AN ANTITRUST PARADOX FOR THE 1990s: REVISITING THE ROLE OF THE FIRST AMENDMENT IN CABLE TELEVISION*

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I. INTRODUCTION

More than a decade ago, then-professor Robert Bork authored the influential book *The Antitrust Paradox*,[1] arguing that courts had interpreted and applied the antitrust laws in ways which conflicted with economic efficiency. Bork's conservative precepts set the tone for antitrust doctrine throughout the 1980's, and may change forever the role of antitrust in the United States system of business regulation. Yet, while American media corporations have benefited greatly from the dominance of Bork's "Chicago School" of antitrust law,[2] they have now created a new, and quite different, sort of antitrust paradox. Applying the first amendment as a shield against governmental regulation, as well as a sword to attack restrictions on their right to enter new markets, cable television and telephone companies have been using the free speech principles of the Constitution to do the work the antitrust laws did in pre-Bork times.

The "antitrust paradox" of the 1990s is that these first amendment arguments—which lie at the heart of a growing public debate about the appropriate communications market structure for the next several decades—are really antitrust issues masquerading in constitutional clothes. What both the cable television and local telephone industries seek to achieve is not the advancement of any marketplace of ideas, but rather the constitutional elimination of restraints on their commercial activities in the video distribution market. Instead of basing regulatory and legislative decisions on the competitive and public policy issues presented by their proposals—for instance, whether cable televi-

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1 R. BORK, THE ANTITRUST PARADOX (1978).

2 *See* Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319 (1983); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

sion systems should be limited in the prices they can charge consumers, or whether local telephone companies should be able to impose on ratepayers the costs of constructing cable television facilities—each of these industries asserts that the first amendment overrides proposed statutory restraints on the scope or conduct of their businesses.

The sophisticated and subtle constitutional constructs assembled in support of these efforts filled much of a recent Symposium issue of the *Cardozo Arts & Entertainment Law Journal*, where the constitutional case was framed by both cable and telephone company interests.[3] Scrutinizing the logic of these quasi-constitutional arguments, however, suggests that the first amendment, as reframed by these adversarial industries, is being misapplied. The real issues facing the courts and Congress are not who can "speak," but rather the competitive structure of the cable television market: the number of systems and programmers from which consumers can choose, the degree to which available alternatives in the market can achieve the most efficient and lowest-cost service possible, and the need for governmental regulation to prevent and redress the acquisition and use of monopoly power.

These are archetypal antitrust issues, qualitatively different from (although analogous to) the "diversity" considerations underlying first amendment precedent.[4] That the Supreme Court has properly ruled that regulators may not prohibit bill inserts[5] or promotional advertising by electric utilities,[6] however, says nothing about whether cable systems should be subject to rate regulation or, more precisely, whether the Constitution dictates the choice between competition and regulation. In making this leap, the logic used by first amendment advocates breaks down,

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[3] *See* Robinowitz, *Cable Television: Proposals for Reregulation and the First Amendment*, 8 CARDOZO ARTS & ENT. L.J. 309 (1990) [hereinafter Robinowitz]; Winer, *Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry into Cable*, 8 CARDOZO ARTS & ENT. L.J. 257 (1990) [hereinafter Winer].

[4] *See* Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990); Shurberg Broadcasting, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989); *see also Federal Communications Commission: Cable Television Policies, Recommendations, and Initiatives Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation* 1-2 (Nov. 17, 1989) (statement of Alfred C. Sikes, Chairman, Federal Communications Commission) ("For more than half a century, American mass media policies have been soundly grounded on competitive principles—and a belief that those actions which foster effective economic rivalry also yield a critical added dividend: namely, diversity in what Mr. Justice Holmes 70 years ago described as the 'free trade in ideas.' ") (footnote omitted).

[5] Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). *See* Winer, *supra* note 3, at 274-75.

[6] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). *See* Winer, *supra* note 3, at 274-75.

at least in part—as this Article suggests—because there is no real first amendment question in the first instance.

II. SHELF SPACE OR SOAP BOXES?

Throughout the first nine months of 1990, there raged in the halls of Congress a fierce debate in which both sides ritualistically wrapped their claims in the hallowed mantle of the first amendment. Cable television companies, flush with recent victories in the courts affirming constitutional protection against municipal franchise requirements,[7] threatened to undermine fast-moving efforts to regulate cable pricing by tying up proposed legislation in the knot of constitutional litigation.[8] Telephone companies, having just recently lost a thirty-year long battle in the antitrust courts to maintain the old Bell System monopoly,[9] are increasingly shrill about their purported first amendment right to enter unregulated (and highly profitable) communications markets. Ironically, but perhaps not unexpectedly, both advocates denigrate the competitive status—and first amendment basis—of the other's industry.[10]

Telephone companies ("telcos") and cable companies also contend that each alone can bring modern communications technologies (in this instance, fiber optic cable) to the curbs and homes of American consumers.[11] This intensely acrimonious debate illustrates the tenuous link between today's technologies for delivering communications and the legal status of those technol-

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[7] *See, e.g.*, Pacific W. Cable Co. v. City of Sacramento, 798 F.2d 353 (9th Cir. 1986); Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330 (D.C. Cir. 1985); Group W. Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987); Century Fed., Inc. v. City of Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984), *later proceeding*, 648 F. Supp. 1465 (N.D. Cal. 1986), *appeal dismissed*, 484 U.S. 1053 (1988); Carlson v. Village of Union City, 601 F. Supp. 801 (W.D. Mich. 1985).

[8] *See* Kaplan, *Time Warner's Dynamic Duo: Bork and Tribe Tapped to Fight Cable Regulation*, Legal Times, May 7, 1990, at 2, col. 4 (" 'If legislation gets enacted and it's just horrendous, we would be ready to challenge it, perhaps on the First Amendment grounds.' ") (quoting Michael Hammer, Director of Communications Policy in Time Warner's Washington office); *House Approves Reins on Cable TV*, Chicago Tribune, Sept. 11, 1990, § 1, at 3, col. 4 (Office of Management and Budget would recommend a veto of cable reregulation legislation on first amendment grounds).

[9] *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[10] *See* Aversa, *Groups Debate Video Role in Growing Broadband Net*, Multichannel News, Apr. 16, 1990, at 9, col. 1.

[11] *See, e.g.*, Chiddix, *Don't Let Overreaction Slow Tech Advances*, Multichannel News, Apr. 16, 1990, at 51, col. 2 ("It is clear the cable industry will bring the benefits of fiber to the American public long before the telcos—MUCH LONGER."); REP. R. BOUCHER, CABLE COMPETITION VS. CABLE REGULATION: WHITE PAPER ON TELECOMMUNICATIONS POLICY 1 (1990) ("[T]elephone company entry into the market for cable services presents the best opportunity for such competition and is a positive step towards improving our telecommunications infrastructure.").

ogies. As America moves steadily into the technologically uncharted terrain of the so-called "Information Age,"[12] our notions of the proper relationship between the law and the commercial providers of the nation's information infrastructure become increasingly cloudy. Newspapers, magazines, movie studios, television networks, cable systems, and telephone companies, among others, all contribute to the wealth of information available to citizens. Yet the owners of these media vary in many ways, from the means of delivering communications, to the availability of governmental licenses for use of the airwaves and the streets, to their ability to control or exclude competition in the marketplace. While these differences should be central to the discussion of whether the first amendment undermines regulatory constraints on communications firms in these markets, they have not been, and the policy debate has suffered accordingly.

Cable television's vision of the first amendment posits that local cable system operators are the 20th Century equivalent of the pamphleteers and newspapers of the 18th and 19th Centuries. Thus, cable systems have convinced a number of federal courts that they are engaged in constitutionally protected "editorial" functions, precluding franchise limitations on which (and how many) cable firms can compete in a given market.[13] The problem is that to reach this conclusion, one must not only disregard the roots of the first amendment in the television industry, but also apply classical antitrust concepts to resolve purported freedom of speech issues.

Regulation of the broadcast television market, including the recently repealed "fairness doctrine" for broadcast television stations,[14] has long been premised on the notion of physical scarcity. Under this "scarcity" rationale, restrictions on the communications activities of licensees—from the license requirement itself to limits on station ownership to restrictions on network programming production—are justified by the need to preserve diversity in expression for all listeners in light of the limited resource of the electromagnetic spectrum in which over-

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12 *See* United States v. Western Elec. Co., 673 F. Supp. 525, 590 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990).

13 *See supra* note 7.

14 Syracuse Peace Council v. Television Station WTVH, 2 F.C.C. Rcd. 5043 (1987), *reconsideration denied*, 3 F.C.C. Rcd. 2035 (1988), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990). *See also* Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987), *cert. denied*, 110 S. Ct. 717 (1990); Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

the-air communications are broadcast.[15] In the cases raising first amendment questions in regulation of cable television systems, however, this concept of physical scarcity has been subtly transformed into one of "economic scarcity."[16] Instead of using limited airwave space as the justification for regulation, municipal franchisors have used the monopoly status of most cable systems as the basis for restricting market entry. The theory is that given the extraordinary costs of wiring communities with coaxial cable, local cable markets are "natural monopolies" in which competition is not sustainable, so municipal regulation of the cable provider is a constitutionally permissible substitute for market competition.[17]

With this twist, the first amendment debate becomes driven not by considerations of communications diversity and expressive freedom, the traditional values protected by the constitutional guarantees of speech and press freedom, but rather by paradigmatic (indeed, Borkean) antitrust concerns such as market structure, economics, and monopoly power. While the first amendment has often been defended with the "marketplace of ideas" metaphor,[18] the actual marketplace operations of first amendment speakers—in areas including corporate acquisitions and mergers, product distribution, and anticompetitive or exclusionary practices—have always been addressed under the antitrust laws.[19] The new learning pressed by the cable industry in its first amendment cases, namely that the Constitution prohibits franchise regulation limiting competitive entry in cable markets, thus appears fundamentally more akin to the Sherman Antitrust

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[15] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). *See also* FCC v. League of Women Voters, 468 U.S. 364, 376-77 (1984).

[16] Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986).

[17] *See, e.g.*, Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

[18] *E.g.*, Anderson v. Celebrezze, 460 U.S. 780, 794 (1983); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[19] *See* Associated Press Co. v. United States, 326 U.S. 1 (1945) (antitrust laws applied to require newspaper wire service to disseminate stories to competitors of members); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (limitations imposed by the FCC on activities and stations' ownership of broadcast television networks permissible); United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989) (affirming "syndicated exclusivity" rules which would enable broadcast stations with exclusive rights to a syndicated program to forbid any cable television station from importing that program into the local broadcast area from a distant station); United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412 (S.D.N.Y. 1980) (movie studio joint venture into pay cable television market designed to be prime time showcase for exhibition of feature films prohibited by antitrust laws).

Act's prohibition of "monopolization"[20] and the Clayton Act's safeguard against mergers which "may substantially lessen competition"[21] than the artistic and political communications interests James Madison had in mind in 1798.[22]

In many ways, cable systems simply are not engaged in activities of significant first amendment value. Unlike cable *programmers* (Turner Broadcasting, Home Box Office, Music Television, etc.), cable *systems* by and large produce little or no programming and perform little or no expression of their own. Rather, cable systems serve as the television supermarkets of the 1990s, making "shelf space" decisions for communications developed, produced and marketed by others. Today's cable systems act more like grocers than speakers. In small systems (twelve to thirty-six channels), the system operator must allocate his channels among the programming services available, while in large systems (as many as 112 or 128 channels) the operator scrambles to find product to fill his shelves, frequently settling for filler material such as multiple channels of teletext services and community bulletin boards.

The "shelf space" activities of cable systems are hardly different from the decisions of local grocers as to which soup cans to stock in their stores, and at the same time are markedly different from the editorializing and reporting functions of newspapers and magazines and the entertainment-production functions of movie studios, television networks, and even television stations.[23] The transmission of cable programming over local cable

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[20] Section 2 of the Sherman Act makes it unlawful to monopolize, attempt to monopolize or conspire to monopolize any market. 15 U.S.C. § 2 (1988).

[21] Section 7 of the Clayton Act makes unlawful mergers and acquisitions the effect of which may be to substantially lessen competition or tend to create a monopoly in any market. 15 U.S.C. § 12 (1988).

[22] Since cable systems also require easements and other uses of the public streets, municipal police power supports at least some limitations on entry and market conduct notwithstanding any first amendment protection cable systems may enjoy. *See* Gannett Satellite Information Network v. Metropolitan Transp. Auth., 745 F.2d 767 (2d Cir. 1984) (upholding licensing fee imposed on newspaper racks in public train stations on the ground that the fees were content-neutral); Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on narrower grounds*, 853 F.2d 1084 (3rd Cir. 1988) (cable systems may constitutionally be assessed franchise fee for commercial use of public rights of way). The suggestion that rate regulation of monopoly cable systems would contravene the first amendment is accordingly specious. *See* Robinowitz, *supra* note 3, at 317-24. Ironically, proponents of this view must rely on the antitrust issue of natural monopoly in arguing that the governmental interest supporting price restrictions is constitutionally insufficient. *Id.* at 321-23.

[23] Both Robinowitz and Winer rely on a series of lower federal court decisions which suggest that the channel carriage decisions of cable system operators are a constitutionally cognizable exercise of "editorial discretion." Winer, *supra* note 3, at 275; Robinowitz, *supra* note 3, at 313-14. Most of the cases have arisen in situations where the first amendment is being used to eliminate barriers to video competition by invalidating mu-

distribution facilities is not really an editorial or communications content activity, but a commercial one. At the very least, it is far removed from the core political, social and artistic values protected by the first amendment. That the "cans" stocked by cable systems contain communications—and sometimes even ideas—makes little difference, since the regulations challenged on first amendment grounds involve content-neutral economic regulation, such as pricing and distribution practices, and generally do not mandate or preclude any specific types of programming carriage.[24] Even where regulations mandate certain types of programming, as in the "must carry" requirements[25] that cable systems include local broadcast stations in channel line-up, the first amendment is not (or should not be) a barrier to governmental action designed to protect the communication rights of *listeners* and the ability of *others* to speak.[26] Indeed, as it becomes increasingly clear that cable systems exercise "bottleneck" or "gateway" power[27] over which television services will be delivered to local consumers, asserting that the first amendment encompasses an "editorial" right to withhold some of those services

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nicipal franchising restrictions against cable entry. *See supra* notes 14-17 and accompanying text. By stretching the concept of "editorializing" to extend the first amendment into these competitive issues, courts trivialize the constitutional status of the first amendment "speaker." Indeed, as Robinowitz concedes, the courts did not extend first amendment protections to cable systems where they simply retransmitted broadcast television stations, although the cable operators did (and still do) "select" which stations to carry on their systems. Robinowitz, *supra* note 3, at 313. Under this approach, however, first amendment protection turns on *where the video programming comes from*, a matter that is plainly not of constitutional relevance.

[24] Incidental regulation of expressive activity is considered content-neutral where it is "*justified* without reference to the content of the regulated speech." Ward v. Rock Against Racism, 109 S. Ct. 2746, 2754 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (emphasis in original). Thus, for instance, arguments that regulation of cable system pricing would violate the first amendment are specious, because they are wholly unrelated to the content of the asserted first amendment conduct. *See* Robinowitz, *supra* note 3, at 319-20. In response to arguments that cable regulation would "discriminate" in favor of competing technologies, *id.*, one need only observe that rate regulation of cable systems has been justified on the ground that cable systems hold monopoly power because these purported "competitors" do not provide effective competition to cable systems.

[25] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[26] "[T]here is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 799 (1978) (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969)). Thus, to the extent that regulation of cable systems prevents the abuse of cable market power and the monopolization of the marketplace of ideas, denying listeners their right to the speech of others, first amendment and antitrust values parallel each other. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[27] Complaint at 16, Viacom International v. Time Inc., No. 89 Civ. 3139 (S.D.N.Y. filed May 9, 1989).

from consumers loses much of its policy legitimacy.[28]

III. Natural Monopoly and the Marketplace of Ideas

That the cable television first amendment debate is really an antitrust controversy becomes clear when one examines the key question in first amendment challenges to local franchise regulation of cable systems—whether or not the market is a "natural monopoly."[29] The answer to this question depends on the definition and underlying economics of the market, issues that antitrust enforcers and antitrust courts regularly grapple with in monopolization and merger cases.[30] Furthermore, the natural monopoly issues really comprise two questions: Is the market a natural monopoly, and who decides whether it is? The latter question is by far more important in the context of the first amendment debate.

Under the antitrust laws, there is no "natural monopoly" defense to an antitrust violation, and local governments have no license to create monopolies by regulatory fiat.[31] The antitrust laws require that the marketplace itself determine if a market is a natural monopoly; if the market cannot support more than one firm, then only one firm will survive the disciplining process of competition.[32] The cable industry's use of the first amendment to restrict municipalities from limiting entry by means of the franchising process thus implements antitrust values, not free speech interests. These first amendment cases, where the courts

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[28] New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802, 817 (S.D.N.Y. 1986).

[29] As FCC Chairman Alfred Sikes recently explained:

> Competition in the cable or multichannel video marketplace is controversial. Many say it is not possible to have competition because this is a natural monopoly business. . . .
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> The end result of this "natural monopoly" attitude and obstructionist actions has been that many despair of ever seeing competition develop and consequently choose government regulations.

Statement of FCC Chairman Alfred C. Sikes on the Commission's Cable Television Report 1-2 (July 26, 1990). For a somewhat different perspective, see Kinsley, *Remote Control*, New Republic, Apr. 23, 1990, at 4 ("Whether cable needs to be a monopoly or always will be are open questions. Whether it's a monopoly now is indisputable (though the cable lobby preposterously disputes it).").

[30] *E.g.*, Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987).

[31] *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); *see also* Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, 858 F.2d 1075 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1955 (1989).

[32] Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) ("[T]he antitrust laws protect competition not only in, but for, the market—that is, competition to be the firm to enjoy a natural monopoly . . . .").

discussed natural monopoly *only* in the constitutional context, are better considered antitrust cases.[33]

This paradox is not the only one presented by the cable industry in the 1990s. A second paradox is that federal policy toward the question of cable system competition is flawed because it is at war with itself over the question of natural monopoly.[34] Traditionally, the *quid pro quo* for natural monopoly is regulation, and that for competition is antitrust.[35] Where a market is a natural monopoly, *e.g.*, gas and electric distribution, local telephones, etc., regulation seeks to replicate the results of a competitive market. On the other hand, competitive markets are left unregulated, but are protected from becoming monopolies by the antitrust laws.

In cable television, federal policy has brought us the worst of both worlds. In 1985, the Justice Department decided it would not apply the antitrust laws to cable system mergers and acquisitions, on the ground that most cable markets are natural monopolies.[36] That same year, the Federal Communications Commission deregulated most cable systems, on the weak reed that there is "effective competition" for cable systems where viewers have three broadcast television stations from which to choose.[37] This policy conundrum means that cable television is treated as a natural monopoly for antitrust purposes—exempt from the antitrust laws—but as a competitive market for regulatory purposes—exempt from regulation. Instead of either regulation or antitrust, local cable systems are unregulated monopolies, facing neither competition nor regulation.[38]

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[33] *See supra* notes 7, 16.

[34] *See* Manishin, *Antitrust and Regulation in Cable Television: Federal Policy at War with Itself*, 6 CARDOZO ARTS & ENT. L.J. 75 (1987).

[35] *See, e.g.*, Notice of Inquiry, In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C. Rcd. 362, 369-70 (1989).

[36] The Justice Department, upon terminating a well-publicized investigation into a substantial cable system merger, announced that in light of cable television's "natural monopoly characteristics," it would defer to the decisions of municipal franchising authorities in lieu of applying the Clayton Antitrust Act. *See* 2 C. FERRIS, F. LLOYD & T. CASEY, CABLE TELEVISION LAW, ¶ 24.06[4] (1990) (discussing Justice Department Press Release, Apr. 2, 1985).

[37] Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Cable Communications Policy Act of 1984, 50 Fed. Reg. 18,637 (1985), *reconsidered*, 104 F.C.C.2d 386 (1986), *aff'd in part, rev'd in part sub nom.* ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), *reconsideration pending*, 5 F.C.C. Rcd. 362 (1989).

[38] Another Symposium author argues that cable television systems are not unregulated monopolies because market definition analysis under the Justice Department's Merger Guidelines "shows conclusively cable's inability to exercise market power." Lloyd, *The FCC's Cable Inquiry: An Opportunity to Reaffirm the Cable Act*, 8 CARDOZO ARTS & ENT. L.J. 337, 347 (1990). Contrary to Lloyd's view that "[c]able is just one provider of

Worse still, the current regulatory climate allows municipalities to decide whether the market is a "natural" monopoly by determining how many, and which, cable systems will serve a market.[39] Not only does this lead to graft and related abuses of the political process, but it also prevents the attainment of any "regulatory dividend." While the 1984 Cable Act[40] and the 1985 Justice Department policy[41] allow a city to sanction a cable monopoly, the FCC's deregulation policy precludes cities from acting as surrogate consumers, namely, using the franchising process to achieve price and service concessions for the benefit of cable subscribers. Judges (and "Chicago School" adherents) Richard Posner and Frank Easterbrook have argued that cable systems should not be treated as public utilities on the ground that the ability of cities to drive a "hard bargain" in the franchising process makes regulation superfluous.[42] Nearly by definition, this defense of unregulated local cable monopolies collapses when, as in the current climate, those municipal bargains are by and large legally unenforceable.[43] This, among other things, is one reason why the second session of the 101st Congress was the scene of considerable rhetoric and legislative rumblings about "reregulation" of the cable industry.

IV. MA BELL "SPEAKS UP"

The final paradox in the confluence of antitrust and first amendment considerations in communications is that the cable industry's efforts to use the first amendment as a shield against governmental regulation have been turned against it by the telcos, which contend that the first amendment makes cross-ownership prohibitions on telephone company entry into the cable

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entertainment and information services in a robust market," *id.*, the Justice Department recently reaffirmed that "neither conventional television broadcasting nor any of the alternative technologies presently available are close enough substitutes for basic and pay cable television services to prevent the providers of such cable services from exercising some degree of market power." Reply Comments of the United States Dep't of Justice, In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, at 2 (filed Apr. 2, 1990).

39 *See* 47 U.S.C. § 541 (Supp. V 1987) (a franchising authority may award "1 or more franchises within its jurisdiction").

40 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)).

41 For a discussion of the Justice Department policy, see *supra* note 36.

42 Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 32 (1983); Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548, 562 (1969).

43 *See* Tribune-United Cable v. Montgomery County, 784 F.2d 1227 (4th Cir. 1986) (upholding cable system's right to unilateral modification of franchise agreements under 1984 Cable Act).

market unconstitutional.[44] As a constitutional matter, the telcos insist (borrowing the cable industry's first amendment refrain) that because cable systems are "speakers," restrictions on their ability to enter the market are invalid.

The telco/cable issue illustrates the extraordinary implications of misapplying first amendment doctrine to market structure issues better suited to antitrust resolution. The telephone company position is essentially that the Constitution permits anyone to enter the cable market, and that since telcos are no different from anyone else, they too have a right to enter and "speak" cable. If the first proposition were correct, of course, there could be no franchise requirement for cable service, no restrictions on entry into the market or prices, and no Cable Act governing regulation of cable systems. More importantly, though, the antitrust history of the telephone industry demonstrates that the telco/cable ban protects competitive interests.[45] From an antitrust perspective, telcos are quite different from other potential cable "speakers."

The real issue in this aspect of the first amendment debate is whether a telephone company enjoys a first amendment right to act as *both* a local telephone monopoly and a cable operator.[46] Telephone companies enjoy a host of government-conferred advantages, including statutory protection of their franchise monopolies, guaranteed financial success and above-market rates-of-return, and access to competitively essential rights-of-way. The *quid pro quo* for these governmental privileges is that telcos are constrained from abusing the competitive advantages they are conferred.[47] Since the history of the telephone industry is

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[44] The 1984 Cable Act and FCC regulations both bar local telephone companies from providing cable television services within their service areas. 47 U.S.C. § 533(b) (Supp. V 1987); 47 C.F.R. § 63.54 (1989). In addition, the United States v. AT&T consent decree bars the Bell Operating Companies from providing "information services," which encompass cable television services, even beyond their service areas. *See* Winer, *supra* note 3, at 269-70.

[45] *See, e.g.*, *'Baby Bell' Regulators Struggle for Power*, CONG. Q., Aug. 26, 1989, at 2210-11.

[46] Plainly, nothing precludes a telco from relinquishing its local monopoly position in telephone service and, on that basis, qualifying to operate a cable television system under the current cross-ownership structure. Thus, the issue is not whether the Constitution grants a right to "cablespeech," but rather whether it requires government to permit a firm to engage in both the telephone and cable businesses in a single franchised location.

[47] *See* § 214 Certificates, 21 F.C.C.2d 307 (1970), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971) (discussing competitive rationales underlying cable/telco cross-ownership rules). Professor Winer suggests that telcos' common carrier status and these government-conferred advantages should not be a factor in the constitutional analysis. Winer, *supra* note 3, at 279. However, as the Supreme Court has recognized, common carriers are different from other first amendment actors: "Unlike

one of continued frustration in regulatory and judicial efforts to control abuse of the telephone companies' local monopoly power,[48] the telco/cable prohibition makes sense as both an antitrust remedy and as a matter of competition policy.[49] So far, the telcos' efforts to use the first amendment to escape the strictures of the *United States v. AT&T* consent decree (which also prohibits telco cable service)[50] have accordingly been rebuffed by the courts.[51]

In this light, the underlying question in the telco/cable dispute is whether *competitive policy* warrants permitting telephone companies to provide cable service. Cable systems, seeking to protect themselves from telco competition, emphasize the antitrust risks attendant to telco entry into competitive markets.[52] Telcos, seeing rising populist fervor against abuses by unregulated cable monopolies as a wedge for advancing their own interests, contend that they are best-suited to bring effective competition to cable systems by combining telephone and cable service in an integrated, 21st Century fiber optic network into the home.[53]

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common carriers, broadcasters are 'entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their [sic] public [duties]." ' "). FCC v. League of Women Voters, 468 U.S. 364, 378 (1984) (quoting Columbia Broadcasting Sys. v. FCC, 453 U.S. 367, 395 (1981) (quoting Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973))).

48 *See, e.g.*, United States v. Western Elec. Co., 673 F. Supp. 525, 568-69, 571-76 (D.D.C. 1987) (FCC accounting and cost regulations are not a "substantial improvement" over procedures previously found inadequate to deter anticompetitive abuses), *rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990).

49 Thus, even if cable system operation raises first amendment values, a telco/cable cross-ownership ban would still pass constitutional muster. It is well-established that an antitrust remedy "may impinge upon [first amendment] rights that would otherwise be constitutionally protected." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697-98 (1978).

50 For a discussion of the consent decree, see *supra* note 44.

51 United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir. 1990) (vacating in part decision upholding antitrust decree restrictions against the regional Bell companies' entry into "information services" without addressing or reaching first amendment arguments).

52 For instance, according to the National Cable Television Association, removal of the cross-ownership prohibition "would result in anticompetitive conduct that would adversely affect and radically transform television and the video marketplace." Comments of The National Cable Television Ass'n, In re Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-.58, CC Docket No. 87-266, at 7 (filed Dec. 16, 1988).

53 *See* Comments of Pacific Bell and Nevada Bell, In re Telephone Company Cable Television Cross-Ownership Rules, §§ 63.54-.58, CC Docket No. 87-266, at 7 (filed Nov. 2, 1987); *see also* Aversa, *Telcos Call Senate Draft Too Restrictive*, Multichannel News, Apr. 9, 1990, at 40, col. 1. Since telephone companies are not prohibited from constructing these "high tech" fiber optic systems and leasing capacity on them to unaffiliated television programmers (including competitors of incumbent cable system monopolies), 47 C.F.R. § 63.57 (1985), it appears that their desire to enter the cable television service

Once again, these are antitrust and market structure issues, not first amendment questions.[54] Indeed, from a first amendment perspective, the governmental interest in preserving competitive markets would appear to be just the sort of "compelling" or "important" state interest necessary to support narrow, content-neutral restrictions on expression like the telco/cable cross-ownership restriction.[55] Moreover, the ban itself does not prohibit telcos from speaking (they can still engage in commercial speech, own newspapers, publish yellow pages, etc.), but only from a particular manner of purported speech, a characteristic sort of permissible "time, place and manner" restriction.[56] By silencing the telephone companies from speaking, we protect the ability of other competitors to do so.

The irony of this issue is illustrative. Telephone companies desire to lift the telco/cable ban not to provide more competition to cable systems, but instead to replace the existing cable monopolies with their own. Exchanging one monopolist for another has no effect on either the "marketplace for ideas" or the marketplace for cable television services.[57] Just as franchise and rate regulation of cable systems is largely content-neutral, so too is the impact of the telco/cable restriction constitutionally neutral. Both should be addressed not as first amendment matters, but as antitrust and competitive policy issues. Until this "antitrust paradox" is resolved, one can expect little more than continued *ad hoc* muddling as courts, legislatures, and observers struggle to fit the cable and telephone industries into the cubbyhole of the first amendment.

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business must be based on some other, unstated strategic objective. *See* TV Signal of Aberdeen v. AT&T, 617 F.2d 1302 (8th Cir. 1980).

54 *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (affirming constitutionality of newspaper/broadcast cross-ownership restriction).

55 The exacting scrutiny required by the "compelling state interest" standard, which applies when laws bar speech based on its effects or involve government in the choice of permissible communications content, may not be appropriate for cross-ownership restrictions, which lack the traditionally suspect characteristics of official control and discrimination. *See* Boos v. Barry, 108 S. Ct. 1157, 1164 (1988).

56 *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (time, place and manner restrictions are not subject to strict scrutiny and are sustainable if they are content-neutral, "designed to serve a substantial governmental interest, and do not unreasonably limit alternative avenues of communication"); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

57 As the National Telecommunications & Information Administration emphasized in proposing that telcos be authorized to provide "video dial tone" on a common carrier basis, "If telephone involvement would simply lead to replacement of one [cable] distributor with another, we would not consider the public to be greatly benefited." National 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 32 (June 1988).

V. CONCLUSION

While there may be room for first amendment principles at the margin of the debate, regulation of cable television services and the cable/telco cross-ownership restrictions present market structure and competitive issues better suited to resolution under the antitrust laws. By injecting constitutional doctrine into this well-funded battle between two major industries, we devalue the protections accorded expressive conduct and divert attention from the more difficult—and in the long-term more important—question of competition in the delivery of video programming. Although no one could seriously argue that the Constitution permits government to dictate which television programming consumers can buy and view, that surely does not mean government cannot regulate this industry, even if first amendment actors are involved, if it is necessary to produce a competitive marketplace or arrest monopoly abuse that diminishes viewers' access to diverse and low-cost television. Whether the victors in this regulatory process are the cable systems or the telcos, however, is a matter of constitutional indifference. Paradoxically, courts, legislatures, and commentators keep looking for the answer in the first amendment.