Merging Phone and Cable

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D R A F T

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[for reasons that I will not bore you with, this is a rougher draft than I had intended - I apologize.]

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I am here, I fear, under false pretenses. I am not an economist and, as a lawyer, have no background in regulated industries. Until asked to talk on a subject that I understand concerns the merits of telephone company entry into the cable business, my knowledge of the telephone industry was limited to paying my monthly bills and one short talk several years ago with Eli Noam. And although I learned a lot from that talk, I am a slow student with whom Eli needed more time to get good results. At best, I can approach the subject from the perspective of a constitutional lawyer whose views on constitutional issues are often somewhat iconoclastic.

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Last summer when Bell Atlantic and Tele-Communications announced plans for a merger, the New York Times indicated cautious approval but argued that the government ought to require Bell Atlantic to make good on its promise to divest itself of TCI-owned cable systems within Bell Atlantic's service area.[1] Curiously, the Times did not note that earlier that summer, a Bell Atlantic affiliate had convinced a district court to strike down as a violation of the first amendment a federal statute that banned telephone provision of cable programming within its service area,[2] that is, it struck down as unconstitutional a statute that

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[1] Editorial, The Cable-Phone Revolution, NYT §A, p.28 (Oct. 19, 1993).

[2] Chesapeake and Potomac Telephone Company of Virginia v. USA, 830 F. Supp. 909 (E.D.Vir., Aug. 24, 1993).

mandated the result that the Times was urging the government to require.[3] Of course, the earlier Congressional ban on ownership could be unconstitutional while the prohibition that the Times advocated would be upheld. The statute had barred all telephone company provision of cable services in its service area, presumably premised on the desirability of keeping the telephone company out the video supply business, at least in the area where it operates as a common carrier.[4] In contrast, an alternative view might be that if the phone company enters, it should not do so by means of purchasing existing cable systems within its service area - a policy presumably based on views concerning the desirability of competition between cable and phone companies. Nevertheless, both the announced merger and the district court decision illustrate a current trend toward merging common and private carriage in an increasingly deregulated communications realm.

In contrast to this trend, since reading Bruce Owen's book on the economics of free speech[5] nearly twenty years ago, I have accepted the presumption that a better

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[3] Although the Times did note that separation of ownership was "no longer required by law," readers were not told the reason was that Bell Atlantic had gotten the prior ban declared unconstitutional, thereby casting some doubt about its promise to divest itself of TCI operations in the Bell Atlantic regime. The Times was alert enough, however, to indicate its view of the worth Bell Atlantic's promises - the Times thought a "legal safeguard" was necessary.

[4] 47 U.S.C.A. § 533(b) provides in relevant part:

(1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or in directly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

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

[5] Bruce M. Owen, Economics and Freedom of Expression: Media Structure and the First Amendment (1975).

communications environment will usually result from separating ownership of carriage and provision of content, and from requiring that the carriage be offered on a common carrier basis. (References throughout to phone "provision" of video programming imply phone ownership and control over the programming package, while phone "carriage" or "transport" imply only that it delivers programming owned and packaged by others, e.g., a cable or programming company.) This separation and the common carriage requirement should normally assure greater access opportunities for content creators without capital to provide than own transmission since they otherwise could face refusal or various forms of discrimination by those owning the transmission system. The result should be a more open and diverse communications order.

This presumption in favor of separating carriage from content provision seems clearly the premise behind the invalidated §533(b), codifying an earlier FCC policy. Given my initially divergent view, even if the trend against such regulation is presently irreversible, I wish to offer an evaluation of the district court decision.

The district court's constitutional analysis had into two parts. First, it decided to apply an "intermediate" standard of first amendment review. Then, in a much shorter section dealing with the substance of the law, the court decided that it did not effectively promote the government's purposes and, therefore, was unconstitutional under the required intermediate scrutiny. Although presented in a carefully and thoughtfully written opinion, I think both conclusions were wrong - probably legally wrong given existing precedent and certainly wrong as a matter of desirable constitutional and policy analysis. In support of my claim, I will offer an alternative way to approach the constitutional issue, then consider general

arguments favoring regulation in the communications industry that may support §533(b), and in each context compare my alternative with the court's analysis.

Constitutional Evaluation of Structural Regulation

Free speech of individuals is protected as a fundamental aspect of individual liberty. That claim makes little sense, however, in the context of corporate entities composed of many people and relying on economically based command structures. It is only such entities, not individuals, that are potentially subject to structural regulation. Presumably, the institutional press, that is, corporate entities within the communications industry receive constitutional protection because their constitutional protection serves various human values, most prominently provision of the diverse, uncensored information and perspective needed both for democratic decision-making and democratic culture. Moreover, these entities may also receive constitutional protection because they serve more specific functions, prominently illustrated by the checking or watchdog function emphasized by Columbia professor Vince Blasi.[6]

My claim is that these considerations, both theoretically and as a matter of case law, justify the government in playing a conscious role in structuring the communications infrastructure unless the government's ends or it means of advancing its ends involve undermining the industry's effectiveness at serving its constitutional role. Also, on this basis, government censorship is firmly forbidden - but this usually takes the form of content regulations that

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[6] Vincent Blasi, The Checking Value in First Amendment Theory, 1977 American Bar Foundation Res. J. 521.

normally are not at issue in structural regulation.

In Potomac Telephone, the court rejected this view that government structural regulation of the media is presumptively valid - and the similar notion that, as the government argued, the court should use rationality review.[7] The court argued that all but one of the cases relied upon to support general governmental power to engage in structural regulation involved broadcasting, which is distinguishable because that regulation there is justified by the "physical scarcity of electromagnetic frequencies."[8] And the court read the one other case, Associated Press v. United States,[9] to stand only for the proposition that "the media may be subjected to economic regulations that are generally applicable to all industries."[10]

The any quick rejection of all the broadcast cases was unsound. First amendment analysis typically assumes that the government cannot burden the exercise of a first amendment right. However, restricting newspaper and broadcasting cross-ownership means that newspapers loose the opportunity available to other applicants (or purchasers) to own a broadcasting station and they loose it solely because they exercise the right to publish.[11] Of

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[7] The emphasis on levels of review pervades the scholarly literature as well as typical legal briefs. This obscures the real tasks, which should be specifying constitutional evils that might justify invalidating a regulation and determining whether the regulation causes any of those evils. If the evils are of the sort I suggest, the crucial inquiry would be to determine whether the regulation actually has a legitimate purpose. Rather than determine the stringency of a balancing analysis, the inquiry should aim at identifying whether the law exhibits any constitutionally specified faults. The court in Potomac Telephone remarkably devoted over nine of its fifteen pages of constitutional discussion to what it is described as the "fundamental constitutional question," that is, identifying "the appropriate level of judicial scrutiny to be applied," 830 F.Supp. at 917, and less than five to evaluating the statute.

[8] 830 F.Supp. at 918.

[9] 326 U.S. 1 (1945).

[10] 830 F.Supp. at 921.

[11] FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

course, not everyone can own a broadcast station, but the Court apparently held that an entity can loose the opportunity to do so specifically on the basis of engaging in a first amendment activity. The decision must be seen as upholding a structural regulation of the newspaper industry. The decision makes no sense except as upholding the authority of the government engage in structural regulation intended to improve the communications system, even though the regulation restricts newspapers.

The decision to uphold the restriction on newspaper ownership of broadcast stations may be a perfect analogy to the prohibition on cable and telephone cross-ownership. I assume that the government can require a telephone company to get a license or its equivalent. That is, not everyone can own a telephone system. Then, even if the court treats a cable system like a newspaper, the newspaper was not allowed to own the other "regulated" communication medium. Surely, cable does not have greater rights. So the ban on cable-phone cross-ownership appears equally legitimate.

The court's more serious error in dismissing the relevance of the broadcasting cases is an error ubiquitous in both judicial and scholarly commentary. Rather than the conclusion that scarcity justifies structural regulation in broadcasting, something close to the converse is true: structural regulation created scarcity but that structural regulation, including regulations responding to the created scarcity, is a permissible means of trying to create a desirable communications system that serves first amendment values.[12]

Economists and many lawyers have forever poked fun at the physical scarcity argument. Physical scarcity of printing presses would exist if the government made them

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[12] I briefly discuss this account in C. Edwin Baker, Human Liberty and Freedom of Speech ___ (1989).

available for free - or if it did not enforce trespass laws but allowed anyone to use any printing press she saw. Physical scarcity of wood pulp might occur if pulp were free (and scarcity has occurred during periods of war and price control). On the other hand, if the government created property rights in broadcast frequencies as it does in printing presses or land, the supply of broadcast outlets would meet the demand at the market price. If, instead, actual scarcity in terms of numbers were considered, there are, as the Court noted,[13] far fewer daily papers than broadcasters.

Although the misleading "scarcity" language has captured the popular imagination, the Court's own analyses are often more sophisticated. In Red Lion, Justice White described the consequences of the airwaves being a commons (my word, his description) where "the problem of interference is a massive reality," (like where no one owns the pasture or like my hypothesized world where no one owns printing presses), and then argues that "[i]t was this fact and the chaos which ensued from permitting anyone to use any frequency" that made government intervention necessary.[14] The chosen form of government intervention was licensing. White proceeded to argue that "nothing in the First Amendment ... prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy."[15] To White, this was obvious. "[T]he Government could surely have decreed that each frequency should be shared among all or some of those who wish to use

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[13] Miami Herald v. Tornillo, 418 U.S. 241, ___ (1974).

[14] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, ___ (1969) (emphasis added).

[15] Id. at ___.

it."[16]

The story White told is one of the need, and the government's right, to determine how to legally structure a new means of communication. Some set of legal rights are necessary to make the means of communication useful. The Court argues that given the need for structural organization, the government can choose its form - including essentially making broadcasters into common carriers that share the facilities with all those who wish to use it. The Court did not assert the constitutional preferability of private ownership and private owner control, that is, it did not assert the constitutional preferability of the newspaper model, even though that arrangement was (and is) possible. No high standards of first amendment scrutiny were applied in reaching these conclusions. If the role of the first amendment in this analysis were to be articulated, I suggest that it would only rule out structural regulation designed to restrict the openness or usefulness of the communications medium or regulations intended to censor some content. But, as explained by White, the challenged law did not commit these transgressions - rather it was intended to make effective and open use of the airwaves. Moreover, White implicitly recognized that generally the choice about which structure is best is a political matter unless the political choice is implausible (unreasonable). Thus, arguably the Court did not adopt a "low level" scrutiny because the regulation applied where physical scarcity exists but rather because structural regulation is generally permissible even if it creates scarcity as it did in broadcasting.

In a sense, in broadcasting, constitutional standards followed the governmental regulatory scheme rather than justifying it. But this the scheme is not limited to broadcasting.

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[16] Id. at ___.

Telephones are an obviously important means of communications. Although seldom discussed by constitutional scholars, possibly because few people imagine anything different, telephones have been subject to constant structural regulation in a manner dramatically inconsistent with the first amendment rights of the type that Tornillo[17] holds are guaranteed for newspapers. Telephone companies, unlike newspapers, have to carry speech with which they do not agree. Telephone companies, also unlike newspapers, are required to provide communications at a price determined (or regulated) by the government. The story seems to be that when a new form of communications technology is introduced, the rights of the owners of the means of communications can be regulated in any way reasonably designed to support the communications order.

This analysis even fits the broadest rationale[18] for striking down the right to reply law in Tornillo. Given the historical development of newspapers, any interference with the developed role of editors must be understood as interfering with the integrity of the

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[17] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[18] A narrower basis of decision is that the evil in Tornillo was that the law was a content regulation, a rationale even more clearly consistent with upholding structural regulation. The Court observed that since the obligation to print the outsider's speech results only because of the paper's earlier publication decision, the obligation amounts to an impermissible penalty or burden on the newspaper's content, with potentially damaging deterrent effects on the newspaper's editorial vigor. This reading has been followed by some courts when upholding structural regulation of the media. See, e.g., Turner Broadcasting System v FCC, 819 F.Supp. 32, 45 n.25 (D.D.C. 1993), cert granted _____ (relying on this distinction); and id. at 55 (Sporkin, concurring) (same).

To the extent that the press as an institution is considered instrumentally, even this holding might not be solid if there were adequate support for the conclusion that a reply right would not generate self-censorship. For example, it seems unlikely that mandatory printing of retractions after court findings of falsity will deter the media's speech as much as the possibility of huge damage awards that are now allowed. This might explain why some think that retraction requirements, despite their similarity to the law struck in Tornillo, could be upheld. Cf. Miami Herald v. Tornillo, 418 U.S. 241, ___ (1974) (Brennan and Rehnquist, concurring); Gertz v. Robert Welch, 418 U.S. 323, ___ n.3 (1974) (Brennan, dissenting).

institution, as undermining rather than supporting the communications system.[19] But no such historical understanding exists to block speech-promoting regulation of broadcasting, cable or telephone.

This reading of the broadcasting cases conforms to judicial decisions involving structural regulation of other communications mediums. First, although the court in Potomac Telephone was technically correct that Associated Press only upheld application of a general economic regulation to the press, normally an uncontroversial practice,[20] the law as applied required the Associated Press to speak to (that is, offer its releases to) those to whom it did not want to speak. More importantly, the Court justified its decision with much broader language that explained how it understood the first amendment. This language affirms the legitimacy of structural regulation designed to improve the communications realm. The Court clearly indicated that the first amendment does not protect private enterprise's right to restrict other's speech freedom. In the context of the case, this meant upholding a governmental structural regulation of the media when that regulation was reasonably thought to improve the communication opportunities of other private parties, here papers that wanted but had been denied access to the Associated Press. The language was so broad that Henry Geller treats as

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[19] This historical contingency of this understanding may help explain why other democratic countries with slightly different traditions can reach radically different conclusions. Although Germany would probably parallel the United States in respecting individual autonomy as a reason to disallow mandatory flag salutes, Germany holds that the right to reply to press accusations is not only permissible but to some degree constitutionally required.

[20] "Uncontroversial" does not mean that media's lawyers, anxious to use the first amendment to free the press from any expensive legal obligations, have not routinely challenged these regulations, often taking their case all the way to the Supreme Court. I mean "uncontroversial" in that the Court predictably, usually unanimously [ck], dismisses these challenges. Likewise, scholarly commentary seldom takes these arguments seriously.

fundamental what he labels the "Associated Press principle," namely that "[t]he aim of the [First] Amendment, its 'underlying premise,' is to foster 'the widest possible dissemination of information from diverse and antagonistic sources.'"[21]

Associated Press is not the only non-broadcasting support for broad governmental power to engage in media-specific structural or economic regulation of the press. Both many constitutionally relatively uncontroversial, historically accepted practices and some court decisions can be cited. For instance, special mailing rates have amounted to subsidies designed both to promote the newspaper and magazine industry. The conditions imposed for obtaining the special rates have purposefully been designed to affect the structure of the industry, promoting some communication practices and some categories of communication and discouraging others. First amendment challenges to these provisions, like the provision that grants the special rate only to papers or magazines that have a subscriber list (as opposed to publications that send out copies to people who have not requested them), have routinely been rejected.[22] The standard used to evaluate the challenged provisions seems to be whether they are "rationally related" to the government's goal[23] - typically a goal of furthering the government's conception of a good communications order. The Supreme Court

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[21] Henry Geller, Fiber Optics: An Opportunity for a New Policy? 11 (Annenberg Washington Program 1991) (citing Associate Press, 326 U.S. at 20). My paper in broad outline agrees with Geller's policy conclusions in his excellent, detailed analysis of the telephone industry. Among other conclusions, he supports the bar on phone company's offering cable services both within and outside their service areas. Nevertheless, I think in some respects, e.g. recognizing telephone company's first amendment rights through a quite strict application of the O'Brien standard, id. 36, he restricts government power to engage in structural regulation more than appropriate and accepts the applicability of a constitutional standard that could be turned on some of the regulatory proposals he supports.

[22] Enterprises v. United States, 833 F.2d 1216 (6th Cir. 1987) (upholding subscriber requirement). See generally, Lewis Publishing Co. v. Morgan, 229 U.S. 288 (191_). [cite K's book on mails]

[23] Enterprises, Inc. v. United States, 833 F.2d at 12__.

notes that these broad subsidy categories, which presumably have structural effects on the print media, are not like conditioning mail subsidies on the basis of viewpoint, a form of censorship that is presumably unconstitutional.[24]

The Court also treated an exemption of small newspapers but not large newspapers from certain employment laws as hardly meriting serious argument, noting merely that this was "not a deliberate and calculated device to penalize a certain group of newspapers."[25] More recently, the Court upheld application of a general gross receipts tax to cable television although the law exempted scrambled satellite broadcast television, which the Court treated as the same medium only with a different delivery system, as well as newspapers. Again, the Court applied no heightened level of review, no O'Brien test. It explained that the fact that cable "is taxed differently from other media does not by itself ... raise First Amendment concerns."[26]

These tax and the labor laws were directed specifically at the press in that they made distinctions as to which portions of the press to exempt from a burdensome law of general applicability. Since neither law was challenged as making any portion of the press worse-off than if the law of applied universally, these cases do not directly support the claim that the government can structure the press with a law uniquely applicable to the press, even if generally designed to improve press functioning, if the law makes some portions of the press worse off than without the law. However, that is precisely what the Newspaper Preservation

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[24] Hannegan v. Esquire, 327 U.S. 146, 156 (1946).

[25] Mabee v. White Plains Publishing Co., 327 U.S. 178, 184 (1946); see also, Oklahoma Press Publishing Co, 327 U.S. 186, 193-94 (1946).

[26] Leathers v. Medlock, 499 U.S. 439, 444 (1991).

Act does. Certain newspapers are allowed to form joint operating agreements (JOAs) that would violate the otherwise generally applicable anti-trust laws. According to suburban and other smaller competitor papers, the JOA results in a combined juggernaut that places them at a competitive disadvantage. They claim the Newspaper Preservation Act leaves them in a substantially worse competitive position than if anti-trust laws applied uniformly. Again without any form of heightened review, the Court of Appeals upheld this structural regulation.[27]

Of course, a whole set of cases have struggled with the government's attempts at structural regulation of cable. The most striking aspect of judicial decisions considering challenges to these regulations is the courts' uncertainty as to what analysis to use. Industry lawyers and commentators often define the issue as turning on whether cable is more like broadcasting or newspapers. The possibility of viewing cable as in some respects like telephone has only recently gaining much attention.[28] Generally, the more lenient review of broadcasting is assumed to require a mid-level, O'Brien analysis. Although the Supreme Court has left the issue almost entirely open,[29] some regulations' apparent invalidity under O'Brien has allowed several lower courts to avoid determining whether a stricter scrutiny

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[27] Committee for an Independent P-I v. Hearst, 704 F.2d 467, 482-3 (9 Cir. 1983).

[28] Both Justices Souter and Scalia raised this possibility in oral argument in Turner Broadcasting. 62 U.S.L.W. 3463 (Jan. 18, 1994).

[29] City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986). In earlier challenges to structural regulations of cable in ways that involved compelled speech, the Court did not even consider the relevance of the first amendment. See, e.g., United States v. Midwest Video, 406 U.S. 649 (1972) (upholding requirement that cable system engage in local cablecasting).

should apply.[30] Others view cable as relatively unique but, after examination, conclude that the middle-level O'Brien standard applies and then uphold the challenged regulation.[31]

These analyses of structural regulations generally differ dramatically in both approach and result from the district court's opinion in Potomac Telephone. Outside the cable cases, they contain no substantial discussion of level of scrutiny. Mostly, they do not invoke even a middle level, O'Brien analysis. Again outside the more mixed results in the cable area, each upheld the challenged structural regulation. In these respects, the courts' analyses proceeded like it does in broadcasting. Its primary warning has been that the analysis would change if the court found the law embodied a bad purpose or tried "to suppress the expression of particular ideas or viewpoints."[32] In contrast, putting aside the special example of Tornillo,[33] as far as I know the Court has never found a structural regulation of the media that rationally served the communications order to violate the first amendment.[34]

Court decisions can always be limited to their precise context - or rejected as wrong. Thus, possibly the most important question is how ought the first amendment apply to structural regulation of the media. Elsewhere I have noted that a society concerned with

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[30] E.g. Century Communications Corp. v. FCC, 835 F.2d 292, (D.C.Cir. 1987), clarified, 837 F.2d 517, cert. denied 486 U.S. 1032 (1988).

[31] E.g. Chicago Cable Communications v Chicago Cable Commission, 879 F.2d 1540 (7th Cir. 1989), cert. denied, 493 U.S. 1044 (1990).

[32] Leathers, 111 S.Ct. at 1447.

[33] See TAN 18 & 19.

[34] Of course, such a ruling may be on the way in the cable context - although for the reasons described herein, I think such a result would be both unfortunate and inconsistent with the better understanding of the first amendment.

press freedom might be solely fearful of government suppression or manipulation.[35] On the other hand, society might also view private power and market functioning as significant threats to a desirable communications order, as threats to diversity, and even as threats to freedom as it is normally understood. This second view would recognize that mere reliance on laws of general applicability will not suffice to create a communications realm that adequately serves a democratic society; such reliance will not produce "the widest possible dissemination of information from diverse and antagonistic sources."[36]

Our history of legal initiatives clearly indicate acceptance of the second view. Postage regulations and subsidies, with their structural effects on newspapers and magazines, have illustrated such a judgement from the beginning of the country through to the present. Twentieth century examples include FCC jurisdiction over telephone, regulation of cable and broadcasting, support for public broadcasting, rules distributing government advertising among competing partisan papers, and the Newspaper Preservation Act. Some structural regulations have been challenged in court, and the resulting case law is likewise comprehensible only from this second perspective. Of course, media critics have argued, I think persuasively,[37] that the inadequacies of the market and the dangers of private power are much greater than past remedial legislative responses imply. But this second view depends on legislative responses to the private threats - with the constitutional guarantee allowing

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[35] This discussion is based on C. Edwin Baker, Private Power, the Press, and the Constitution, 10 Constitutional Commentary 421 (1993). See also, C. Edwin Baker, Human Liberty and Freedom of Speech ch. 10 & 11 (1989)

[36] Associate Press, 326 U.S. at 20.

[37] See, C. Edwin Baker, Advertising and a Democratic Press (1994).

responses while maintaining vigilance against governmental abuse.

This second perspective recognizes press freedom - or a communications order that serves the democratic functions of the press - can be threatened from either direction, by either private or public power. Response to private threats requires that governmental intervention, largely in the form of structural regulations. Press freedom in the functional sense embedded in constitutional theory and doctrine normally requires that these structural regulations generally be upheld. But history clearly shows that not all governmental interventions are benign from the perspective of an open communications order. Thus, the constitution gives legislatures direction; and more to the point here, it empowers courts to strike down any government initiative designed to censor or to undermine the freedom or integrity of the press.

From this view, the court in Potomac Telephone applied the wrong standard - it should have looked at the purpose of the cable telephone cross-ownership prohibition. As long as the law can be reasonably understood as a means of improving or protecting an open, democratic communications order, it should have been upheld. However, the court apparently thought that it could not meet even this standard. Thus, the next section reviews various reasons related to communications for regulating the communication infra-structure to see if any justify the ban on cable-telephone cross-ownership.

Regulatory Rationales

Any argument for regulation of the rapidly changing and competitive realm of communications may be misguided - as well as irrelevant given industry opposition. The

extreme position argues that regulation has no place in future telecommunications. Only slightly more moderate is the apparent industry-government consensus on the outlines of the needed overhaul of the telecommunications system. According to Tom Norris, A.T.& T.'s vice-president for government affairs, "All members of the industry at least have come to the point where they agree what the endgame is, which is to have competition wherever feasible."[38] Telecommunications seems to be "moving inexorably towards competition, deregulation, and fiber optics, [with] the day ... not far off when entry will be wide open ..."[39]

In the rush towards the new information superhighway and the rush toward the competition that presumably will spur its development, important rationales for regulation may be forgotten. Beyond general economic goals of efficient delivery of services and prevention of abuse of monopolistic power, at least three concerns related to providing for a desirable communications order often support specialized regulatory treatment of the communications infra-structure. A fourth concern also sometimes lies in the background and should also be specifically addressed. Here I will examine each and consider whether any justify §533(b)'s bar on telephone provision of video programming.

First, communication products, including basic telephone and basic cable service, should be made as widely available as possible and priced in manner that allows virtually universal access (the universal audience access principle). Second, creators and suppliers of

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[38] Edmund L. Andrews, U.S. Ready to Ease Its Legal Barriers in Communications, New York Times, Sec. A, p.1 (Dec. 20, 1993).

[39] Eli M. Noam, From the Network of Networks to the System of Systems: An End of History in Telecommunications Regulation? Regulation 26, 26 (1993 #2).

communications products should have fair access to the transmission system so as to have access to audiences. As a corollary, the transmission system should not be empowered to exclude any speaker (the common carrier principle). Third, despite the common carrier principle, some communications or communicators should receive structural subsidies in order to increase the diversity or quality of the communications realm in ways not supported by an unregulated and unsupplemented market (the support of diversity principle). Similarly, above-cost and below-cost charges for some categories of speakers are sometimes permissible if designed to make the overall system more open and universally available to audiences. Fourth, structural choices should respond to the danger of corruption of the political process by concentrated corporate power and the increased danger posed when this corporation power combines control over important elements of the communication infrastructure with control over the content of communications (the political power principle).

The importance of each of these "principles" deserves more attention and its relevance for telephone provision of video services needs consideration.

1. Universal Audience Access

Universal service has long been a major policy goal. It has been a central emphasis of postal policy. Cheaply served users have always subsidized postal deliveries to more expensive to reach users. Universal (free) public basic education, in its broadest sense a part of the country's communication infra-structure, is treated as fundamental by every state of the union. Broadcasters serving each community, even if a more market driven approach would result in greater geographical concentration of media outlets, has from the beginning been a

Congressional and then a FCC policy. Likewise, government policy has generally assumed that equity (and to some extent efficiency[40]) requires that everyone have access to a phone. Historically, telephone rate regulation advanced universal service by various means, most obviously by charging some users a disproportionate[41] amount of the cost of joint facilities. Sometimes, the impact is distributionally perverse, for example, if poor intercity users support suburban users.[42] But equitable goals are usually advanced by subsidies of residential by business users, rural by urban users, local service by long distance service,[43] and basic service by enhanced services.[44]

Subsidies take various forms. Equal charges offer subsidies when the expense of providing service varies. Regulatory required unequal "special" rates can benefit some users,

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[40] Others in addition to party paying for service are advantaged by the party having phone service - most obviously, those who would like to reach the person by phone. The value of the phone system to any user depends not merely on her connection but also on other people being connected so that she can reach them. However, market mechanisms are unlikely to effectively bring these potential callers' preferences to bear on the decision (or the financial ability) of a person purchasing service. Thus, subsidy arrangements that promote universal service have some efficiency justification - to correct for a market failure in accounting for callers' preference that people they want to call are connected.

[41] If costs are really joint, there is no objective or neutral way of allocating them - the allocation logically must reflect either explicit or implicit value judgements. Still, the point here is that traditionally these value judgements have been made in a manner to promote universal service.

[42] Likewise, inequity may result if expensive to serve rural areas are left to small rural local telephone companies that do not gain revenue from more lucrative exchanges. This contrasts unfavorably with the greater emphasis on universal service by the postal system.

[43] Robert Britt Horwitz, The Irony of Regulatory Reform 274 (1989) (ATT figures from 1984 indicate that only 10% of residential users make over $25 worth of long distance calls per month and suggesting that it is such users who were benefitted by the break-up of ATT despite the increased local rates).

[44] Lifeline phone service in New York City costs as little as $1/month, with the initial installation fee also much lower than for regular service.

often making availability more equal.[45] Both techniques are used in the postal and telephone systems. Likewise, in broadcasting, provision of "free" licenses to rural or small markets where an unregulated system would result in the broadcast right being purchased by urban users amounts to a subsidy of rural service in the name of universal availability. At least in intention, expensive to educate children are to receive an appropriate education at the same zero price as less expensive to educate children. However, the most evident aspect of the policy to promote universal availability in the education sphere is the state transfer programs that make available to poor districts at least the minimal resources thought necessary to provide for education.

The goal of creating a communications infra-structure that allows for universal access is of major importance. It has justified extensive and discriminatory regulatory interventions. And the need for interventions is likely to last as long as poverty exists. One recent study found that even now over 25% of the low income households in the New York Telephone Company territory do not have phones.[46] However, by lowering costs, competitive forces and related technological innovations sometimes can contribute more than many traditional regulatory moves. The question here is, first, whether this goal of universal service is now wisely advanced by traditional regulatory practices and, more specifically, whether the ban on phone company provision of video programming advances this goal.

Competition undoubtedly can create benefits - but it can also often impose costs. Just

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[45] In contrast, without regulation in contexts where there are jointly used facilities, often the greater competitive power of volume users allows them to gain special favorable rates that allocate these joint costs more to weaker users, the result often being directly contrary to equitable goals.

[46] Horwitz, supra note 43, at 274 (citing statistics gathered by Public Utility Law Project of New York and reported in letter, New York Times, March 2, 1987, 18).

as Reagan and Bush administration policies resulted in increased disparity between the rich and poor, an unregulated introduction of new communications technologies runs the risk of increasing the communications and information gap between rich and poor. Prevention of this should be a major goal of communications policy - the evils of increased inequality are likely to outweigh purported benefits of new services or greater efficiency. Robert Horwitz argues that among the effects of the breakup of ATT and the related deregulation of telecommunications was reduced cross-subsidization, particularly of local, poor, and rural users by long distance and volume users. The result is "basic telephone users ... pay higher rates and may look forward to a decline in the quality of service."[47]

Competition holds the potential of both wasting resources and undermining regulatory attempts to provide for universal service. When unregulated competitors offer cheap service to high volume, low cost users, the regulated utility's higher charges will result in loss of business, reducing the revenue available to subsidize universal service. MCI's recently announced plan to install fiber optic "driveways" for large local users is aimed at reducing the approximately $5 billion a year that MCI pays local phone companies for access to the local exchange.[48] Potentially lower charges for volume customers are great for them. However, local exchanges' revenue will be reduced. In part, they may write-off investments and live with lower profits - although this may reduce the incentive for long term investment, including investment in facilities that serve the low volume users. But local companies must maintain the revenues necessary for continued provision of service, most likely by requiring

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[47] Id.

[48] New York Times sec.3, p. 2 (January 9, 1994).

the remaining local users to pay a larger share of the costs. Thus, "competitive" cream skimming by MCI predictably contributes to the distributionally perverse result of pushing up rates for basic phone service.[49]

The above only claims that deregulated competition can create problems. The question here is whether phone company provision of video creates any problems. The answer might be yes. Phone company ownership of unregulated businesses,[50] especially those that make joint use of the phone transmission facilities, offers opportunities for abuse. If the phone company has monopoly power in provision of local phone service or local switching but faces competition in providing video programming, allocating more joint costs to the phone rate base can subsidize the cable operations. And opportunities to subsidize can occur in many ways. For example, a major phone company "expense" is the cost of money. Most telephone operating companies have excellent credit ratings, which keep down their cost of capital. Cable systems often have much worse ratings. Mergers like that of Bell Atlantic and TCI or phone company investment in cable operations may cause the phone company's credit rating to decline while the cable operation's rating improves. The result pushes the cost of phone service up and pulls the cost of cable down.

Regulators make heroic efforts. But as long as both "products" rely on the same facilities and real depreciation does not depend on the extent of use, allocating costs between users is inherently arbitrary. The economic and factual inquires are sufficiently difficult and

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[49] This profitable competitive opportunity for MCI to siphon off these high volume users can also result in over investment in basic infra-structure (that is, economically wasteful, duplicative facilities).

[50] Even if the additional businesses are also regulated, the complexity of the regulatory task may increase sufficiently that the profit goals of the utility will stymie proper cost allocations.

sufficiently intertwined with value or policy judgments, and the phone company is such a powerful legal/lobbying/advocacy force, that even if regulators always have adequate resources, commitment and integrity, it would be naive to expect complete regulatory success. Pragmatically, the better institutional design places less demands on regulators.

Despite this analysis, this game may already be lost irrespective of a ban on phone provision of video (and basic phone service may be sufficiently available that this is not where any battles should be fought). Phone companies' involvement in unrelated non-regulated enterprises already allows some cross-subsidies that burden the rate basis, although here regulatory separations of costs are comparatively effectove. More relevant are current phone company opportunities to cross-subsidize businesses that make joint use of phone facilities or that involve advanced use of the facilities in ways the phone company is uniquely able to facilitate. Joint use and added services are a part of the rational, economical, full use of the phone infra-structure and potentially help pay for the facilities needed for basic service.

This reasoning underlies the FCC's decision to permit local phone companies to offer video dialtone services.[51] As defined by the FCC, "video dialtone" requires a basic "video platform" operated under common carrier obligations. Given this platform, both the phone company and other users are allowed to provide video "gateways" not subject to common carrier regulation, although the phone company still can not itself provide the video programming. A video gateway apparently can offer everything now provided by a cable company - and more. Thus, video dialtone permits the phone company to compete with cable

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[51] In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, 7 FCC Rcd 5781 (Released August 14, 1992; Adopted July 16, 1992) [hereafter, Video Dialtone with page numbers to Lexis numbering, 1-218].

companies in offering packaged and unpackaged video carriage. In trying to obtain business, the phone company may try to allocate disproportionate costs of joint facilities to its regulated monopoly switching or local audio uses. To the extent this cross-subsidization is the evil identified with phone ownership of cable, and to the extent providing this carriage is an element in the best use of the company's infra-structure facilities,[52] the question is whether phone provision of video creates additional opportunities or incentives to impose costs on the basic phone users.

The answer, I think, is "probably no." Two caveats are possible. First, the value of monopolizing video transport might be increased if the phone company could also provide programming, thereby increasing the already existing incentive to impose costs on phone users. Second, competing in programming could be counter productive if the communications system is best served by the phone company devoting its full attention and efforts at providing the best transport system.[53] Although I could be wrong, neither of these possible effects seem sufficient in themselves to justify §533(b).

Still, in considering further arguments for §533(b), an important difference between carrying and providing video (cable) involves the comparative public benefits of each. Carriage may be implicit in making fullest, most economical use of the phone lines. If phone facilities can profitably carry cable type programming to residents, the phone company would

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[52] The additional usage of phone lines could result in lower phone costs. Alternatively, this opportunity might lead the phone company to make expensive facility upgrades that offer no or few benefits for the basic phone users even though those users might be obliged to help pay for them. Of course, policy makers might welcome this method of financing initial construction of the "information highway." Still, potentially objectionable distributional effects should not be ignored.

[53] This consideration is not quite the same as the universal service goal. However, this section that discusses potentially objectionable impacts of cross-ownership on policies related to provision of phone service.

predictably provide this service even without itself owning the programming. Video programmers or even additional cable systems could compete over with the current cable company, paying the phone company for carriage. In contrast, there is little obvious gain from the phone company owning these competing video products.

In fact, one wire going into each home, with that wire carrying competing video (cable systems), computer, phone, and possibly additional new services, may constitute the most efficient use of resources. As long as the wire itself (its installation, maintenance, necessary switches, and the wire itself) is a substantial portion of the cost of the transmission system and this one wire has sufficient capacity for all relevant uses, two wires could be wasteful. If so, any regulatory system that forbid combining phone and video carriage would be presumptively irrational on straightforward economic grounds. (Of course, competitive concerns, safeguarding against system breakdowns, or more complex economic considerations might overcome this presumption).

Nevertheless, a developing consensus reportedly assumes a two wire future, probably with both the phone and cable wire competing to provide both services.[54] While not blanching at the possibility of the "worst case" scenario of a one wire world, Thomas Hazlett asserts that "competition can and will endure." He argues that the cable's existing long-lived physical plant is a sunk cost leaving "the future costs of these facilities ... close to zero," a cost basis which allows cable to stay competitive.[55] But as new video products or expanded

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[54] Andrews, supra note 38.

[55] Affidavit of Thomas W. Hazlett, ¶¶38-43 (April 29, 1993), in Chesapeake and Potomac Telephone Co. v. United States.

versions of cable require more advanced lines, rather than upgrading it may become economically rational for everyone to rent space on the cheapest available large capacity line. Hazlett's point seems too short term. Still, the point here is that the correct resolution of the transport issue is irrelevant to whether the carrier ought to provide the content.

2. Common Carriage

Without downplaying the value of continued efforts to promote universal service, from the present perspective of the system of free expression the most important goal is to promote access for the broadest and most diverse constellation of communication creators or producers This was the premise for Bruce Owen's claim that first amendment values are best advanced by separating media products from delivery systems.[56] Often small, diverse, often less profitable media producers will not themselves be able to own delivery systems. If they must go to an entity that sells competing media content to obtain transport, they are likely to face refusal or discrimination - whether for ideological or more likely for economic reasons. The obvious solution is to require separation of content and carriage ownership and to mandate carriage on a common carrier basis.[57]

I find it hard to quarrel with this argument. Arguably, regulators could assure smaller media producers fair access to the delivery systems operated by major programmers. But the dangers seem obvious. On the other hand, if fair access is really guaranteed, their seem few

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[56] Owen, supra note 5.

[57] A person or an entity may have a first amendment right to carry - deliver or transport - its own communications, however, there is no reason to extend that right to entities in the carriage, or any other, business.

reasons why the communications order is advantaged by media producers' or programmers' owning delivery systems. In any event, the need to promote openness and diversity hardly seems served, and could be impeded, if current common carriers diversified into programming or media production. Anything common carriers could provide, other separate entities could provide. In contrast, their entry into programming could lead not only to its skimping on its devotion to carriage but, more importantly, to its skewing delivery to favor its own products. This is the central argument for §533(b).

The system of freedom of expression requires institutional arrangements that promote rather than impede people's opportunities to communicate. Censorship, whether by governmental, private or structural forces, is presumptively objectionable. As Justice Hugo Black so clearly put it, "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[58] The aim is a structure that promotes creative opportunities and facilitates audiences' access to diverse cultural, partisan, and informational communications. Mail, telephone, broadcasting, and cable illustrate contexts where government interventions and sometimes monopoly promote diversity and communicator access better than does sole reliance on a so-called unregulated marketplace.[59]

Common carriage is essentially a guarantee that the utility, here, the phone company,

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[58] Associated Press v United States, 326 U.S. 1, 20 (1945).

[59] I use the term "unregulated market" with misgivings - fundamentally, there is no such thing. Choices among property regimes and among various possible alternative contract rules illustrate that all markets rely on legal structuring or regulation. There is no "neutral" or "natural" regime that can be called a "free" market. Cf. Duncan Kennedy & Frank Michelman, Are Property and Contracts Efficient?, 8 Hofstra L. Rev. 711 (1980).

will not arbitrarily or invidiously deny access. It restricts private power to censor. Common carriage must, however, be interpreted from a first amendment, not merely an economic efficiency perspective. In a generally persuasive partial dissent to the FCC's Video Dialtone Report and Order,[60] Commissioner James Quello argued that a single wire into the home is unsafe - that "we simply cannot afford to give one entity that much control over the information that flows to the home" even if it is regulated as a common carrier.[61] Quello's point gained force in light of Court of Appeal's decisions upholding the right of "common carrier" phone companies to deny service on the basis of message content.[62] Even though the "dial-a-porn" messages (indecent but not obscene) were not illegal, the court reasoned that the common carrier could deny carriage on the basis of a business judgment that this carriage would be bad for its reputation and hence bad for business.

Quello's solution - a second wire into the home - is inadequate. The owner of the second wire is likely to engage in censorship of the same type and for the same reasons as the first. Duplicative censorship by owners with similar values or operating under similar economic constraints often occurs - for example, by competing TV networks.[63] A more promising response is to make common carriage mean what it should mean - a solution that

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[60] Video Dialtone, supra note 51.

[61] Id. at 177.

[62] Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co, 827 F.2d 1291 (9th Cir. 1987), cert. denied, 108 S.Ct. 1586 (1988); Carlin Communications, Inc. v. Southern Bell Telephone & Telegraph Co., 802 F.2d 1352 (11th Cir. 1986).

[63] Cf. CBS v. Democratic Nat. Committee, 412 U.S. 94 (1973) [ck - all the nets?] [Neighbor-to- Neighbor anti-Folger's ad]

the FCC could order, Congress could require and, I would urge, the constitution mandates.[64] The Court of Appeals' decisions, which Quello rightly fears, should be seen as simply wrong.

The primary argument for §533(b) is that it will help make the common carrier requirement effective. If the phone company only carries, it still might allocate cable transmission expenses to basic phone service, thereby gaining a subsidy advantage for its video carriage, possibly even allowing it to monopolize that market. But as long as common carriage requirements apply, a carriage monopoly does not necessarily restrict video programmers' access to the public. If, however, the phone company itself sells programming to the public, it would have an incentive to allocate some programming costs to its regulated monopoly services, thereby subsidizing its video offerings. Likewise, it would have an incentive to impose difficult to prove obstacles on its programming competitors. The result

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[64] Doctrinally, finding state action is key for asserting a constitutional mandate for common carriage - or, at least, a mandate that carriers not deny access on the basis of speech content. As a central part of the communications infra-structure, the phone system is analogous to the streets of the company town in Marsh v. Alabama, 326 U.S. 501 (1946) (finding state action and holding that private owner could not keep "trespassing" speakers off its streets). Phone companies' primary function is to provide for public communication, a function implicitly assumed in the government's extensive regulation of the phone system and the function that partly explains why many countries favor public ownership. Extensive government supervision justified in large part because of the public importance of providing fair terms of universal access implicates the government in any decision of the utility to deny service to a category of users. Cf. Jackson v. Metropolitan Edison, 419 U.S. 345 (1974) (Marshall, dissenting) (indicating a belief that Court would find the state's involvement sufficient to impose a non-discrimination obligation such that the utility could not deny service to Negroes or other groups).

The Court's recent tendency to require a connection between the government and the specific challenged act generally cuts against a finding of state action. But when government action clearly contributes to the opportunity of the actor to engage in the challenged action - as have government actions in structuring the telephone industry - the Court has often found state action without government participation in the actual challenged decision. Cf. Edmonson v Leesville Concrete Co., 111 S.Ct 2077 (1991) (state action in defense counsel's use of a peremptory jury challenge and citing with approval Burton v. Wilmington Parking Garage, 365 U.S. 715 (1961)).

This reasoning suggests that rather than being an interference with the cable system's first amendment rights, requiring cable systems to provide access opportunities is constitutionally mandated. In the context of a city granting only one cable franchise, the ACLU asserted such a claim in a suit against Kansas City for eliminating its requirement that the cable system operate an access channel. The suit was dropped when the city reinstated the access channel. See Marc A. Franklin & David A Anderson, Mass Media Law, 4th ed. 898-99 (1990).

would be the phone company gaining an inefficiently large segment of the video market, potentially even monopoly power in this market. As compared to when the wire operated merely as a common carrier, phone company programming could sharply restrict independent and diverse video producers' access to the public.

In arguing to allow the telephone company to provide cable programming, Thomas Hazlett asserted: "There is simply no dispute: when one begins with monopoly, new entry can only increase the amount of consumer choice."[65] Maybe[66] - but this does not show that unrestrained phone company entry should be allowed. The proper question is whether the phone company should enter as a program provider or only as a carrier of others' offerings. If the phone company could profitably offer programming, one or more independent programmers should be equally able to offer the programming. However, the first arrangement (phone provision) gives the phone company an incentive to favor its own programming, thereby disadvantaging any independent programmers. The phone company could become a monopolistic bottleneck similar to existing cable companies. This would clearly be a worse result, and could reduce consumer choice, as compared to likely developments if the phone company operates solely as a carrier. This second arrangement (phone carriage) creates an incentive for the phone company to encourage demand for

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[65] Hazlett, supra note 55.

[66] On its face, this claim is wrong in some circumstances, for example, if competition wasted resources in duplicating service and dissipating revenues that the monopolist, possibly because of regulatory mandate, would devote to diverse programming. Commentators often rely on this point to explain why a monopolist owner of three networks might provide more diverse programming and less waste of resources than do three competitive broadcast networks. A court also relied on these considerations in concluding that protecting a local broadcaster from additional competition could in certain circumstances serve the public interest in programming. Carroll Broadcasting Co v. FCC, 258 F.2d 440 (D.C.Cir. 1958).

transmission by more programmers, potentially increasing diversity, accessibility for programmers, and availability for the residential public. Prima facia the second alternative is preferable.

3. Subsidized Support for Merit and Diversity Programming

The premise of many governmental policies is that markets do not adequately support some communications that are valuable from the perspective of freedom of expression.[67] The concern with availability of diverse and quality communications has justified not only a regulatory promotion of open access (i.e., the common carrier principle) but also regulatory mechanisms to subsidize expression inadequately supported by the market. The subsidization can come either directly from the government or through a governmentally mandated diversion of monopoly profits. Thus, in broadcasting, government's attempts to promote communications inadequately supported by the market take two forms: direct subsidy support for non-commercial or public television and radio; and diversions (from resources possessed in part because of their quasi-monopolistic position[68]) implicitly required of broadcasters in

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[67] Elsewhere I have argued both that even fully "competitive" unregulated markets cannot be expected to produce "efficient" production and distribution of communications and, even if they did, that efficiency is often not an acceptable standard for evaluating the production and distribution of cultural, informational, and argumentative communications. C. Edwin Baker, Advertising and a Democratic Press ch.3 (1994).

[68] This provides the rationale for the currently discredited Carroll doctrine, which justified denying a license to a potential competitor of an incumbent broadcaster despite physically available spectrum space if the FCC concluded that competition would be economically detrimental to both station's capacity to serve the public interest. Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C.Cir. 1958). In eventually repudiating the doctrine, the FCC explained that this repudiation only precluded consideration of such economic effects in the context of individual licensing decisions, not in rule making or policy making. Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, 4 FCC Rcd 2276, 66 R.R.2d 19 (1989). Past acceptance of the Carroll doctrine (which involved governmental denial of use of physically available spectrum) illustrates that public interest considerations, not physical scarcity, underlie government regulatory power over broadcasting. See supra note ?.

order to fulfill their public interest programming obligations. In the mail, this concern justifies special low rates (presumably subsidized partly by the government and partly by other "speakers") for some categories, such as that of some non-profits. In cable, it takes various forms including "must carry" requirements[69] and mandatory channel space and subsidization for public access, educational, and governmental [PEG] channels. Although cable monopolies may cause higher prices and reduced quality of service,[70] an important benefit has been a surplus, part of which Congress or local governments can force cable systems to devote to non-market-supported categories of communications.

The question here, assuming the need for non-market-supported cable programming is unaffected, is whether phone provision of video would negatively affect the government's ability or willingness to force support for this programming - and, thus, provide some justification for §533(b). Theoretically the government could impose on telephone providers obligations to support access programming. However, if phone and cable companies compete, presumably less "monopoly" profits would be available for regulatory transfer to merit or access programming. The situation duplicates the problem created by unregulated telephone competitors skimming off high volume users from whom the regulated local company previously obtained the revenue used to subsidize universal service.

Moreover, if legal support for phone company competition with cable reflects an anti-regulatory, pro-competitive agenda, the government is unlikely to impose these support obligations. In the Video Dialtone proceedings, the FCC recommended, with potentially

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[69] cert granted,

[70] Thomas Hazlett, Cable TV Regulation, Regulation 45 (#2, 1993).

significant caveats, that Congress eliminate §533(b). It also considered but refused to require the telephone company or other gateway providers to include something similar to cable's PEG offerings. Finally, it rejected imposition of common carrier obligations on video gateways.[71] If some voices were unable to pay for access, the FCC would leave them to Congress.[72]

These FCC rulings suggest that in a video dialtone regime, with potentially competing video packagers (e.g. competing cable companies), policy makers will find the competition either reduces the need for or makes economically more difficult to effectuate any requirements to subsidize channels unable to gain market support, even if the need for these channels is not lessened.[73] Likewise, if video gateways offer cable-type programming independent of access requirements and subsidies for public access channels, local governments will be pressured to do away with these requirements on cable operators. These effects should cont on the ledger as bad consequences of competition, whether or not outweighed by good consequences. Logically, however, I am unpersuaded that phone provision of video programming makes subsidy mandates any less workable than they are in a realm where phone companies merely transport competing video programming. Thus, if

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[71] The decision makes some sense. If these gateways are designed to serve various audience demands, they may become less valuable to recipients if the provider cannot tailor the content. Still, the decision is troublesome in that it permits discriminatory exclusion of non-market supported, especially, unpopular groups', diverse programming.

[72] Dialtone ¶¶ 40, 44, 143. Cf. id. at 100, Quello, partial dissent (suggesting that cable operators may "avoid franchise obligations through the simple expedient of becoming 'enhanced gateway service providers'").

[73] I tentatively recommend a "sales tax" on video providers to fund public access and public television video programming and recommend that these and other non-commercial programming receive access to carriage on beneficial terms, much like the lifeline services provided to phone users or the reserved channels provided for non-commercial broadcasters. Cf. Video Dialtone, supra note 51, at ¶40 (recommendation of Massachusetts Community Antenna Television Commission).

§533(b) is supported by this concern it is probably because, as a political matter, the opposition of the combined phone-cable company would be a more formidable obstacle to imposing policy-justified support obligations than would the opposition of other video programmers.

4. Corporate Political Power

Shortly after Bell Atlantic and TCI announced plans to merge, a state Public Utility Commissioner privately bemoaned that Bell Atlantic's political power frequently blocked regulatory moves that would benefit the public - but that veterans in his agency feared that if phone interests merged with cable, the resulting combine would run the state in a way not seen since the days when railroads controlled everything they wanted.[74] An obviously appropriate policy concern is corporate political power. Historically this judgment has been embedded in many government policy decisions, although it sometimes drops out of economics-influenced academic policy analyses. At least since the progressive era and early twentieth century legislation directed at restricting corporate use of money and power to control electoral politics, the dangers of corporate political power have been obvious to many observers.

The potential raw political power generated by any huge corporate merger should be a cause of concern - and the Bell Atlantic/TCI merger is the largest we have had. However, the dangers take on added dimensions in the communications field, where three concerns

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[74] Conversation with Public Utility Commissioner in a state served by Bell Atlantic operating companies. October 1993.

stand out. First is the fear that the merged company's changed economic interests will corrupt media content. The incentives to base cultural or news content on economic interests rather than journalistic or creative judgements in heightened when the media's corporate owners have additional economic interests, for example, if they own other business enterprises that are potentially affected by government policies. A major source of unease at having General Electric own NBC was that GE's interests would effect NBC's journalism. Similarly, a major newspaper publisher described his nightmare as having newspapers fall into hands of owners like Mobil Oil.[75]

Second, media mergers may increase the closure of political space. Often the opportunity for legislative or agency adoption of logically and normatively justified public interest initiatives depends on industry being divided. The hope for a policy initiative contrary to the interests of some segment of industry often depends on support from some other industry segment that, in addition to any possible public interest motivation, hopes to see burdens imposed on its competitors. But as cable and telephone interests merge, the space for public interest initiatives related to either phone or cable or related communication options is likely to narrow. The declining support for things like PEG channels, discussed above, is an example.

From the perspective of the system of freedom of expression, the above concern relates to a third point. This country, like most democracies, has maintained the policy judgement that society is best served by spreading and diversifying control over media content

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[75] C.K. McClatchy, How Newspapers Are Owned - And Does it Matter? 7-9 (#23, Press-Enterprise Lecture Series, 1988).

- with the consolidation of the media industries being seen as an evil.[76] The merger creates the danger of increased closure and decreased access opportunities for unsettling dissident perspectives as a few corporate interests combine control of the most marketable content with control of the major transmission mechanisms. Here, a political response is most needed - such as the historical demand that phone service be offered on a common carrier basis, that broadcasters provide public interest content, or that cable subsidize PEG channels. There is already evidence that as mergers occur and the industry reaches consensus on the future deregulated framework, support for these initiatives is collapsing. If that was because the relatively ineffective old access mechanisms were being replaced by more effective guarantees for non-market supported diverse programming, there would be little cause for alarm. But that does not appear evident. The more obvious conclusion is that the combined power of the industry groups are merely coalescing around an abandonment of bedrock first amendment concerns and, instead, seeing the first amendment as a shield for their power. Laws that restrict these mergers, as well as laws like §533(b) that maintain the borders between common carrier transmission facilities and programming, provide some defense against these evils.

In sum, the dangers of merging cable's private carriage operations with telephone's public carriage should create a number of presumptions concerning the structure of the communications industries. First, the means of transmission should be operated as much as

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[76] This represents the judgment of all the national commissions, as well as this country's Hutchinson Commission study of the press, of which I am aware. The first significant deviation was a lengthy report of the United States Department of Commerce, issued early in 1993, which argued that there is insufficient media concentration in this country and recommended legal changes to allow greater concentration. [cite]

possible on a common carrier basis. Second, since this will work more effectively if owners of the transmission infra-structure have no economic incentive to favor some content over other, the presumption should be that the common carrier not be a provider of communications content. These points have added force since there are no obvious economic or social advantages from combining the two - especially, combining them under phone company ownership. Surely, these presumptions provide strong support for §533(b).

5. The Court Decision

The district court in Potomac Telephone does not see the issue as I described it above. Rather, the court rejects the government's argument by overtly misunderstanding its main rationale. The court begins well in noting the government's two justifications: "promoting competition in the video programming market and preserving diversity in the ownership of communications media."[77] But it then rejects the first argument with the non-sequitur that, since §533(b) "serves to bar entry into the market for video transport service by [telephone companies]," it clearly "restrict[s] competition in the market for video programming by limiting the number of outlets through which such programming can be distributed."[78] The obvious flaw here, as the court later correctly observes, is "that telephone companies are not precluded ... from competing in the market for video transport services."[79] Thus, the challenged provision does not limit the "outlets through which [video] programming can be

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[77] 830 F.Supp. at 927

[78] Id. at 927.

[79] Id. at 929. It also said this fact was "of paramount significance" - which is not obvious - but at least here the court got the law right.

distributed."

Nevertheless, the court moves to government's second interest, diversity of ownership, which the court takes to represent a government fear that the telephone company will drive cable out of business. The court argues that the phone company could only drive out cable by monopolizing the video transport market, for example by cross-subsidization of video transport with money from phone rate payers. Since the phone company can already compete in video transport, §533(b) does not prevent the result the government fears. Therefore, this interest cannot justify the law - §533(b) is not tailored to serve the interest.

The court misses the point. As long as the phone company cannot itself offer cable programming, it has no incentive to drive cable companies out of business - even if it has an incentive to have cable use phone lines for carriage. Most importantly, under those circumstances, any monopoly power over carriage would not provide leverage over programming. The logic of the government's concern with competition and diversity relates to restricting amy power the phone company has in the transport market from being used to restrict the programming market - a goal directly furthered by denying them entry into that market. Even if presently cable monopolizes video packaging in most neighborhoods, and even if the worst the phone company could do is replace this cable monopolist with a phone monopolist, by allowing the phone company to provide transport but not be a program packager, the realistic expectation is that various video packagers or even independent programmers will find it economical to deliver their programming over the phone lines. The result would both be more competition and more access by smaller, more diverse entities. The government's interests are directly served.

Bruce Owen, as quoted by the court, offers basically the above justification for §533(b). Phone companies' power in the video transport market would allow them to exercise undue power in the video programming market[80] and would increase the value to the phone company of monopolizing transport.

The court's response was three fold. First, it repeated that "the essential point" is that telephone companies can already compete in transport[81] - an irrelevant response since the issue is what the phone company does in the programming market (as well as a lessor concern with its incentive to monopolize transport). Second, the court argued that the evidence about the difficulty of regulating anti-competitive conduct related only to the transport business, which it thought is irrelevant if the government's concern was with telephone company power in programming[82] - but Owen's premise was that the telephone company could use its admittedly hard to regulate power over transport for leverage in programming, so the court's response again fails to join issue about abuse of transport power. Third, the court observed that the worst possible outcome would be the inconsequential trade of a cable monopolist for a phone monopolist.[83] Not only does this ignore that this more extensive monopolist's greater power could make it more objectionable but, more importantly, the whole rationale of allowing telephone transport of video while prohibiting

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[80] Id. at 930. Henry Geller found a similar ability to exercise power used by another communications transporter, cable, to undermine the government's attempt to create programming diversity through leased access channels. The cable owners' power over transport plus the incentive to control programming caused them to undermine the system in ways regulators were ineffective at preventing. Geller, supra note 21, at ___.

[81] Id. at 831.

[82] Id. at 930.

[83] Id.

provision of programming was that this arrangement is more likely to lead to competition in the programming market. The court's added claim that telephone entry into programming would be without any "inherent advantage that would enable them to evade effective regulation"[84] is wrong as long as the phone company can combine transport and programming in a single product. Only §533(b) prevents undue advantage because, otherwise, the company can make use of its hard to restrict advantage in transport.

Thus, the court's critique of §533(b) missed the key government argument. The government should not allow telephone companies to leverage power in the video transport market into power in the video programming market. Moreover, the inherent difficulties of effective regulation and the benefits of not wasting resources on the task always make the preferable solution the creation of structures that require minimum regulatory oversight rather than rely on any theoretical regulatory capabilities. This is what §533(b) does. The all important free speech interest in keeping the channels of communication maximally unimpeded so that diverse sources can present communications to the public adequately justifies §533(b).

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[84] Id. at 931.