called “a vaster wasteland.”<sup>26</sup>

A noninteractive, “vaster wasteland” is undesirable because it eviscerates the potential of the information highway. In contrast, an interactive information highway could allow people to discover their unique corner of the virtual world, where they could share enthusiasm about topics as specialized as nuclear physics, Salvador Dalí or the best choice for mayor. In general, interactive BBSs could provide a viable alternative to the numbing—and dumbing—effect of noninteractive television. For instance, interactive information highway services could support “distance learning,” which enables students to study Japanese with a teacher hundreds of miles away, and “telemedicine,” which allows doctors on opposite coasts to confer about the same x-ray.<sup>27</sup> On a philosophical level, interactive services could help human beings form new bonds that will heal spirits alienated and isolated as a result of the modern dispersion of families and communities.

## B. Regulation of the Telecommunications Industry

Access to interactive telecommunications for most Americans is likely to depend on how the telecommunications industry is regulated. Regulation of the telecommunications industry has occurred in a fairly unique manner: it has been conducted in large part by the district court overseeing the modified final judgment decree, commonly known as the MFJ, that broke up the American Telephone and Telegraph Company (AT&T).<sup>28</sup>

The MFJ heralded the end of AT&T's control over most of the nation's telecommunications infrastructure. AT&T and its local subsidiaries agreed in 1982 to the MFJ, which modified the terms of a Department of Justice (DOJ) antitrust action originally brought against AT&T in 1949.<sup>29</sup> The MFJ split the behemoth

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26. Mitchell Kapur, *Building Open Platforms: Public Policy For The Information Age*, in 20/20 VISION: THE DEVELOPMENT OF A NATIONAL INFORMATION INFRASTRUCTURE 126 (Dep't Commerce 1994). See also Mitchell Kapur & Jerry Berman, *The NII: A Superhighway Through the Wasteland?*, EFF NETWORKS & POLICY 1.

27. For applications of information highway technology, see NATIONAL INST. OF STANDARDS & TECHNOLOGY, PUTTING THE INFORMATION INFRASTRUCTURE TO WORK: A REPORT OF THE INFORMATION INFRASTRUCTURE TASK FORCE COMMITTEE ON APPLICATIONS AND TECHNOLOGY 857 (1994).

28. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983), *modified*, 714 F. Supp. 1 (D.D.C. 1988).

29. The MFJ modified an original consent decree entered in 1956, *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246. In 1974, the government alleged

AT&T into Ma Bell and the seven Baby Bells.<sup>30</sup> Ma Bell retained the name "AT&T" and was allowed to operate in competitive markets, including long distance services and telephone equipment manufacturing. The Baby Bells, also known as Regional Bell Operating Companies (RBOCs),<sup>31</sup> retained the local service franchises (most of which were local monopolies granted by state and local governments) and were prohibited from entering competitive markets, including long distance services and manufacturing.<sup>32</sup> Both AT&T and the RBOCs were initially barred<sup>33</sup> from providing information services.<sup>34</sup>

Since AT&T and the DOJ agreed to the MFJ in 1982, District Court Judge Harold Greene has overseen changes to the decree, and gradually reduced restrictions imposed on the RBOCs. Even though his official position is simply federal district judge for the District of Columbia, Judge Green has become the *de facto* administrator of significant segments of the telecommunications industry because of his power over AT&T and the RBOCs under the

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in a second antitrust suit that the regional telcos gave preferential treatment to AT&T's long distance calls, thereby disadvantaging competitors like MCI. The result of this second antitrust suit was the MFJ. *AT&T*, 552 F. Supp. at 131.

30. For additional information concerning the evolution of the MFJ since 1982, see *infra* part V.C.1.

31. The RBOCs include Ameritech Corporation, Bell Atlantic Corporation, Bell-South Corporation, Nynex Corporation, Pacific Telesis Group, Southwestern Bell Corporation and US West. In addition to the RBOCs, there are approximately 2,500 independent telephone companies, including GTE Corp. and United Telecom. SONINA VELASQUEZ, DATAPRO RESEARCH, AN INTRODUCTION TO TELEPHONY 5 (1991).

32. *AT&T*, 552 F. Supp. at 231.

33. *AT&T*, 552 F. Supp. at 227. The court was concerned that if AT&T were allowed to provide information services, called at that time "electronic publishing," its market power would enable it to smother the infant industry. *Id.* at 223-24.

34. "Information service" is defined in the decree as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *AT&T*, 552 F. Supp. at 229. The district court has given as examples of information services: "(1) [T]ravel information, restaurant reviews and reservations, hotel and rental car information, and airline schedules; (2) instantaneous access to ticketing for sports, musical, cultural, and entertainment events; (3) information concerning meetings . . . ; (4) social messaging; (5) access to . . . governmental information; (6) language instruction; (7) reprints of newspaper and magazine articles; and (8) employment services." *United States v. Western Elec. Co., Inc.*, 673 F. Supp. 525, 590 (D.D.C. 1987), *modified*, 900 F.2d 283 (D.C. Cir.)(*per curiam*), *cert. denied sub nom.*, *MCI Communications Corp. v. United States*, 498 U.S. 911 (1990).

MFJ.<sup>35</sup> Judge Greene will retain this power until the MFJ is dismantled or vacated,<sup>36</sup> or telecommunications reform legislation is passed to move oversight of the MFJ to the executive branch.<sup>37</sup>

Although Judge Greene wields considerable power, the federal entity that is officially designated to regulate the telecommunications industry is the Federal Communications Commission (FCC). The FCC, in fact, is responsible for the regulations—§§ 533(b)(1) and (2)—that constitute the cross-ownership ban at the heart of the *C & P* case.

The cross-ownership ban stems from FCC regulations that were intended to protect the nascent cable television industry from the predatory practices of telcos. In the late 1960s and early 1970s, cable television, called Community Access Television (CATV), provided wired connections to communities that could not receive television signals through the air. Telcos were interested in expanding their lines of business into this promising new industry.<sup>38</sup> Telcos therefore had incentives to deny independent cable companies' requests for access to the infrastructure necessary for installing cable.<sup>39</sup> Regulators were particularly concerned because telcos owned many of the poles and conduits that cable companies expected to use in laying their lines.

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35. Leslie Cauley, et al., *Telecom Showdown: Battle Lines Harden as Baby Bells Fight to Kill Restrictions*, WALL ST. J., July 22, 1994, at A1.

36. Four of the RBOCs (Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation and Southwestern Bell) brought a motion to vacate the consent decree, arguing that the purposes of the decree had been achieved. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (No. 82-192), *motion to vacate*, filed July 21, 1994. See Cauley, et al., *supra* note 35, at A1.

37. See, e.g., H.R. 3626, 103d Cong., 2d Sess. (1994), and S. 1822, 103d Cong., 2d Sess. (1994).

38. The Justice Department and others warned the Commission "that the telephone companies ha[d] been seeking to extend their regulated telephone monopoly into the areas of CATV and broadband coaxial cables, primarily to assure themselves of control over the services broadband coaxial cable will perform in the future." Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (final report and order), 21 F.C.C.2d 307, 324 (1970), *reconsidered in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.*, General Tel. Co. of the S.W. v. United States, 449 F.2d 846 (5th Cir. 1971) [hereinafter 1970 Order].

39. See 1970 Order, *supra* note 38, at 324. "The monopoly position of the telephone company in the community [results in] effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems. Hence, the telephone company is in an effective position to preempt the market for this service . . ." *Id.* See also *General Tel. Co. of the S.W.*, 449 F.2d at 851; *Common Carrier Tariff for CATV Systems*, 4 F.C.C.2d 257 (1966) (containing complaints that telcos had been favoring their own CATV subsidiaries, and discriminating against independent CATV providers, in leasing pole and conduit space).

In a 1970 rule-making proceeding, the FCC found that telcos with cable investments had the ability and incentive to discriminate against independent CATV providers,<sup>40</sup> and therefore decided that telcos should not be allowed to provide cable services in their local service areas.<sup>41</sup> In cross-ownership regulations that are still on the books, the FCC banned telco ownership of cable companies.<sup>42</sup>

The FCC instituted these regulations as part of its authority to approve telco proposals for infrastructure modification, pursuant to § 214 of the Communications Act.<sup>43</sup> In 1978, Congress passed the Pole Attachments Act of 1978, which authorized the FCC to regulate the rates, terms and conditions for attaching cable wiring to telephone poles.<sup>44</sup> Subsequently, Congress codified the telephone-cable cross-ownership regulations at § 533(b)(1) & (2)<sup>45</sup> of

40. Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Notice of Proposed Rule Making), 34 FED. REG. 6290 (1969).

41. See 1970 Order, *supra* note 38.

42. The rule prohibits a local telephone company from providing "video programming to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier . . ." 47 C.F.R. § 63.54(a) (1993). The relation is strictly construed so that the telco may have no "financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer." 47 C.F.R. § 63.54(c) (1993). The Commission's rules also prohibit any telco from providing "channels of communications or pole line conduit space, or other rental arrangements" to any affiliate of itself to provide video programming to the public. 47 C.F.R. § 63.54(b)(1993).

43. Section 214 provides in pertinent part:

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . . . 47 U.S.C. § 214(a)(1988).

44. Pub. L. No. 97-130, 95 Stat. 1687 (codified at 47 U.S.C. § 224 (1982 & Supp. V 1987)).

A 1987 Supreme Court decision, *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), determined that the Act applies only if pole access is granted voluntarily by the owner. The government may not mandate access because that would constitute a constitutional taking of property. *Florida Power*, 480 U.S. at 251. The Supreme Court upheld the Pole Attachments Act, against a constitutional challenge as a taking of property because the provision of access was voluntary. The Court said: "[N]othing in the Pole Attachments Act . . . gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators." *Id.* Therefore, pole owners can avoid regulation by denying access to all.

45. Further, when Congress codified the FCC's cross-ownership ban, *supra* notes 10-12, it preserved the exceptions in the FCC regulations. Subsections 533(b)(3) and (4) enable the FCC to waive the cross-ownership ban in special circumstances. Sub-

the Cable Communications Policy Act of 1984 (1984 Cable Act).<sup>46</sup> According to § 533(b)(1), telcos are not allowed to provide video programming directly over their own lines.<sup>47</sup> Under § 533(b)(2), telcos are not allowed to carry the video programming of cable companies with which they are affiliated.<sup>48</sup> Video programming is defined by the 1984 Cable Act as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."<sup>49</sup>

This cross-ownership ban has irked telcos, who have been seeking to dismantle barriers preventing them from providing video programming. Recently, telcos have gained more freedom on account of several regulatory changes. In 1991, the MFJ ban preventing RBOCs from providing information services was lifted.<sup>50</sup> Also, with its Video Dialtone Order in the summer of 1992, the FCC reversed its position on the cross-ownership ban between telephone and cable companies.<sup>51</sup> The FCC advocated repeal of the ban in order to "increas[e] competition in the video marketplace, spur[ ] the investment necessary to deploy an advanced infrastructure, and increas[e] the diversity of services available to the public."<sup>52</sup> The FCC found that the public interest in allowing telcos to

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section 533(b)(3) allows telcos to provide cable services in rural areas that are otherwise "unlikely to be served by independent cable systems." 47 C.F.R. § 63.58 (1981). See Final Rule, *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18637, 18646 (1985). The FCC may also waive the ban if good cause is shown under § 533(b)(4). Good cause may consist of evidence that no alternative provider will provide cable services in the area, or that new technologies will benefit the public. See Telephone Company/Cable Television Cross-Ownership Rules §§ 63.54-58, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C.R. 5849, 5861, nn. 48-49 (1988).

46. 47 U.S.C. §§ 521-557 (1984).

47. See *supra* note 11.

48. See *supra* note 12.

49. 47 U.S.C. § 522(19)(1992).

For purposes of this definition, the FCC has ruled that the technological benchmark is the broadcast television programming provided in 1984, when the 1984 Cable Act was passed. Telephone Company-Cable Television Cross-Ownership Rules 7 F.C.C.R. 5781, 5820 (1992) (Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking) [hereinafter Video Dialtone Order]. The *C & P* district court stated that, because the parties did not challenge this definition of video programming, it would defer to the FCC's interpretation. 830 F. Supp. at 923 n.21 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

50. *United States v. Western Elec. Co.*, 767 F. Supp. 308, 327 (D.D.C. 1991). For more information regarding the evolving modification of the final judgment in the AT&T decree, see *infra* part V.C.1.

51. Video Dialtone Order, *supra* note 49.

52. Video Dialtone Order, *supra* note 49, at 5847.

compete with cable companies outweighed remaining risks that telcos would act anticompetitively.<sup>53</sup> Therefore, in the Video Dialtone Order, the FCC formally recommended that Congress amend the 1984 Cable Act to permit telcos "to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards."<sup>54</sup>

In the absence of a congressional repeal, however, the FCC had to retain the cross-ownership provisions codified in the 1984 Cable Act. To the extent possible while formally obeying the limits imposed by § 533(b), the FCC liberalized restrictions on telco entry into the video industry. Accordingly, while the Video Dialtone Order did not allow telcos to provide "video programming," a category comprised of traditional cable services,<sup>55</sup> telcos are being permitted to transport video programming produced by others. This permission allowed telcos to offer the underlying interactive services required for some programming.<sup>56</sup>

Although the developments in the MFJ and the Video Dialtone Order were promising, telcos were disappointed by the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).<sup>57</sup> In the 1992 Cable Act, Congress failed to remove or to modify the cross-ownership ban, § 533(b), from the 1984 Cable Act. Instead, as the *C & P* district court noted, "[t]he Senate Report accompanying the 1992 Cable Act expressly affirmed

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53. Video Dialtone Order, *supra* note 49, at 5848-49. The FCC has applied the Video Dialtone Order to promote competition. For example, the FCC has approved several video dialtone trial projects conducted by telcos, and a full-scale fiber optic facility to be operated by New Jersey Bell Telephone in Dover Township, New Jersey. FCC 94-180 (July 18, 1994). See Frank W. Lloyd, *Telco Entry Into Video-Telco Market Gets a Boost*, N.Y.L.J., Sept. 23, 1994, at 5.

54. Video Dialtone Order, *supra* note 49, at 5847.

55. Video Dialtone Order, *supra* note 49, at 5789 ("Consistent with the Cable Act, our video dialtone rules will not permit a telephone company to select or have a cognizable financial interest in video programming, which we find to be the hallmarks of acting as a traditional cable operator. In order to assure compliance with these restrictions, telephone companies will not be able to: (1) select video programming by determining how programming is presented for sale to consumers, including making decisions concerning the bundling or 'tiering,' or the price, terms and conditions of video programming offered to consumers, or (2) otherwise have a cognizable financial interest in, or exercise editorial control over, video programming provided directly to subscribers within their telephone service areas.").

56. Video Dialtone Order, *supra* note 49. "Telephone companies would be permitted to provide the underlying interactive capabilities, but not the video programming itself." *Id.* at 5821-22 n.194.

57. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. §§ 521-58 (1992)).

the Committee's belief that the § 533(b) ban 'enhance[d] competition.'<sup>58</sup>

### C. The Birth of the C & P Case

Bell Atlantic, C & P's parent company, challenged the cross-ownership ban in 1992 because it was dissatisfied with reregulation of the cable industry. Further, Bell Atlantic sought to take advantage of the opportunities afforded by the removal of the MFJ ban on information services. Bell Atlantic, an RBOC, therefore created a test case<sup>59</sup> involving C & P,<sup>60</sup> its subsidiary that has exclusive responsibility for local telephone service in parts of Virginia.

On September 24, 1992, Bell Atlantic created Bell Atlantic Video Services Company (BVS), with the goal of providing video programming to consumers of C & P's local voice services. Contemporaneously, C & P claimed that it would enhance the capacity of its Alexandria, Virginia, telephone network to carry several hundred channels of video programming.<sup>61</sup> C & P stated that these facilities would be available on a common carrier basis to video programmers, including BVS, its sister company.<sup>62</sup>

As a common carrier, C & P is subject to regulations set forth in subchapter II of the Communications Act. These regulations include § 533(b), which prohibits C & P from carrying the video programming of the affiliated BVS.<sup>63</sup>

On December 17, 1992, C & P filed a complaint requesting that the court invalidate the cross-ownership ban and permit C & P to carry video programming produced by BVS.<sup>64</sup> C & P asserted that

58. *C & P*, 830 F. Supp. at 915 (citing S. REP. NO. 92, 102d Cong., 1st Sess. 18 (1991)).

59. See Emily Barker, *Corporate Counsel; Inside Moves*, THE AM. LAW., Oct. 1993, at 42.

60. Memorandum of Intervenor-Def. Nat'l Cable Television Assoc., Inc. in Opp'n to Pls.' Mot. for Summ. J. & in Supp. of its Cross-Mot. for Summ. J. at 4 n.2, *C & P*, 830 F. Supp. at 920 n.17. ("C & P . . . is incorporated as a Virginia public service corporation (Va. Code § 56-1) and is a public utility within the definition of § 56-265.1(b). In accordance with § 56-265.3(A), C & P holds a certificate of public convenience and necessity to furnish public utility service. That certificate gives C & P the right to be the *exclusive* provider of local telephone service for the area in which it is certiffied], absent a showing by a potential alternative provider, to the satisfaction of the Virginia State Corporation Commission, that the service being rendered by C & P is inadequate to the requirements of the public necessity and convenience. See §§ 56-265.4, 56-265.4:4.")

61. *C & P*, 830 F. Supp. at 911 (citing Alston Aff. at 1-2) (Alston was C & P's Vice President of Operations & Engineering).

62. *C & P*, 830 F. Supp. at 911 (citing Alston Aff. at 2).

63. *C & P*, 830 F. Supp. at 911.

64. See Plaintiffs' Mem. Supp. Summ. J. at 19-21, *C & P*, 830 F. Supp. 909.

§ 533(b), the cross-ownership ban, is a direct, content-based ban on speech, which should be subjected to strict scrutiny under the First Amendment. Additionally, C & P challenged § 533(b)(2)<sup>65</sup> as an infringement on its First and Fifth Amendment right to use private property for expressive purposes.<sup>66</sup>

Predictably, this important test case attracted interest from numerous parties. The court permitted the National Cable Television Association (NCTA) to intervene as a defendant and to participate in all aspects of the litigation. In addition, thirty-three organizations submitted *amici curiae* briefs to the district court.

### III. The C & P Circuit and District Courts' Holdings Under the First Amendment

#### A. Selecting the Intermediate Level of Review

Before selecting the intermediate standard of review, the circuit court and the district court rejected arguments for applying strict scrutiny and rational basis review.

The Supreme Court has held that strict scrutiny should be applied to regulations that restrict speech on the basis of content. The instruction to apply strict scrutiny to content-based statutes stems from the First Amendment's preference for freedom of speech. To survive strict scrutiny, the government must show that a content-based regulation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."<sup>67</sup> In most cases, government cannot satisfy the stringent requirements of the strict scrutiny test.<sup>68</sup> In fact, in the recent First Amendment case *R.A.V. v. City of St. Paul*, the Supreme Court stated that "[c]ontent-based regulations are presumptively invalid."<sup>69</sup>

As strict scrutiny is very difficult to satisfy, the crucial juncture in First Amendment analysis is not the *evaluation* under strict scrutiny, but the *decision to apply* strict scrutiny in the first place. In this regard, § 533(b), the cross-ownership ban, overcame a major obstacle when the C & P courts opted not to apply strict scrutiny.

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65. See *supra* note 12.

66. See Plaintiffs' Mem. Supp. Summ. J. at 19-21, C & P, 830 F. Supp. 909.

67. C & P, 830 F. Supp. at 917 (quotations omitted).

68. See, e.g., *Burson v. Freeman*, 112 S. Ct. 1846, 1849-50 (1992) (rare case of a law—a Tennessee statute to prevent fraud and intimidation near balloting stations—that survived strict scrutiny).

69. 112 S. Ct. 2538, 2542 (1992) (five Justice majority struck down a statute because it prohibited only limited types of fighting words, and was therefore content-based and overbroad) (citations omitted).



For its strict scrutiny analysis, the circuit court invoked a two-part test from the Supreme Court's most recent communications case, *Turner Broadcasting System, Inc. v. FCC*.<sup>70</sup> This test evaluates (i) whether, on its face, a regulation confers benefits or imposes burdens based on content<sup>71</sup> and, if not, (ii) whether the regulation's "manifest purpose is to regulate speech because of the message it conveys."<sup>72</sup> Applying the first part of this test, the circuit court found that the burden imposed by § 533(b) is not based on the message conveyed within the video programming, and therefore the regulation is not, on its face, content-based.<sup>73</sup> For the second part, the circuit court found no illicit government motive in the history of § 533(b).<sup>74</sup> Further, the circuit court considered whether the structure of § 533(b), *i.e.*, its targeting of a limited group of speakers, raises suspicions that its objective is to suppress certain ideas.<sup>75</sup> The circuit court dismissed this argument because membership in the small group of speakers affected by § 533(b) is based solely on the medium used for speech, *e.g.*, the telephone lines.

The district court also rejected strict scrutiny. The district court observed that "[g]overnment regulation of expressive activity is content-neutral [and not subject to strict scrutiny] so long as it is 'justified without reference to the content of the regulated speech.'"<sup>76</sup> The district court compared § 533(b) to the regulation limiting the location of adult theaters in *Renton v. Playtime Theatres*,<sup>77</sup> finding that both statutes were content-neutral because their primary aim was to control secondary effects. Specifically, § 533(b)

70. *C & P*, 1994 U.S. App. LEXIS 32985, at \*33 (citing *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

71. *C & P*, 1994 U.S. App. LEXIS 32985, at \*33 (citing *Turner Broadcasting*, 114 S. Ct. at 2459 n.19 & 2460).

72. *C & P*, 1994 U.S. App. LEXIS 32985, at \*33-34 (quoting *Turner Broadcasting*, 114 S. Ct. at 2461).

73. *C & P*, 1994 U.S. App. LEXIS 32985, at \*35. *See also C & P*, 1994 U.S. App. LEXIS 32985, at \*39 (quoting *Regan v. Time*, 468 U.S. 641, 656 (1984), for proposition that § 533(b) is not content-based because, in determining whether video programming is being transmitted, "the Government does not need to evaluate the nature of the message being imparted."), and *C & P*, 1994 U.S. App. LEXIS 32985, at \*43 ("Because Section 533(b)'s speaker distinction is thus justifiable entirely on the basis of the peculiar economic and physical venue inherent to cable communications, we conclude that it is not an improper content-based distinction.").

74. *C & P*, 1994 U.S. App. LEXIS 32985, at \*44.

75. *C & P*, 1994 U.S. App. LEXIS 32985, at \*47-48.

76. *C & P*, 830 F. Supp. at 924 (citing *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) emphasis omitted)).

77. 475 U.S. 41 (1986).

is motivated not by the content of the signal transmitted, but rather by secondary concerns about diversity and competition in the video programming marketplace.<sup>78</sup>

In addition, both courts rejected the government's argument that rational basis review applies to § 533(b). The circuit court declined to apply minimal scrutiny for four reasons. First, the court echoed *Turner Broadcasting* in distinguishing the cable industry from the broadcasting industry. In broadcasting, the problem of allocating the limited number of broadcasting frequencies justifies federal intervention and regulations. In contrast, there is no inherent physical scarcity, such as spectrum, that affects the cable industry, and no basis for federal economic regulation. Therefore, cable regulations merit a higher level of First Amendment scrutiny than the review applied to the economic regulations governing the broadcasting industry.<sup>79</sup> Second, the circuit court repudiated appellants' argument, based on *FCC v. National Citizens Commission for Broadcasting (NCCB)*,<sup>80</sup> that minimal scrutiny applies to all regulations prohibiting cross-ownership of different modes of communications in the same market. Relying again on the distinctions between cable transmission and broadcasting, the circuit court stated that *NCCB*'s reasoning applied only in broadcasting cases and therefore was inapplicable in *C & P*.<sup>81</sup>

Third, the circuit court rejected appellants' argument that minimal scrutiny applied to regulations conditioned upon acceptance of monopoly benefits by common carriers, e.g., telcos. The court found this *quid pro quo* argument to be unpersuasive because, whereas the monopoly benefit of local telephone franchises is conferred by state and local governments, § 533(b) is a burden imposed by the federal government.<sup>82</sup> Finally, the circuit court declined to follow the Supreme Court's holding in *Associated Press v. United States*<sup>83</sup> that media organizations cannot be shielded from all regulations, and therefore minimal scrutiny still applies to economic regulations in this industry. The circuit court rejected this

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78. *C & P*, 830 F. Supp. at 924.

79. *C & P*, 1994 U.S. App. LEXIS 32985, at \*27-29 (citing *Turner Broadcasting*, 114 S. Ct. at 2457-58).

80. 436 U.S. 775 (1978).

81. *C & P*, 1994 U.S. App. LEXIS 32985, at \*29-30 (citing *NCCB*, 436 U.S. at 799-800).

82. *C & P*, 1994 U.S. App. LEXIS 32985, at \*31-32.

83. 326 U.S. 1 (1945). See *infra* part V.C.

argument because § 533(b) is not one of the "generally-applicable antitrust laws."<sup>84</sup>

In the district court, Judge Ellis declined to apply minimal scrutiny because § 533(b), the cross-ownership ban, has a disproportionate impact on expressive conduct.<sup>85</sup> Although arguably § 533(b) is merely a structural, economic statute that is not aimed at speech, the statute "is a direct abridgement of the telephone companies' right to [speak]."<sup>86</sup> Therefore, the statute must be subjected to a more stringent constitutional test than mere rational basis review.

## B. Applying the Intermediate Test to *C & P*

Thus, both the circuit court<sup>87</sup> and district court<sup>88</sup> in *C & P* decided to apply an intermediate standard of review.<sup>89</sup> Under the Supreme Court's intermediate test stated in *United States v. O'Brien*,<sup>90</sup> a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>91</sup>

84. *C & P*, 1994 U.S. App. LEXIS 32985, at \*32. See *infra* part V.C.

85. *C & P*, 830 F. Supp. at 921 (citing *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983)).

86. *C & P*, 830 F. Supp. at 921-22 (comparing with *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986)).

87. *C & P*, 1994 U.S. App. LEXIS 32985, at \*54.

88. *C & P*, 830 F. Supp. at 926.

89. The application of intermediate review is supported by the Supreme Court's ruling in *Turner Broadcasting*, 114 S. Ct. 2445. Decided approximately ten months after the *C & P* district court decision, *Turner Broadcasting* considered the constitutionality of a federal statute, the must-carry regulation, requiring cable companies to carry local commercial and noncommercial educational broadcast stations. *Turner Broadcasting*, 114 S. Ct. 2445. *Turner Broadcasting* also applied the intermediate test because, like § 533(b), the must-carry regulations under review were found to be content-neutral restrictions that impose an incidental burden on speech. *Turner Broadcasting*, 114 S. Ct. at 2469 (citing *Ward*, 491 U.S. 781, and *O'Brien*, 391 U.S. 367).

90. 391 U.S. 367 (1968). *O'Brien* considered whether, under the First Amendment, a federal regulation prohibiting the burning of draft cards was constitutional. *O'Brien* alleged that the burning was symbolic speech. *Id.* at 376. In its analysis, the Supreme Court sought to determine, among other things, whether the regulation furthered an important or substantial governmental interest, and was an incidental restriction that was no greater than essential to further the government's interest. *Id.* at 377. The Court held that the anti-burning regulation did further the substantial government interest in the continued availability of issued draft cards, and was narrowly tailored to achieve that goal. *Id.* at 382.

91. *Turner Broadcasting*, 114 S. Ct. at 2469 (quoting *O'Brien*, 391 U.S. at 377).

The Supreme Court refined the *O'Brien* test in *Ward v. Rock Against Racism*.<sup>92</sup> *Ward* commands that the regulation need not be the *most* narrowly tailored one possible, provided ample alternative means of communication remain available.<sup>93</sup> The Supreme Court's *Turner Broadcasting* decision interpreted *Ward* to hold that a regulation will be found constitutional "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."<sup>94</sup> In other words, narrow tailoring requires that "the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"<sup>95</sup> Summarizing edicts from *O'Brien*, *Ward* and perhaps *Turner Broadcasting*, the *C & P* circuit court isolated three separate prongs: (i) the interests that § 533(b) purports to serve must be "significant," (ii) § 533(b) must be "narrowly tailored" to serve those interests, and (iii) where § 533(b) regulates transmission of information, the regulation must "leave open ample alternative channels for communication of [that] information."<sup>96</sup>

Both the circuit court and district court in *C & P* held that, under the intermediate test, § 533(b) did not pass constitutional muster because it is not narrowly tailored.

Following its own three prong test, the circuit court found that, although § 533(b) satisfied the first prong (significant government interest), the regulation failed under the second prong (narrow tailoring) and the third prong (ample alternatives). Specifically, the first prong was satisfied because the circuit court recognized the significant governmental interest in preventing both cross-subsidization<sup>97</sup> and "network-access discrimination," as the court termed discrimination in the era of video programming transmission.<sup>98</sup> The circuit court did not dwell long on this issue, as the Supreme Court had clearly ruled in the recent *Turner Broadcasting* case that "[t]he government's interest in eliminating restraints on fair com-

92. The case held a New York City guideline governing concerts in Central Park to be valid under the First Amendment as a reasonable regulation of the place and manner of protected speech. *Ward*, 491 U.S. at 790-803.

93. *Ward*, 491 U.S. at 789-91. *Ward* also advised that content-neutral restrictions on the time, place or manner of speech do not require strict scrutiny. *Id.*

94. 114 S. Ct. at 2469 (quoting *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))).

95. *Turner Broadcasting*, 114 S. Ct. at 2469 (quoting *Ward*, 491 U.S. at 799).

96. *C & P*, 1994 U.S. App. LEXIS 32985, at \*54.

97. Cross-subsidization occurs when a firm shifts costs from production in a competitive market into production in a monopoly market. See *infra* note 245.

98. *C & P*, 1994 U.S. App. LEXIS 32985, at \*54-56.

petition is always substantial, even where the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment."<sup>99</sup>

Under the second prong, the circuit court held that § 533(b) is not narrowly tailored because it burdens substantially more speech than necessary to achieve the government's goal in preventing telcos from dominating the market.<sup>100</sup> In reaching this holding, the circuit court agreed with the district court that there are obvious, less burdensome alternatives to § 533(b).<sup>101</sup> For instance, regulators could require telcos to lease a portion of their channels on a common carrier basis to companies and individuals seeking to provide video programming.<sup>102</sup>

Finally, § 533(b) did not satisfy the third prong of the circuit court's test either.<sup>103</sup> In analyzing the question of whether ample alternative methods of communications remain available, the circuit court considered whether the remaining avenues of communication are sufficiently similar to the method foreclosed by § 533(b).<sup>104</sup> The circuit court found that § 533(b) does not meet this requirement because it "bars absolutely the telephone companies from entering, with editorial discretion, the cable television market" serving their local audience.<sup>105</sup> Targeting an audience of common carrier subscribers could be construed to be a "particular manner or type of expression at a given time or place."<sup>106</sup> The circuit court found that § 533(b) prohibits telcos from speaking in this manner, and that alternative methods of communications are unavailable.<sup>107</sup> The circuit court considered telcos' ability to offer

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99. *C & P*, 1994 U.S. App. LEXIS 32985, at \*55 (quoting *Turner Broadcasting*, 114 S. Ct. at 2470). Also, regarding diversity in ownership of media sources, the circuit court followed *Turner Broadcasting's* statement "that [a]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *C & P*, 1994 U.S. App. LEXIS 32985, at \*55 (quoting *Turner Broadcasting*, 114 S. Ct. at 2470).

100. *C & P*, 1994 U.S. App. LEXIS 32985, at \*66-67 (citing *Ward*, 491 U.S. at 799, and quoting *Turner Broadcasting*, 114 S. Ct. at 2470).

101. *C & P*, 1994 U.S. App. LEXIS 32985, at \*66 (citing *C & P*, 830 F. Supp. at 930-31).

102. *C & P*, 1994 U.S. App. LEXIS 32985, at \*66 (citing *Video Dialtone Order*, *supra* note 49, at 5781).

103. *C & P*, 1994 U.S. App. LEXIS 32985, at \*71.

104. *C & P*, 1994 U.S. App. LEXIS 32985, at \*68 (citation omitted).

105. *C & P*, 1994 U.S. App. LEXIS 32985, at \*69.

106. *C & P*, 1994 U.S. App. LEXIS 32985, at \*69-70 (citing *Ward*, 491 U.S. at 802; other citations omitted).

107. *C & P*, 1994 U.S. App. LEXIS 32985, at \*69-70 (citing *Ward*, 491 U.S. at 802; other citations omitted).

video programming outside of their service area to be irrelevant to the question whether telcos could choose to serve subscribers to their common carrier services.<sup>108</sup>

Similarly, the *C & P* district court had found that § 533(b) did not pass constitutional muster under intermediate scrutiny. The district court held that § 533(b) is not narrowly tailored<sup>109</sup> because it represents an extreme response to the problem of concentration of economic power in the media marketplace. The district court stated that “[t]here is no more draconian approach to solving the problem of potential anti-competitive practices by telephone companies in the cable television industry than a complete bar on their entry into that industry.”<sup>110</sup> Numerous alternative measures for controlling anticompetitive telco behavior indicated to the district court that there is “an entire range of effective alternatives that would burden substantially less speech than § 533(b).”<sup>111</sup> The court therefore held that the existence of less restrictive alternatives indicated that the cross-ownership ban was overbroad.<sup>112</sup>

### C. Judicial Deference to Congress

In reaching their holdings, both the circuit court and the district court acknowledged that it is improper for courts to put themselves in the place of legislatures. For instance, the circuit court stated that, in determining whether a statute is narrowly tailored, the court “generally afford[s] great weight to the decisions of Congress and the experience of the FCC.”<sup>113</sup> Also, the district court stated that “courts must not substitute their judgment on policy matters for that of Congress.”<sup>114</sup>

This deference is limited, however. As the circuit court observed, deference is extended only where Congress has made factual findings regarding the need for the particular measure

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108. *C & P*, 1994 U.S. App. LEXIS 32985, at \*69.

109. *C & P*, 830 F. Supp. at 928.

110. *C & P*, 830 F. Supp. at 928.

111. *C & P*, 830 F. Supp. at 931-32 n.33 (comparing with *Albertini*, 472 U.S. at 689).

112. *C & P*, 830 F. Supp. at 928. “In short, if there exists a range of regulatory strategies that would effectively eliminate the threat of anti-competitive conduct by the telephone companies in the cable television industry, then § 533(b) would ‘burden substantially more speech than is necessary to further the government’s legitimate interests,’ and would therefore violate the First Amendment.” *Id.*

113. *C & P*, 1994 U.S. App. LEXIS 32985, at \*57 (quoting *Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973)).

114. *C & P*, 830 F. Supp. at 928 (comparing with *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (reversing Court of Appeals for disagreeing with Park Service over existence of less speech-restrictive alternatives)).

enacted.<sup>115</sup> The district court also objected to the notion that courts should assume that Congress always fully considers the constitutional implications of passing regulations that limit free speech. The district court observed that, if courts always infer that Congress has fully contemplated the impact of its legislation, judicial review would not be required and the narrow-tailoring prong of the *O'Brien* test would be reduced to a "nullity."<sup>116</sup>

Thus, despite discussing the deference that should be accorded to Congress, after reviewing the legislative history, neither the circuit court nor district court found an adequate factual basis in the record to support § 533(b). The circuit court stated that "Congress did not buttress Section 533(b) with any underlying factual findings," including adequate legislative history.<sup>117</sup> The circuit court did not consider the FCC's findings to provide adequate support for Congressional actions, particularly because the FCC did not devote enough attention to alternative, less drastic regulatory schemes. Furthermore, the FCC's contemporaneous discussions about the pole access rule, which was codified as § 533(b),<sup>118</sup> did not contemplate the complexities involved in the cable transport and video programming markets.<sup>119</sup> Similarly, the district court observed that "nowhere in the legislative materials is there any indication that Congress reached a conclusion concerning the effectiveness of less restrictive regulatory measures . . . ."<sup>120</sup>

#### IV. Essential Facilities Analysis in the Noninteractive and Interactive Relevant Product Markets

As mentioned in the preceding Part, courts applying the intermediate *O'Brien* test, as refined by *Ward*, should uphold a regulation if it promotes a substantial governmental interest that would be achieved less effectively absent the regulation.<sup>121</sup> The *C & P* courts found that § 533(b), the cross-ownership ban, fails this intermediate test. Section 533(b) was found to be unconstitutional

115. *C & P*, 1994 U.S. App. LEXIS 32985, at \*57-58 (citations omitted).

116. *C & P*, 830 F. Supp. at 929.

117. *C & P*, 1994 U.S. App. LEXIS 32985, at \*63.

118. See *supra* part II.

119. *C & P*, 1994 U.S. App. LEXIS 32985, at \*63-64.

120. *C & P*, 830 F. Supp. at 929. The court reviewed both a 1984 House Committee Report, H.R. REP. NO. 934, 98th Cong., 2d Sess. 56 (1984), reprinted in U.S.C.C.A.N. 4655, 4693, and a 1991 Senate Committee Report, S. REP. NO. 92, 102d Cong., 1st Sess. 18 (1991), reprinted in U.S.C.C.A.N. 1133, 1150. Neither report addressed the question of less restrictive alternatives, according to the court.

121. *Turner Broadcasting*, 114 S. Ct. at 2469 (quoting *Ward*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 689)).

under the First Amendment because allegedly the governmental interest could be promoted through alternative measures that burden substantially less speech.<sup>122</sup>

The antitrust portion of this Note seeks to contradict the courts' holdings that § 533(b) is too "draconian," as the district called it,<sup>123</sup> and that alternative measures would adequately achieve the governmental interest in preventing telcos' anti-competitive practices. In general, this Part discusses the antitrust concerns underlying the cross-ownership ban in order to show that Congress was reasonable in including § 533(b) in the 1984 Cable Act and neglecting to repeal it in the 1992 Cable Act. The *C & P* courts should therefore have deferred to the fact-finding, legislative branch of government.

To support this premise, this Part will show that § 533(b) is necessary to prevent anticompetitive behavior by telcos based on control over the essential facilities for switching and billing. This discussion reviews technologies comprising the information highway, posits the two relevant product markets of noninteractive and interactive video programming transmission, and analyzes telcos' competitive position in these two markets.<sup>124</sup>

### A. The Relevant Product Markets

Before determining whether a firm possesses an essential facility that is necessary for competition in the market, the relevant product market must be defined.<sup>125</sup> Defining the relevant product mar-

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122. *C & P*, 830 F. Supp. at 931 (comparing with *Albertini*, 472 U.S. at 689 n.33).

123. *C & P*, 830 F. Supp. at 928.

124. Please note that throughout this paper predictions are made about technology and the division of power in markets based on that technology. Due to the rapid evolution of video programming transmission technology, these predictions are necessarily based on independent judgment.

125. Unlike the relevant product market, the relevant geographical market is more easily defined. According to antitrust principles, the geographical market is also defined by analyzing substitutability. For the geographical analysis, the market is defined as the area within which consumers might travel, following an increase in price, in order to purchase a substitute product.

The relevant geographical market for telecommunications usually includes the local infrastructure, whether it consists of cable or telephone lines. Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 1994 FCC LEXIS 5322, at \*35 (citation omitted) (Sept. 28, 1994) [hereinafter Video Programming Assessment]. If the product market includes some type of wireless cable, the market might extend as far as the signal can reach over the air. The definition of the geographical product market may also depend on the presence of earth-based, mediating facilities requiring line-of-sight connections. *Id.* at \*76. Regarding the *C & P* case, the relevant geographical market was *C & P*'s territories in Virginia.



ket requires a determination of the cross-elasticity of demand for a given product. Cross-elasticity is measured by considering which products consumers would willingly substitute, following changes in price, for the product in question.<sup>126</sup> Cross-elasticity is high if consumers willingly substitute one product for another on a regular basis, and low if reasonable consumers will interchange products only following significant increases in the price of the preferred product. The relevant product market is limited to products consumers will accept as substitutes following typical fluctuations in price, and does not include products that consumers refuse to accept.

The role of cross-elasticity shows that demand by consumers—rather than the content of the product considered in the abstract—is the most important factor in delineating the relevant product market. For example, although cellophane and aluminum foil are not similar substances, the willingness of consumers to use one or the other, *i.e.*, accept them as substitute products, indicates that they belong in the same product market. Thus, in *United States v. duPont & Company*, the applicable market was defined to include all “flexible packaging materials,” because of the high cross-elasticity of demand between aluminum foil products and duPont’s cellophane.<sup>127</sup>

### 1. Background: The Technology

Delineating the relevant product market for the purposes of this Note is difficult because the technologies capable of delivering video programming are evolving rapidly.<sup>128</sup> This discussion therefore provides only an overview that will likely be outdated soon after the date of publication of this Note. Nevertheless, to provide some context for the legal discussion that follows, below is an explanation of technologies currently being used to convey video programming, including fiber optic wiring, coaxial cable, copper-twisted pair wiring, Narrowband Integrated Services Digital Net-

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126. Video Programming Assessment, *supra* note 125, at \*32 n.87.

127. 351 U.S. 377, 404 (1956) (duPont did not possess monopoly power, even though it produced almost 75% of all cellophane sold in the United States, because the market was defined to include other materials). *See also* *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424-25 (2d Cir. 1945) (*Alcoa*) (market defined to include scrap, as well as virgin, ingot).

128. Video Programming Assessment, *supra* note 125, at \*182. (“The foregoing discussion suggests that it is too soon to draw any conclusions regarding the ongoing dynamics of technological change that permeate the telecommunications industry today.”)

work (N-ISDN), satellite, wireless, smart terminal and hybrid technologies.

To begin, one of the most advanced types of technology is fiber optic wiring. Fiber optic wiring transmits digital signals at the speed of light.<sup>129</sup> The advantages of fiber optic wiring are that distortion is reduced by using digital signals, transmission at the speed of light allows for real-time communications,<sup>130</sup> and the wiring usually has adequate capacity to transmit multiple signals. All companies involved in information highway services, including telcos, cable companies and even electric companies,<sup>131</sup> may eventually upgrade their facilities by installing fiber optic wiring.

A less advanced but common type of wiring is copper coaxial cable. One advantage of copper coaxial wiring that makes it particularly well-suited for cable is that it can transmit multiple signals

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129. The capacity of cables to carry information is measured according to bandwidth, which is the number of waves (or hertz) that pass through a line per second. To compare, coaxial cable systems in 1992 had a potential bandwidth of 1 billion hertz (1 gigahertz), and twisted-pair copper telephone wiring has a capacity of 4,000 hertz. George Gilder, *Cable's Secret Weapon*, FORBES, Apr. 13, 1992, at 80 [hereinafter Gilder *Secret Weapon*]. Fiber optic wiring has a far superior capacity to either coaxial cable or copper twisted-pair, with a bandwidth of close to 2.9 gigahertz. George Gilder, *Metcalfe's Law and Legacy*, FORBES ASAP: A TECH. SUPPLEMENT, Sept. 13, 1993, at § 158 [hereinafter Gilder *Metcalfe's Law*]. In addition, fiber optic wires are thinner and more flexible than copper, twisted-pair wires. DATAPRO RESEARCH, AN INTRODUCTION TO TELEPHONY 4 (Jan. 1991). Thus, whereas copper, twisted-pair systems can deliver 24 voice calls, fiber optics can deliver 37,500 voice calls during the same period. DATAPRO RESEARCH, FIBER OPTIC COMMUNICATIONS: ISSUES AND TRENDS 2 (Apr. 1990).

When fiber is combined with advanced switching technology, such as Broadband Integrated Services Digital Network (B-ISDN), it can carry approximately 50,000 to 60,000 simultaneous telephone conversations, or about 20,000 simultaneous television channels, or 6,500 High Definition TeleVision (HDTV) channels. Bill Hancock, *There's Definitely Fiber in Your Future; Broadband ISDN Gets the Most Out of Fiber-Optic Communications Line Bandwidth*, DIGITAL REVIEW, Aug. 5, 1991, at 28. Digital telephone lines using ISDN can operate at 144 kilobits per second (a bit is a unit of information storage capacity). Gilder, *Metcalfe's Law*, *supra* at § 158.

130. "Real-time" means that there is no delay between transmission and receipt of the communication.

131. See Steven R. Rivkin, *Look Who's Wiring the Home Now*, N.Y. TIMES, Sept. 26, 1993, at § 6 (Magazine), at 46. Rivkin states that while the cable and telephone companies compete for the right to provide video programming, electric companies are installing new wiring equipped with fiber optic lines. The electric companies will have the capacity to provide video programming to the home, and they will recoup their investment by installing interactive services to increase energy efficiency. While this technology is currently in the testing phase, the outlook is encouraging. *Id.*

See also Video Programming Assessment, *supra* note 125, at \*117-20. In addition to capitalizing on savings from increased energy efficiency, electric utilities' installation of wiring for video programming transmission is also economically attractive because they already have many of the necessary rights-of-way. *Id.* at \*119.

simultaneously. A disadvantage of copper coaxial cable, however, is that the need to boost the signal might hinder the provision of interactive communications over long distances. Copper coaxial cable can transmit analog signals, which do not become very distorted when the transmission is limited to distances under three hundred feet.<sup>132</sup> For transmissions of longer distance, coaxial cable requires an amplifier to repeat the signal so that it is strong enough to overcome electric resistance on the line.<sup>133</sup> This amplification process creates noise, or distortion, of the signal.<sup>134</sup>

One of the older forms of technology is copper twisted-pair wiring, which was used in building the original telephone infrastructure. Copper twisted-pair wiring is not well-suited for the one-way delivery of video programming and similar communications because it does not have as much capacity as coaxial cable or fiber optics. As much of the telephone infrastructure consists of copper twisted-pair wiring, however, telcos have been developing methods to provide video-over-copper. Video-over-copper will compress more information into the signal and through the copper twisted-pair wiring.<sup>135</sup> For example, AT&T Paradyne and Compression Labs are combining advanced modulation and video compression technology to create a new device to deliver video services over residential telephone lines.<sup>136</sup> If successfully deployed, video-over-copper will obviate the need to install fiber optic wiring. Nevertheless, telephone central office switches would probably need to be upgraded. In addition, success of video-over-copper is by no means certain.<sup>137</sup>

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132. Gilder, *Secret Weapon*, *supra* note 129.

133. Gilder, *Secret Weapon*, *supra* note 129.

134. Gilder, *Secret Weapon*, *supra* note 129.

135. See Robert X. Cringely, *You're the Viewer. Choose a Program.*, N.Y. TIMES, Aug. 31, 1993, at A17. Cringely describes the RBOCs' discovery of AT&T Bell Laboratory technology that can send a digital video signal, including stereo sound, over existing telephone lines. Cringely states that, although the service is limited to households within three miles of a central telephone office, this category includes at least 80% of people in the United States. *Id.*

136. This device would include Asymmetrical Digital Subscriber Line (ADSL) and Compressed Digital Video technologies. ADSL transports video-over-copper through use of Carrierless, Amplitude/Phase (CAP) modulation, which allows high bandwidth services over the copper, twisted-pair wiring that often connects to the home. The compressed signal will allow the companies to squeeze the signal over the relatively narrow copper line. *AT&T, Compression Labs, Developing Device to Deliver Video Over Phone Lines*, COMMUNICATIONS DAILY, Jan. 20, 1993, at 2.

137. Edmund L. Andrews, *The Homely Phone Proves a Tough Act to Follow*, N.Y. TIMES, Oct. 2, 1994, at C8. "AT&T and MCI both tried to launch a new generation of videophones three years ago, using new data-compression technology to squeeze all

As another measure to upgrade its infrastructure to support video programming transmission, telcos might install a switching technology, called Narrowband Integrated Services Digital Network (N-ISDN). N-ISDN is beneficial because it facilitates the transport of analog signals originating at subscribers' copper lines over digital networks, preventing further distortion of the signal. In addition to N-ISDN, telcos are developing Asynchronous Transfer Mode (ATM) technology to provide interactive, multimedia communications.<sup>138</sup>

Video programming may also be carried by technologies other than the "hardwiring"<sup>139</sup> of fiber optics or coaxial cable. Potential alternative technologies include Home Satellite Dishes (HSDs),<sup>140</sup> Satellite Master Antenna Television (SMATV),<sup>141</sup> Multi-channel Multi-point Distribution Systems (MMDS),<sup>142</sup> Direct Broadcast

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the information over a single ordinary phone line. But the pictures are jerky and distracting, and sales have been minimal." *Id.*

138. Asynchronous Transfer Mode (ATM) is a digital multiplexing and switching technology developed and standardized by the world's telcos to integrate the transmission of voice, video and data communications. Bob Metcalfe, *The Future of LANs; Do LAN Managers See Asynchronous Transfer Mode Technology in Their Networking Future?*, INFO WORLD, May 24, 1993, at 67. Metcalfe, the inventor of the local area network (LAN) technology, the Ethernet, suggests "you think of ATM as packet switching revamped to incorporate voice and video in computer networks." *Id.* He also thinks that it may take twenty years before ATM is fully standardized and deployed.

139. The term "hardwiring" is used within this Note to distinguish between information infrastructure composed entirely of wires, and hybrid systems using wireless or satellite communications as part of or as a substitute for wires.

140. HSDs enable private individuals to receive video signals directly from satellite providers. Video Programming Assessment, *supra* note 125, at \*60-61. *See generally id.* at \*60-67 (discussing potential for HSDs to compete with cable systems in the video programming transmission market).

141. SMATV is similar to HSD, except that the signal is transmitted to multiple, locally situated recipients. For example, landlords may install SMATV to provide video signals to all of their residents. Video Programming Assessment, *supra* note 125, at \*80. *See generally id.* at \*79-86 (discussing potential for SMATV to compete with cable in the video programming transmission market).

142. MMDS uses an omnidirectional microwave signal to deliver video programming to a fixed receiving antenna. Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Serv. Rates, 5 F.C.C.R. 259, 267 n.31 (1990). MMDS is also known as "wireless cable." Video Programming Assessment, *supra* note 125, at \*67. *See generally id.* at \*67-79 (discussing potential for wireless cable to compete with cable in the video programming transmission market).

Satellites (DBS),<sup>143</sup> Local Multipoint Distribution Service (LMDS)<sup>144</sup> and traditional broadcast television.<sup>145</sup>

In addition, a futuristic notion is that communications may be provided by relying on "smart terminals," or computers. This system includes fiber optic wiring to the "curb," connecting to coaxial wiring between the curb and the home, and ending at a smart terminal in the home. A major proponent of this idea, George Gilder, proposes using "smart terminals" at the end of each line to sort the exponentially increasing number of signals that can be sent over fiber optic wiring.<sup>146</sup> He predicts that the smart terminals, which continue to become faster and otherwise more capable, will be able to sort quickly through the many received messages in order to select the messages intended for that location.<sup>147</sup> Similar to broadcasting, all signals will reach all recipients, and each recipient will be able to choose which signals to receive. While enticing, this theory will probably not be practical until the capacities of fiber optic wiring and computers are increased.

Perhaps the most probable future scenario is the installation of hybrid networks.<sup>148</sup> Following the American tradition, consumers may simply demand more choices (e.g., wireless cable for the car and fiber optics at home) instead of substituting one telecommuni-

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143. DBS service refers to satellites that transmit signals intended for reception by the general public. Video Programming Assessment, *supra* note 125, at \*51 (citation omitted). According to the FCC's report in September, 1994, this service is being offered only by Hughes Communications Galaxy, Inc./DirecTV and United States Satellite Broadcasting. A "medium power DBS," using signals in a different bandwidth, is being offered by Primestar. *Id.* EchoStar Communications Corporation is also raising money to enter the market. *Id.* at \*57-58. See generally *id.* at \*52-60 (discussing potential for DBS services to compete with cable in the video programming transmission market).

144. LMDS is a new technology, similar to MMDS, in which multiple channels of video programming are transmitted using high-frequency microwave channels. Video Programming Assessment, *supra* note 125, at \*111. See generally *id.* at \*111-14 (discussing potential for LMDS services to compete with cable in the video programming transmission market).

145. See generally Video Programming Assessment, *supra* note 125, at \*87-92 (discussing potential for broadcasting to remain competitive with cable in the video programming transmission market).

146. George Gilder, *A Work in the Making: Into the Fibersphere*, FORBES, Dec. 7, 1992, at 111 [hereinafter *Into the Fibersphere*]; Gilder, *Metcalf's Law*, *supra* note 129, at 158.

147. *Into the Fibersphere*, *supra* note 146, at 111; Gilder, *Metcalf's Law*, *supra* note 129, at 158.

148. For a discussion of the different types of hybrid possibilities, see Video Programming Assessment, *supra* note 125, at \*101-02.

cations medium for another.<sup>149</sup> In addition, the companies operating the information highway might construct hybrid networks that combine technologies to transport signals from one point to another. For example, a system might use fiber optic trunk lines to deliver programming to the curb. Then, from the curb to the home, companies will rely on fiber optic or coaxial cable wiring. Satellites or wireless cable may be used to transport the signal across long distances, or to save costs.<sup>150</sup>

## 2. *Noninteractive and Interactive Relevant Product Markets*

The types of information highway services that will be demanded by consumers are unpredictable. Although any predictions are therefore suspect, this Note nevertheless postulates two basic relevant product markets: noninteractive and interactive services.

The distinction between these relevant product markets depends on whether the transmission technology supports interactivity, or is capable of transmitting information only one-way. This Note considers "interactivity" to describe a system that provides users at both ends with the same capacity to transmit information, and enables information to flow in both directions. In other words, information consumers should have the opportunity to act as information providers. Furthermore, in order to promote dialogue rather than the exchange of static information, "interactions" between two users should occur as close in time as possible.

According to this definition, interactivity is present in telephone conversations and computer bulletin board system conferences using copper-twisted pair or fiber optic wiring. Interactivity is also present in video conferences conducted over fiber optic wiring.

In contrast, this definition would *not* encompass "video juke boxes," "pay-per-view" or "movies-on-demand," all of which require the consumer to place an "order" via another medium, such as the telephone or through a restricted communications pathway, in order to receive the requested video programming. For example, a columnist for *Forbes* magazine observed that the noise on

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149. See Joseph N. Pelton, *Why Nicholas Negroponte is wrong about the future of telecommunications; The Future of Telecommunications: Special Section*, TELECOMMUNICATIONS, Jan. 1993, at 35.

150. This hybrid scenario is especially likely because of the global nature of the telecommunications infrastructure. One commentator noted: "Today at least sixty percent of all overseas telecommunication traffic and over eighty percent of international television exchange occurs through a global satellite system that now serves over 185 countries. This fact alone should suggest that the world has not yet embraced an 'all fiber' approach . . . ." See Pelton, *supra* note 149, at 35.

cable companies' coaxial cable would "virtually prohibit efficient two-way communications . . . . Because of this limitation, most pay-per-view CATV systems and the various shopping channels depend upon both cable *and* telephone companies: [c]ustomers see the video programming via cable, but they order films or merchandise over the phone."<sup>151</sup> In addition, home-shopping that broadcasts video programming of products for sale and relies on telephones for ordering would not qualify as "interactive" under this definition. The ability to pay bills by "pointing and clicking" on icons also does not qualify as fully "interactive" because it does not allow recipients to upload an equivalent type of content.

Although all of the technologies mentioned in Part IV.A.1. are capable of supporting one-way transmission of video programming, few currently support video programming that is "interactive," according to the definition within this Note. For instance, DirecTV claims to offer an interactive DBS service because a modem in the equipment that receives the DBS signal can send signals over the telephone lines.<sup>152</sup> Although it enables consumers to order pay-per-view movies,<sup>153</sup> DirecTV does not permit communications between subscribers and therefore is not "interactive" as defined within this Note. Similarly, NYNEX is claiming that its delivery of video-on-demand through a hybrid fiber-coaxial cable system is "interactive."<sup>154</sup> NYNEX's system is not "interactive" because, while end users are able to communicate their choices to NYNEX's video information provider systems, they cannot transmit, or upload, their own programming over the system. Also, the Interactive Video and Data Services (IVDS)<sup>155</sup> that wireless cable promises will probably not be fully "interactive" because a limited

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151. Gilder, *Secret Weapon*, *supra* note 129, at 80 (emphasis added).

152. Video Programming Assessment, *supra* note 125, at \*59 (citation omitted). See also *supra* note 143.

153. Dana Blankenhorn, *DirecTV and USSB: Separate But Unequal Services Build Compatibility Into Technology*, ELECTRONIC MEDIA, Oct. 31, 1994, at 19. ("[DirecTV] send[s] a signal through the satellite to [the consumers'] set-top box, initializing it and opening channels or authorizing pay-per-view").

154. Video Programming Assessment, *supra* note 125, at \*105 & nn.330-31 (citation omitted) ("NYNEX employs a 'video juke box' to deliver stored and timeshifted video information provider programming to the limited base of interactive trial end-users, with VCR-like functionalities").

155. The FCC has been auctioning off spectrum for this experimental technology, a process that started in 1991. FCC, *FCC Proposes Establishment of Interactive Video Data Service in the 218-218.5 MHz Band (Gen. Docket 91-2)*, Report No. DC-1788; Docket No. 91-2, 1991 FCC LEXIS 144, Jan. 10, 1991.

signal capacity may restrict communications to activities like sending orders based on a previously arranged account.<sup>156</sup>

Interactive video programming, as "interactivity" is defined here and as opposed to interactive communications like telephone conversations or BBSs, is available currently only for users connected by fiber optic wiring.<sup>157</sup> While this represents a limited universe of users, it is important to consider the impact of the *C & P* case on the legislature's ability to regulate potential providers of such interactive video programming services. As discussed in the next subsection, if telcos are allowed into both the video programming transmission and content markets of today, their ability to act anticompetitively may distort the interactive video programming market of tomorrow.

### **B. Application of the Essential Facilities Doctrine in the Noninteractive and Interactive Relevant Product Markets**

To address the issue of anticompetitive concerns implicated by telcos' providing video programming in their local service areas, the antitrust laws should be considered. The law pertinent in this situation is the Sherman Act.<sup>158</sup> According to the Supreme Court, the goal of the Sherman Act is to "preserv[e] free and unfettered competition as the rule of trade."<sup>159</sup> To achieve this goal, Section 2 of the Sherman Act<sup>160</sup> makes it a crime for any person to "monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States."<sup>161</sup>

Monopoly power is defined as "the power to control prices or exclude competition."<sup>162</sup> This definition is not necessarily intuitive because, in ordinary usage, "monopoly" refers to a firm that has sole control over the supply of a particular good or service. For the

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156. Michael Dresser, *Low-Cost Interactive Upstart*, THE BALTIMORE SUN, Nov. 28, 1994, at 14C.

157. As discussed above, in the future compression technology may allow use of other connections. See *supra* notes 135-138.

158. 15 U.S.C. § 1 (1988).

159. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). See also National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692-95 (1978); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

160. 15 U.S.C. § 2 (1988).

161. 15 U.S.C. § 2 (1988).

162. U.S. v. E.I. DuPont DeNemours & Co., 351 U.S. 377, 391 (1956); United States v. Grinnell, 384 U.S. 563, 571 (1966). See also PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 38 (4th ed. 1988).



purposes of antitrust analysis, however, monopoly power exists when one firm has the ability to manipulate the market and fix prices.<sup>163</sup>

In the past, telecommunications infrastructure has been considered to constitute a "natural monopoly." According to traditional theories, a "natural monopoly" exists when the market can naturally support only one provider.<sup>164</sup> To consider whether telcos possess a natural monopoly in the video programming market, this Note applies one theory of natural monopoly: the essential facilities doctrine.<sup>165</sup>

The essential facilities doctrine considers whether courts should intervene to mandate access to a firm's facilities when a firm possesses "bottleneck control." To explain the analogy, when a firm possesses "bottleneck control," it can prevent entry into a market by barring a potential competitor from passing through the "neck" to gain access to the "bottle," *i.e.*, the market. When a firm possesses such control in a market, courts may intervene. For example, Judge Greene invoked the notion of bottleneck control, *a.k.a.* the essential facilities doctrine, when he ordered the break-up of AT&T.<sup>166</sup>

Professor Phillip Areeda has crystallized the essential facilities doctrine into a three-step test.<sup>167</sup> The test states that a single firm's facility will create a bottleneck (*i.e.*, be essential for access) when:

163. Monopoly power may be present when the firm is one of many in a market. On the other hand, if the possibility of competition from a firm presently outside the market prevents a sole supplier from manipulating prices, a sole supplier will not be found to exert monopoly power. See *FTC v. Procter & Gamble*, 386 U.S. 568 (1967).

See generally William J. Baumol et al., *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* (rev. ed. 1988). This book discusses the theory of "perfect contestability," in which the absence of barriers, such as sunk costs, provides for free entry into (contestable) markets. If a market is perfectly contestable, then a monopolist in that market will not be able to charge high prices without inviting competition from a new entrant with lower prices. *Id.* at 5-7.

164. See, e.g., *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 430 (1945). "A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand." *Id.*

165. Telcos' monopoly power in the video programming transmission market is analyzed according to the essential facilities doctrine because the doctrine provides a rigorous framework.

166. *AT&T*, 552 F. Supp. at 171 ("the overriding fact is that the principal means by which AT&T has maintained monopoly power in telecommunications has been its control of the Operating Companies with their strategic *bottleneck* position.") (emphasis added).

167. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1989) [hereinafter *Essential Facilities*].

For examples of the application of the premises underlying Areeda's essential facilities doctrine, see *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 398 (1912) ("The

- 1) a potential market entrant cannot compete effectively without it;
- 2) duplication or practical alternatives are unavailable (or uneconomic); and
- 3) the potential entrant is essential for competition.<sup>168</sup>

### *I. Noninteractive Video Programming Transmission*

Applying Areeda's test to the relevant product market of noninteractive video programming transmission, telcos do not have essential facilities. In fact, this market is dominated, if not monopolized, by cable companies.<sup>169</sup>

Specifically, the FCC has found that cable television remains the dominant medium for providing consumers with multiple channels of video programming.<sup>170</sup> In addition, the House conference report accompanying the 1992 Cable Act stated: "For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems." The same House report also observed that cable television systems had achieved significant penetration levels, with over sixty percent of households with television subscribing to cable.<sup>171</sup>

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physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated."), and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373 (1973) (approving the Federal Power Commission's application, in ordering interconnection to electric facilities, of the standard of "necessary or appropriate in the public interest."). For a general discussion of the essential facilities doctrine, see Monroe E. Price and Mark S. Nadel, *Antitrust Issues in the New Video Medium*, 3 CARDOZO ARTS & ENT. L.J. 27, 47-49 (1984).

168. *Essential Facilities*, *supra* note 167, at 852.

169. Exceptions to the notion of cable dominance in the first relevant product market are telcos that received rural or other waivers from the FCC to provide cable services in their voice service area. In this case, telcos are actually acting as both telcos and cable companies within their local service areas.

170. Video Programming Assessment, *supra* note 125, at \*182-83.

171. H.R. CONF. REP. NO. 124, 102d Cong., 2nd Sess., at § 2(a)(3) (1992). The full quote from the report stated that:

There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable television industry has become a dominant nationwide video medium. Citation omitted. The inference from this analysis is that the 40 percent of households with television that do not subscribe to cable television are consumers of broadcast television.

More recently, the FCC reported that nearly sixty-two percent of all households that could receive basic cable in 1993 purchased such services.<sup>172</sup> Such penetration levels supported Congress' inference that "cable television industry has become a dominant nationwide video medium."<sup>173</sup>

Finally, in *Turner Broadcasting*, the Supreme Court observed that cable networks own an "essential pathway for cable speech."<sup>174</sup> Ownership of the "physical connection," *i.e.*, the cable wiring into consumers' homes, gives the cable operator "bottleneck . . . control over most of the television programming that is channeled into the subscriber's home."<sup>175</sup> This enables the cable operator to block out competitors easily, "with a mere flick of the switch."<sup>176</sup>

Thus, in the noninteractive relevant product market, the cable companies—not the telcos—dominate.

## 2. Interactive Video Programming Transmission

The relevant product market of interactive video programming transmission is the market in which concerns about telcos' bottleneck control arise. Specifically, telcos' switching and billing expertise may constitute essential facilities in the context of this interactive relevant product market.<sup>177</sup> This finding is explained and substantiated in an analysis that progresses through the three steps of Areeda's essential facilities test.

The first factor in Areeda's test<sup>178</sup> for essential facilities queries whether the facilities in question are necessary. To provide interactive communications, it is quite likely that telcos' switching and billing facilities are necessary. First, through switching telcos have the capacity to provide customized connections. According to well-known advertisements, telcos are masters at allowing people

172. Video Programming Assessment, *supra* note 125, at \*14-15 (citation omitted).

173. H.R. CONF. REP. NO. 124, 102d Cong., 2nd Sess., at § 2(a)(3) (1992).

174. *Turner Broadcasting*, 114 S. Ct. at 2466.

175. *Turner Broadcasting*, 114 S. Ct. at 2466.

176. *Turner Broadcasting*, 114 S. Ct. at 2466 (quoting ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 168 (1983) ("The central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant . . . . If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system.")).

177. This conclusion includes the disputable assumption that the telephone system will either be wired with fiber optics or include new technologies that will allow delivery of interactive video programming.

178. See *supra* text accompanying note 168.

to "reach out and touch someone," which means that they can select, from among millions of telephone service recipients, the specific individuals who wish to interact. While these services are limited mostly to the provision of voice services, telcos are already developing expertise in the field of interactive video as a result of the Video Dialtone Order.<sup>179</sup> Second, telcos may have essential facilities in the interactive market on account of their expertise in providing customized billing for their customized services.<sup>180</sup> Telcos know how to bill millions of people individually, for transactions as small as a few cents.<sup>181</sup>

Acknowledgement of the necessity of telcos' switching and billing facilities is derived from several sources, including FCC Commissioner Andrew Barrett, the Bell Atlantic Corporation, Judge Greene and former Assistant Attorney General for Antitrust William Baxter III. First, FCC Commissioner Barrett has stated that the technology superhighway has two building blocks: switching and programming.<sup>182</sup> In 1993, Barrett observed that one of the reasons that Time Warner Communications was aligning itself with US West was "to draw upon US West's expertise in building and managing two-way switched networks."<sup>183</sup> More generally, Barrett asserted that one of the purposes of recent cable-telco alliances is to provide both partners with "expertise in operating a highly reliable, switched network and a complex billing system . . ."<sup>184</sup> Finally, Barrett reported that "[c]able companies need access to switching and network capabilities," yet "they have little experi-

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179. Video Dialtone Order, *supra* note 49.

180. *But see* Detariffing of Billing and Collection Services, 102 F.C.C.2d 1150 (1986). In this Report and Order, the FCC found that billing was a "financial and administrative service," and not a common carrier service that would subject telcos to regulation under Title II of the Communications Act. *Id.* at ¶¶ 30-32.

The assertion that telcos' billing facilities are essential may also be challenged by considering the competitive potential of electric companies. Similar to telcos, electric companies also bill all residents in a local community individually based on amount of their use of their service. If telcos' competitors were unable to develop their own billing systems, they could potentially deal with electric companies, rather than being forced to deal with telcos.

181. Mitch Betts, *Tune In, Turn On, Get Rich?: IS Executives Are Building And Looking To Exploit The Techno-infrastructure For Future Interactive TV Services*, COMPUTERWORLD, Oct. 25, 1993, at 102. The corporate vice president for advanced information technology at Telecommunications, Inc. (TCI), Sadie Decker, observed that the astronomical number of variables in interactive TV would require a total rethinking of the concept of billing. *Id.*

182. Andrew C. Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COMM. L.J. 39, 45 (Dec. 1993).

183. Barrett, *supra* note 182, at 46 (citation omitted).

184. Barrett, *supra* note 182, at 49.

ence in switched communications networks."<sup>185</sup> Barrett's statements clearly place a high premium on telcos' switching and billing expertise, and indicate that this expertise is a significant factor driving cable companies to engage in joint ventures or mergers with domestic and international telcos.<sup>186</sup>

Perhaps unwittingly, Bell Atlantic, C & P's parent company, also acknowledged the significance of its switching expertise. Concluding its brief submitted to the Fourth Circuit Court of Appeals in the *C & P* case, Bell Atlantic argued that excluding telcos from the video programming market would "deny [a telco] the ability to provide the *unique* types of programming that the telephone company could supply over its own network, *such as movies on demand.*"<sup>187</sup> As Bell Atlantic has no expertise in programming, the only way it could fulfill this promise of delivering "unique" programming is to rely on areas where it does have special expertise, such as switching and billing.

In fact, Bell Atlantic has provided a tangible example of how it will leverage its switching and billing expertise to provide unique programming. Along with two other RBOCs (Nynex Corporation and Pacific Telesis Group), Bell Atlantic is building a new digital video production center.<sup>188</sup> The chief executive of Bell Atlantic Video Services, Stuart Johnson, stated that the company's "charter is to offer a differentiated product that will allow [it] to compete with the cable industry."<sup>189</sup> The RBOCs' new \$200 million plant will depend significantly on switching and billing expertise in order

185. Barrett, *supra* note 182, at 49.

186. See, e.g., Video Programming Assessment, *supra* note 125, at \*97 n.305. "For example, within the past year: Southwestern Bell acquired two operating cable systems in the Washington D.C. metropolitan area from Hauser Communications; US West purchased several cable systems in the Atlanta, Georgia area; and BellSouth entered into an agreement to acquire a 22.5% interest in Prime Cable . . ." *Id.* (citation omitted).

187. Brief for Appellees at 74, *C & P*, 1994 U.S. App. LEXIS 32985 (4th Cir. Nov. 21, 1994) (Nos. 93-2340, 93-2341) (citation omitted)(emphasis added).

The pay-per-view systems currently available are also sometimes called "movies-on-demand," and do not require interactive services. Bell Atlantic was probably not referring to these services. As cable companies currently offer pay-per-view services, this clearly is not a "unique" type of programming.

188. Edmund L. Andrews, *A Launching Pad for a Video Revolution*, N.Y. TIMES, Oct. 27, 1994, at D1 [hereinafter *Launching Pad*]. Supporting the concerns underlying this Note, the purpose of this elaborate video-production center is to provide "more customized entertainment and shopping," not necessarily to provide an avenue for consumers to place their own content on the information highway. *Id.* at D1.

189. *Launching Pad*, *supra* note 188.

to deliver a "differentiated product."<sup>190</sup> This product will be created by combining the expertise of the three RBOCs, including Bell Atlantic's new navigational software to supply video-on-demand, Pacific Telesis' prototype navigational software and Nynex's transmission technology.<sup>191</sup> Thus, the joint venturers will combine their expertise in allowing consumers to navigate between choices to select the individual with whom they wish to communicate. As a result of this powerful combination, the dominant product of this joint venture, movies-on-demand, may be delivered as soon as 1997 or 1998.<sup>192</sup>

Another acknowledgement of the centrality of telcos' facilities in the relevant product market of interactive video programming transmission services was provided by Judge Greene during his 1988 periodic review of the modified final judgment decree (MFJ) that broke up AT&T. In the 1988 review, Judge Greene said that independent audiotext providers had reported that the RBOCs were making their billing and switching services inconvenient.<sup>193</sup> These activities resembled AT&T's behavior toward MCI Telecommunications Corporation before the break-up.<sup>194</sup> In his words, "even after the break-up of that System, [the RBOCs] have been engaging in these practices to the extent that they have been permitted into markets that offered opportunities therefor."<sup>195</sup> Three years later in a 1991 decision, Judge Greene revealed his belief that

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190. For example, the plant will use ATM technology, *supra* part IV.A.1., to switch large amounts of digital video programming. According to Dan McWhorter, Bell Atlantic's Assistant Vice President-Program Management, "ATM-based video transport and switching systems today [will] allow Bell Atlantic to plan for a technical trial in 1995 and full service rollout by 1996" that will provide true interactivity for end users. Alan Stewart, *Bell Atlantic Gambles On Video On Demand*, AMERICA'S NETWORK, Sept. 15, 1994, at 28.

Admittedly, Bell Atlantic will purchase ATM and other technologies from outside vendors, who could also sell to competitors. RBOCs, however, currently retain a considerable advantage: the ability to combine all of the necessary elements in order to provide interactive programming in the near future. This advantage is illustrated by the fact that three RBOCs—not cable companies or other information highway companies—have elected to create a joint venture to combine their specialized expertise.

191. *Nynex, Bell Atlantic and Pacific Telesis Plunge Into Video Programming*, COMMON CARRIER WEEK, Nov. 7, 1994, at No. 44, Vol. 11 [hereinafter COMMON CARRIER WEEK].

192. COMMON CARRIER WEEK, *supra* note 191.

193. *Western Elec. Co.*, 767 F. Supp. at 323 (citing Larson Aff. at 8-10, regarding conduct of US West; Stabley Aff. at 5-6, regarding conduct of Bell Atlantic). For description of AT&T's anticompetitive activities in the original decree, see *AT&T*, 552 F. Supp. at 223.

194. *Western Elec. Co.*, 767 F. Supp. at 323.

195. *Western Elec. Co.*, 767 F. Supp. at 323.

the RBOCs were operating essential facilities, which included their switches. Essential facilities are, explained Judge Greene, a type of entry barrier that provides the controller of the facility with the power to exclude competition.<sup>196</sup> According to Greene, the RBOCs would not hesitate to use their control over essential facilities<sup>197</sup> to exclude competition, if allowed.<sup>198</sup> In his words, the source of the RBOCs' power was their "complete domination over . . . the local wires and switches without which few, if any, competitors can reach the ultimate consumers . . ." <sup>199</sup>

Also, the FCC has noted the importance of the RBOCs' switching and billing facilities in its Open Network Architecture (ONA) Order.<sup>200</sup> This Order, which has been amended to account for more realistic assessments of current technology,<sup>201</sup> required the RBOCs to provide access for competitors to basic network capabilities that would be useful in enhanced service applications.<sup>202</sup> In its original ONA Order, the FCC specifically mandated access to sig-

196. *Western Elec. Co.*, 767 F. Supp. at 314 nn. 29 (citing *Otter Tail*, 410 U.S. at 377; *United States v. Terminal R. Ass'n.*, 224 U.S. 383 (1912); *Hecht v. Pro-Football, Inc.*, 187 U.S. App. D.C. 73, 570 F.2d 982, 992-93 (D.C. Cir. 1977)).

197. *Western Elec. Co.*, 767 F. Supp. at 314.

198. *Western Elec. Co.*, 767 F. Supp. at 315 nn. 29-33.

199. *Western Elec. Co.*, 767 F. Supp. at 314.

200. Amendment of Sect. 64.702 of the Comm'n's Rules and Regulations, 104 F.C.C.2d 958 (1986) (Computer III), *modified on reconsideration*, 2 F.C.C.R. 3035 (1987), *aff'd on further reconsideration*, 3 F.C.C.R. 1135 (1988), *modified on reconsideration*, 3 F.C.C.R. 1150 (1988), *further reconsideration*, 4 F.C.C.R. 5927 (1989), *rev'd and vacated*, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (vacating Third Computer Inquiry and remanding to the FCC), *further reconsideration*, 5 F.C.C.R. 5242 (1990) (FCC proposing to reinstate Third Computer Inquiry non-structural safeguards), *vacated in part and remanded in part*, *California v. FCC*, 1994 U.S. App. LEXIS 29001 (9th Cir. Oct. 18, 1994) [hereinafter Open Network Architecture Order].

201. See *California v. FCC*, 1994 U.S. App. LEXIS 29001, at \*28 (9th Cir. Oct. 18, 1994) (*California III*). In reviewing the history of the FCC's efforts to require unbundling of services through the Open Network Architecture Order, *supra* note 200, the Ninth Circuit stated:

[i]n a companion order to the Order on Remand, the FCC conditionally approved ONA plans filed by the BOCs. In this order, as in the ONA orders reviewed in *California II*, the FCC reaffirmed its view that ONA will be an evolutionary process. In line with this policy shift, the approved ONA plans do not offer full deployment of ONA services and are not based on new technology. In the Order on Remand, the FCC recognized that it no longer requires fundamental unbundling of the BOC networks as a precondition to lifting structural separation. *Id.* at \*28 (citing Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 F.C.C.R. 7571, 76000-01 (1991)). Thus, the FCC now views ONA as evolutionary and does not require unbundling of all services.

202. Open Network Architecture Order, *supra* note 200, at 1040, 1064.

naling, switching, billing and network management facilities.<sup>203</sup> This clearly demonstrated the FCC's concern about telcos' control over switching and billing facilities.

Perhaps the most convincing statement regarding the potential for the RBOCs to act anticompetitively by leveraging power derived from possessing unique switching facilities was made recently by former Assistant Attorney General for Antitrust William Baxter III. Testifying before Congress, Baxter stated that "[i]t is inherently anticompetitive to allow a regulated monopoly that controls local telephone *switching* services also to be a player in an adjacent market, such as long distance, that is dependent upon those *switching* services."<sup>204</sup> "Interactive video programming" may be substituted for "long distance" in this sentence, because both services may be dependent on switching. Thus, even Baxter—who was in office during the break-up of AT&T and is an important member of the school of antitrust theory that usually trusts businesses to organize suitably competitive arrangements<sup>205</sup>—acknowledges the monopolistic characteristics of telcos' switching facilities.

Having offered evidence from various sources regarding the necessity of access to telcos' switching and billing facilities in order to promote competition, it is now appropriate to address the second step of Areeda's essential facilities test: the availability of duplicative facilities or practical alternatives.<sup>206</sup> Currently, duplicate facilities for local switched services, including voice or perhaps video in the future, are not available.<sup>207</sup> Duplicating the facilities required to provide switched local services is expensive, perhaps as costly as \$50 per line, per month.<sup>208</sup> As the current average price of local telephone service is around \$14 per month, would-be competitors might find it prohibitively expensive to build duplicate switched

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203. Open Network Architecture Order, *supra* note 200, at 1040.

204. *The Communications Act of 1994: Hearings on S. 1822 Before the Subcomm. on Antitrust, Business Rights, and Monopolies of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (statement of William Baxter III, former Asst. Atty. Gen. for Antitrust) [hereinafter Baxter Testimony] (emphasis added).

205. See *infra* parts V.C.1.

206. See *supra* text accompanying note 168.

207. *The Communications Act of 1994: Hearing on S. 1822 Before the Committee on Commerce, Science and Transportation*, 103d Cong., 2d Sess. (May 12, 1994) (statement of Bert C. Roberts, Jr., Chairman & Chief Exec. Officer of MCI Communications Corp.) (quoting *The Enduring Local Bottleneck*, a study by Economics and Technology, Inc.) ("The easiest way to prove there is no competition is to observe that there is no place in the country today where a consumer has a choice of local carriers for local telephone service.').

208. John S. Harrison, *The Information Superhighway*, FORTNIGHTLY, at 38.



telephone networks.<sup>209</sup> Duplication may be feasible only for services that promise higher rates of return, such as niche services or basic telephone services in densely populated areas with lower per capita costs.<sup>210</sup>

Of particular relevance to this discussion of the cable-telco cross-ownership ban, present cable systems are not practical alternatives to local telephone systems. Cable companies that lack the equivalent to telcos \$51-billion switching architecture, as well as technical knowledge and experience providing voice communications, might have difficulty duplicating telcos' networks.<sup>211</sup> Cable companies' efforts to duplicate the fiber and switching facilities, as well as the network and management functions, has been called "an enormous financial undertaking which will take many years to complete."<sup>212</sup> Currently, the promised two-way digital cable systems offering telecommunications are not yet fully viable, as they are only in trial stages.<sup>213</sup>

Other commentators believe that installing duplicative switching facilities may entail an unnecessary waste of resources.<sup>214</sup> For in-

209. Harrison, *supra* note 208.

210. Harrison, *supra* note 208.

211. Harrison, *supra* note 208.

212. *The Antitrust and Communications Reform Act of 1993: Hearing on H.R. 3636 Before the Subcomm. on Economics and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (Feb. 2, 1994) (statement of John D. Zeglis, Senior Vice Pres.-Gen. Counsel & Govt. Affairs for AT&T) [hereinafter Zeglis] testimony. Admittedly, as Senior Vice President-General Counsel and Government Affairs for AT&T, which views the RBOCs' attempts to gain permission to provide long distance services as threatening, Zeglis might be motivated to exaggerate the power of the RBOCs.

213. Zeglis, testimony *supra* note 212. Zeglis observed that "Cable networks are essentially one-way broadcast networks designed to distribute a signal from a cable network 'head-end' to all locations on the network. Cable networks will have to be transformed from these one-way analog distribution networks to networks that can supply two-way switched communications." *Id.*

214. In addition to duplicating the switching facilities, duplicating the network for delivering voice services may also be prohibitively expensive. Video Programming Assessment, *supra* note 125, at \*179-82 (discussing conflicting views regarding the economy of deploying fiber to the curb or the home). "Leland Johnson suggests that the cost of rebuilding an existing cable system with fiber to the neighborhood is in the range of \$250 to \$300 per subscriber, whereas upgrading a system with fiber to the curb in order to provide a combination of telephon[e] and video service[s], increases the cost dramatically to approximately \$1,242 per home passed, comparable to the cost of a [telco]-provided integrated network of \$1,150 per subscriber." *Id.* at \*180 n.522 (citing LELAND L. JOHNSON, TOWARD COMPETITION IN CABLE TELEVISION 32 (1994)).

Although the FCC reported that commentators have different opinions regarding the economic feasibility of deploying a fiber network that can support both voice and video programming, in some areas cable companies have already installed fiber net-

stance, in an article about antitrust law and the information highway, commentator John Stevens observed that local telcos may have natural monopolies on account of their switching equipment. In his words, "[l]ocal telephone exchanges probably constitute natural monopolies due to economies of scale in the areas of switching costs and network design and management."<sup>215</sup> Interestingly, Stevens supported this assertion by describing the case of metropolitan access networks, which bypass local telcos in order to provide connections for long-distance telephone service.<sup>216</sup> Stevens observed that metropolitan access networks have been limited to providing non-switched, dedicated transmission lines. The significance of switching facilities is particularly demonstrated by the fact that, instead of installing their own switching facilities, one metropolitan access network petitioned the FCC and the DOJ in order to force the RBOCs to provide access to their switching facilities.<sup>217</sup> In other words, the competitor seeking access considered the facilities to be too expensive to duplicate easily. Thus, the facilities were considered essential for competition, which is the second step of Areeda's test.<sup>218</sup>

Finally, the third element of Areeda's essential facilities test analyzes whether a potential entrant would be essential for competition.<sup>219</sup> To evaluate this element, it is necessary to consider whether telcos face significant competition in most markets. Testifying before Congress in the fall of 1994, Assistant Attorney General for Antitrust Anne Bingaman discussed "the lock that the local monopolies of the Bell System, the Bell Operating Compa-

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works. In this regard, the FCC reports, "[t]he installation of fiber in cable systems has grown from close to zero in 1988, to over 24,000 miles by 1992. . . . The cable television industry's rate of fiber deployment doubled between 1991 and 1992, and in 1993, over 25% of wired cable subscribers were served by systems employing fiber optics." *Id.* at \*180 (citations omitted).

215. John M. Stevens, *Antitrust Law and Open Access to the NREN*, 38 VILL. L. REV. 571, 594 n.101 (1993). Note, however, that Stevens' statement may be challenged in areas where cable companies have already installed fiber optic wiring. See *supra* note 214.

216. Stevens, *supra* note 215, at 594 n.101 (citing Charles Siler, *How to Bypass Your Friendly Phone Company*, FORBES, Aug. 21, 1989, at 89).

217. Stevens, *supra* note 215, at 594 n.101 (citing Royce J. Holland, *Competitive Local Communications: The New Landscape*, TELECOMMUNICATIONS, Feb. 1992, at 23). See also Expanded Interconnection with Local Telephone Company Facilities Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 8 F.C.C.R. 7374 (1993) (ordering telcos to increase opportunities to interconnect with their switched transport services).

218. See *supra* text accompanying note 168.

219. See *supra* text accompanying note 168.

nies (BOCs), still have on local telephone service (carrying more than 99% of local traffic in their service areas).<sup>220</sup> According to this authoritative report, telcos—at least the RBOCs—face little or no competition for local switched services. Therefore, under the third element of the essential facilities test, any entrant would be essential to promote competition in switching in local markets.

Thus, the conclusion derived from considering the three elements of Areeda's essential facilities test as applied in the interactive relevant product market is that telcos (or at least the RBOCs) may indeed possess essential facilities.<sup>221</sup> To summarize, telcos' essential facilities are their switching and billing infrastructure because (i) without switching facilities and billing expertise a potential entrant to the interactive video programming transport market cannot compete effectively, (ii) a practical alternative to switching and billing may be unavailable or duplication may be prohibitively expensive, and (iii) potential entrants in the interactive video programming transport market would be essential for competition.

Of course, in the future telcos' facilities may cease to be characterized as "essential." For instance, telcos' facilities will no longer be essential if wireless cable proves effective for interactive digital communications or the cable companies implement fully operative switched networks. Until such time, however, telcos' facilities can be labeled "essential."

## V. Recommendations

This Note proposes three recommendations regarding the *C & P* case. First, more attention should be paid to the relevant product market of interactive video programming transmission, which promises to support the best applications for the information highway.

Second, *C & P* and cases modeled on it<sup>222</sup> should be reversed because the courts that already decided these cases failed to focus on the interactive product market. More generally, judges should

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220. *The Communications Act of 1994: Hearing on S. 1822 Before the Subcomm. on Antitrust, Business Rights, and Monopolies of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. (Sept. 20, 1994) (statement of Anne K. Bingaman, Asst. Atty. Gen. for the Antitrust Div., U.S. Dept. of Justice) [hereinafter Bingaman Testimony].

221. Note that this conclusion assumes that telcos will install the fiber optic wiring or develop new technologies that will enable them to transport interactive video programming over their switched system.

222. See *supra* notes 4-8.

not legislate from the bench, especially in this complicated area of telecommunications reform.

Third, the reason the courts have found that § 533(b) is not narrowly tailored is that regulators are imposing industry-specific regulations, rather than relying on enforcement of the generally-applicable antitrust laws. This situation has arisen because, in the current era of more lenient antitrust enforcement, antitrust and First Amendment law are no longer pursuing harmonious goals. The risk of failing First Amendment review could be avoided by reinvigorating application of the generally-applicable antitrust laws in the marketplace of ideas.

### A. Emphasize Interactive Video Programming Transmission

The public interest will be advanced by selecting the relevant product market that encapsulates a vision of the best potential uses of the information highway. To achieve this goal, the relevant product market should be based on an ideal consumer of interactive, rather than noninteractive, information highway services.<sup>223</sup> The public interest will be served because interactivity will inspire active interchange of ideas and community-building in cyberspace, rather than passive, introverted consumption of movies and home-shopping. Only the relevant product market that includes interactivity can fully support public interest activities, such as democracy, interest-based communities, telemedicine and distance learning. These are the types of activities that will challenge consumers to explore and realize the full potential of this incredible new marketplace, the information highway.

As noted above, in the relevant product market of interactive video programming transmission services, telcos may have a competitive advantage because of their switching and billing infrastruc-

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223. Interestingly, selecting the relevant product market based on the notion of an ideal consumer does not contradict the principles of *Professional Engineers*, 435 U.S. at 695; which states that "the statutory policy precludes inquiry into the question whether competition is good or bad." See also *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) ("The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful."). In *Professional Engineers*, the Supreme Court stated that antitrust laws should not be applied to further public policy objectives directly. Instead, antitrust laws should concentrate on enforcing competition, which is the surest method for producing outcomes, such as better goods and services, that serve the public interest. *Professional Eng'rs*, 435 U.S. at 694-95. The antitrust analysis in this Note obeys the *proviso* of *Professional Engineers*. Instead of introducing public interest arguments into the *application* of the antitrust laws, the public interest is advanced through the *selection* of relevant product market.

ture and expertise.<sup>224</sup> Telcos may leverage this power to discourage competition from independent companies and individuals seeking to provide content for the information highway.

To explain, if telcos are allowed to provide their own video programming over their own facilities, they will be able to charge for both transmission and content, e.g., video programming. The prospect of profits from video programming might provide telcos with incentives to discriminate against other content providers. In particular, telcos may not be willing to transmit content for competing providers, such as individual computer bulletin board system operators and users. These low budget providers may lure customers away from purchasing products, such as video programming, from telcos' affiliates. One commentator has observed: "There's tons of valuable business information available on the Internet. Charging higher fees to end users to get that information may push out a lot of the 'cyber-surfers' who are just looking for fun, personal stuff. There's a definite business aspect, now that there's a profit angle."<sup>225</sup>

Striking down the cross-ownership ban may indeed promote development and competition in the noninteractive video programming transmission market, which includes entertainment and home-shopping. Unfortunately, this competition may be achieved at a dear price: reduced opportunities for competition from independent content providers seeking to promote interactive uses of the information highway. Particularly as interactive uses may better serve the public interest, ignoring the dangers of telcos' possible anticompetitive practices in this arena would be a short-sighted way to promote the growth of the information highway. Thus, before liberating telcos from cross-ownership restrictions, government officials, judges and other concerned individuals should thoroughly study the competitive position of telcos in the interactive relevant product market.

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224. See *supra* part IV.B.2.

225. *Internet Privatization Opens Fast Lanes for Telcos on the I-Way*, TELCO BUSINESS REPORT, Nov. 21, 1994, at No. 23, Vol. 11 (quoting Bob Barbour). Bob Barbour is a spokesman for Metropolitan Fiber Systems, which is providing a network access point to the Internet. MFS Datanet is one of several companies assuming some of the National Science Foundation's management responsibilities for gateways to the Internet.

1. *Current Status of the Proposed Solution to Emphasize Interactive Video Programming Transmission*

Arguably, the *C & P* courts reached their holdings about the reasonableness of § 533(b) by considering the statute's impact only on the relevant product market for noninteractive video programming transmission.<sup>226</sup> For instance, the circuit court discussed the statute's role in barring telcos from entering the "cable television market" and transmitting "video programming . . . via cable television."<sup>227</sup>

Similarly, the *C & P* district court focused on the noninteractive relevant product market. This premise is supported by the district court's discussion of broadcasting cases, such as *Red Lion Broadcasting Co. v. FCC*.<sup>228</sup> Further, the *C & P* district court indicated that the case concerned "cable transmission systems" consisting of "multiple lines of coaxial cable or fiber optics."<sup>229</sup> The comparisons with broadcasting and cable systems indicate that the district court was concerned with only the market for one-way communications, *i.e.*, the noninteractive relevant product market.

The *C & P* courts are not the only important decisionmakers who have focused on noninteractive, as opposed to interactive, video programming transmission. Significantly, in reregulating the cable industry in the 1992 Cable Act, Congress predicated its actions on noninteractive video programming transmission. This is illustrated by the fact that the goal of the legislation was to promote competition from technologies, such as wireless cable, that transmit video programming one-way, but do not aim to support interactivity at the present time.<sup>230</sup> The focus on noninteractive products is further illustrated by one of the main goals of the 1992 Cable Act: hindering video programming suppliers' favoritism of certain cable companies, in order to ensure access to the diversity

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226. See *supra* part IV.B.1.

227. *C & P*, 1994 U.S. App. LEXIS 32985, at \*69.

228. 395 U.S. 367 (1969) (regulation requiring broadcasters to provide time for replies to personal attacks, under the Fairness Doctrine, upheld as constitutional because of the scarcity of broadcast channels).

229. *C & P*, 830 F. Supp. at 919 n.14 (quoting Joint Stipulations of Fact, ¶ 40).

230. Assistant Secretary of Commerce Larry Irving, who is currently the Clinton Administration's top telecommunications policy person, previously was a senior attorney on the subcommittee that produced the 1992 Cable Act. He has explained that "[w]hat we tried to do with that bill was create consumer protection and then move to a competitive model where you have more than one cable company or cable competing in satellites or cable competing in some microwave services." *Technopolitics* (PBS television broadcast, Sept. 17, 1993).

For a general discussion of the technology involved, see *supra* part IV.A.1.

of programming required for effective competition for wireless cable providers.<sup>231</sup>

In contrast, the relevant product market of interactive transmission, albeit not necessarily video programming transmission, was the predicate for Judge Greene's decisions. For instance, in a 1991 decision, Judge Greene had to decide whether telcos should be allowed into the information services market. In that case, Judge Greene clearly indicated that he would not include wireless services in the relevant product market for information services. Specifically, he stated that "[t]he evidence also demonstrates that non-telephone-based services are not substitutes for the information transmitted over the telephone network."<sup>232</sup> The reason services like wireless cable cannot be substituted for telephone connections is that "only the [hardwired] telecommunications network can offer two-way interaction with up-to-the-minute information databases accessible by a large customer base, including occasional users."<sup>233</sup>

## **B. The Courts' Holdings in *C & P***

As discussed above, it is important to appreciate the distinction between facilities used to transmit interactive, as opposed to noninteractive, video programming. Therefore, decisionmakers in this complicated area of telecommunications reform should be in command of the facts. Historically, the branch of government entrusted with studying facts has been Congress. Understanding the relationship between research and legislation, the judiciary is usually deferential to Congress.

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231. Video programming suppliers may be easily influenced in their dealings with cable companies that either occupy a very large market share, like Telecommunications, Inc., or have an ownership interest in the supplier. Responding to this situation and hoping to encourage competition from wireless cable, Congress enacted § 19 of the 1992 Cable Act. This section requires video programming suppliers to make their wares available to distributors using MMDS and DBS. See 138 CONG. REC. 8317 (daily ed. Sept. 14, 1992) (adding a new section to Part III of Title VI of the Communications Act of 1934).

Speaking on the House floor in support of the conference report, Rep. Mike Synar (D-Okla.) stated that "in a rural district . . . many . . . constituents rely on satellite dishes for their television programming. Right now some cable programmers refuse to even sell programming to home satellite dish distributors and those that do[,] charge the distributors an average of 500-percent more than they charge cable operators . . ." 138 CONG. REC. 8672 (daily ed. Sept. 17, 1992). See also 138 CONG. REC. 8675-76 (daily ed. Sept. 17, 1992) (statement by Rep. Slattery).

232. *Western Elec. Co.*, 767 F. Supp. at 315 (citing *Sinback Aff.* 5-12).

233. *Western Elec. Co.*, 767 F. Supp. at 315 (citing Huber Report, submitted by DOJ during triennial review proceedings, at 6.23).

This tradition of deference of Congress was not evident in the *C & P* decisions, however. Admittedly, the courts mentioned the importance of deferring to Congress; they did not, however, act on their own advice. The circuit and district courts erred by overstepping the boundaries of their authority. Even if consensus is building to repeal the cross-ownership ban, it is the legislature's prerogative to take this step, not the judiciary's.

In *Turner Broadcasting*, the Supreme Court instructed that courts have an obligation to exercise independent judgment when First Amendment rights are implicated, in order to ensure that Congress has drawn "reasonable inferences based on substantial evidence."<sup>234</sup> Yet, the Supreme Court cautioned that this obligation is "not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [the court's] own."<sup>235</sup> In striking down § 533(b), the cross-ownership ban, because it was not narrowly tailored, the *C & P* courts effectively reweighed the evidence of the potential for telcos' anticompetitive behavior. In fact, the district court acknowledged that it was "undertak[ing] its own review of the record to determine whether Congress 'reasonably could have' found that a prophylactic ban was necessary to effectively accomplish Congress' purposes."<sup>236</sup>

The courts in *C & P* acted appropriately in reviewing the reasonableness of Congress' adoption of § 533(b) as the least restrictive alternative. The courts also may have found correctly that there is "an entire range of effective alternatives that would burden substantially less speech than § 533(b)."<sup>237</sup> The courts, however, acted inappropriately in deviating from the *proviso* set forth by the Supreme Court in *Ward* that a regulation should be found constitutional " 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' "<sup>238</sup> The instruction from *Ward* is addressed specifically to situations where effective alternatives exist, and should prevent a court from interfering in the legislative process as long as there is a reasonable justification for the disputed regulation.

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234. *Turner Broadcasting*, 114 S. Ct. at 2471 (citing *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)). See also *supra* part III.C.

235. *Turner Broadcasting*, 114 S. Ct. at 2471.

236. *C & P*, 830 F. Supp. at 929 (citing *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 539 (1987)).

237. *C & P*, 1994 U.S. App. LEXIS 32985, at \*66, and *C & P*, 830 F. Supp. at 931 n.33 (comparing with *Albertini*, 472 U.S. at 689).

238. *Turner Broadcasting*, 114 S. Ct. at 2469 (quoting *Ward*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 689)). See *supra* part III.B.



Admittedly, many legislators and commentators believe that the cross-ownership ban is no longer a beneficial regulation.<sup>239</sup> In fact, in 1994, telecommunications reform legislation that would have repealed the cross-ownership ban easily passed in both the House of Representatives<sup>240</sup> and the Senate Committee on Commerce, Science and Transportation.<sup>241</sup> The Clinton Administration also favored repeal, as illustrated by statements made by the head of the National Telecommunications and Information Administration, Larry Irving. For instance, speaking at a hearing before the House Subcommittee on Telecommunications and Finance, Irving stated that “[w]e believe that telephone companies should be allowed to provide video services in their local exchange areas, subject to effective safeguards to protect consumers and competition.”<sup>242</sup>

Even if it is desirable to repeal the cross-ownership ban, however, this does not mean that Congress acted unreasonably when it included § 533(b) in the 1984 Cable Act and did not repeal the statute in the 1992 Cable Act. For instance, as discussed in detail above, telcos’ switching and billing infrastructures might be characterized as essential facilities that should be regulated in order to promote competition.<sup>243</sup> Further, telcos may successfully engage in the anticompetitive practice of tying purchases of their video programming to the provision of voice or video transmission services.<sup>244</sup> Also, persuasive authorities maintain that the FCC may not

239. See, e.g., statement by REPRESENTATIVE DINGELL, HOUSE COMM. ON ENERGY AND COMMERCE, REPORT ON NATIONAL COMMUNICATIONS COMPETITION AND INFORMATION INFRASTRUCTURE ACT OF 1994, H.R. REP. NO. 3636, 103d Cong., 2d Sess. 43-49 (1994).

240. H.R. 3636, 103d Cong., 2d Sess. (1994).

241. S. 1822, 103d Cong., 2d Sess. (1994).

242. *Hearing on H.R. 3636 Legislation Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. (1994) (statement of Larry Irving, Asst. Secretary for Communications and Information, U.S. Dep’t of Commerce).

243. See *supra* part IV.B.2.

244. Tying is present when vendors leverage power in one market to force consumers to purchase products in an adjacent market. The Supreme Court has loosely defined leverage “as a supplier’s power to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of the second product.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 n.20 (1984) (citing PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 1134a, at 202 (1980) [hereinafter AREEDA & TURNER]).

The concern is that, once telcos are permitted to supply video programming, they might use their control over the supply of local voice services to force consumers to purchase their video programming or other products, such as data services. See Bingaman Testimony, *supra* note 220. Bingaman discussed “the lock that the local monopolies of the Bell System, the Bell Operating Companies (BOCs), still have on local

be capable of adequately monitoring and preventing cross-subsidization.<sup>245</sup> Consequently, the *C & P* courts should have found Congress' actions regarding the cross-ownership ban to be reasonable, and should have upheld the statute under the First Amendment. Instead, the courts assumed responsibility for evaluating the alternatives to § 533(b). For example, the district court seemed to favor a recent FCC recommendation to limit telcos' direct provision of video programming to a specified percentage of channel capacity.<sup>246</sup> Rather than recognizing that the district court was attempting to legislate from the bench, the circuit court agreed with District Judge Ellis' legislative proposal.<sup>247</sup>

Such evaluation of regulatory alternatives is a classic example of a responsibility that has traditionally been allocated to the legislative branch of government. Even the Supreme Court, addressing a communications regulation (the must-carry rule) in *Turner Broadcasting*, gave the government an opportunity to provide more detailed facts.<sup>248</sup> The Supreme Court remanded the case, requiring proof that the government's remedy (the regulation) did not burden substantially more speech than necessary to further the government's legitimate interests.<sup>249</sup> The Supreme Court stated that

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telephone service . . . ." *Id.* This "lock" could provide the RBOCs with leverage sufficient to engage in tying.

245. Cross-subsidization occurs when a firm shifts costs from production in a competitive market into production in a monopoly market. In his affidavit submitted to the *C & P* district court, Alfred Kahn, an economist and professor emeritus at Cornell University, stated that "the danger of cross-subsidization typically arises in situations in which significant portions of the costs of competitive and monopoly services are common to both." Kahn Aff. at ¶ 6, *C & P*, 830 F. Supp. 909 (E.D. Va. 1993). There is a risk of cross-subsidization if telcos are allowed to provide video programming because both voice services and video programming transmission could be supported by the same facilities.

The issue of the FCC's capacity to monitor and prevent cross-subsidization by telcos is a continuing subject of debate. For instance, former Assistant Attorney General for Antitrust Baxter recently testified that, despite the good intentions and efforts of the FCC, "[r]egulation is inherently incapable of ferreting out the subtle means of . . . cross-subsidization that a monopolist can employ." Baxter Testimony, *supra* note 204.

Significantly, however, the FCC has attempted to address these concerns through two new safeguards: price caps and strengthened accounting rules. Price Cap Performance Review for Local Exchange Carriers, 9 F.C.C.R. 1687 (1994) (Notice of Proposed Rulemaking). The Ninth Circuit recently found that the FCC's new safeguards will reduce the RBOCs' incentives and abilities to cross-subsidize. *California III*, 1994 U.S. App. LEXIS 29001, at \*20-21.

246. *C & P*, 830 F. Supp. at 930-31.

247. *C & P*, 1994 U.S. App. LEXIS 32985, at \*66.

248. *Turner Broadcasting*, 114 S. Ct. at 2471-72.

249. *Turner Broadcasting*, 114 S. Ct. at 2472 (quoting *Ward*, 491 U.S. at 799). As part of its explanation, the Court noted that "[w]hen the Government defends a regu-

the lower court needed this evidence in order to judge whether the regulation does in fact serve the government's interests,<sup>250</sup> and whether "constitutionally acceptable less restrictive means" exist.<sup>251</sup> To assist the court in making these determinations, the government must show that the regulation restricting speech addresses harms that are "real, not merely conjectural . . . ."<sup>252</sup>

The *C & P* district court did acknowledge that the executive branch (represented by the FCC) must make recommendations to Congress regarding regulatory alternatives,<sup>253</sup> and cannot repeal the cross-ownership ban on its own.<sup>254</sup> Despite this lip service to the importance of separation of powers, however, the *C & P* courts did not hesitate to legislate from the bench, thereby replacing Congress' factual predictions with their own opinions.

### C. Strengthen Antitrust Law Enforcement in the Telecommunications Industry

Once the *C & P* courts decided to apply intermediate, as opposed to minimal basis, review to § 533(b), it became much more likely that the statute would be found unconstitutional.<sup>255</sup> The cross-ownership ban, § 533(b), merited a higher level of review because, unlike the generally-applicable antitrust law in *Associated Press v. United States*,<sup>256</sup> it is an industry-specific regulation.<sup>257</sup> Industry-specific regulations are more likely to be considered to be content-based and therefore evaluated—and struck down—under a higher standard of First Amendment review.

Similarly, *Turner Broadcasting* characterized the must-carry rules as industry-specific antitrust legislation.<sup>258</sup> The Supreme

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lation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' " *Id.* at 2470 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

250. *Turner Broadcasting*, 114 S. Ct. at 2472 (quoting *Ward*, 491 U.S. at 799).

251. *Turner Broadcasting*, 114 S. Ct. at 2472 (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989)).

252. *Turner Broadcasting*, 114 S. Ct. at 2470 (citing *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 496 (1986) (quotations omitted); other citation omitted).

253. *C & P*, 830 F. Supp. at 930-31.

254. *See supra* part III.C.

255. *See supra* part III.A.

256. 326 U.S. 1 (1945) (First Amendment not implicated when generally-applicable antitrust laws were applied to news distribution organization, simply because commodity of the organization was speech, because the laws did not aim to or in fact restrict speech).

257. *Turner Broadcasting*, 114 S. Ct. at 2445 (citations omitted).

258. *Turner Broadcasting*, 114 S. Ct. at 2455 (citations omitted).

Court could have made a convincing argument that the must-carry rules are content-based because, by guaranteeing cable channels to selected cable programmers or "speakers," the rules are based on speech.<sup>259</sup> Instead, the Court was convinced that, because the regulation originated with Congress' interest in ensuring access to the physical means of communication, the must-carry rules were not content-based regulations that would demand strict scrutiny.<sup>260</sup>

The risk of intermediate or high tier review could be avoided by relying instead on the traditional antitrust laws. In general, the judiciary should not insulate media-related companies, including telcos, from antitrust regulations. The antitrust laws permit the application of prophylactic measures to companies engaged in speech.<sup>261</sup> In fact, the *C & P* district court observed that "[t]he federal agencies charged with enforcement of the antitrust laws stand ready to guard against anti-competitive behavior in the video programming market, just as in any other industry."<sup>262</sup> The legislature should not be prevented from adopting precautionary measures that it finds, following fact-finding and debate, to be necessary.

In recent cases, however, regulations affecting the telecommunications industry, such as § 533(b) in *C & P* and the must-carry rules in *Turner Broadcasting*, have been subjected to First Amendment challenges. These challenges are at least partially the result of confusion caused by the conflicting goals of antitrust and First Amendment law. Specifically, the goals of First Amendment and antitrust law, which were aligned when *Associated Press* was decided in

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259. See *Turner Broadcasting*, 114 S. Ct. at 2458 ("Because the must-carry provisions impose special obligations upon cable operators and special burdens upon cable programmers, some measure of heightened First Amendment scrutiny is demanded.").

260. *Turner Broadcasting*, 114 S. Ct. at 2467-68. See also *id.* at 2466.

261. *Associated Press*, 326 U.S. at 20. The case stated that:

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. *Id.*

262. *C & P*, 830 F. Supp. at 931.

1945, have diverged with the advent of the Chicago School of anti-trust theory.

When *Associated Press* was decided, both First Amendment and antitrust law sought to encourage the development of a communications industry consisting of multiple and diverse companies. This harmony of purpose resulted in cases that provided only rational basis scrutiny for "legislative efforts to correct market failure in a market whose commodity is speech."<sup>263</sup> A rational basis for review was supported: (i) by antitrust laws, on account of the economic motivation for the regulation at issue, and (ii) by First Amendment jurisprudence, because courts did not see the need to analyze antitrust laws affecting the market for speech under the rubric of the First Amendment.

Currently, the competitive activities of media enterprises are more often governed by industry-specific regulations, which are more vulnerable to First Amendment challenges, than by traditional antitrust laws. This preference may derive from the changes in antitrust law enforcement since the *AP* decision. Specifically, the trend in antitrust law is to tolerate large conglomerates because of their claimed efficiencies.<sup>264</sup> Tolerance for larger, vertically integrated enterprises, however, may limit the number of market participants.

Significantly, when the commodity at issue is speech, conflict arises because tolerance of a few large firms may result in limiting the number of speakers. While antitrust law may tolerate fewer speakers, First Amendment law favors an accessible "marketplace of ideas" that is hospitable to small, fringe speakers.<sup>265</sup> Thus, although the two bodies of laws once operated symbiotically to produce diversity in the marketplace of ideas, now they may conflict with each other.

To limit uncertainties caused by First Amendment challenges to regulations affecting the communications industry, government should apply the traditional antitrust laws instead of drafting new

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263. *Turner Broadcasting*, 114 S. Ct. at 2470 (quoting Brief for Federal Appellees at ¶ 17, *Turner Broadcasting*, 114 S. Ct. 2445, and citing *Associated Press*, 326 U.S. 1, and *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)).

264. See, e.g., Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977).

265. *Turner Broadcasting*, 114 S. Ct. at 2470 (citations omitted) ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.").

industry-specific regulations, such as § 533(b) or the must-carry rules considered in *Turner Broadcasting*.

Government should regulate media companies under the Sherman or Clayton Acts,<sup>266</sup> which are broadly applicable laws that cannot be characterized as content-based. Therefore, if the government challenges the structure of a media organization by applying one of the antitrust laws, it will not be subject to allegations of regulating speech based on content. The government will thus avoid the necessity of defending its regulations under strict scrutiny or the intermediate test, as it was required to do recently in *C & P* and *Turner Broadcasting*.

1. *Current Status of the Proposed Solution to Strengthen Antitrust Law Enforcement in the Telecommunications Industry*

In order for communications law to rely on antitrust rather than First Amendment law to foster diversity in the media marketplace, antitrust law enforcement must "go back to the future." Applying the antitrust laws the way it did prior to the advent of the Chicago School, the federal government could foster diversity by preventing one or a few organizations from grasping too much power in the marketplace. This type of antitrust enforcement would realign the antitrust laws with the First Amendment, thereby favoring a multiplicity of participants in the market for speech.

The traditional antitrust perspective is the structural economic approach. According to this view, which was followed from the time of President Franklin Delano Roosevelt until 1980,<sup>267</sup> the structure of an industry determines the level of its performance. If

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266. Mark S. Nadel, an Attorney/Advisor in the Common Carrier Bureau of the FCC, has observed that "[f]or most economic markets, common carrier rules or the 'essential facilities doctrine' help eliminate market distortions. In the context of communications, common carrier rules help eliminate distortions in the marketplace of ideas." Mark S. Nadel, *A Technology Transparent Theory of the First Amendment and Access to Communications Media*, 43 FED. COMM. L.J. 157, 181 (1991) (citation omitted).

See also Mark S. Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 FORDHAM URB. L.J. 163 (1982). "[N]ot only does the first amendment forbid the imposition of unreasonable regulations on access to fora controlled directly by the government or by users selected by the government, but [ ] the amendment permits, and probably even supports, the imposition of economic regulations to facilitate access to all media, including privately owned newspapers." *Id.* at 191 (citations omitted) (emphasis omitted).

267. Seymour D. Lewis, *The Reagan Revolution in Antitrust*, N.Y.L.J., Sept. 21, 1989, at 1, 9. Lewis was a former special assistant to the Attorney General in the Antitrust Division.

only a few firms participate in a given market, the structural school would consider it likely that the dearth of vigorous competition would produce higher prices and profits.<sup>268</sup> Antitrust officials might have to intervene to prompt restructuring of markets dominated by certain firms in order to improve competition, increase efficiency and promote competitive pricing.

Two classic cases—*Brown Shoe Co. v. United States*<sup>269</sup> and *United States v. Philadelphia National Bank*<sup>270</sup>—illustrate the impact of the structural school on actual cases. In *Brown Shoe*, the Supreme Court prohibited, as a violation of the Clayton Act,<sup>271</sup> a merger of two firms accounting for only five percent of the total industry output. Thus, the Court would not allow the merger to proceed because the structure of the industry might be harmed by allowing a five percent concentration of market power. The next year, in *Philadelphia National Bank*,<sup>272</sup> the Supreme Court embraced the structural school view once again. The Court invalidated a merger between the second and third largest banks that would have resulted in a single bank with control of thirty percent of the commercial banking in the Philadelphia metropolitan area.<sup>273</sup> Demonstrating a presumption in favor of preventing the concentration of market power, the Court stated that mergers must be enjoined unless there is evidence that the merger would not have anticompetitive effects.<sup>274</sup> Thus, the Court held that any merger producing a firm with an undue market share and causing a significant increase in the concentration of firms in that market would be *prima facie* unlawful.<sup>275</sup>

In contrast to the structural school's emphasis on the effect that mergers or other activities may have on the structure of, or concentration of power within, the marketplace, the Chicago School is more concerned with how monopoly power is acquired. Rather

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268. Lewis, *supra* note 267, at 1, 9.

269. 370 U.S. 294 (1962).

270. 374 U.S. 321 (1963).

271. 38 Stat. 730 (1914), *codified as amended*, 15 U.S.C. §§ 12-27 (1987).

272. 374 U.S. 321 (1963).

273. *Philadelphia Nat'l Bank*, 374 U.S. at 364-65.

274. *Philadelphia Nat'l Bank*, 374 U.S. at 363 (citing *United States v. Koppers Co.*, 202 F. Supp. 437 (W.D. Pa. 1962)). "Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.*

275. Lewis, *supra* note 267, at 1, col. 2.

than seeking to break-up firms with significant market power, the Chicago School instructs that monopolists who legitimately acquire and do not abuse their power should be "tolerated but not cherished."<sup>276</sup> Professor Areeda has explained that "the concept of monopolization requires . . . monopoly power coupled not with building the better mousetrap, but monopoly power coupled with some impropriety in its achievement or maintenance."<sup>277</sup> Under this theory, antitrust law should focus its regulation on monopoly power that is willfully acquired or maintained by improper means, such as excluding rivals.<sup>278</sup>

According to the Chicago School, monopoly power stemming from superior business acumen or historical accident should not be punished. The Chicago School champions leniency in applying antitrust laws in order to allow businesses to shape their own agreements and business structures. Unless clear economic information demonstrates otherwise, the Chicago School would assume that "corporate endeavors are procompetitive by necessity."<sup>279</sup> The Chicago School instructs that in enforcing the antitrust laws, the courts should be cautious about engaging in extensive theoretical economic investigations rather than presumptively acting on assumptions about the validity of industrial organization.<sup>280</sup> Judge Frank H. Easterbrook, former faculty member of the University of Chicago Law School, advised adopting a skeptical approach to antitrust enforcement, including questioning whether government has

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276. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

When the market will support only one firm, this is a classic case of natural monopoly. According to Areeda, if the market will support only one supplier of a given product, then that monopoly supplier should not be punished for entering first or becoming the monopolist in the market. *Essential Facilities*, supra note 167, at 846. Although natural monopolists should not be punished, their ability to act anticompetitively may be increased if they are not disciplined by market forces. It may therefore be necessary for the government to regulate a natural monopoly.

277. *Essential Facilities*, supra note 167, at 846.

278. *Berkey Photo*, 603 F.2d at 274 (quoting Justice Douglas in *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). Justice Douglas' specific words in *Grinnell*, 384 U.S. at 570-71, discussed the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident."

279. Barbara Ann White, *Countervailing Power—Different Rules for Different Markets? Conduct and Context in Antitrust Law and Economics*, 41 DUKE L.J. 1045, 1064 (1992).

280. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933-34 (1979). See also ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).



the ability to judge the optimal organization of industries and markets.<sup>281</sup>

The effect of the debate between the structural and Chicago schools on the deregulation of the RBOCs' telecommunications infrastructure is illustrated by the differing views of District Judge Greene and the Court of Appeals that reviews his decisions. In the years since the break-up of AT&T, Judge Greene has been gradually deregulating the RBOCs. Continuing this deregulation in 1988, Judge Greene permitted the RBOCs to enter the videotext services market.<sup>282</sup>

In the same year, however, Judge Greene did not permit the RBOCs to enter the information content services market.<sup>283</sup> Judge Greene distinguished between videotext transmission and information content services by observing that the RBOCs' infrastructure was necessary, or at least most efficient, for distributing videotext services on an integrated national basis.<sup>284</sup> The inference was that the infrastructure supporting videotext services constituted a monopoly that should be regulated to ensure access.<sup>285</sup> Thus, structural school reasoning guided Judge Greene to deny the large RBOC firms entrance into the information content market. Specifically, when Judge Greene refused to lift the information content ban, he explained that the RBOCs are some of the largest corporations in the country.<sup>286</sup> Quoting a classic case of the pre-Chicago

281. Frank H. Easterbrook, *Ignorance and Antitrust, in ANTITRUST, INNOVATION, AND COMPETITIVENESS* 119 (Thomas M. Jorde & David J. Teece eds., 1992). "The hallmark of the Chicago approach to antitrust is skepticism. Doubt that we know the optimal organization of industries and markets. Doubt that government could use that knowledge, if it existed, to improve things, given the ubiquitous private adjustments that so often defeat public plans, so that by the time knowledge had been put to use the world has moved on." *Id.*

282. In 1988, he permitted the RBOCs to engage in the transmission of information services, which includes "data transmission, address translation, protocol conversion, billing management, and introductory information content." The RBOCs were also permitted to engage in voice messaging and electronic mail services, provided they did not discriminate against other providers. *United States v. Western Elec. Co.*, 714 F. Supp. 1, 23 (D.D.C. 1988).

283. *Western Elec. Co.*, 714 F. Supp. at 1.

284. *Western Elec. Co.*, 714 F. Supp. at 6.

285. In contrast to videotext services, Judge Greene found in 1988 that other services—including telecommunications manufacturing, long distance services and information content—"can and do function exceedingly well without Regional Company participation." *Western Elec. Co.*, 714 F. Supp. at 6 n.15. According to Judge Greene, the RBOCs were not needed in the information content business and, in fact, "could flourish therein only if they used their telecommunication monopolies to disadvantage competitors in these markets." *Western Elec. Co.*, 714 F. Supp. at 4.

286. *Western Elec. Co.*, 714 F. Supp. at 4 n.9.

school, structural era, Judge Greene stated that individuals should not be left "helpless[ ]" before "great aggregations of capital."<sup>287</sup>

In reversing and remanding Judge Greene's 1988 decision,<sup>288</sup> the Court of Appeals cited a treatise written by Chicago school adherents Areeda and Turner.<sup>289</sup> The Court of Appeals stated that retaining the information content ban would not serve the public interest, as conceptualized by the antitrust laws, if doing so would "be certain to lessen competition."<sup>290</sup> Emulating the Chicago School, the Court of Appeals identified the goal of the antitrust laws to be competitive efficiency, rather than public interest concerns, such as the protection of ratepayers.<sup>291</sup> The Court of Appeals further found Judge Greene's solicitude for small, innovative firms to be misplaced, because protecting such firms might actually harm competition.<sup>292</sup>

The Court of Appeals therefore remanded the case, with instructions that Judge Greene remove the restriction and permit the RBOCs to enter the information content market—unless he concluded that the RBOCs' entry into the market would be "certain to lessen competition."<sup>293</sup> As a result of the appellate court's com-

287. *AT&T*, 552 F. Supp. at 163-64 (quoting *Alcoa*, 148 F.2d at 428 (footnote omitted), and citing *Standard Oil Co. v. United States*, 221 U.S. 1, 50, 55 (1911), and *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323-24 (1897), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983)).

288. *Western Elec. Co.*, 900 F.2d 283.

289. See *Western Elec. Co.*, 900 F.2d at 308 (citing *AREEDA & TURNER*, *supra* note 244, at ¶ 330, at 141-42).

290. *Western Elec. Co.*, 900 F.2d at 308 (citing *AREEDA & TURNER*, *supra* note 244, at ¶ 330, at 141-42).

291. *Western Elec. Co.*, 900 F.2d at 296. The Court of Appeals believed that protecting ratepayers was the job of the FCC and state regulators, not the district court. *Id.*

Subsequently, the Court of Appeals stated that the lower court's findings were unreliable because they may have been "infected by the court's legal error concerning the proper standard of review." *Id.* at 308 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982)). Part of Judge Greene's legal error included applying the rigorous public interest analysis that would be appropriate for reviewing the original consent to judgment decree, rather than the more lenient standard appropriate for reviewing modifications made under the existent decree. *Id.* at 299-300. This statement responded to complaints that Judge Greene had "considered the impact of removing the restrictions on various public policies, including the welfare of local ratepayers, innovation in the manufacturing market, the goal of universal telephone service, first amendment values, and the United States' position in international trade." *Western Elec. Co.*, 900 F.2d at 299-300. The Court of Appeals believed that a more rigorous standard was particularly appropriate for an uncontested modification, as was the case with the repeal of the information content ban. *Id.* at 306-07.

292. *Western Elec. Co.*, 900 F.2d at 296 (comparing with *Cargill, Inc. v. Monfort*, 479 U.S. 104, 115 (1986)).

293. *Western Elec. Co.*, 900 F.2d at 308-09.

mand, Judge Greene approved the RBOCs' entrance into the information content field.<sup>294</sup>

## VI. Conclusion

Regulations in force now will influence future development of the information highway. Regulators must, therefore, acknowledge the concepts—such as interactive and noninteractive video programming transmission, or structural and Chicago school anti-trust theory—guiding their actions. Also, in this extremely complex and market-sensitive industry, the judiciary should be especially deferential to the branch of government charged with assessing facts: Congress.

Much is at stake. A member of the “access-to-the-media” movement in the 1960s wrote at that time:

There is an anomaly in our constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression. Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the “marketplace of ideas” is freely accessible. . . . Difficulties in securing access, unknown both to the draftsmen of the first amendment and to the early proponents of its “marketplace” interpretation, have been wrought by the changing technology of mass media. . . . Only the new media of communication can lay sentiments before the public, and it is they rather than the government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance.<sup>295</sup>

In the 1990s, we face the same problem in a new guise. Now, the “new media of communication” is the information highway, which has incredible potential for engaging more people in the “marketplace of ideas.” Individuals will realize this opportunity to place their own content onto the information highway, rather than merely receiving the commercialized content of others—but only if visionary legislatures and judges properly balance First Amend-

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294. *Western Elec. Co.*, 767 F. Supp. at 309-10.

295. Jerome Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967).

ment and antitrust concerns to ensure that this wonderful new medium is interactive and accessible to the public.<sup>296</sup>

*Laura Land Sigal\**

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296. The question of access, often phrased as the issue of "universal service," is important, but beyond the scope of this Note. Interested readers, however, might start investigating the issue by reading the Notice of Inquiry on Universal Service and Open Access Issues, which was issued by the NTIA on September 19, 1994. 59 FED. REG. 48,112 (1994). The FCC is also studying the issue of universal service.

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