TELEPHONE COMPANIES HAVE FIRST AMENDMENT RIGHTS TOO: THE CONSTITUTIONAL CASE FOR ENTRY INTO CABLE*

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I. INTRODUCTION

It has become a cliche to speak of this as the "Information Age," but a cliche that nonetheless is accurate.[1] The impact of virtually instantaneous, largely uncensored global communication cannot be doubted by anyone watching the historic transformation of the political world as one revolution leads to the next. Another revolution, that of astounding advances in computer science and technology, promises equally profound effects on human society.[2] Combining communications and computer technologies has limitless potential. We may be on the threshold of a futuristic "super-pipe" link among homes, businesses and other institutions through which will flow, in all directions, an integrated panorama of voice, data, print, video, and computing services.[3]

One normally would expect the United States telephone industry, which always has been at the forefront of telecommunications science, to have a major role in developing and providing such services. Currently, however, there is at least one significant, artificial barrier to telephone companies' full participation. Through somewhat different but overlapping restrictions, the various telephone companies ("telcos") are effectively excluded from the cable television industry. Without the lucrative opportunity of being cable operators, the telcos may not have sufficient incentive to help develop the technological infrastructure neces-

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[1] *See* Golshani & Regulinski, *Prologue* to ON THE SYNERGISM OF COMPUTERS AND COMMUNICATION (Communications of the ACM, Jan. 1990) (describing the current era as "set off by processes involved in the acquisition, storage, retrieval, transmission, reception, and security of information"). *See generally* Wright, *On the Road to the Global Village*, SCIENTIFIC AMERICAN, Mar. 1990, at 83 [hereinafter Wright].

[2] *See generally* Peled, *The Next Computer Revolution*, SCIENTIFIC AMERICAN, Oct. 1987, at 57 (introduction to symposium issue on the next phase of computer science and technology).

[3] *See infra* notes 248-53 and accompanying text (discussing information age technologies).

sary for true information age services. Their participation may be crucial.

The argument against participation proceeds from the apprehension that local telephone companies that enjoy regulated monopoly status in their common carrier functions will use this market power in anticompetitive ways, through cross-subsidization or discriminatory practices, to unfairly compete against cable companies. Indeed, the ban originated as a way of promoting the development of an independent cable industry free from the threat of being swallowed by the all-powerful telephone companies. Similarly, the telcos' presumed power as cable operators may dominate or even drown out other voices in the electronic video marketplace. Further, allowing the telcos to participate only in the transmission aspects of cable but not the content related activities may be sufficient for development of advanced technology.

These arguments, however, seem not only wrong but backwards. Cable today is hardly the poor orphan it once was perceived as. Cable arguably has developed into a powerful, unregulated monopoly that could use the market discipline of competition from telcos rather than re-regulation by Congress. Artificially excluding cable's major, natural competitors then makes no sense. Moreover, telco entry into the cable industry may greatly enrich, rather than restrict, the diversity of the "marketplace of ideas," particularly if it leads to vastly expanded capacity with new products and services. This would serve an important public interest while also respecting the telcos' rights and interests.

While this Article generally favors the latter approach, its real thrust is elsewhere. We need to place the debate over telco entry into cable in the proper context, that of the first amendment. The telephone companies are willing speakers, with no mass media position, wishing to enter an important electronic mass media market. They have a first amendment right to do so that cannot be curtailed in the absence of a demonstrated and compelling need effectuated only by narrowly tailored means. Government denial of that right is a prior restraint of the most repressive kind that cannot be justified by speculative fear of untoward results. Such entry, of course, may be subject to regulations, such as those proposed by the Federal Communications Commission ("FCC" or "the Commission") that do not infringe first amendment freedoms and are designed to monitor and control anti-competitive activities.

This Article addresses what in some respects is the most disappointing aspect of the debate, the relegation of constitutional principles to secondary or tertiary status. It may seem strange to stress the first amendment rights of the "big, bad telephone companies," especially since freedom of expression is too often associated only with that of individuals or the established media. But the first amendment fundamentally concerns our common interest in assuring freedom of expression to all, not just officially preferred, speakers. Thus, the challenge is to begin from the premise that telephone companies have a right to develop, own, and operate cable systems. Government should allow their participation in the media without infringing their first amendment freedoms or stifling technological progress, while taking appropriate steps to avoid possible excesses.

Part II of this Article surveys the FCC rules, statutory provisions, and court decrees that constitute the ban on telephone companies entering the cable business and the justifications offered for it. Part II also discusses the current regulatory climate. Part III begins the constitutional analysis by demonstrating that the telcos' first amendment rights are not qualified by their corporate nature, their common carrier status, or other existing media cross-ownership restrictions. Part IV first considers the proper relationship between antitrust and first amendment principles and then establishes that the ban should be treated as a prior restraint. As such it cannot be justified by hypothetical fears about anti-competitive behavior or dislocation of the marketplace of ideas. Finally, Part V considers briefly the possible technological benefits from telco entry into cable which may be jeopardized by continuation of the ban.

II. Current Restrictions

To understand the constitutional infirmities of a ban on telephone companies entering a mass media market such as cable television, one first must consider the various restrictions currently in force, their genesis, and the justifications generally offered for them. There are three somewhat overlapping sets of prohibitions: FCC rules, codifications in the Cable Communications Policy Act of 1984,[4] and provisions of the *Modified Final Judgment* ("MFJ") as interpreted and applied by Judge Greene.

[4] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521-559 (Supp. V 1987)).

A. *FCC Rules*

The Commission's telephone company — cable television cross-ownership restrictions[5] date back to 1970.[6] At that time, the cable industry was a mere shadow of its present stature. Indeed, it was then still referred to as "Community Antenna Television" ("CATV"), reflecting its primary function of receiving broadcast signals and redistributing them to subscribers by coaxial cables in areas that otherwise were inaccessible or had only poor reception.[7]

The Commission feared that telephone company control of telephone poles and conduit space, needed to accommodate coaxial cables, could be used to favor cable companies owned by or affiliated with the phone companies to the competitive disadvantage of independent cable operators.[8] This could lead to a "concentration of control of broadband cable facilities and . . . thwart the introduction of new and different services."[9] This concern

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[5] The current FCC rules appear at 47 C.F.R. §§ 63.54-63.58 (1989).

[6] *See* Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 F.C.C.2d 307, *modified*, 22 F.C.C.2d 746 (1970), *aff'd sub. nom.* General Tel. Co. of S.W. v. United States, 449 F.2d 846 (5th Cir. 1971).

[7] *See General Tel. Co. of S.W.*, 449 F.2d at 850-51. At the time of the Commission's fundamental cable rulemaking in 1972, Cable Television Report and Order, 36 F.C.C.2d 143, *reconsid.*, 36 F.C.C.2d 326 (1972), *aff'd sub. nom.* ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975), there were only 2,841 local cable systems serving about six million subscribers and penetrating only 9.5% of all television households. J. GOODALE, ALL ABOUT CABLE § 1.14 (rev. ed. 1988). Cable did not begin developing into the sort of mass media we know today until Home Box Office pioneered satellite distribution of its programming in 1976. C. FERRIS, F. LLOYD & T. CASEY, CABLE TELEVISION LAW ¶ 5.05[7] (1989) [hereinafter CABLE TELEVISION LAW]. For a description of the dramatic growth in the cable industry, see Nat'l Telecommunications and Information Admin., United States Dep't of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, at 8-17 (June 1988) [hereinafter NTIA Report]. *See also infra* notes 209-13, 223-24 and accompanying text.

[8] *See* Northwestern Indiana Tel. Co. v. FCC, 872 F.2d 465, 469 n.2 (D.C. Cir. 1989) ("[t]he need to eliminate favored treatment of telephone company affiliates is, of course, the cross-ownership rules' *raison d'etre.*"), *cert. denied*, 110 S. Ct. 757 (1990).

[9] Telephone Company — Cable Television Cross-Ownership Rules, Notice of Inquiry, 2 F.C.C. Rcd. 5092, 5092, ¶ 3 (1987). *See* Telephone Company — Cable Television Cross-Ownership Rules, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C. Rcd. 5849 (1988). Such anticipated services included "the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds." *Final Report and Order*, 21 F.C.C.2d at 324-25, ¶ 47. By and large such services on cable systems have not materialized despite the Commission's rules. *Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5097 n.33; *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5857, ¶ 35.

Indeed, the FCC's concern was something of a *non sequitur*. It never really explained how telephone entry into cable, even at a commanding market level, would inhibit the development of broadband technology and services that independent cable companies alone otherwise might produce. *See Final Report and Order*, 21 F.C.C.2d., at 324-25. One could argue contrarily that a telephone company with substantial market power, and advanced research and development capabilities, would seek to extend its monopoly profits into any related product markets it could develop. Nonetheless, an avowed pur-

about monopolization resulted in the Commission's basic prohibition on any telephone common carrier, subject to the 1934 Communications Act,[10] providing video programming to the viewing public in its telephone service area either directly or through an "affiliate."[11] If such a carrier wishes to construct and maintain, as a common carrier, distribution facilities for lease to a cable system in its service area, *i.e.* provide "channel service"[12] it must obtain "Section 214 authorization"[13] and show that the

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pose of the cross-ownership ban was to "preserve an environment for the development of new and different broadband services . . . ." *Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5093, ¶ 12. The Commission is now reexamining this issue. *Id.* at 5095, ¶ 23, 5097 n.33; *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5857.

[10] 47 U.S.C. §§ 201-220 (1934). Such common carriers include the long-distance, interexchange carriers such as AT&T and its reinvigorated competitors like MCI and US Sprint; the seven Regional Holding Companies, comprised of the twenty-two Bell Operating Companies ("BOCs") spun off from AT&T in the 1984 divestiture pursuant to the 1982 Modified Final Judgment, *infra* note 64; and the 1500 or so independent, local exchange telephone companies. *See Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5096 n.26. The telephone service areas of these entities, and therefore the extent of the prohibition, vary.

Most long distance interexchange carriers such as AT&T no longer control access to local distribution facilities—poles and conduit space—that was considered essential for cable service. There is, therefore, an argument that the term "telephone service area" (*see* 47 C.F.R. § 63.54 (1989); Cable Act § 613(b), 47 U.S.C. § 533(b) (Supp. V 1987)) should be taken to mean "local exchange service area," with the effect of exempting the interexchange carriers from the rules and the statute. *See Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5862-63, ¶ 70. *See also infra* note 69.

[11] 47 C.F.R. § 63.54. Recently the Commission seems to be narrowing somewhat the previously broad scope it gave to the term "affiliate." *See* Century Fed., Inc. v. FCC, 846 F.2d 1479, 1481-82 (D.C. Cir. 1988) (FCC enlarging exception to its affiliation rule); Northwestern Indiana Tel. Co. v. FCC, 824 F.2d 1205, 1209-10 (D.C. Cir. 1987), *following remand*, 872 F.2d 465, 468 (D.C. Cir. 1989) (discussing FCC's indicia of affiliation), *cert. denied*, 110 S. Ct. 757 (1990).

[12] *See Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5097 n.35; *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5870 n.2. Under the Cable Act, the lessee may need a cable franchise to be able to provide "cable service." *See* Cable Act §§ 602 (4)-(6), 621(b), 47 U.S.C. §§ 522(4)-(6), 541(b); H.R. REP. No. 934, 98th Cong., 2d Sess. 57, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4694 [hereinafter H.R. REP. No. 934]. *See generally* NTIA Report, *supra* note 7, at 40-43.

On the other hand, a customer of tariffed video transmission services provided by a common carrier, much like a user of a "PEG" (public, educational, or governmental) channel under Section 531 of the Cable Act, or a user of a commercial leased access channel under Section 532, might not own, control or manage a cable system "facility" and therefore might not need a franchise as a "cable operator." *See Telco Notice of Further Inquiry*, 3 F.C.C. Rcd. at 5863. At the same time, a carrier when providing channel service also may not need a cable franchise as it has no role in producing, selecting, or marketing programming, nor any relationship with subscribers, and thus may not be providing cable service. *Id.*

[13] Section 214 requires such a carrier to obtain a certificate from the FCC. 47 U.S.C. § 214 (1982). *See* General Tel. Co. of California, 13 F.C.C.2d 488 (1968), *aff'd*, General Tel. Co. of California v. FCC, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969) (upholding Commission's jurisdiction to regulate channel service). Section 214 authorization is the vehicle through which the FCC enforces its cross-ownership rules. *See* NTIA Report, *supra* note 7, at 45.

Outside a carrier's telephone service area the Commission has granted blanket Section 214 authority for channel service. Blanket Section 214 Authorization for Provision by a Telephone Carrier of Lines for its Cable Television and other Non — Common

cable operator is unrelated and unaffiliated.[14] Focusing on the potential for anticompetitive effect, the rules also allow for waivers in communities where independent cable service otherwise "demonstrably could not exist" or upon "other showing of good cause" if the public interest would be served.[15] Furthermore, there is a general exemption for rural areas,[16] now without regard for whether alternative, independent cable service would be available in such areas.[17]

In 1987, however, the Commission determined that recent changes in the telecommunications industry and the tremendous development of cable television warrant reexamination of these cross-ownership rules.[18] For example, in originally formulating its rules the Commission did take notice of the general competitive relationship between cable and the telephone industry. This included the possibility of a telephone company cross-subsidizing its cable operations from its telephone revenues and the potential adverse social and economic effects of concentration of control over cable by the already powerful telephone companies.[19] But the Commission focused on the particular problem of access to poles and conduit space.[20]

Then, in 1978, the Pole Attachments Act gave the FCC the right to assure that the rates, terms, and conditions for pole at-

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Carrier Services Outside its Telephone Service Area, Report and Order, FCC 84-28, 49 Fed. Reg. 21333 (1984). *See Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5870 n.2.

14 47 C.F.R. §§ 63.54-.55 (1989). Few such arrangements seem to have been made. *See* D. BRENNER, M. PRICE & M. MEYERSON, CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 11.03[4][a], at 11-24 to 11-28 (1989) [hereinafter BRENNER, PRICE & MEYERSON].

As of mid-1988, Centel, the nation's twelfth largest local telephone company, was the largest telephone company providing cable service *outside* its service area. It owned and operated cable systems in seven states serving 521,000 subscribers, placing it among the top 25 cable operators. NTIA Report, *supra* note 7, at 44 n.127, 58-59.

15 47 C.F.R. § 63.56. In a recent controversial proceeding, based on its assessment of the public interest benefits the FCC granted a conditional, good-cause waiver to General Telephone Company of California to construct and maintain broadband, coaxial and fiber optic cable facilities in Cerritos, California. General Tel. Co. of California, 4 F.C.C. Rcd. 5693 (1989), *appeal docketed sub nom.*, National Cable Television Ass'n v. FCC, No. 89-1517 (D.C. Cir. Aug. 2, 1989).

16 47 C.F.R. § 63.58.

17 *See Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5096 n.12; *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5850-51.

18 *Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5093, ¶ 8.

19 Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 F.C.C.2d 307, 308, 323-24 (1970).

20 *Id.* at 323-27. *See Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5094, ¶ 13 (potential for cross-subsidization was a "serious concern" but not an "explicit rationale" for adopting the 1970 cross-ownership rules); *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5849, ¶ 3.

tachments are "just and reasonable."[21] This Act does not guarantee access, which remains a matter of contract negotiation between the cable operator and the utility owning the poles or conduits.[22] Nonetheless, the Commission does have some authority to mandate access in specific cases of denial or termination.[23] So while the Commission is not persuaded that all concerns over access to poles and conduits have been eliminated,[24] the ability of cable to wire over eighty percent of the nation's residences is a good indication that the purpose of the Pole Attachments Act is being achieved.[25]

Other issues remain concerning the relationship between telephone companies and the cable industry, including the possibility of telco cross-subsidization. A 1981 FCC staff report considered possible efficiencies from telco entry into cable and the development of new technologies and services, but concluded that necessary safeguards did not then exist to allow elimination of the cross-ownership ban.[26] In launching its current inquiry after further evolutions in the industries, the Commission describes the "central issue" as "whether it is still necessary or desirable to restrict entry of telephone companies in order to preserve an environment that encourages competitive provision of cable facilities and services."[27]

In June 1988, the Commerce Department's National Telecommunications and Information Administration (NTIA) released a report on Video Program Distribution and Cable Television.[28] A key recommendation was to allow local telephone companies greater freedom in providing non-discrimina-

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

22 Indeed, in sustaining the Pole Attachments Act against a constitutional challenge as an uncompensated taking of property, the Supreme Court relied on the absence of compulsory access in the Act stating, "The language of the Act provides no explicit authority to the FCC to require pole access for cable operators, and the legislative history strongly suggests that Congress intended no such authorization." FCC v. Florida Power Corp., 480 U.S. 245, 251 n.6 (1987) (citations to legislative history omitted).

23 *See Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5871 n.16.

24 *Id.* at 5871 n.17.

25 *See* National Cable Television Ass'n, Inc. v. FCC, 747 F.2d 1503, 1505, 1506 & n.1 (D.C. Cir. 1984). In upholding the FCC's rural exemption, the court noted that the opportunities for phone companies to use control over pole attachments to extract a monopolist's premium from providers of cable services have diminished with passage of the Pole Attachments Act. *Id. See Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5093-94, ¶ 13 (discussing ameliorating effect of the Pole Attachments Act).

26 FCC Policy on Cable Ownership, A Staff Report, released Nov. 1981, FCC Office of Plans and Policy, *described in Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5850, ¶ 6.

27 *Telco Notice of Inquiry*, 2 F.C.C. Rcd. at 5093, ¶ 10; *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5851, ¶ 10.

28 NTIA Report, *supra* note 7.

tory, video common carriage — a "video dial tone" — within their service areas.[29] While the NTIA was clearly in favor of continuing to prohibit the phone companies from providing video programming directly to local subscribers,[30] the users of the recommended video transport services no longer would have to be franchised cable operators. They also could be more closely affiliated with the telephone companies in that the latter could provide ancillary services such as billing, order taking, service maintenance and the like.[31] Not too surprisingly, development of widely available video dial tone service was generally supported in a more sweeping NTIA study released later in 1988.[32]

The Commission now has gone even further in tentatively concluding that the public interest would be best served by greater telco participation in the provision of cable television service, because this would foster increased competition in the cable industry.[33] The Commission thus seems ready to recommend removal of the cross-ownership ban subject to appropriate safeguards against anticompetitive cross-subsidies.[34] This would go beyond the "video dial tone" proposal in allowing telephone companies to directly market video programming to subscribers.[35] However, the video dial tone does not address the telephone companies' first amendment concerns discussed below. Moreover, the Commission believes that full entry is necessary to give the telcos sufficient financial incentives to develop and offer video and other services and achieve efficiencies of operation.[36]

Similarly, the Commission has proposed specifying particu-

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[29] *Id.* at 32-60.

[30] *Id.* at 36.

[31] *Id.* at 35-36, 39-43.

[32] Nat'l Telecommunications and Information Administration, United States Dept. of Commerce, NTIA TELECOM 2000, at 150, 161-62 (Oct. 1988).

[33] *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5849.

[34] *Id.* at 5860. Alfred C. Sikes became Chairman of the FCC after the Telco Further Notice of Inquiry was released. Mr. Sikes had been Assistant Secretary of Commerce for Communications and Information and as such supervised NTIA's narrower recommendation in terms of video dial tone service. His current position is not clear. *See Sikes Focuses a Critical Gaze on Cable's Franchise Foundations*, CABLEVISION, Dec. 4, 1989, at 48, 55; *The "Irreversible Momentum" of Al Sikes*, BROADCASTING, Oct. 9, 1989, at 35, 36-37. *See infra* notes 226-31 and accompanying text (further discussing proposed safeguards).

[35] In this capacity the telephone company presumably would be subject to the same franchising requirements of any other cable operator. *See Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5863. *Cf. supra* note 12.

Commissioner Dennis filed a separate statement expressing her preference on the present record for the NTIA "video dial-tone" approach rather than the open entry favored by the majority. Separate Statement of Commissioner Patricia Diaz Dennis, 4 F.C.C. Rcd. 2400, 2401 (1989).

[36] *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5857 n.23. *But cf.*, NTIA Report, *supra* note 7, at 39. *See infra* note 261 and accompanying text.

lar standards under which it will grant "good cause" waivers, making such waivers more accessible. Thus, the Commission tentatively "concluded that construction and operation of technologically advanced, integrated broadband networks by carriers for the purpose of providing video programming and other services will constitute good cause for waiver."[37] The Commission reached this conclusion despite both the legislative history of the 1984 Cable Act codifying the cross-ownership rules, which indicates the Commission's waiver authority should be narrowly construed,[38] and the general requirement for a "hard look" at waiver requests.[39] Finally, and toward much the same end, the Commission plans to modify its broad definition of affiliation to focus on ownership or control as the prohibited relationships between a carrier and a cable system, even though the Commission earlier had determined that nothing in the 1984 Cable Act or its legislative history suggests Congress thought any such change necessary then.[40] The effect will be to ameliorate the previous stringent application of the cross-ownership rules.[41]

B. *The 1984 Cable Act*

The FCC is constrained in eliminating the cross-ownership ban by the codification of its rules in the 1984 Cable Act. This has several practical ramifications for the effort to allow telephone entry into cable.

The Cable Act[42] was the FCC's first explicit statutory grant

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[37] *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5849 ¶ 1, 5861 ¶ 60. *See infra* notes 250-59 and accompanying text (describing integrated broadband networks). Such an approach was anticipated in Revision of the Processing Policies for Waivers of the Telephone Company — Cable Television Cross-Ownership Rules, 69 F.C.C.2d 1097, 1110 (1978). In addition to such integrated systems capable of providing cable television service and traditional common carrier services, the Commission will consider other waiver proposals for technologically advanced communications services. *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5873 n.48.

The Commission's proposal to generally remove the ban, however, is not contingent upon the construction of any particular technologically advanced facilities. *Id.* at 5858.

[38] *See Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5850, 5861 (citing 130 CONG. REC. H10,444 (daily ed. Oct. 1, 1984)).

[39] *See id.* at 5861 (citing WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969)).

[40] *Id.* at 5865-66. *See* Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, 58 Rad. Reg. 2d (P&F) 1, 16-17 (1985).

[41] The current federal regulations prohibit *any* financial, business or other relationship between telephone and cable companies beyond the basic carrier-user relationship. 47 C.F.R. § 63.54 n.1. Such relationship contemplates a general offer to provide substantially the same services to all similarly situated entities or individuals on a non-discriminatory basis. *See Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5865, 5874 n.64.

[42] Cable Act §§ 601-39, 47 U.S.C. §§ 521-59 (Supp. V 1987).

of authority over cable.[43] In this context Congress essentially codified[44] the FCC's telephone — cable cross-ownership rules, relying on the Commission's findings to support them without independent analysis.[45] This may make it easier for Congress simply to defer to a new recommendation from the FCC. Moreover, with respect to policy and constitutional analysis the rules and the statute can be treated alike.

As a practical and legal matter, therefore, the FCC cannot act unilaterally to eliminate the statutory ban but can only make such a recommendation to Congress. This has two consequences. First Congress must be persuaded to act, and this may be a propitious time. Congress is considering re-regulation of the cable industry[46] in the context of a widespread perception that the cable industry has become too powerful, monopolistic, and vertically integrated, with adverse competitive effects and excessive rates for consumers.[47] One important aspect of new legislation addressing these issues may be the creation of more diversity and competition in the cable industry by letting telephone companies enter.[48]

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[43] Prior to the Cable Act, the FCC could regulate cable only on the theory and to the extent such regulation was "reasonably ancillary" to its effective regulation of broadcasting. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). This approach had clear limits. *See* United States v. Midwest Video Corp., 406 U.S. 649, 676 (1972) (Burger, C.J. concurring in result) (FCC's local origination cable rule "strains the outer limits" of its jurisdiction over cable); FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (mandatory access and minimum channel capacity requirements for cable systems exceed FCC's statutory authority).

[44] Cable Act § 613(b), 47 U.S.C. § 533(b) (Supp. V 1987).

[45] *See* Telephone Company — Cable Television Cross-Ownership Rules, Notice of Inquiry, 2 F.C.C. Rcd. 5092, 5092-93 (1987); H. R. REP. No. 934, *supra* note 12 at 4693-94 (indicating congressional intent to codify FCC rules). Congress, however, did wish to provide an unqualified rural exemption, *id.*, and the Commission complied. *See Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5851.

[46] The Cable Act itself requires the FCC to report to Congress by October 30, 1990, on rate regulation of cable services and the effect of competition in the marketplace. Cable Act § 613(h), 47 U.S.C. § 543(h) (Supp. V 1987). The FCC has launched a broad notice of inquiry on the status of cable television that it hopes to complete early in the summer of 1990. Competition, Rate Deregulation and the Commission's Policy Relating to the Provision of Cable Television Service, Notice of Inquiry, 5 F.C.C. Rcd. 362 (1989). *See FCC to Review State of Cable TV*, BROADCASTING, Dec. 18, 1989, at 81.

[47] *See generally Competition, Rate Deregulation*, 5 F.C.C. Rcd. at 362-63; *Cable TV: The New Big Kid Confronts Re-Regulation*, 49 CONG. Q. 3361, 3361 (1989) [hereinafter *Cable TV: The New Big Kid*]. For a study of recent basic cable rate increases, see NTIA Report, *supra* note 7, at App. A; *General Accounting Office, Telecommunications: National Survey of Cable Television Rates and Services, Report to the Chairman, Subcomm. on Telecommunications and Finance, House Comm. on Energy and Commerce*, (GAO/RCED-89-193) (Aug. 3, 1989) [hereinafter *GAO Survey*]. The Commission has initiated a separate proposed rulemaking on basic cable rates. Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Notice of Proposed Rulemaking, 5 F.C.C. Rcd. 259 (1990).

[48] *See Competition, Rate Deregulation*, 5 F.C.C. Rcd. at 365-67. *See, e.g.*, S.1068, 101st Cong., 1st Sess. § 4 (1989) and H.R. 2437, 101st Cong., 1st Sess. § 4 (1989). (These

The necessity for congressional action also means that much of the friction in recent years between Congress and the Commission may be avoided with smoother and more definite results. As just one example of this recently difficult relationship, consider the uncertain status of the fairness doctrine over the past several years. In its 1985 Fairness Doctrine Report, the FCC finally recognized the probable constitutional infirmity of the doctrine.[49] It refrained from eliminating the doctrine, however, out of concern that it might have been codified by a 1959 amendment to the Communications Act.[50] A panel of the Court of Appeals for the District of Columbia Circuit then announced that the doctrine was only an "administrative construction, not a binding statutory directive."[51] Another panel of the same court told the Commission that, in the face of a constitutional challenge in a specific fairness doctrine enforcement proceeding, it was obliged to resolve the status of the doctrine despite intense political pressure from Congress.[52] That pressure included a statutory directive that the Commission "consider alternative means of administering and enforcing the Fairness Doctrine" and report to Congress, presumably *before* altering the doctrine.[53]

Following this mandate the FCC proceeded with a notice of inquiry and report,[54] but *simultaneously* with release of its report the Commission eliminated the doctrine in a pending enforcement proceeding.[55] Both this result and the manner in which it

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companion measures would partially reregulate cable but allow telcos to offer cable services).

49 1985 Fairness Doctrine Report, 102 F.C.C.2d 143, 148-57 (1985), *petition for review dismissed as to constitutional challenge but not otherwise*, Radio-Television News Directors Ass'n v. FCC, 809 F.2d 860 (D.C. Cir.) (per curiam), *vacated*, 831 F.2d 1148 (D.C. Cir. 1987). The two-pronged obligation of the Commission's fairness doctrine required broadcast licensees to provide coverage of important and controversial issues of local community interest and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. *1985 Fairness Doctrine Report*, 102 F.C.C.2d at 146.

50 *1985 Fairness Doctrine Report*, 102 F.C.C.2d at 227-46.

51 Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 517, *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

52 Meredith Corp. v. FCC, 809 F.2d 863, 872-74 (D.C. Cir. 1987).

53 Making Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-500, 132 CONG. REC. H10,619 (daily ed. Oct. 15, 1986). *See Meredith Corp.*, 809 F.2d at 873 n.11 (citing H.R. REP. No. 1005, 99th Cong., 2d Sess. (1986), *reprinted in* 132 CONG. REC. H10,720 (daily ed. Oct. 15, 1986)).

54 Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine of Broadcast Licensees, Notice of Inquiry, 2 F.C.C. Rcd. 1532 (1987); Report of the Commission, 2 F.C.C. Rcd. 5272 (1987), *reconsid. denied*, 3 F.C.C. Rcd. 2050 (1988).

55 Syracuse Peace Council v. Television Station WTVH, 2 F.C.C. Rcd. 5043, 5057 (1987), *reconsid. denied*, 3 F.C.C. Rcd. 2035 (1988) ("fairness doctrine, on its face, violated the first amendment and contravened the public interest"), *aff'd*, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990).

was achieved greatly angered many in Congress.[56] The reaction has included repeated and ongoing attempts to write the doctrine into law,[57] one of which would have succeeded but for a presidential veto.[58] Such contretemps between Congress and the Commission sours their relationship and affects and distracts from other issues as well.[59]

The message here is clear. Whatever inconvenience results from the uncertain status of the fairness doctrine pales in comparison to what would occur if there were a similar dispute between the FCC and Congress over telephone entry into cable. The present paralysis would continue, as no one would undertake substantial investment to enter an industry where the right to remain was at all questionable. Cooperation, not acrimony, between Congress and the Commission is essential and far wiser politically.

Nonetheless, the Commission may be positioning itself to partially supplant continued congressional inaction. By proposing to grant certain waivers more liberally and adopting a more flexible notion of affiliation, despite some contra-indications from Congress,[60] the Commission may be perceived as again trying to usurp congressional prerogative.[61] Much, of course,

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[56] *See Official Reaction to Fairness Doctrine Repeal: The Good, the Bad and the Ugly*, BROADCASTING, Aug. 10, 1987, at 59; *A Question of Priorities*, BROADCASTING, Aug. 10, 1987, at 28. The fairness doctrine is intimately related to 47 U.S.C. § 315 (1982), the provision mandating equal broadcast opportunities for political candidates. *See* Winer, *The Signal Cable Sends — Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 268-76 (1987) [hereinafter Winer, *The Signal Cable Sends*]. This may partly explain the particular affinity for the fairness doctrine many in Congress exhibit.

[57] *See Fairness Excised As Congress Exits*, BROADCASTING, Nov. 27, 1989, at 40.

[58] Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987). President Reagan characterized the doctrine as unconstitutional content-based regulation. *Id.* President Bush may take a similar approach. *See Bush Seen As Sending Signal On Fairness Doctrine*, BROADCASTING, Apr. 17, 1989, at 31.

[59] *See, e.g., Fairness Doctrine Law Still "Quid" To Broadcasters' "Pro Quo"*, BROADCASTING, May 8, 1989, at 36. For descriptions of other similar incidents between Congress and the FCC, see Emrod, *The First Amendment Invalidity Of FCC Ownership Regulations*, 38 CATH. U.L. REV. 401, 425-27 (1989) (Congressional disfavor of FCC's attempt to change the multiple ownership rules) [hereinafter Emrod]; Winter Park Communications, Inc. v. FCC, 873 F.2d 347, 350-51 (D.C. Cir. 1989) (congressional action to forestall possible Commission changes in comparative preferences based on gender and race), *cert. granted sub nom.* Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 715 (1990); and Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902, 925 n.39 (D.C. Cir. 1989) (Silberman, J.) (same; Congress obliged FCC to disregard court order), *cert. granted sub nom.* Ltd. Astroline Communications Co. Ltd. Partnership v. Shurberg Broadcasting of Hartford, Inc., 110 S. Ct. 715 (1990).

[60] *See supra* notes 37-41 and accompanying text. This is not to say that the FCC's interpretation of Congress' current positions on these issues may not be both supportable and correct.

[61] Such a charge is being made in the appeal of the Cerritos waiver granted to GTE. General Tel. Co. of California, 4 F.C.C. Rcd. 5693 (1989), *appeal docketed sub nom.*, National Cable Television Ass'n v. FCC, No. 89-1517 (D.C. Cir. Aug. 2, 1989). *See NCTA*

would depend upon how the FCC actually implements its proposed changes.[62] The far better approach, however, would be for Congress and the Commission to agree upon an end to the cross-ownership ban and allow open entry with appropriate safeguards. This is the value of reliance upon the constitutional arguments to be developed, since they apply equally to Congress and the FCC (and to judicial supervision of the *Modified Final Judgment* discussed below) and depend less on variable policy evaluations.

C. *The Modified Final Judgment*

Even if Congress and the Commission agree on eliminating or substantially relaxing the telco-cable cross-ownership ban, one must still contend with Judge Greene.[63] The *Modified Final Judgment* ("MFJ"),[64] which divested AT&T of what now are called the Bell Operating Companies ("BOCs"), imposed various lines of business restrictions. In particular, AT&T was excluded from "electronic publishing" over its own transmission facilities for seven years,[65] and the BOCs generally were restricted through-

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Says FCC Overstepped Bounds in Cerritos Case, BROADCASTING, Jan. 22, 1990, at 60; *supra* note 15.

62 The Commission, for example, might conclude that the statutory ban does not apply to interexchange carriers or that waivers often should be available to such carriers. *See* Telephone Company — Cable Television Cross-Ownership Rules, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C. Rcd. 5849, 5862-63 (1988).

63 Congress may essentially overrule Judge Greene through legislation. The antitrust consent decree process is a creature of statute, Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (Supp. V. 1987) (also known as the Tunney Act), and there is little doubt Congress has the power to intervene. *See* United States v. AT&T, 552 F. Supp. 131, 149 n.76 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). Indeed, Congress might even remove continued supervision of the BOCs from the district court and place it where many believe it belongs, namely, with the FCC, the agency that presumably has the expertise and resources to manage the telephone industry. *See, e.g.*, H.R. 2140, 101st Cong., 1st Sess. (1989) ("Consumer Telecommunications Services Act of 1989"). Judge Greene, however, has some doubts about the Commission's commitment and ability here. *See infra* notes 228-29 and accompanying text. *Cf.* Maryland v. United States, 460 U.S. 1001, 1005 (1983) (Rehnquist, J., Burger, C.J., and White, J., dissenting) (question of whether an antitrust consent decree is in the public interest, assigned to district courts by statute, "is a classic example of a question committed to the Executive"). This broader controversy, however, is beyond the scope of this Article.

64 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).

65 The MFJ defines "electronic publishing" as the "provision of any information which AT&T or its affiliates has, or has caused to be, originated, authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means." *AT&T*, 552 F. Supp. at 231. *See id.* at 180-85; United States v. Western Elec. Co., 714 F. Supp. 1, 12 n.39, *amendment and clarification denied*, 1988-1 Trade Cas. (CCH) ¶ 68,094 (D.D.C. 1988).

The MFJ defines "information" as "knowledge or intelligence represented by any

out the country from providing "information services."[66] This was based on fear that the BOCs, through their continued control over the local network, could discriminate against competitors by providing their own services more favorable access to the network. Also, they might shift costs and use revenues from their local exchange monopoly to cross-subsidize their other services at anti-competitive prices.[67] There has been no specific judicial or regulatory ruling whether these decree prohibitions include cable television.[68] The language of Judge Greene's opinion, however, strongly suggests that cable is included.[69]

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form of writing, signs, signals, pictures, sounds, or other symbols." *AT&T*, 552 F. Supp. at 229. This prohibition now has been lifted. United States v. Western Elec., 1989-2 Trade Cas. (CCH) ¶ 68,673 (D.D.C. 1989).

66 The MFJ defines "information service" 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. These sometimes are referred to as "enhanced services." *Id.* at 178 n. 198. *See id.* at 189-90.

The MFJ defines "telecommunications" as

> the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching and delivery of such information) essential to such transmission.

Id. at 229.

67 *AT&T*, 552 F. Supp. at 189. *See* United States v. Western Elec. Co., 673 F. Supp. 525, 563-67 (D.D.C. 1987). In subsequently denying requests for waivers from the restrictions, the court described several forms of harmful cross-subsidization. United States v. Western Elec., 1989-1 Trade Cas. (CCH) ¶ 68,619, at 61,269 (D.D.C. 1989).

68 NTIA Report, *supra* note 7, at 49; Telephone Company — Cable Television Cross-Ownership Rules, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C. Rcd. 5849, 5873 n.51. One BOC, Pacific Telesis, however, has requested waivers of the MFJ restrictions to enable it to buy controlling interests in Chicago cable systems. Request of Pacific Telesis Group, United States v. Western Elec. Co., Civ. No. 82-1092 (HHG) (D.D.C. Dec. 19, 1989). *See Pac Tel Asks Waivers To Buy Chicago Cable Systems*, 7 CABLE T.V. & NEW MEDIA 3 (Jan. 1990).

69 Judge Greene referred to "information services" as an "umbrella description of a variety of services including electronic publishing and other enhanced uses of telecommunications." *AT&T*, 552 F. Supp. at 189. He expressly incorporated his earlier discussion of "electronic publishing," *id.* at 189 n.237, which rather clearly includes cable. *Id.* at 180-81.

On the other hand, AT&T disavowed any intention of competing with newspapers, broadcasting, or traditional cable television. *Id.* at 185 n.221. Instead, AT&T agreed to the future restrictions on the BOCs as part of the overall settlement. *Id.* at 186 nn.227, 220-22. Moreover, Judge Greene's rationale for prohibiting the BOCs from providing information services is based on their control over the local telephone networks. *Id.* at 189-90. It may be possible to argue, therefore, that the unqualified language of the decree prohibition was not meant to constrain BOC activity outside their local service areas. *But see* United States v. Western Elec. Co., 1989-1 Trade Cas. (CCH) ¶ 68,619 at 61,266, 61,270-72 (waivers of line of business restrictions denied because BOC bottleneck monopolies and their ability to cross-subsidize would permit them to engage in

Upon the first triennial review of the MFJ,[70] the court found the information services restrictions more problematic.[71] Judge Greene struck a distinction between control over the content of information and the means for its transmission. Again, this was based on the perceived temptation for a company that both generates and transmits information, especially time-sensitive material, to discriminate against competitors that rely on it for the transmission function.[72] As generation or control of information involves the exercise of editorial discretion, however, such activity is at the core of first amendment freedoms. Nonetheless, the court maintained the information services prohibition as far as the generation or manipulation of information content is concerned, while allowing the BOCs to construct and operate a sophisticated network infrastructure for the transmission of information services where others generate and control the content.[73] Operating a cable system in the usual sense of programming channels still seems forbidden.[74]

Thus, Judge Greene's continued supervision of the BOCs under the MFJ will keep the largest and quite likely the most important, effective and innovative potential competitors out of the cable industry.[75] The telcos probably are best situated to play the leading role in development of a fiber-optic, integrated broadband communications network and the new technologies and services associated with it.[76] They also have the capital and

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anticompetitive activities even with respect to out-of-region information services activities); United States v. Western Elec., 627 F. Supp. 1090, 1110 (D.D.C. 1986) (rejecting argument that BOCs are free to provide voice storage and retrieval services outside their own regions).

70 *See AT&T*, 552 F. Supp. at 195 (Department of Justice will report to court every three years on the continued need for the decree's restrictions).

71 United States v. Western Elec. Co., 673 F. Supp. 525, 563 (D.D.C. 1987).

72 *Id.* at 595, 603.

73 *Id.* at 603. The court cited videotex (interactive data services), such as provided on the French Teletel system, as a model for the sort of transmission services it had in mind. *See* United States v. Western Elec. Co., 714 F. Supp. 1 (D.D.C.), *amendment and clarification denied*, 1988-1 Trade Cas. (CCH) ¶ 68,094 (D.D.C. 1988).

74 *See Western Elec.*, 714 F. Supp. at 11-22 (Judge Greene's description of what BOCs may do by way of information "gateway" services under his more liberal approach).

75 The BOCs comprise about two-thirds of the domestic telecommunications industry and serve approximately 77% of United States local exchange customers. P. HUBER, THE GEODESIC NETWORK: 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY 1.34 (Report prepared for first triennial review of the MFJ) [hereinafter HUBER]. *See Western Elec.*, 673 F. Supp. at 528 n.1, 537 n.44). *See also* Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change, Office of Plans and Policies*, FCC, Nov. 1988, at 26-27 [hereinafter Pepper]. The preclusive effect of the MFJ, coupled with the FCC rules and the Cable Act provision, therefore amounts to virtually a total ban on telephone companies providing cable service domestically.

76 Even Judge Greene recognizes the importance of BOCs' participation, at least on the transmission side, for the development of a vigorous, nationwide market in informa-

technical experience and expertise to compete competently with powerful, entrenched cable systems.[77] As with continued enforcement of the FCC rules and the statutory prohibition, the main basis for this Draconian exclusionary approach is the speculative fear of anticompetitive activities in that industry[78] and the concern for diversity in the media marketplace discussed below. While there are a number of issues peculiar to continuing judicial review of the MFJ,[79] the constitutional issues which Part III addresses are common to all three sources of restrictions and compel rectifying congressional action.

III. CONSTITUTIONAL ISSUES

The most disappointing aspect of the debate over telco entry into cable is the paucity of weight given to first amendment principles and analysis. If any other non-media entity wished to enter the field and thereby serve its own interests as well as those of potential subscribers, an overwhelming first amendment presumption would support its right to do so. With the telephone companies, however, constitutional principles are relegated to a subsidiary role. Why should this be so? As this Section shows, nothing in the corporate nature of the telcos, nor their general status as common carriers, nor other existing media cross-owner-

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tion services. *Western Elec. Co.*, 714 F. Supp. at 6. But he claims they are "not needed" on the information side. *Id.* at 3 n.4. *See infra* notes 243-59 and accompanying text (discussing the technology and services).

77 The BOCs each rank in the top 20 American corporations in terms of assets and in the Fortune 50 in terms of sales. *Western Elec. Co.*, 714 F. Supp. at 4 n.9. *See* United States v. AT&T, 552 F. Supp. 131, 187 n.230 (D.D.C. 1982) *aff'd sub. nom.* Maryland v. United States, 460 U.S. 1001 (1983); *infra* note 265 (referencing BOCs' foreign cable experience).

78 Because the mere possession of monopoly power in one market is not a sufficient antitrust justification to restrict competition generally, Judge Greene explicitly based his restrictions upon "the *assumption* that the Operating Companies, were they allowed to enter the forbidden markets, would use their monopoly power in an anticompetitive manner." *AT&T*, 552 F. Supp. at 187 (emphasis added).

79 One key issue is the appropriate standard for lifting the restrictions, whether it is to be a liberal public interest test for modifying an antitrust consent decree or the specific, stricter language of Section VIII(C) of the MFJ. Section VIII(C) requires a petitioning BOC to make a showing that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *Western Elec. Co.*, 673 F. Supp. at 532. A related issue is the extent to which the BOCs, or more accurately AT&T on behalf of the BOCs, waived their first amendment or other rights.

The Court of Appeals now has ruled that the public interest standard should be applied to the BOCs unopposed motion to lift entirely the information services restriction and therefore remanded this matter to Judge Greene without addressing any first amendment issues. United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir. Apr. 3, 1990). The "public interest" standard, however, at least under the Communications Act, "necessarily invites reference to First Amendment principles." FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978), *quoting* Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973).

ship restrictions qualifies their first amendment rights. Moreover, the following Section establishes that the same is true of applicable antitrust principles. Thus, rather than viewed as a mere incidental restriction on speech, as the FCC maintains, the ban on telco entry should be recognized for what it clearly is — a prior restraint, the most onerous and least supportable abridgment of first amendment freedoms. Particularly in light of the substantial benefits telco entry into cable promises,[80] the heavy burden of justifying continuation of the ban cannot be met. Congress therefore should act to remove the exclusionary provisions.

A. *Corporate Speech*

At least since *First National Bank of Boston v. Bellotti*,[81] the Supreme Court's leading case on the free speech rights of corporations, it is difficult to claim that the mere corporate status of a willing speaker denies it the protection of the first amendment. In *Bellotti*, the Massachusetts legislature wished to enact a graduated individual income tax, but was stymied in several electoral attempts to approve the necessary constitutional amendment. To stifle opposition, the legislature passed a criminal statute prohibiting any contributions or expenditures by banks and business corporations to influence the vote on referendum issues, other than one "materially affecting" the corporation. The legislature tied the knot by simultaneously decreeing that no individual income tax issue materially affects corporations.[82]

Upon a constitutional challenge, the Supreme Court re-

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80 *See infra* notes 243-59 and accompanying text.

81 435 U.S. 765, *reh'g denied*, 438 U.S. 907 (1978).

82 Even in dissenting, Justice Rehnquist acknowledged that the Massachusetts legislature blatantly tried to "muzzle" corporate speech on core political issues to achieve its tax objective. *Id.* at 826 n.6 (Rehnquist, J., dissenting). The Massachusetts statute provided in relevant part:

> No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company . . . shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters other than one materially affecting any of the property, business or assets of the corporation. . . .

MASS. GEN. LAWS ANN. ch. 55, st. 8 (West Supp. 1977).

The Massachusetts statute further provided:

> No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

MASS. GEN. LAWS ANN. ch. 55, st. 8 (West Supp. 1977).

jected the Massachusetts Supreme Court's approach of asking generally whether and to what extent corporations enjoy first amendment rights. Rather, the Supreme Court found the speech in question clearly entitled to protection and asked whether the corporate identity of the speaker somehow deprived it of that protection. The Court could find no basis for such a denigration of the liberty interest in free speech protected, for both media and non-media entities,[83] against state abridgment by the due process clause.[84] The Court therefore applied the "exacting scrutiny" demanded by the first amendment to see if Massachusetts could demonstrate the sort of compelling interest, achieved only by narrowly drawn means, necessary to justify its legislation.[85] Most pertinent for present purposes, the Court rejected the asserted justification that, absent the legislation, corporate participation would exert an undue influence on the outcome of referenda, thereby diminishing the active role of the individual citizen in the electoral process and destroying confidence in the democratic process and the integrity of government.[86]

The Court has reinforced its support for corporate free speech, even for privately owned but government regulated monopolies. It would not allow, for example, the Public Service Commission of New York to prohibit Consolidated Edison Company from including inserts in its monthly electric bills discussing

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[83] The Court declined to distinguish media and non-media corporate entities for purposes of its decision. "[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten." *Bellotti*, 435 U.S. at 782. Chief Justice Burger wrote separately to emphasize the difficulty of such a distinction. *Id.* at 795. This separate opinion was likely in reaction to a well-known speech by Justice Stewart, who developed the thesis that the press clause gives special status and privileges to the institutional press. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

A majority of the Court continues to reject any such distinction. *See* Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985); *id.* at 765 (White, J., concurring in judgment); *id.* at 774-96 (Brennan, Marshall, Blackmun, Stevens, JJ., dissenting). *But see* infra note 97.

[84] The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . . In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.

Bellotti, 435 U.S. at 777, 784-85.

[85] *Id.* at 786.

[86] *Id.* at 789-92. *See infra* notes 232-41 and accompanying text (further discussing the diversity issue). The Court also rejected the argument that the legislation was needed to protect corporate shareholders' interests. *Bellotti*, 435 U.S. at 792-95. *But see infra* note 101.

For a criticism of *Bellotti's* alleged abstract and formalistic approach to corporate free speech, see Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227 (1986) [hereinafter Schneider].

controversial issues of public importance.[87] Indeed, the Court has found that first amendment protection for such entities extends even to their purely commercial speech in the form of promotional advertising.[88]

First amendment protection must extend, therefore, to telephone companies as cable system operators. As with broadcasting, cable activities "plainly implicate First Amendment interests" through original programming and the exercise of editorial discretion.[89] In fact, much of what cable operators presently do fits the Court's previous definition of core editorial activity, namely "selection and choice of material."[90]

As cablecasters, telcos should be entitled to such constitutional protection not only because they would be affording the public "access to discussion, debate, and the dissemination of information and ideas,"[91] but also because of the telcos' own interests in self-expression.[92] The Court has recognized that *both*

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87 Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530, 534 n.1 (1980) ("Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights.").

88 Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

89 Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 495 (1986). Since it was reviewing the dismissal of a complaint, the Court appropriately refrained from a detailed analysis of the precise first amendment standard to apply to cable. In ruling on motions for summary judgment the district court subsequently found that "[t]he programming of a cable television network, like the publishing of a newspaper, involves editorial discretion." Preferred Communications, Inc. v. Los Angeles, No. CV 83-5846 (CBM), slip op. at 18 (C.D. Cal. Jan 5. 1990) *See* FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979) ("Cable operators now share with broadcasters a significant amount of editorial discretion."); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985) (describing cable operators' dramatically expanded editorial role), *cert. denied*, 476 U.S. 1169 (1986); Tele-Communications of Key West Inc. v. United States, 757 F.2d 1330, 1336-37 (D.C. Cir. 1985) ("Whether or not [cable] produces any original programming of its own, its activities of transmitting and packaging programming mandate that it receive First Amendment protection.").

90 "For better or worse, editing is what editors are for; and editing is selection and choice of material." CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973). Requirements that cable operators produce local origination programming further emphasize their editorial function. *See* Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989) (such requirements do not violate the first amendment), *cert. denied*, 110 S. Ct. 839 (1990). Moreover, cable operators' vertical integration into programming has expanded programming availability for the viewing public and is yet another aspect of their first amendment activity. *See* Klein, *The Competitive Consequences of Vertical Integration in the Cable Industry*, at 4 (June 1989) (unpublished manuscript).

91 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783, *reh'g denied*, 438 U.S. 907 (1978).

92 *See id.* at 777 n.12 ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge."). *See also* Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530, 534 n.2 ("Freedom of speech also protects the individual's interest in self-expression.").

considerations apply to the first amendment rights of corporations and that by protecting corporate self-expression — specifically, the "wish to enter the marketplace of ideas" — the public's interest in receiving information is also protected.[93]

For at least a plurality of the Court, a corporation has autonomy interests analogous to those of natural persons, which are an important part of the rationale for first amendment freedoms. This was a major reason why, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[94] the Court held that a privately owned, regulated utility could not be forced to include in its billing envelopes speech of a third party with which it disagreed. At least for the plurality such forced association with objectionable ideas violates the first amendment because it offends the underlying autonomy interest — the interest in affirmative self-expression and the "concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[95] Thus, "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say."[96]

Recognition of this full scope of first amendment interests of corporations is only natural. Otherwise how could we distinguish, as we surely would want, the expansive first amendment freedoms of media entities, most of which operate in the corpo-

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93 Pacific Gas & Elec. Co. v. Public Utils. Comm'n of California, 475 U.S. 1, 8 (1986). *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). In holding that corporate commercial speech is entitled to first amendment protection, the Court stated, "[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases." *Id.* at 756.

94 475 U.S. 1, *reh'g denied*, 475 U.S. 1133 (1986).

95 *Pacific Gas*, 475 U.S. at 11 (quoting Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 524, 559 (1985)) (emphasis in original). Telephone companies in particular have been exercising just this sort of discretion in terminating certain "dial-a-porn" services with which they do not wish to be associated. Their autonomy interests in doing so, even with respect to telephone service, have been upheld so long as their action is not coerced or significantly encouraged by the state. Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291 (9th Cir. 1987) *cert. denied*, 485 U.S. 1029 (1988); Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352 (11th Cir. 1986); United States v. Western Elec. Co., 1989-2 Trade Cas. (CCH) ¶ 68,710 (D.D.C. 1989) (court approved restrictions on billing and collection services). But state action here restricting access to non-obscene material might be unconstitutional censorship. Sable Comm'n of California, Inc. v. FCC, 109 S. Ct. 2829 (1989).

96 *Pacific Gas*, 475 U.S. at 16. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (right of reply statute applied to a newspaper violates the first amendment). Dissenting in *Pacific Gas*, Justice Rehnquist described the plurality's "fundamental flaw" as extending to business corporations "negative" free speech rights which in his view depend on individual freedom of conscience. *Pacific Gas*, 475 U.S. at 32-33 (Rehnquist, J., dissenting). *See also* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). The *PruneYard* case was distinguished in *Pacific Gas*, 475 U.S. at 12.

rate form.[97] Moreover, if membership corporations such as the ACLU or the NAACP actively enjoy such rights, either collectively or as representatives of their members,[98] why should the standard corporate form make any difference?[99] A corporation, after all, is constituted by a group of individuals with presumably some common interests and purposes. Today many expect corporations to reflect and support shareholders' views on a broad range of social, political, environmental and economic interests, which often are quite removed from the narrower business purposes of the firm.[100] The corporate structure should not defeat a first amendment autonomy interest collectively exercised by the corporation, particularly given free shareholder entry into and exit from the organization.[101]

This is not to say that corporations necessarily enjoy all constitutional rights coextensively with natural persons. As the *Bellotti* Court explains, certain "purely personal" guarantees, such as the fifth amendment privilege against compulsory self-incrimination, may be unavailable to corporations for reasons relevant to the particular constitutional provision.[102] But both the autonomy interest in self expression and the social utility of broad

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97 The potential difficulty is well illustrated by the fact that in *Pacific Gas* the utility distributed its own newsletter in its billing envelopes, which occasioned the third party request for access to the envelopes. The plurality found this newsletter "[i]n appearance no different from a small newspaper," and therefore invoked *Miami Herald*, 418 U.S. at 241, as controlling precedent. *Pacific Gas*, 475 U.S. at 8-18. *See supra* note 83 and accompanying text. *But see* Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1401-02 (1990) (under equal protection analysis, Court sanctions an exemption for media corporations in a state act limiting some corporate political expenditures); *Cf. id.* at 1414-15 (Scalia, J., dissenting).

98 *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428 (1963) (NAACP can assert first amendment rights on its own behalf as well as for its members); ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (ACLU as lead petitioner for review of FCC's original orders implementing the Cable Act).

99 *But see Austin*, 110 S. Ct. at 1398-1400, in which the Court attempts to distinguish, at least in the context of corporate political expenditures, *some* nonprofit ideological corporations from ordinary business corporations. *Cf. id.* at 1419 (Kennedy, J., dissenting).

100 *Compare* C. STONE, WHERE THE LAW ENDS (1975) *with* Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979).

101 *But see Austin*, 110 S. Ct. at 1399 (discussing the economic disincentive in disassociating with a corporation). *Cf. id.* at 1411-12 (Scalia, J., dissenting). For a contrary argument in favor of substantially lessened free speech rights for traditional corporations, see Schneider, *supra* note 86, at 1252-61. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, Brennan, Marshall, JJ., dissenting).

102 *Belloti*, 435 U.S. at 778 n.14. There may also be some circumstances that justify different application of the first amendment to individuals and corporations. *Id.* at 777-78 n.13. For example, although reaffirming *Bellotti's* corporate free speech principle, the Court recently upheld a state campaign finance statute that prohibits corporations from using their general treasury funds, as opposed to special segregated funds, for independent expenditures supporting or opposing candidates in elections for state office. *Austin*, 110 S. Ct. at 1396. Corporate participation in partisan candidate elections is an area that the *Bellotti* opinion itself distinguished. *Bellotti*, 435 U.S. at 788 n.26.

communication and dissemination of information and ideas underlying the first amendment support constitutional protection for the telephone companies' desire to enter the cable industry. As Chief Justice Burger stated, "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."[103]

B. *Common Carrier Status*

Telephone companies are not only regulated utilities, often with a monopoly position, but common carriers subject to extensive regulation under Title II of the Communications Act.[104] This, however, should not affect their ability to enter the cable industry, their status as cable operators, or their first amendment rights as such.

Cable television systems are not common carriers. Prior to the 1984 Cable Act the Supreme Court ruled that the FCC could not regulate cable systems as common carriers.[105] Congress reinforced this position in the Cable Act which unambiguously states that cable systems are not subject to common carrier or utility regulation by virtue of providing cable service.[106] Removal of the ban on telcos as cable operators, therefore, would allow such an entity to be a common carrier with respect to other telecommunications services it provides, while also providing cable service as to which it would not be treated as a common carrier.

Such a dual function is just what the legislative history of the Cable Act contemplates. Congress intended the Act's definition of "cable services"[107] to delineate between those services provided by a cable system that are exempt from common carrier regulation and all other communications services that could be provided by that system, with the inference that the latter might

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[103] *Belloti*, 435 U.S. at 802 (Burger, C.J., concurring).

[104] 47 U.S.C. §§ 151-609 (1982 & Supp. V 1987). The Communications Act's circular definition of a "common carrier," 47 U.S.C. § 153(h), has been given meaning by courts and the FCC. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (discussing the meaning of common carrier service in the communications context). *See generally* CABLE TELEVISION LAW, *supra* note 7, at ¶ 6.03.

[105] *Midwest Video*, 440 U.S. 689, 708-09 (1979); United States v. Southwestern Cable, 392 U.S. 157, 169 n.29 (1968).

[106] Cable Act § 621(c), 47 U.S.C. § 541(c) (Supp. V 1987). There is some confusion, however, as to the circumstances in which the Cable Act's definition of a cable system includes the facilities of a common carrier. *Id.* at § 602(6), 47 U.S.C. § 522(6). *See* BRENNER, PRICE & MEYERSON, *supra* note 14, at ¶ 11.03[3].

[107] Cable Act § 602(5), 47 U.S.C. § 522(5). The term includes both "video programming," *id.* at § 602(16), 47 U.S.C. § 522(16), and "other programming service," *id.* at § 602(11), 47 U.S.C. § 522(11).

be subject to common carrier regulation.[108] Indeed, the legislative committee described some of these "other" communications services that might "compete with services provided by telephone companies."[109] Since such services can be provided by a cable system, but are not considered "cable services," the Act does not affect existing regulatory authority over them.[110] Thus it is clear that, under the Cable Act, cable operators can "provide any mixture of cable and non-cable service they chose [sic]."[111]

This is quite consistent with earlier understandings. The Supreme Court, for example, in its pre-Act ruling that the FCC cannot impose common carrier regulation on a cable system, noted that such a system can operate as a common carrier with respect only to another portion of its service.[112] Other courts have made a similar observation about telephone companies.[113] The term "common carrier," therefore, is better used to describe an activity as to which a particular entity is a common carrier rather than to describe the entity itself.[114]

In their capacity as cable operators, telephone companies should be entitled to the same first amendment rights as any other cablecasters. Nothing in their additional status as common carriers, with respect to other services and activities, detracts from such entitlement.[115] The Supreme Court has implicitly acknowledged this in its recent "dial-a-porn" decision.[116]

In operating a "976" or "Scoopline" dial-a-message network, a telephone company leases such a line to a business subscriber which then offers to the public, for a specified price per

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108 H.R. REP. No. 934, *supra* note 12, at 4678.

109 *Id.* at 4678-81. One example is voice communication between subscribers. A cable service, by contrast, must make its information available to all subscribers generally and may not include subscriber-specific information. *Id.*

110 *Id.* at 4678. In its Computer II Inquiry, the FCC decided not to impose Title II common carrier regulation on certain enhanced services, combining data processing and communications services, although it retained ancillary jurisdiction over them. Second Computer Inquiry, 77 F.C.C.2d 384, *reconsid.*, 84 F.C.C.2d 50 (1980), *further reconsid.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

111 H.R. REP. No. 934, *supra* note 12, at 4681. "The term 'cable system' is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well." *Id.*

112 FCC v. Midwest Video Corp., 440 U.S. 689, 701 n.9 (1979).

113 Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1293 n.2 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988).

114 *Computer and Communications Indus.*, 693 F.2d at 209 n.59.

115 *Cf.* United States v. Western Elec. Co, 673 F. Supp. 525, 586 n.273 (D.D.C. 1987) (treating the BOCs as common carriers with respect to information services and therefore "differently for First Amendment purposes than traditional news media"), *remanded*, 900 F.2d 283 (D.C. Cir. 1990).

116 Sable Communications of California v. FCC, 109 S. Ct. 2829 (1989).

call, various kinds of information services such as sports updates, weather reports or, more controversially, sexually explicit "adult" messages known as "dial-a-porn." In simultaneously connecting thousands of paying callers to a single recorded message, this service resembles cablecasting.[117] Whatever notion Congress might have had that a telephone company's common carrier status would allow greater regulation of this service was dashed by the Court's unanimous opinion that legislation banning indecent interstate commercial telephone messages violates the first amendment.[118]

Thus cable operators, including telephone companies, may act as hybrids with different regulatory schemes applicable to different activities.[119] As such, difficult first amendment issues will arise. Among the more significant of these is the question of access to the system.[120] It is probably a mistake to try and resolve these first amendment issues prior to substantial telephone entry. Such entry may affect, for example, the need for mandatory access as well as the capacity for and feasibility of providing it.[121] So, while telco entry may aid the resolution of some difficult issues, the constitutional considerations should not depend on the identity or other similar status of the operators.

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117 *See Carlin*, 827 F.2d at 1294. The court loosely spoke of broadcasting without considering the closer analogy to a subscriber cable system. *Cf. Sable*, 109 S. Ct. at 2837.

118 *Sable*, 109 S. Ct. at 2837. A majority, however, upheld the prohibition of obscene telephone messages.

119 *See* Brenner, *Cable Television and the Freedom of Expression*, DUKE L.J. 329, 331 (1988) ("The key to cable's first amendment regime lies in distinguishing, as reasonably as possible, among the expressive and nonexpressive activities of operators.").

120 Section 531 of the Cable Act allows franchisors to require that cable operators make available channels for public, educational, or governmental use ("PEG" channels). Cable Act § 611, 47 U.S.C. § 531 (Supp. V 1987). Section 532 requires a cable operator to designate specified channel capacity for leased commercial use. *Id.* at § 612, 47 U.S.C. § 532. Both of these prohibit an operator's editorial control over the access channels.

The constitutionality of these provisions remains an open question. In holding that FCC cable access rules imposed prior to the Cable Act exceeded the Commission's statutory authority, the Supreme Court noted that the rules "significantly compromise" cable operators' editorial discretion and raise first amendment problems that are "not frivolous." FCC v. Midwest Video Corp., 440 U.S. 689, 707 n.17, 709 n.19 (1979). While the Eighth Circuit had held the rules unconstitutional, Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), the Supreme Court suggested "less intrusive" access provisions might survive. *Midwest Video*, 440 U.S. at 705 n.14. *See* Century Fed., Inc. v. Palo Alto, 710 F. Supp. 1552, 1554-55 (N.D. Cal. 1987), *appeal dismissed*, 484 U.S. 1053 (1988) (mandatory access channels provision unconstitutional). *Accord* Group W Cable, Inc. v. Santa Cruz, 669 F. Supp. 954, 968-69 (N.D. Cal. 1987); Preferred Communications v. City of Los Angeles, CV 83-5846 (CBM) (C.D. Cal. Jan. 5, 1990). *Contra* Erie Telecommunications, Inc. v. Erie, 659 F. Supp. 580, 598-601 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988).

121 *See infra* notes 243-59 and accompanying text (describing possible new technologies).

C. *Other Media Cross-Ownership Provisions*

There are numerous FCC "structural" rules that limit or preclude multiple or cross ownership interests among various mass media.[122] Many depend on the perceived scarcity of the broadcast spectrum, which is irrelevant to cable and telcos. This dependency, and dramatic changes in the video marketplace, also are rendering such rules increasingly outdated and suspect on constitutional and other grounds.[123] None is so drastic as to totally ban entry into a mass media market by a non-participant in any such market. These other structural rules, therefore, lend no support to a continued telco/cable cross-ownership ban.[124]

The idea of the FCC enforcing structural regulation of the media industry dates back at least to the chain broadcasting[125] regulations upheld in *National Broadcasting Co. v. United States*.[126] In substance, this was an antitrust case in which the Commission mandated certain business relationships between broadcast licensees and the networks to limit network dominance over the local affiliated stations. The narrow question presented by the case was simply whether specific statutory authority over chain broadcasting[127] encompassed the business regulations at issue. Writing for a bare majority of the Court, however, Justice Frankfurter laid the scarcity predicate for comprehensive broadcast regulation pursuant to the public interest. Moreover, in a single paragraph discussing the first amendment implications of such regulation, Justice Frankfurter inverted the proper relationship between Congressional power and the Constitution by suggesting that FCC action does not violate the first amendment if it is valid under the public interest standard of the Communications Act.[128]

This precedent[129] puts into perspective the other structural

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122 For an extensive description of these rules, see generally Emrod, *supra* note 59, at 401-69.

123 *See id.*

124 *Cf.* United States v. American Tel. & Tel., 552 F. Supp. 131, 183-85 (D.D.C. 1982) (citing other cross-ownership provisions to support the public interest determination made).

125 "Chain broadcasting," the "simultaneous broadcasting of an identical program by two or more connected stations," 47 U.S.C. § 153(p) (1982), meant simply the network system of program distribution. *See* 47 C.F.R. § 73.658 (1989).

126 319 U.S. 190 (1943). *See* Winer, *The Signal Cable Sends*, *supra* note 56, at 220-27 (discussing NBC v. United States, 319 U.S. 190 (1943)).

127 47 U.S.C. § 303(i) (1982).

128 *NBC*, 319 U.S. at 227. One noted commentator responded, "The passage catches a great judge at an unimpressive moment." Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. L. & ECON. 15, 43 (1967).

129 In United States v. Storer Broadcasting, 351 U.S. 192 (1956), the Court further

regulations most pertinent to a consideration of the telco/cable ban, namely the broadcast/cable and the newspaper/broadcast cross-ownership restrictions. As to the former, beginning in 1970 the FCC prohibited common ownership or control between a cable system and a local broadcast television station where their service areas sufficiently overlap.[130] At the same time the FCC prohibited the national broadcast networks from an ownership interest in any cable system, wherever located.[131] These regulations were in furtherance of the "Commission's policy favoring diversity of control over local mass communications media."[132] More recently, the Commission has described the goals on which it based its rules as "increasing competition in the economic and ideological marketplaces."[133]

The owner of a television station challenged the rules in *Marsh Media, Ltd. v. FCC.*[134] The court first determined that these rules, like those on newspaper/broadcasting cross-ownership, are an exercise of the Commission's authority over broadcast licensees.[135] It then ruled that Marsh Media's first amendment challenge was foreclosed by the Supreme Court's decision in *FCC v. National Citizens Committee for Broadcasting*[136] upholding the newspaper/broadcasting rules.

The Commission, however, is reviewing its position. The 1988 NTIA Report notes dramatic changes in today's video marketplace, such as a "clear trend towards greater competition in the local [video] distribution market"[137] and the emergence of

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supported the Commission's ability to issue business regulations (multiple ownership rules) dealing with "concentration of control."

130 Second Report and Order in Docket No. 18397, 23 F.C.C.2d 816 (1970), *reconsid. denied in part*, 39 F.C.C.2d 377 (1973). This was codified in the Cable Act, at section 613(a), 47 U.S.C. § 533(a) (Supp. V 1987), which also gives the FCC the authority to make other cable ownership rules governing persons who own or control other co-located media of mass communications. *Id.* at § 613(c), 47 U.S.C. § 533(c). A number of broadcast entities now own cable systems outside their service systems. *See* NTIA Report, *supra* note 7, at 61.

131 *Second Report and Order*, 23 F.C.C.2d at 819. The FCC later made minor modifications as to a divestiture requirement. Second Report and Order in Docket No. 20423, 55 F.C.C.2d 540 (1975), *reconsid. denied*, 58 F.C.C.2d 596 (1976). The current version of the rules is at 47 C.F.R. § 76.501 (1989). The Cable Act did not codify the network provision. For an example of a waiver of the network rule based on changes in the cable industry, see In re CBS, Inc., 87 F.C.C.2d 587 (1981). The next year CBS sold its cable interests.

132 *Second Report and Order*, 23 F.C.C.2d at 820.

133 Third Report and Order in Docket No. 20423 (Postponement of Divestiture Requirement), 56 Rad. Reg. (P&F) 2d 87 (1984).

134 798 F.2d 772, *reh'g en banc denied*, 802 F.2d 455 (5th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987).

135 *Marsh Media*, 798 F.2d at 775.

136 436 U.S. 775 (1978).

137 NTIA Report, *supra* note 7, at 69.

cable as an important source of programming.[138] Because of such developments, "the bases for the network/cable cross-ownership rules cannot withstand empirical or theoretical analyses."[139] The NTIA therefore recommended FCC repeal of this rule.[140] It also urged amendment of the Cable Act to allow permanent waivers for local broadcast stations to own co-located cable systems on a showing that there will be no lessening of economic competition and diversity in that market.[141] Based on this and previous studies, the FCC has issued a Further Notice of Proposed Rulemaking on repeal of the network rule.[142]

Since the court in *Marsh Media* simply deferred to the Supreme Court's constitutional opinion in *National Citizens*, the first amendment analysis in *National Citizens* is relevant to both media cross-ownership rules under discussion. The newspaper/broadcasting ban at issue in *National Citizens* prospectively prohibited co-located daily newspaper/broadcast combinations. Also, absent waiver, it required divestiture over five years of such combinations in "egregious cases . . . [of] effective monopoly in the marketplace of ideas as well as economically."[143] In addition to favoring economic competition, this policy was based on the diversity principle — that is, the perceived negative "impact on the dissemination of ideas in a democratic society . . . [from] a lack of diversity of viewpoints and programming" feared to result from a "combination of media holdings held by a single entity."[144]

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138 *Id.* at 72.

139 *Id.*

140 In doing so, the NTIA noted that allowing telephone companies greater flexibility in providing transport facilities for video programming, which it also was recommending, further supported elimination of the rule. *Id.* at 73 n.247.

141 *Id.* at 74-76.

142 3 F.C.C. Rcd. 5283 (1988).

143 Second Report and Order in Docket No. 18110, 50 F.C.C.2d 1046, 1080-81, *modified*, 53 F.C.C.2d 589 (1975). The rule is currently codified at 47 C.F.R. § 73.3555(c) (1989).

144 *Second Report and Order*, 50 F.C.C.2d at 1059, 1074. *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 780 (1978). The potential for government abuse of the diversity principle is well illustrated by the recent attack Senator Kennedy orchestrated against publisher Rupert Murdoch. In the early morning hours as Congress was about to adjourn, the Senator attached an unnoticed and undiscussed rider to a catchall appropriations bill that prevented the FCC from extending any waiver of the newspaper/television cross-ownership ban. This was aimed squarely at Murdoch, the only person affected by it, and would have required him to sell either the newspaper or the television station he owned in both Boston and New York City. Senator Kennedy reportedly was motivated, at least in part, by criticism of him in Murdoch's Boston paper. *See Kennedy And Paper Battle In Boston*, N.Y. Times, Jan. 7, 1988, at A16, col. 4; *Congress Faces New Battle Over Media Ownership*, N.Y. Times, Jan. 11, 1988, at A13, col. 1. *See also* News America Publishing, Inc. v. FCC, 844 F.2d 800, 802, 806-10 (D.C. Cir. 1988). The court found that the bill violated the first and fifth amendments. Murdoch, however, subsequently sold his New York newspaper and his Boston television station. *See*

The Supreme Court upheld the Commission's rulemaking relying squarely on FCC authority to regulate *broadcasting* in the public interest since the Commission has no authority over newspapers. Such regulation, in turn, was justified despite a first amendment challenge because of the physical scarcity of the broadcast spectrum. Indeed, the Court cited its leading broadcasting cases establishing scarcity as the predicate for regulation that otherwise would violate the first amendment.[145] Such scarcity, however, is irrelevant to both the telephone and cable industries.[146] Even current cable systems have great multi-channel capacity.[147] Moreover, the hallmark of telco entry into cable and the development of a high-technology, fiber optic network is the potential for virtually unlimited capacity for the transmission of information, quite likely surpassing the needs of available programming.[148]

More fundamentally, the scarcity rationale itself is rapidly losing whatever legitimacy it once may have had. In *FCC v. League of Women Voters*,[149] the Court for the first time invalidated on constitutional grounds a statutory restriction on broadcasters' freedom of expression. In so doing, the Court once again referred to scarcity as the "fundamental distinguishing characteristic" of broadcasting,[150] but applied a standard of review of upholding only those restrictions that are "narrowly tailored to further a substantial governmental interest."[151] Although the Court disavowed a new approach, this is a stricter level of scrutiny than it has applied in the past.[152] Moreover, the Court noted

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Murdoch to Sell TV Station to Owners of Boston Celtics, N.Y. Times, Sept. 22, 1989, at D15, col. 3.

145 *National Citizens*, 436 U.S. at 794-800 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish"); and CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) ("broadcast media pose unique and special problems not present in the traditional free speech case").

146 Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1449 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("[T]he 'scarcity rationale' has no place in evaluating government regulation of cable television."). *Accord* Century Communications Corp. v. FCC, 835 F.2d 292, 295 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

147 86.8% of cable subscribers are served by systems with capacity exceeding 30 channels. Competition, Rate Dergulation and the Commission's Policy Relating to the Provision of Cable Television Service, Notice of Inquiry, 5 F.C.C. Rcd. 362, 363 (1989).

148 *See infra* notes 243-59 and accompanying text.

149 468 U.S. 364 (1984) (prohibition on editorializing by noncommercial educational broadcasters who accept funds from the Corporation for Public Broadcasting is unconstitutional).

150 *Id.* at 377.

151 *Id.* at 380. The Court did comment that ensuring adequate and balanced coverage of public issues is such an interest. *Id.*

152 *See* News America Publishing, Inc. v. FCC, 844 F.2d 800, 812, 814 (D.C. Cir. 1988).

the increasing criticism of scarcity as the prevailing rationale for broadcast regulation and suggested that it might reconsider its entire approach upon an appropriate signal from Congress or the FCC that technological developments in the electronic media warrant it.[153]

The Commission sent just such a signal the next year in its 1985 fairness doctrine Report.[154] There it documented the tremendous growth and development of both radio and broadcast television, as well as dramatic technological developments leading to a rich variety of alternatives in the electronic mass media, especially cable. The Commission therefore concluded that the fairness doctrine contravenes the public interest and is questionable as a matter of constitutional law, thereby undercutting the factual basis and rationale developed in *Red Lion* which the Court has relied on since.

Lower federal courts already have gotten the message. One panel of the Court of Appeals for the District of Columbia Circuit recently noted that a universal economic fact such as scarcity cannot be used to justify regulation in one media but not another. Rather, scarcity as an analytic tool is a "distinction without a difference . . . [that] inevitably leads to strained reasoning and artificial results."[155] Concurring in an even more recent opinion, another member of this Court acknowledged that "spectrum scarcity, without more, does not necessarily justify regulatory schemes which intrude into First Amendment territory."[156] Rather, in evaluating restrictions that tread on the editorial discretion of broadcasters, courts must carefully scrutinize application of the regulatory standard to the interests assertedly advanced.

One commentator, not addressing the telco ban, asserts that the "Commission has not written one word concerning the constitutional validity of its structural regulations," and questions how it could avoid applying its recent emphasis on first amendment concerns in other areas to a re-examination of the cross-ownership rules.[157] With regard to the telco/cable ban the point

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153 *League of Women Voters*, 468 U.S. at 376 n.11.

154 1985 Fairness Doctrine Report, 102 F.C.C.2d 143 (1985).

155 Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 508, *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) (review of FCC's decision not to apply three forms of political broadcast regulation to teletext). Judge Bork wrote the opinion joined by Judge, now Justice, Scalia.

156 Syracuse Peace Council v. FCC, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J., concurring), *cert. denied*, 110 S. Ct. 717 (1990).

157 Emrod, *supra* note 59, at 431.

is even stronger. The scarcity predicate for regulation is irrelevant and dying out in legitimacy. But even on the Commission's own terms of ownership preference for new and different speakers, the telcos should be favored. The other ownership restrictions limit the share of some mass media market owned or controlled by a single entity *already* participating in the mass media. None of them goes so far as to entirely exclude from the media market an entity, such as a telephone company, that has essentially no mass media position. Such a drastic denial of first amendment rights is counter to the FCC's own diversity goals. Invoking other cross-ownership restrictions in support of the telco/cable ban is, therefore, not only wrong and outmoded, it is contradictory.

IV. ANTITRUST, PRIOR RESTRAINT, AND THE FIRST AMENDMENT

Thus, the argument comes down to whether concern for competition, both in the economic marketplace and in the marketplace of ideas, is sufficient to justify a virtually complete ban on telco entry into cable. This depends upon the appropriate relationship between antitrust enforcement and first amendment considerations and, more importantly, upon a proper appreciation of the first amendment status and consequences of the ban as a prior restraint.

A. *Antitrust*

Antitrust, tax, and other economic regulations apply to media entities. The first amendment does not shield them from such generally applicable regulations, at least so long as there is no significant impact on the editorial process.[158] Differential treatment, however, that burdens certain elements of the media without particularized justification raises the specter of suppression of expression and is "presumptively unconstitutional."[159]

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[158] *See* Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) (examples of permissible regulation; but Court rules newspaper tax at issue is unconstitutional); Home Placement Serv., Inc. v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983) (newspaper free to make decisions on accepting advertising based on legitimate editorial or business reasons, but not for anticompetitive reasons); Newspaper Guild v. NLRB, 636 F.2d 550, 558 (D.C. Cir. 1980) (otherwise valid laws may become invalid in application where they constitute interference by government with "matters lying at the heart of a newspaper's independence"). *Cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (newspaper's editorial discretion to carry help-wanted advertisements in sex-designated columns may be restricted with respect to such commercial speech that aids illegal employment discrimination).

[159] *Minneapolis Star*, 460 U.S. at 585.

The Court recently found, for example, that selective taxation of the press designed to encourage "fledgling publishers" and "foster communication" violates the first amendment.[160]

The seminal case on the relationship between antitrust and the first amendment, and the one relied on by Judge Greene,[161] is *Associated Press v. United States*.[162] The facts of that case, however, demonstrate how misplaced and ironic such reliance is. The Associated Press was a non-profit membership organization for the gathering and dissemination of news to its member newspapers. Its by-laws allowed existing members to effectively restrict new membership by competitors who therefore were precluded from access to important, though not the only, sources of news — the association itself as well as each of the individual members. The by-laws were found to constitute a restraint of trade seriously limiting the opportunity for new entry by competing newspapers in cities already served by an existing member.[163] The Court therefore required the Associated Press to offer membership on a basis that did not discriminate against competitors.

In other words, the Court removed privately imposed restraints on entry into the print media. It *opened up* the market to greater competition from all sources, even in face of the argument that doing so would cause Associated Press to grow so large as to "become the only news service, and get a monopoly by driving out all the others."[164] The Court thus rejected precisely the speculative fear that is used to ban telco entry, and specifically avoided any restraint on the member newspapers' ability to publish as they pleased.[165] It is in this context that the Court's well-known endorsement of first amendment principles must be read:

> 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 a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a ref-

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160 Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 222 (1987).

161 *See* United States v. American Tel. & Tel., 552 F.2d 131, 183-84 (D.C. Cir. 1982) *aff'd*, 460 U.S. 1001 (1983); United States v. Westinghouse Elec., 673 F. Supp. 525, 585-86 (D.D.C. 1987).

162 326 U.S. 1 (1945).

163 *Id.* at 12-13.

164 United States v. Associated Press, 52 F. Supp. 362, 374 (S.D.N.Y. 1943) (Hand, J.). Judge Learned Hand perceived no harm from this "exceedingly remote" possibility of a monopoly open to all. *Id.*

165 *Associated Press*, 326 U.S. at 20 n.18.

> uge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.[166]

To be sure, should the telcos enter the cable industry and engage in monopolistic or other anti-competitive practices, the teaching of *Associated Press* is that the full range of the antitrust laws is available to rectify the problem.[167] The nature and scope of particular remedies, however, should be sensitive to first amendment concerns.[168] But the case cannot be read for the proposition that,

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166 *Id.* at 20. Indeed, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 252 (1974), the Supreme Court rejected reliance on this very language to support an argument for increased diversity and competition in the economic media marketplace and the marketplace of ideas, the same argument behind the telco ban.

167 *See, e.g.*, Lorrain Journal Co. v. United States, 342 U.S. 143 (1951) (injunction approved against newspaper attempting to maintain its local monopoly on mass dissemination on all news and advertising by forcing its advertisers to boycott a competing radio station); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (joint operating agreement between two newspapers, that had the purpose and effect of monopolizing local newspaper business, required modification). The FCC has specific authority to further antitrust policies. 47 U.S.C. § 314 (1988). *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795-96 (1978).

168 It is well established that antitrust and similar economic regulation must take into account first amendment concerns. *See Lorrain Journal*, 342 U.S. at 156 ("[w]hile the decree should anticipate probabilities of the future, it is equally important that it do [sic] not impose unnecessary restrictions"); *Citizen Publishing*, 394 U.S. at 139 ("[n]either news gathering nor news dissemination is being regulated by the present decree"); United States v. National Soc'y of Professional Engineers, 555 F.2d 978, 984 (D.C. Cir. 1977) (antitrust decree requiring professional society to state affirmatively that it does not consider competitive bidding unethical violates the first amendment), *aff'd*, 435 U.S. 679, 686 n.8, 697-98 (1978) (noting, however, that the first amendment does not prevent antitrust remedies). *See also* Passaic Daily News v. NLRB, 736 F.2d 1543 (D.C. Cir. 1984) (while a newspaper is accountable for unfair labor practices against its editorial employees, Associated Press v. NLRB, 301 U.S. 103 (1937), it cannot be required to publish such an employee's material); Standard Oil Co. of California v. FTC, 577 F.2d 653, 662 (9th Cir. 1978) ("first amendment considerations dictate that the Commission exercise restraint in formulating remedial orders which may amount to a prior restraint on protected commercial speech"); Beneficial Corp. v. FTC, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (government "must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary").

The Court's recent opinion in FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768 (1990), is not to the contrary, particularly as applied to the telco/cable ban. In that case the Court of Appeals ruled that the FTC had to apply the antitrust laws "with a special solicitude for . . . First Amendment rights." *Superior Court Trial Lawyers Ass'n*, 856 F.2d 226, 233 (D.C. Cir. 1988). The scope of regulation could be no "greater than is essential to further the state's interest in maintaining competition." *Id.* at 248. The government had to "prove rather than presume" a "significant threat to competition." *Id.* at 250, 253. The Supreme Court reversed because it found the antitrust *per se* rule against the sort of boycott and horizontal price fixing arrangement at issue, even though it may have entailed a component of political expression, was justified by a "long-standing judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.' " 110 S. Ct. at 780 (quoting Jefferson Parish Hosp. District No. 2 v. Hyde, 466 U.S. 2, 16 (1984)). With a government imposed, absolute ban on

especially absent any significant, demonstrated violations, the government is free *ab initio* to ban all entry. Quite the contrary, the telcos, like any other willing speaker, are among the "diverse and antagonistic sources" enjoying first amendment rights. The government has no prerogative to selectively "impede the free flow" of their ideas. Rather, the "[f]reedom to publish . . . for all" must include the telephone companies.

B. *Prior Restraint*

This conclusion is all the more compelling when we consider the nature of the telco/cable ban. The FCC naturally wishes to emphasize the ordinary, regulatory nature of the ban designed to meet important goals of economic competition and diversity in the marketplace of ideas, with only an "incidental" effect on freedom of expression. Despite this attempt to invoke a particularly accommodating, but inapposite, trend in the Court's recent first amendment jurisprudence, the ban amounts to the worst kind of prior restraint — the most onerous and least supportable form of governmental regulation. If put to its proof, as the government should be, it is hard to imagine justification for the ban.

The concept of prior restraint is not well defined in first amendment jurisprudence. It has been invoked in a variety of arguably dissimilar situations to occasion the highest level of judicial scrutiny, with the almost immediate result of invalidating whatever restriction on free expression has been so characterized.[169] One indeed might argue that the doctrine of prior restraint has become simply an expression of fundamental policies in favor of expanding first amendment freedoms.[170] The linguistic characterization of the ban on telco entry into cable as a prior

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telco entry which substantially restricts competition, the presumption is reversed. As the Court noted, the Sherman Act reflects a legislative judgment in favor of competition, including the "free opportunity to select among alternative offers." *Superior Court Trial Lawyers Ass'n*, 110 S. Ct. at 775 (quoting *National Soc'y of Professional Engineers*, 435 U.S. at 695). Rather than being "categorically prohibit[ed]," competition from telco entry is presumptively favored, and any restrictions imposed should require at least the scrutiny of the lower court's approach. *Id.* at 779.

169 *See* Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409, 419 (1983) (both judicial and academic commentators reinforce "the impression of elasticity and incoherence in the term 'prior restraint' ") [hereinafter Jeffries]; Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C.L. REV. 1, 2 (1989) (asserting the Supreme Court has "affixed the prior restraint label to an exceptionally diverse group of laws, regulations, and government actions").

170 *See* Jeffries, *supra* note 169, at 419-20. The Supreme Court, however, clearly continues to believe there is an identifiable concept meriting special treatment. *See, e.g.*, Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 583-84 n.6 (1983) ("Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect.").

restraint on the telephone companies' freedom of expression need not trouble us, however. On any measure the presumptive unconstitutionality of the ban is apparent.

The ban is aimed directly at a categorically defined class of speakers and prohibits any and all use of a major electronic medium of mass communications of expanding reach and importance. An entity with no mass media presence is prohibited from what is likely its most natural and accessible *entre* into that general market. The simple identity of the willing speaker precludes it from clearly protected, basic, first amendment activity. While the ban apparently is not viewpoint specific, it can hardly be considered content-neutral,[171] thereby allowing greater room for regulation. For it would be perverse to consider a *total* ban on cablespeech by telcos content-neutral, and therefore less infringing, because it was not *more limited* to specific categories of expression.[172] Rather, absolute prohibitions on speech are presumptively unconstitutional.[173] Moreover, an articulated goal of the ban in terms of fostering diversity in the marketplace of ideas reveals the fundamental content-based nature of the regulation.[174]

Consequently, the ban on telco entry deserves to be treated

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171 The Supreme Court's latest statement on content-neutrality in the first amendment context seems to conflate the notions of viewpoint discrimination and content-neutrality. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2754 (1989). Taking the government's purpose as the controlling consideration, the Court states that incidental regulation of expressive activity is content-neutral so long as it is "*justified* without reference to the content of the regulated speech." *Id.* (citing Community for Creative Non-Violence, 468 U.S. 289, 293 (1989); Heffner Int'l Soc'y v. Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 711 (1976))) (emphasis in original). This background paragraph of the Court's opinion, citing numerous precedents, apparently was not meant to alter traditional analysis. At any rate, as discussed in the text, the telco ban is partly justified by reference to content and cannot be considered as having only an incidental effect on first amendment rights.

172 "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 530, 537 (1980). *A fortiori*, to be at all meaningful it must extend to prohibition of all public communication on any topic. *See also* Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722, 1728 (1987).

173 *See* Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 107 S. Ct. 2568, 2572 (1987) (no conceivable governmental interest could justify prohibition on all first amendment activities at airport regardless of its status as a public or nonpublic forum).

174 Pacific Gas & Elec. Co. v. Public Util. Comm'n of California, 475 U.S. 1, 12-13 (1986) (access to utility's billing envelopes designed to "offer the public a greater variety of views" is not content neutral). *But cf.* United Video Inc. v. FCC, 890 F.2d 1173, 1189 n.13 (D.C. Cir. 1989) (FCC's syndicated exclusivity rules are justified by their encouragement of production of diverse programming and therefore are content-neutral). The lower court somehow viewed this as a justification "without reference to the content of the regulated speech." *Id.*

as a prior restraint. Indeed, it is the worst kind of prior restraint; it is far closer to a permit or licensing scheme that works a total exclusion than to the prototypical prior restraint in the form of an injunction that has more limited effect. As such, it suffers from many of the vices associated with the broad power to censor by administrative fiat.[175] The ban, therefore, must bear a "heavy presumption against its constitutional validity,"[176] and the government must meet the "heavy burden of showing justification for the imposition of such a restraint."[177]

To avoid this burden which it cannot meet, the FCC, in its brief discussion of constitutional issues raised by the ban, portrays it as content-neutral regulation affecting speech only incidentally.[178] As such, the Commission asserts that its rules can be sustained as narrowly tailored (no greater than essential) to achieve a substantial government interest under the *O'Brien* standard.[179] This is plausible as the Court has been eviscerating the protection it is willing to afford even political expression from regulation that it deems has only an "incidental" burden on speech.[180]

This approach is very similar to the FCC's unsuccessful attempt to sustain its cable "must-carry" regulations by invoking a lessened standard of review. The original must-carry regulations were held to violate the first amendment even under *O'Brien's* in-

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175 *See* Jeffries, *supra* note 169, at 421-34. The overlapping administrative, statutory, and judicial components of the ban make it somewhat complicated to fit nicely into Jeffries' discussion of different types of prior restraints. Administrative discretion, for example, which Jeffries identifies as an especially troublesome factor, is present in the FCC's waiver policy. *Id.* at 423. *See* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988) (licensing statute entailing governmental discretion may constitute prior restraint and result in censorship). Judge Greene's repeated judicial review, on the other hand, even though on a very broad level of regulation, may possess some ameliorating characteristics. *See* Jeffries, *supra* note 169, at 426-34. As described in the text, however, the problems with the ban are manifest.

176 New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

177 *Id.* (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)). *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-62 (1975).

178 Telephone Company — Cable Television Cross-Ownership Rules, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C. Rcd. 5849, 5864 (1988).

179 United States v. O'Brien, 391 U.S. 367, 377 (1968). While Judge Greene never discussed the appropriate standard for evaluating the constitutionality of the telco ban, those opposing telco entry on appeal argued the *O'Brien* standard.

180 *See* United States v. Albertini, 472 U.S. 675, 689 (1985) (a neutral, incidental burden on speech need only promote a "substantial government interest that would be achieved less effectively absent the regulation"). *See also* Board of Trustees of the State University of New York v. Fox, 109 S. Ct. 3028, 3033-34 (1989) (rejecting, in the commercial speech context, a "least restrictive means" test for narrow-tailoring and suggesting the same applies to political expressive conduct). *Accord* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2757-58 (1989).

terest-balancing formulation.[181] At the same time, the Court expressed its "serious doubts" about applying such an unexacting standard to these infringements on cable operators' editorial discretion.[182] In reformulating its rules[183], the Commission tried to rely on the Supreme Court's intervening decision in *City of Renton v. Playtime Theatres, Inc.*,[184] an adult theatre zoning case. In *Renton*, the Court maintained that the time, place and manner zoning ordinance at issue was content-neutral because it was not aimed at the content of the adult films but at the "secondary effects" adult theaters have on the surrounding community.[185] It therefore was "*justified* without reference to the content of the regulated speech."[186]

Renton is dangerous first amendment precedent. Just as it is becoming all too easy to describe clear content-based regulation as only incidentally burdening expression, so too does Justice Rehnquist's opinion for the Court in *Renton* demonstrate how easy it is to contrive secondary effects to justify suppression of free speech plainly directed at its content.[187] A majority of the Court may be retreating slightly in acknowledging that the impact of speech on its audience—the concern of the diversity principle supporting the telco ban—cannot be a mere "secondary effect" subject to *Renton* analysis.[188] At any rate, the fate of the FCC's prior attempts to rely on *O'Brien* and *Renton* should control here as well.

The must-carry rules invalidated in *Quincy* interfered with a cable operator's editorial discretion on only a portion of his available channels. The cable operator was entirely free to program as it wished on the rest of the channels. The court realized that, as with the telco ban, the goal of the rules could be framed in content-neutral terms of preserving competition and fostering

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181 *See generally* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

182 *Id.* at 1448.

183 Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C. Rcd. 864, 893-94 (1986), *reconsid. denied*, 2 F.C.C. Rcd. 3593, 3602-03 (1987), *rev'd*, Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct 2014 (1988).

184 475 U.S. 41 (1986).

185 *Id.* at 47.

186 *Id.* at 48 (quoting Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (emphasis in original)).

187 *See Renton*, 475 U.S. at 55-63 (Brennan, Marshall, JJ., dissenting); Boos v. Barry, 108 S. Ct. 1157, 1171-73 (1988) (Brennan, Marshall, JJ., concurring) (further describing the dangers and difficulties posed by the *Renton* analysis).

188 *Boos*, 108 S. Ct. at 1163. *But see* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2754 (1989); *id.* at 2761 n.1 (Marshall, Brennan, Stevens, JJ., dissenting).

diversity in the electronic video marketplace.[189] Nonetheless, the rules were a "far cry" from a merely incidental burden on speech.[190] Although viewpoint neutral, they were "explicitly designed to 'favor[] certain classes of speakers over others.' "[191] Therefore, they "profoundly affect values that lie near the heart of the First Amendment."[192] If pressed, it is hard to see how the court in *Quincy* could have avoided treating the must-carry rules as a direct burden on the first amendment rights of cable operators subject to exacting scrutiny. Indeed, the Commission had no more success in invoking *Renton* to buttress its incidental/secondary effects argument in support of far less onerous modified rules.[193]

The telco ban does not just infringe editorial discretion it precludes any opportunity for its exercise by a telephone company. The ban keeps *all* potential cable channels from the telcos and reserves them for others. It "favors" certain classes of speakers in a particularly Draconian way by wholly eliminating another class. As a direct ban it is certainly a direct burden, and the question is whether the government can possibly justify such a prior restraint.

C. *The First Amendment*

One may assume, at least in the abstract, that the asserted goals of preserving economic competition in the electronic video marketplace and competition in this marketplace of ideas are substantial, even compelling, governmental interests.[194] Even so, and simply put, speculative fears about untoward consequences in these regards from telco entry into cable cannot begin to justify the total ban.

On one level, if neither plausible fear at the highest rank of

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189 Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1451 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1980).

190 *Id.*

191 *Id.* (quoting HBO, Inc. v. FCC, 567 F.2d 9, 48 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)) (FCC's pay cable rules invalidated).

192 *Quincy TV*, 768 F.2d at 1453.

193 *See generally* Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). Once again, the court found the rules did not satisfy even the less-demanding *O'Brien* test and therefore did not have to decide whether to apply a stricter standard. *Id.* at 298.

194 *See* FCC v. League of Women Voters of California, 468 U.S. 364, 377-80 (1984). *But see* Shurberg Broadcasting v. FCC, 876 F.2d 902, 919-23, 923 n.33, 926 (D.C. Cir. 1989) (Silberman, J.), *cert. granted sub nom.* Astroline Communications Co. Ltd. Partnership v. Shurberg Broadcasting of Hartford, Inc., 110 S. Ct. 715 (1990) ("It is doubtful that the FCC has a compelling interest in fostering programming diversity."). *Cf. id.* at 930 n.11 (MacKinnon, J., dissenting).

government of a grave threat to national security during a time of war,[195] nor realistic concerns about preserving the fundamental constitutional right to a fair trial in a capital case,[196] justify a prior restraint on the media, the far more speculative and far less momentous interests asserted here cannot possibly justify the even broader prior restraint on the telephone companies. One need not go to such lofty heights, however. On their own terms the government's economic and diversity concerns are wholly inadequate to overcome the heavy presumption against "one of the most extraordinary remedies known to our jurisprudence."[197]

In upholding the FCC's limited divestiture requirement of co-located newspaper-broadcast combinations in *National Citizens*, the Supreme Court allowed the Commission to rely on factual economic determinations of a "judgmental or predictive nature" in circumstances where "complete factual support . . . is not possible or required."[198] In *Bellotti*, the Court indicated that an empirically-supported argument that a particular faction "threatened *imminently*" to overwhelmingly dominate the marketplace of ideas, "thereby denigrating rather than serving First Amendment interests," would at least merit the Court's consideration.[199] Neither of these approaches, however, supports the broad prior restraint on the telephone companies.

As a preliminary matter, even if the FCC and, by extension Congress, in reliance upon the Commission, were to maintain the need for continuing the ban, that cannot determine the first amendment issue. As the Court frequently states, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[200] This principle has particular

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195 *See generally* New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (The Pentagon Papers Case). The standard from this case for sustaining a prior restraint usually is taken from Justice Stewart's opinion: the government must show that lack of prior restraint "surely will result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, White, JJ., concurring). *See also id.* at 726-27 (Brennan, J., concurring).

196 *See generally* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569-70 (1976).

197 *Id.* at 562.

198 FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978). *See id.* at 796-97 (diversity and its effects are elusive concepts, not easily defined or measured; in these circumstances the Commission is entitled to rely on its judgment).

199 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978) (emphasis added). *See also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 577 (1980) (Blackmun, J., concurring) (absent an emergency that justifies repression, the remedy for alleged distortion in the marketplace of ideas is "more speech, not enforced silence").

200 Sable Communications of California v. FCC, 109 S. Ct. 2829, 2838 (1989) (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)). *See also* Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986); Century Communications Corp. v. FCC, 835 F.2d 292, 299 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032

force when the asserted "finding" is in fact merely a presumption.

1. Economic Concerns

Concerns that telephone companies in the cable business will engage in cross-subsidization, unfair competition, or other monopolizing activities are not wholly ephemeral.[201] The telcos well may have both the ability and temptation to do so.[202] The point, rather, is that such *a priori* speculative fears cannot sustain a broad prior restraint.[203] Such fears do not simply constitute a well-accepted economic theory that may be relied upon in a specific instance without empirical support.[204] Instead they represent a conclusion about what necessarily will happen in a dynamic economic market, despite forewarning and available alternative means well short of prior restraint to prevent their occurrence or remedy excesses that do occur.

The appropriate approach again is typified by the must-carry cases. Although the court in *Quincy* was reviewing regulation that infringed the editorial discretion of cable operators far less than the telco ban, and it ultimately applied the less demanding *O'Brien* standard, it nonetheless distinguished the *National Citizens* approach.[205] Deference to the Commission's "concededly un-

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(1988) ("[T]he substantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake."); News America Publishing, Inc. v. FCC, 844 F.2d 800, 805 (D.C. Cir. 1988) ("even in broadcast regulation the First and Fifth Amendments demand" close fit between a law and its asserted legitimate purposes).

201 *But see* HUBER, *supra* note 75, at § 6.35 (indicating that the lack of overlap involved in many activities of running a local telephone exchange and a cable service presents little opportunity for cross-subsidization).

202 *See, e.g., Wrong Numbers: Nynex Overcharged Phone Units For Years, An FCC Audit Finds*, Wall St. J., Jan. 9, 1990, at 1, col. 6 (findings of cost and revenue shifting by a BOC) [hereinafter *Wrong Numbers*]; In re New York Telephone Co., 67 Rad. Reg. (P & F) 588 (1990) (apparent violations of affiliate transaction rules and policies).

203 If one were to argue that "any given issue of Hustler [Magazine] may be found legally obscene" and that, therefore, the Magazine generally should be subject to sanction or prior restraint, *see* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1029 (5th Cir. 1987) (Jones, J., concurring in part and dissenting in part), *cert. denied*, 485 U.S. 959 (1988), loud first amendment alarms surely would sound. The telcos are entitled to at least as much first amendment solicitude as Larry Flint. *See* Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1413-14 (1990) (Scalia, J., dissenting) (describing the long and powerful tradition that "the mere potential for harm does not justify a restriction upon speech").

204 *See* United Video Inc. v. FCC, 890 F.2d 1173, 1180 (D.C. Cir. 1989) (Commission's conclusion sufficiently in accord with accepted economic theory that it can stand without empirical support).

205 Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1458 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). The court found the FCC capable of the "most sophisticated analysis" of the effects of cable on conventional broadcasting. *See also* News America

supported determinations [was] plainly inappropriate."[206] Where first amendment rights are at stake "the Commission must do more than ask us to defer to its 'more or less intuitive model' and 'collective instinct.' "[207] In short, "speculative fears alone have never been held sufficient to justify trenching on first amendment liberties."[208]

Moreover, the empirical basis for the speculative fears is questionable. The cable industry has grown dramatically in recent years. Its audience and revenues have exploded,[209] and sales of cable systems command increasingly high prices.[210] Many consider the cable industry already too concentrated,[211] vertically integrated[212] and powerful. For example, multiple system owners ("MSOs") control over fifty percent of subscribers with the top ten controlling about 47% and the top four about 28%.[213] Currently, the Commission is undertaking major studies of the industry[214] in the wake of growing congressional sentiment for re-regulation.[215]

However, the best way to discipline the industry is through

Publishing, Inc. v. FCC, 844 F.2d 800, 811-12 (D.C. Cir. 1988) (rejecting FCC's broad reading of *National Citizens*).

206 *Quincy*, 768 F.2d at 1457.

207 *Id.* at 1458. Even in the criminal context, "cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate" to restrain expression. Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916, 929 (1989).

208 Century Communications Corp. v. FCC, 835 F.2d 292, 300 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). *See also* Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n of New York, 447 U.S. 529, 543 (1980) ("Mere speculation of harm [from cross-subsidization] does not constitute a compelling state interest"); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 569 (1980) ("conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising").

209 *See* United Video Inc. v. FCC, 890 F.2d 1173, 1181 (D.C. Cir. 1989); Competition, Rate Deregulation and the Commission's Policy Relating to the Provision of Cable Television Service, Notice of Inquiry, 5 F.C.C. Rcd. 362, 362-63 (1989).

210 *See* Fabrikant, *For Cable Systems The Takeover Frenzy Cools*, N.Y. Times, Jan. 22, 1990, at C6, col. 3.

211 *See* NTIA Report, *supra* note 7, at 77-88 and Attachment 2 (concentration charts of top ten and top four MSOs for 1983-87); *Competition, Rate Deregulation*, 5 F.C.C. Rcd. at 362-63, 370-73.

212 NTIA Report, *supra* note 7, at 89-107; *Competition, Rate Deregulation*, 5 F.C.C. Rcd. at 373-74.

213 *See Cable TV: The New Big Kid*, *supra* note 47, at 3364; *Top 100 MSO's*, CABLEVISION, Jan. 29, 1990, at 80. Taking into account cross-ownership interests among MSOs these concentration figures can appear considerably higher. *See Competition, Rate Deregulation*, 5 F.C.C. Rcd. at 378 n. 68.

214 *See generally Competition, Rate Deregulation*, 5 F.C.C. Rcd. 362; Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Notice of Proposed Rulemaking, 5 F.C.C. Rcd. 259 (1990).

215 *See, e.g.*, S.1880, 101st Cong., 1st Sess. (1989); H.R.3826, 101st Cong., 1st Sess. (1990). These companion measures would impose significant restrictions on cable operators.

increased competition.[216] To exclude the single best source of such competition, and in particular the two thirds of the domestic telecommunications industry represented by the BOCs,[217] is senseless and counterproductive. Indeed, the argument that we have to exclude these potential competitors to preserve competition in the industry is all too reminiscent of the logic regarding the Vietnamese village that had to be destroyed in order to save it.

It is axiomatic that the goal of antitrust policy is to protect competition, not competitors.[218] The best result from telco entry would be the creation of direct competition between systems serving the same customers and providing some roughly fungible services. This would create real choice and perhaps some diversity for consumers.[219] Cable, however, may be a local natural monopoly because economic factors in the industry may dictate that the long-range competitive market equilibrium would result in a single firm serving a given geographic area.[220] Even if so, and even if fears of telephone companies replacing cable operators through anticompetitive practices materialize, at worst one natural monopolist will replace another. While some cable operators might suffer, it is not clear the public would. Under this pessimistic scenario, however, maintaining the ban on telco entry not only does violence to the first amendment, it also forecloses potential competitive pressure to produce periodically, through market forces and not governmental edict, the "best" cable monopolist.[221]

The FCC now believes both that the cable industry is suffi-

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216 *Competition, Rate Deregulation*, 5 F.C.C. Rcd. at 363 ("[I]n the long term, competitive market forces [as opposed to direct regulatory intervention] will best promote the interests of viewers or consumers.").

217 HUBER, *supra* note 75, at 1.34. Another study suggests the BOCs serve approximately 77% of United States local exchange customers. *See* Pepper, *supra* note 75, at 26-27.

218 *See, e.g.*, Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 (1986).

219 *See* Hazlett, *Cable vs. Telcos: Technology Shaping Emerging Policy Options*, 7 CABLE T.V. AND NEW MEDIA 1 (May 1989).

> The real opportunity from a public policy perspective is to juxtapose two telecommunications giants in earnest rivalry in local markets. . . . [T]echnological evolution means that the separation of video service providers and common carrier voice or data transmission suppliers will become increasingly archaic. As in other areas of communications, convergence of distribution modes forces a reassessment of the separation of distribution functions.

Id. See also Pepper, *supra* note 75, at 78-79; *Reexamination of the Effective Competition Rulemaking*, 5 F.C.C. Rcd. at 267 n. 30.

220 *See* Winer, *The Signal Cable Sends*, *supra* note 56, at 245-52 (discussing this problematic issue).

221 *See id.* at 249-50.

ciently strong and mature to compete competently with the telephone companies and that it has available adequate, nonstructural accounting and related safeguards to monitor and detect improper anticompetitive behavior by the telcos.[222] It is hard to quarrel with this conclusion. Cable is now available to almost 82% (73.9 million) of the nation's television households with over 56% (50.8 million) actually subscribing.[223] In terms of revenues, profitability, ratings, market share, access to programming, and investor interest, cable has come of age.[224] The initial construction phase of cable is virtually complete leaving telephone companies the alternative of acquiring existing systems or overbuilding to compete. As the Commission concludes, "with respect to most of the country, there is no risk of telephone company preemption of broadband services."[225]

The situation may be less conclusive with respect to safeguards for preventing anticompetitive activity. The Commission apparently believes that provision of cable service by telephone companies would be sufficiently similar to their provision of other services that it can devise and apply adequate, nonstructural accounting and other safeguards analogous to those developed to protect against anticompetitive conduct by carriers in other areas.[226] Implementing such safeguards would not appear to raise any significant first amendment concerns, so long as they do not infringe upon editorial discretion.[227]

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222 Telephone Company — Cable Television Cross-Ownership Rules, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C. Rcd. 5849, 5853, 5858-60.

223 *By The Numbers*, BROADCASTING, Dec. 18, 1989, at 14.

224 *See generally Cable TV: The New Big Kid*, *supra* note 47, at 3361-66; *Competition, Rule Deregulation*, 5 F.C.C. Rcd. at 362.

225 *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5853. *See also* NTIA Report, *supra* note 7, at 34 (concerns that telephone companies would displace the cable industry "overlook the strengths of the cable industry"). The BOCs, however, still dwarf the cable operators. The largest MSO had 1987 revenue of $1.71 billion compared with sixth-ranked Pacific Telesis' $9.13 billion. Amparano, *Phone Firms Battle Cable-TV Operators Over Providing Fiber-Optic Home Links*, Wall St. J., Sept. 9, 1988, at 23, col. 3.

226 *Telco Further Notice of Inquiry*, 3 F.C.C. Rcd. at 5858-60. These might include requiring the offering of unbundled basic services, explicit cost allocation standards, and the common carrier offering of underlying transmission capacity to others on the same terms and conditions the carrier takes such capacity for its own cable service. *See* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990) (upholding FCC rules governing transfer of assets between a regulated telco and its nonregulated affiliates).

227 Ironically, the debate over regulation of cable seems driven, at least in part, by such lofty concerns as the siphoning of sports programming onto "pay" television, as if viewers have an inherent, fundamental right to "free" access to such programming. *See* Carnevale, *Congress Seeks To Rein In Cable TV*, Wall St. J., Dec. 11, 1989, at B1, col. 4; *Joe Sixpack: This One's For You*, CONG. Q., Dec. 9, 1989, at 3362 ("Congress knows no fury, it seems, like that of a frustrated sports fan"). Accounting safeguards are one thing, but government attempts to determine what is shown on television, on what channels, under what conditions, and when offend the first amendment and are inappropriate.

Judge Greene has been rather skeptical of the FCC's previous oversight abilities.[228] But specifically with regard to telco entry into cable, the FCC and others presumably are well aware of the possible problems and know what to look for in monitoring the industry.[229] Moreover, the Commission no longer is dealing with one enormous and monolithic telephone company. Instead there are many substantial, independent companies, prominently including the increasingly diversified BOCs all of whom may become horizontal competitors with each other as well as with the existing MSOs and independent cable operators.[230] In the past cable operators have not been hesitant to assert themselves against anticompetitive activities,[231] and there is no reason to believe the expanded and even more competitive industry will be any less vigilant in policing itself this way. If necessary, the Commission should apply increased regulatory resources before extinguishing the telephone companies' freedom of expression. Furthermore, deference to the FCC's expertise here is appropriate as it operates in favor of first amendment rights.

2. Diversity Considerations

Finally, appeal to an amorphous diversity principle in support of prior restraint is wholly inappropriate. First, it is as equally backwards as the economic argument. Allowing telco entry may well stimulate greater development of broadband facilities and networks making available more, new and better programs and services.[232] In particular, these might include the

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228 United States v. Western Electric Co., 673 F. Supp. 525, 567-74 (D.D.C. 1987). *See Wrong Numbers, supra* note 202 (FCC has fewer than 20 auditors to police a $150 billion industry and could conduct a full audit of each major phone company only once every 16 years). The fact that the FCC has just fined Nynex $1.4 million and ordered it to disgorge $35 million in inflated profits earned through cost-shifting demonstrates both that problems exist and the FCC's ability to detect and remedy them. *See* In re New York Tel. Co., 67 Rad. Reg. (P & F) 558 (1990). *See also* Sims, *U.S. Accuses 2 Nynex Companies Of Overcharging And Fines Them*, N.Y. Times, Feb. 9, 1990, at 1, col. 1; *FCC: Nynex Telcos Overpaid $118.5 Million To Unregulated Subsidiary*, FCC Week, Feb. 12, 1990, at 1, 2 (FCC Chairman quoted as saying that Commission's action demonstrates "safeguards actually exist, and that they are being efficiently administered and vigorously enforced.").

229 *See* United States v. Western Electric Co., 714 F. Supp. 1, 17-18, *amendment and clarification denied*, 1988-1 Trade Cas. (CCH) ¶ 68,094 (D.D.C. 1988).

230 *See* United States v. American Tel. & Tel., 552 F. Supp. at 187 (distinguishing the BOCs from the former, monolithic Bell system). *See also* Lopez & Carnevale, *Phone Firms Are Becoming Poles Apart: Bells, In Varying Degrees, Diverge and Diversify*, Wall St. J., Feb. 9, 1990, at B5, col. 1.

231 *See, e.g.*, Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) (affirmance of multi-million dollar antitrust judgment for cable operator against a competitor).

232 A stated purpose of the Cable Act is the provision of "the widest possible diversity of information sources and services to the public." Cable Act § 601(4), 47 U.S.C.

considerable benefit of substantially increased opportunities for access to the medium in far less constitutionally troublesome ways. The Commission now seems persuaded of this basic view.[233]

More fundamentally, the diversity concept necessarily implies an inherently vague and subjective social-political-economic scale on which to measure programming and related services. Social scientists might think they can do this,[234] but the first amendment demands more precision.[235] Simple market fragmentation does not yield program diversity;[236] there is no necessary relationship between the two, as a comparison of the three major broadcast networks readily demonstrates. Moreover, as just discussed, the economics of the cable industry may well mean that telco entry will not much affect, one way or the other, the degree of market fragmentation. At most, the identity of some players may change.

A cable operator who "narrowcasts" a range of cable chan-

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§ 521(4) (Supp. V 1987). The telcos certainly would qualify in terms of sources and services.

233 Telephone Company — Cable Television Cross-Ownership Rules, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C. Rcd. 5849, 5857 (1988). Again, there seems little potential for a more restrictive industry even if telcos do displace present cable operators.

234 As an example of what passes for research in this general area, consider Lowry & Towles, *Prime Time TV Portrayals of Sex, Contraception and Venereal Diseases*, 66 JOURNALISM Q. 347 (Summer 1989). The authors' basic coding categories for selected prime time network programming included "erotic touching" ("heavy" kissing was counted but not a casual "peck" type of kiss, unless the context was ambiguous and the kiss lasted three seconds or longer), *id.* at 349, and "heterosexual intercourse" subdivided into verbal (*e.g.* spoken references to "an affair"), implied, or physically depicted. *Id.* In another category, "physical suggestiveness," three women in bikinis walking together directly in front of the camera counted as one instance, but three different camera shots of one woman in a bikini counted as three instances! *Id.* at 350. The authors performed modest statistical compilations of the data collected — that is, the number of "codable behaviors" observed in each category — and purported to draw conclusions such as: "[N]etwork TV presentation of sexual behaviors is more a disinformation campaign than a realistic source of information." *Id.* at 352. One must hope the first amendment would save us from any attempt to regulate based on such stuff.

235 *See, e.g.*, Winter Park Communications, Inc. v. FCC, 873 F.2d 347, 358-59 (D.C. Cir. 1989) (Williams, J., dissenting) (criticizing study purporting to show link between minority broadcast ownership and diverse programming for failing to define " 'minority-targeted programming' " and suggesting the inevitable collapse of any such evidence), *cert. granted sub nom.* Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 715 (1990).

236 Even when particularized to the area of gender- and race-based preferences in awarding broadcast licenses, there is great controversy as to whether minority ownership leads to minority programming. *See, e.g.*, Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902, 921-22 (D.C. Cir. 1989) (Silberman, J.) (calling this a "questionable premise" based on racial or ethnic stereotypes), *cert. granted sub nom.* Astroline Communications Co. Ltd. Partnership v. Shurberg Broadcasting of Hartford, Inc., 110 S. Ct. 715 (1990). *Cf. id.* at 932 (opinion of MacKinnon, J.) (citing legislative findings); *id.* at 944-48 (Wald, C.J., dissenting). *See also* Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989), *cert granted sub nom.* Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 715 (1990).

nels, just like a broadcaster who programs a single channel, has to attract a sufficient audience (subscribers) to be profitable. The broadcaster with a single channel by and large does this with bland, average, lowest-common-denominator programming. For the cable operator the task is more complicated since it must determine the right mix of programming and prices to offer in various options. Still, consumer demand will produce substantial similarity among the services offered regardless of who the cable operator is.[237] As with any medium of information and entertainment there is room for diversity but, mainly, only at the margins. It is hard to imagine a coherent, let alone conclusive, argument that telco entry into cable will so distort the industry as to produce a uniformly deleterious marginal effect, or even that such a hypothetical effect would be of any consequence.

At any rate, the first amendment clearly precludes any governmental attempt to engineer the mass media for such content-based diversity. As the Court repeatedly stresses in a variety of contexts, "the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[238] Even more certainly, such distinctions cannot be made based on the identity of the speaker or the interests the speaker might represent.[239]

Ultimately one's view of the appropriateness of government "tinkering" with the mass media marketplace, as in the telco ban, depends on a reading of the first amendment as a prohibition on such government involvement, "Congress shall make no law," or on a belief that the amendment creates an affirmative power or obligation for the government to structure such markets to achieve perceived underlying goals.[240] First amendment free-

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237 *See Shurberg Broadcasting*, 876 F.2d at 923 (Silberman, J.) ("[I]t is not at all apparent why a station owner, be she minority or nonminority, would make programming decisions according to her personal tastes rather than in response to the demands of the marketplace.").

238 Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790-91 (1978); Pacific Gas & Elec. Co. v. Public Util. Comm'n of California, 475 U.S. 1, 14 (1986).

239 *Bellotti*, 435 U.S. at 784; *Pacific Gas*, 475 U.S. at 15.

240 *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 145 (Stewart, J., concurring) in which Justice Stewart warned of the "dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.' " Even if one adopts the latter point of view, one also would have to believe the government can outperform the market in this regard, a dubious proposition at best. *See* Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1415-16 (1990) (Scalia, J., dissenting) (discussing the appropriate first amendment roles of government and private institutions in managing the arena of public debate).

doms do create dangers including, perhaps, influence by certain interests over particular media. By and large, however, they are dangers contemplated by the framers of the first amendment and left to the people to resolve without the heavy hand of government intervention, an even greater danger.[241]

V. Technological Benefits From Telco Entry

The first amendment arguments for telephone companies' right to enter the cable market stand alone. They do not depend on an affirmative demonstration of the public benefits to be gained. Such benefits, however, already inhere in the actual or potential competition the telcos will represent, as well as the opportunities for greater diversity in the marketplace of ideas they may provide. It is also useful to consider briefly the technological developments telco entry may stimulate, resulting in new and better products and services.

The FCC has a statutory mandate to promote technological developments in the communications field.[242] And even Judge Greene emphatically acknowledged both the tremendous benefits from broad development of information services[243] and the practical necessity of BOC participation in creating the transmission infrastructure for such services.[244] The Judge focused on what he termed the "videotex industry," referring to a wide variety of easy-to-use interactive data services that he described in

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241 *See Bellotti*, 435 U.S. at 791-92; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). *See also supra* note 144. Consider the difficulty the media in England is having with a supposedly conservative government in the absence of a first amendment. *See, e.g.*, Atlas, *Thatcher Puts A Lid On: Censorship In Britain*, N.Y. Times, Mar. 5, 1989, (Magazine) at 36.

242 *See* 47 U.S.C. § 218 (1982) (FCC should act so that "the benefits of new inventions and developments may be made available to the people of the United States."); 47 U.S.C. § 303(g) (1982) (FCC should "generally encourage the larger and more effective use of radio in the public interest.").

243 United States v. Western Elec. Co., 714 F. Supp. 1, *amendment and clarification denied*, 1988-1 Trade Cas. (CCH) ¶ 68,094 (D.D.C. 1988). Judge Greene wrote that

> If consumer-oriented videotex services were made available on a large scale, the economic and social welfare of the American people could be substantially advanced. It is difficult to overestimate the significance of this potential. Information services . . . can come in an amazing scope and variety. If developed to their full potential, these services could in some ways revolutionize American intellectual, social, cultural, and economic life.

Western Elec., 714 F. Supp. at 5-6 (footnote omitted).

244 *Id.* at 6. Judge Greene, however, felt that BOC participation in the provision of information content was unnecessary and would pose the danger of anticompetitive activity. *Id.* at 5-6; United States v. Western Elec. Co., 673 F. Supp. 525, 595 (D.D.C. 1987). For Judge Greene, such an infrastructure consists "primarily of various low-level gateway functions that do not involve control of or interaction with information content." *Id.* at 592. *See* United States v. Western Elec. Co., 714 F. Supp. 1, 11-17, *amendment and clarification denied*, 1988-1 Trade Cas. (CCH) ¶ 68,094 (D.D.C. 1988).

some detail.[245] Indeed, although noting that several efforts to provide videotex services in this country have failed,[246] the Judge looked to Teletel, the French videotex system, as one possible model for a "coherent information services network," but one that soon may be eclipsed.[247]

In fact, the brave, new, inevitable information world may well surpass whatever we dream of today. The marriage of computing capability and electronic communications holds limitless potential.[248] The head of MIT's Media Lab, for example, predicts that in twenty years the average television set will have the computing power of today's Cray supercomputer.[249]

The key, most likely, is the development of a fiber-optic system whose greatly expanded capacity and increased speed[250] will allow for broadband, integrated services digital networks ("B-ISDN"), for both business and residential use. This "envisions a universal and ubiquitous system designed to provide efficient broadband interconnection for all possible communication services," in particular integrating voice, data and video on a single system.[251] So far ISDN has been rather limited, encompassing only narrowband activities;[252] but telephone companies are ex-

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245 *Western Elec.*, 714 F. Supp. at 5-7. Quoting the HUBER REPORT, Judge Greene explained that "videotex arranges information in a text or graphic format on a video display with user input through a keyboard." *Id.* at 5 n.12. This is distinguished from "audiotex" which "allows consumer access to information through a regular telephone line and the use of a touchtone keypad." *Id.* at 13 n.44. The court, however, did not distinguish between the two in allowing BOC involvement in the transmission of information services. *Id.* at 13.

246 *Western Elec.*, 673 F. Supp. 525, 587 (D.D.C. 1987). The telcos have not yet had much chance to develop it.

247 *Western Elec.*, 714 F. Supp. at 7-8; *id.*, 673 F. Supp. at 588-89. *See generally* Wright, *supra* note 1, at 83-94.

248 *See generally* S. BRAND, THE MEDIA LAB: INVENTING THE FUTURE AT MIT (1987) [hereinafter BRAND]; Baer, *New Communications Technologies and Services*, in 2 NEW DIRECTORS IN TELECOMMUNICATIONS POLICY 139 (P. Newberg ed. 1989) [hereinafter Baer].

249 BRAND, *supra* note 248, at 77-78 ("It will not be receiving pictures. It will be receiving data, and *it* makes the pictures").

250 *See* Pepper, *supra* note 75, at 6.

251 U.S. Congress, Office of Technology Assessment, *Critical Connections: Communication for the Future*, OTA-CIT-407 (U.S. Gov't Printing Office, Jan. 1990) at 50 [hereinafter *Critical Connections*]. Digitalization is "the process of transforming 'analog' messages (a spoken word, a picture, a letter) into signals made up of discrete pulses that can be transmitted, processed and stored electronically." *Id.* at 49. Not only is transmitting in digital form far more efficient and accurate, but in such form "audio, video, and textual messages can be combined and recombined, allowing information to be integrated in a way that previously was impossible." *Id.* at 49-50. This can lead to tremendous multimedia applications in videotex and elsewhere. *Id.* at 52-53. *See also* Frenkel, *HDTV and the Computer Industry*, 32 COMMUNICATIONS OF THE ACM, 1301, 1307-08 (1989) (describing the virtues of digital television) [hereinafter Frenkel].

252 The upper limit for standard copper cable ISDN lines is to provide two 64,000 bit-per-second voice channels and one 16,000 bit-per-second data channel. Digital transmission of regular television, however, requires 45 million bits-per-second (HDTV

pected to be in the forefront of developing this technology.[253]

We should allow market forces to promote development of such networks to their maximum extent. Even so, legitimate questions arise relevant to telco entry into the cable market.[254] For example, unlike business and other large users, it is not clear what residential services besides entertainment video will require broadband capacity.[255] Such capacity may be linked to advanced television technologies such as high definition television (HDTV), representing "the convergence of the television, computer, and telephone industries."[256] As one visionary describes a digital, interactive[257] world: "your workstation will probably become a large screen on a wall that is your port into information space, whether from telecomputing if you stay at home and work, or whether for entertainment."[258] The GTE experiment in Cerritos may provide useful information on what is currently possible and feasible, from both a technological and economic perspective, with certain integrated, broadband functions including video-on-demand.[259]

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needs 150 Mbps). Fiber optic cable may be capable of carrying a trillion bits of information per second. Wright, *supra* note 1, at 91-93. By contrast, humans "are analog beasts . . . our brains can absorb only 50 bits per second." *Id.* at 93 (quoting AT&T vice president of customer relations).

253 *Critical Connections*, *supra* note 251, at 51. *See, e.g.*, Dawson, *With Sonet, Telcos Move Much Closer to Achieving BISDN and Video Dial Tone*, CABLEVISION, Nov. 20, 1989, at 38. Baer, *supra* note 248, at 141 ("Switched broadband ISDN services to business and homes remain a telephone company vision for the late 1990s or beyond.").

254 *See* Pepper, *supra* note 75, at 38. The cost-effectiveness of bringing fiber optics to the home also is a major uncertainty. *Id.* at 6-11.

255 *Id.* at 13-14. Broadband networks for large users will be necessary for "high speed data, video conferencing, high speed document transfer, and new applications using computer aided design and manufacturing, artificial intelligence, and graphic imaging." *Id.* at 14 n.20.

256 Frenkel, *supra* note 251, at 1303. Development of HDTV may have a significant impact on the United States semiconductor industry. *Id.* at 1304-05. More generally, a digital fiber optic infrastructure could "combine technologies in which the United States still has the leading edge . . . [and be] a longer term solution to retaining technological leadership." *Id.* at 1309. *See also U.S. Counts On Computer Edge in the Race For Advanced TV*, N.Y. Times, Nov. 28, 1989, at B5, col. 6 [hereinafter *U.S. Counts*].

257 The network probably will be a switched one and allow asymmetric two-way transmission. Pepper, *supra* note 75, at 5.

258 Frenkel, *supra* note 251, at 1308; *U.S. Counts*, *supra* note 256, at B8 ("Smart TV's . . . could automatically scan the digital airwaves for shows of interest, recording them when certain key words were present"). *See also* Riley and Berns, *Legal Issues, Judicial Limitations In Regard To "Switchable Video,"* N.Y.L.J., Nov. 3, 1989, at 5, col. 1.

> A switchable fiber system would be capable of carrying more than entertainment. The same line could simultaneously carry multiple picturephone conversations, numerical data for banking and energy management, and instantaneous FAX signals. The morning newspaper could be FAXed in less than a second, and shopping at home from an interactive video catalogue could become a reality.

Id.

259 General Tel. Co. of California, 4 F.C.C. Rcd. 5693, 5699-5700 (1989), *appeal dock-*

Continuation of the telco ban on entry into the cable market thus could have the serious detrimental effect of inhibiting, if not precluding, development of the residential network with all its attendant benefits. On the other hand, perhaps telco entry is not really necessary to spur cable industry development of its own fiber-optic network at a reasonable pace. The cable industry has its own incentives for near-term exploitation of fiber-optics.[260] Some also might question whether the telcos have to provide video programming in order for them to develop switched, fiber broadband networks.[261] Uncertainties abound, which is only to be expected since "we are not good at forecasting the demand for new telecommunications services."[262] We can expect, however, that "[f]uture services requiring large bandwidths and very high transmission rates are likely to develop as advanced information services employing expert systems and artificial intelligence develop."[263]

The point, therefore, is that the telcos have made their own determinations and most are anxious to expand into cable.[264] Some already are gaining cable experience in foreign markets.[265] They have the right to enter and such entry may very well make tremendous contributions to our telecommunications and infor-

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eted sub nom. National Cable Television Ass'n v. FCC, No. 89-1517 (D.C. Cir. Aug. 2, 1989). GTE proposes to offer "near" video-on-demand on its coaxial cable, enabling customers to choose a program at intervals of 15-30 minutes using up to 30 channels. "Pure" video-on-demand service, using the full bandwidth of an optical fiber facility, can offer point-to-point distribution and telemetric control of programming to particular customers, a far greater service capacity. *Id. See GTE Test Offers View Of Video Future*, Wall St. J., Dec. 29, 1988, at B1, col. 3; *GTE Details Fiber Plans For Cerritos*, BROADCASTING, June 27, 1988, at 66.

260 *See Cable Sees A Shortcut The Telcos Can't Follow*, CABLEVISION, Aug. 15, 1988, at 39. *See also* Dawson, *Clearing The Fog Around Fiber*, CABLEVISION, Feb. 29, 1988, at 14; 16.

> [M]uch time will elapse before telcos are ready for video in the framework of their ISDN approach, and, in the meantime, the cable industry will be exploring the technological options fully in the context of perceivable and exploitable market demand for new services and in light of direct advantages in signal quality, operations savings and other factors that flow from use of fiber.

Id.

261 *See* Pepper, *supra* note 75, at 18-20, 72-73. In an analogous circumstance, however, the 1970 Sloan Commission on Cable concluded that a common carrier system would not provide sufficient economic incentive for the cable industry's development. *See* I. POOL, TECHNOLOGIES OF FREEDOM 169 (1983).

262 Elton, *Integrated Broadband Networks: Balancing The Risks*, 7 CABLE T.V. & NEW MEDIA 1 (Oct. 1989).

263 Pepper, *supra* note 75, at 14. The author goes on to note that "[a]s with many new technological advances, broadband networks will lead to applications and services unknown before increased speed and capacity make those new services possible." *Id.* at 15.

264 *See* Amparano, *Phone Firms Battle Cable-TV Operators Over Providing Fiber-Optic Home Links*, Wall St. J., Sept. 9, 1988, at 23, col. 3.

265 *See* Sim, *The Baby Bells Scramble For Europe*, N.Y. Times, Dec. 10, 1989, § 3, at 1, col. 3; *US West And International Cable*, BROADCASTING, Aug. 14, 1989, at 66.

mation industries. The artificial, regulatory barriers to entry should be removed.

VI. CONCLUSION

In the debate over telco entry into cable we should put the first amendment back where it belongs — into the position of primary importance. It is both necessary and appropriate that we begin from the premise that telephone companies enjoy the same first amendment right to develop, own and operate cable systems as any other individual or entity. Nothing resulting from their corporate nature, common carrier status, other existing media cross-ownership restrictions, or applicable antitrust principles affects this conclusion. To the contrary, the ban operates as a prior restraint on speech. A heavy presumption therefore favors its elimination and mandates allowing entry.

Moreover, this constitutional mandate accords with the substantial benefits likely from telco entry. The telephone companies will provide much needed economic competition to the cable industry. This is far preferable, from both a marketplace and constitutional perspective, than re-regulation by Congress,[266] particularly since the FCC believes it can monitor and control anticompetitive excesses by the telcos. Moreover, we can expect telco entry to stimulate rather than restrict diversity in the marketplace of ideas, whatever that rather ambiguous concept may mean. This is especially likely if telco entry furthers the developing links between communications and computer technologies leading to greatly expanded capacity and a wealth of new products and services.

One cannot be certain that the FCC's safeguards and regula-

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266 There is considerable irony in the cable industry's shortsighted opposition to telco entry. *See, e.g.*, *The Evolution Of Cable's Anti-Telco Strategy*, BROADCASTING, Mar. 6, 1989, at 30. For some time, cable companies properly have been asserting their own entitlement to full first amendment status. *See, e.g.*, Chicago Cable Communication v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990) (constitutional challenge to requirements for local origination programming); Pacific West Cable Co. v. Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987) (city's single franchising policy violates first amendment); *supra* note 120. They should realize that in opposing first amendment rights of the telcos to enter cable they are acting analogously to broadcasters' efforts in the must-carry dispute to deny cable operators first amendment freedom. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292, 295 (D.C. Cir. 1987), *cert denied*, 108 S. Ct. 2014 (1988). Simultaneously the cable industry, by trying to exclude market competition, is reinforcing the need for its re-regulation by Congress, thereby undoing its hard-won freedom. One day, perhaps, *all* the electronic media will realize their symbiotic relationship with one another and that the only way for any of them to achieve true first amendment parity with the print media is for each to support full first amendment rights for all others. *See generally* Winer, *The Signal Cable Sends*, *supra* note 56.

tory approach will be adequate to curb the telcos' anticompetitive tendencies. Nor can one predict the benefits that actually will accrue from telco entry. But such risk and uncertainty are inherent in first amendment freedoms. Equally inherent in the first amendment is the principle that needs repeated emphasis: government must restrain itself from the constant temptation to engineer the "best" media marketplace. That is why the appropriate premise is so important here — namely, that telephone companies have first amendment rights too.