The Cable-Telco Cross-Ownership Prohibition: First Amendment Infringement Through Obsolescence

Michael G. Oxley(*)

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Introduction

The United States stands at the brink of a revolution. Telecommunications technology evolves at a pace that makes even the most contemporary systems obsolete. This technological revolution could yield tremendous results in fields as diverse as education and health care.

Unfortunately, the positive results of this change are fettered by government policies that were meant to regulate a different time and a less complex telecommunications field. As Congress grapples with the proper method to regulate the interactions between companies that are on the forefront of change, other nations are allowing the entrepreneurial spirit to flourish. These restrictive U.S. policies hinder the advancement of the United States as the telecommunications standard-bearer of the global village. These policies also retard growth in other industries and occupations that rely on communications.

Cable television companies and telephone companies in the United States are well situated to deploy a nationwide interactive broadband communications network. Congress, by not allowing these two forces to compete or cooperate, is missing a tremendous opportunity to expedite the process. Congress's rationale for its overreaching policy is rooted in an obsolete notion that telephone companies (telcos or common carriers) would use their financial power to thwart cable operators' technological advancement.

This Article analyzes how the changing marketplace and technology has made unconstitutional the cross-ownership ban prohibiting the telephone companies from entering the highly profitable business of video programming distribution. Although many constitutional attacks exist, this Article will analyze the ban's constitutionality against the backdrop of prior restraint and commercial speech jurisprudence. It will then outline a regulatory approach that is more consistent with the contemporary technology and the business atmosphere. Finally, it will review the potential benefits of competition and cooperation between the emerging leaders of wire-based telecommunications.

I. History of the Cable-Telephone Company Ownership Restrictions

Telephone company provision of cable television service has concerned the Federal Communications Commission (FCC or Commission) for over two decades.(note 1) In 1969, the Commission initiated a rulemaking proceeding in order to determine whether telephone companies should be able to provide cable television service, and if so, what conditions should be attached to any such authorization.(note 2) The Commission subsequently determined that a central problem in the evolving cable television marketplace was the

> anomalous competitive situation between CATV [community antenna television] systems affiliated with the telephone companies, and those which have no such affiliation, but have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities.(note 3)

In 1970, when the cable industry was in its infancy, the Commission adopted rules that prohibited all telcos from providing video programming to subscribers in their respective local service area, either directly or indirectly through an affiliate.(note 4) The restrictions barred telcos from having any sort of business or financial relationship with cable operators, other than a carrier-user arrangement.(note 5) The Commission was concerned that telcos would engage in improper cross-subsidization, hinder the development of broadband cable services, and use control of telephone poles and conduit space to prevent or hinder competition from independent cable companies.(note 6)

Congress codified these rules, in a less restrictive manner, in the 1984 Cable Act.(note 7) The statutory language provided that the Commission could waive the provisions in areas where the delivery of video programming would not otherwise exist or upon a showing of good cause.(note 8)

The 1984 Cable Act essentially deregulated cable television, allowing it to enjoy uninhibited growth. Subscriber rates rose rapidly and the quality of service declined.(note 9) A 1990 FCC report concluded that the cable industry enjoyed very little market pressure in the local service area.(note 10) Soon thereafter, Congress and the Commission began to ponder whether reregulation was necessary, or whether a competitive marketplace would encourage lower prices, improved service, and the distribution of advanced technologies.

Since passage of the 1984 Cable Act, the cable industry has undergone rapid growth. It has evolved from mere community antenna television into an industry that generates billions in annual revenues. "Nearly 56 million households, over 60 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase."(note 11) Cable service is now accessible to more than 95 percent of the television households, and approximately 60 percent of those households subscribe to cable service.(note 12) Today over nine thousand cable systems exist.(note 13) However, the large number of cable systems has not promoted local competition. The quality of service has decreased while the prices have increased. In fact the General Accounting Office has concluded that since deregulation, cable systems have raised rates for basic service an average of 43 percent.(note 14)

Congress's goal of allowing growth in the cable industry was realized. However, competition fell to the wayside. In fact, the 1992 Cable Act(note 15) codified a strict review of local laws that prohibited awarding a competing franchise in a locality that already had a pre-established cable franchise.(note 16)

These changes did not go unnoticed by Congress. In creating the Cable Act of 1992, Congress found that "competition to cable from alternative multichannel video technology ha[d] failed to materialize."(note 17) This resulted in undue market control for cable operators as compared to that of consumers and providers of video programming.(note 18) After the passage of the 1984 Cable Act, not only did cable rates increase at three times the rate of inflation,(note 19) but, in addition, Congress found that cable operators were increasingly vertically integrated into programming, and had the ability to discriminate in favor of their affiliated programmers.(note 20) This power produced an effective barrier to entry by potential competitors.(note 21)

The dramatic changes in the video services marketplace led the three agencies responsible for administering the cable-telco banthe FCC, the National Telecommunications and Information Administration (NTIA), and the Department of Justice (DOJ)to independently conclude that the cross-ownership ban was obsolete. The FCC examined the status of the cable marketplace and rejected reregulation as a solution to the problem. Instead, it favored policies that would encourage competition in the marketplace.(note 22)

The NTIA supported the FCC's 1992 decision to amend its rules to permit telcos to have a greater role in the distribution of video programming.(note 23) It also supported the FCC's recommendation to Congress that it repeal the cable-telco cross-ownership prohibition.(note 24) The benefits of telco entry into the video programming business would outweigh the potential costs of telco provision of video programming. These costs were either overstated or could be effectively ameliorated by adapting existing regulatory safeguards to suit the video programming marketplace.(note 25) The NTIA also concluded that telco provision of video programming would offer direct competition to incumbent cable systems, thus expanding competition in the provision of home video programming and multiplying opportunities for entry by independent program providers.(note 26)

The Department of Justice concluded that telco ownership and operation of video programming would have procompetitive benefits that would outweigh any anticompetitive risks.(note 27)

> Telephone company entry, according to DOJ, would introduce a needed competitor to the video programming market; provide greater incentives for telephone companies "to take the financial risk of developing" improved telephone networks capable of carrying video programming because relief "will insure an affordable source of programming for their new networks"; and allow telephone companies to compete more effectively with cable operators, which are already vertically integrated.(note 28)

Most importantly, the video services consumers would be best served by the removal of the ban.

It is clear that technology and marketplace demand have obviated the need for the Section 613 ban on cable-telco cross- ownership. Without competition, the cable industry grew into a monopoly, and the rapid expansion of the cable industry effectively eliminated the reasons supporting the prohibition against telephone company entry into the video distribution market. The current policy forces consumers to suffer the consequences of higher rates and lower quality of service. The resultant myopic reregulation of the industry only half-heartedly attacks one portion of the problem.

Furthermore, the ban, for all of the same reasons, no longer enjoys legal support. In fact, the evolution of the marketplace has forced a law, already on dubious legal grounds, to become unconstitutional.

II. The Section 613 Ban as a Prior Restraint

From the moment Congress enacted the Section 613 ban on cross- ownership, the telcos' First Amendment rights have been relegated to a tertiary level of concern. Telcos have been regarded as entities deserving unique and more onerous attention due to their historical monopoly over the local telephone loop. However, this status should not deprive them of their First Amendment rights, especially in light of the fact that the industry that was to be protected from the telcos' omnipotence has built an equally strong financial foundation, and now enjoys a similar monopoly in the local cable loop. Therefore, the ban should no longer be viewed as a mere *protection*, but instead as a restraint on *expression*.

The telcos desire to engage in the distribution of video programming to homes. However, as established, the government prohibits such distribution due to an unjustified fear that the telcos would use their market power to force the cable operators out of the market. The goal of Congress in the codification of the prohibition was to circumscribe telco business activities that could injure and delay the growth of a nascent industry and the subsequent deployment of a broadband information highway. However, in the process of reaching this goal, Congress shackled the telcos' ability to express themselves to their customers. In reality, Congress placed a prior restraint on the telcos' speech.

Sir William Blackstone laid the cornerstone for the jurisprudence of prior restraint when he stated:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press . . . .(note 29)

Nearly two centuries later, the Supreme Court introduced the theory of prior restraint into American jurisprudence in *Near v. Minnesota*.(note 30) This case involved a statute that authorized judicial abatement of any newspaper or periodical deemed "malicious, scandalous and defamatory."(note 31) A Minneapolis periodical sought to expose the corruption of gangsters and the city officials who cooperated with them.(note 32) The state court found that the publication violated the statute,(note 33) but the Supreme Court held the statute unconstitutional as an invalid prior restraint on the freedom of expression.(note 34)

The theory of prior restraint has been used most commonly in cases involving injunctions and protective orders. *New York Times Co. v. United States*,(note 35) the "Pentagon Papers" case, is the most famous example of government attempting to suppress the media through injunction. However, the case involved a national security matter and was decided with undue haste, yielding numerous concurring opinions with varying rationales. *Nebraska Press Ass'n v. Stuart*(note 36) presents a more coherent and refined holding for cases involving this sort of prior restraint.

In *Nebraska Press Ass'n*, a Nebraska state trial judge, in anticipation of a murder trial, issued an order that forbade the confessions or statements of the accused from being published by the press.(note 37) The Supreme Court granted certiorari in order to determine whether the order violated the constitutional guarantees of freedom of the press, and found that pretrial publicity does not necessarily lead to an unfair trial.(note 38) It also found that the trial court's conclusion that pretrial publicity would alter the outcome of the case was "speculative," and that the record indicated that the judge explored no other means to prevent this result.(note 39) The Supreme Court reversed the decision of the Nebraska Supreme Court, holding that "the heavy burden imposed as a condition to securing a prior restraint was not met."(note 40)

The Court reiterated that the First Amendment guarantees that Congress shall make no law abridging the freedom of speech. It also stated that this guarantee affords "special protection against orders that prohibit the publication or broadcast of particular information or commentaryorders that impose a `previous' or `prior' restraint on speech."(note 41) The Court admonished, "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."(note 42) This restraint is particularly loathsome due to the fact that it has an immediate and irreversible effect, especially when it falls upon the communication of news and commentary of current events.(note 43) In other words, "the gravity of the evil, discounted by its improbability," did not justify the invasion of free speech that was necessary to avoid the danger.(note 44) Injunctions, as one form of prior restraint, are subject to the independent presumption of unconstitutionality.(note 45)

Along with injunctions, a second form of prior restraint is administrative preclearance.(note 46) Prior restraint arises within this arena when a license is needed from an executive body in order to execute an action. The Supreme Court, in *Shuttlesworth v. City of Birmingham*,(note 47) set the parameters by which an administrative prior restraint must be judged. In *Shuttlesworth*, the leader of a civil rights march in Birmingham, Alabama, was arrested for violating a city statute that prohibited parades or processions in the city streets without first obtaining a permit from the City Commission.(note 48) The statute permitted the Commission to refuse the permit if its members believed that the proposed parade endangered the health, safety, or welfare of the city's residents.(note 49)

The Court, in overturning the city code, held that this ordinance contradicted the doctrine that had evolved in the previous three decades: a law subjecting the exercise of First Amendment freedoms to prior restraint, without a narrow, objective, and definite standard to guide its administration, is unconstitutional.(note 50) "It is settled . . . that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship . . . ."(note 51) The Court affirmed that a government may not empower an administrative official to "roam essentially at will, dispensing or withholding permission to speak" in accordance with the official's own "opinions regarding the potential effect of the activity in question on the `welfare,' `decency,' or `morals' of the community."(note 52)

The Section 613 ban can be viewed as nothing less than an administrative prior restraint imposed by Congress. The ban seeks to prohibit a group of speakers, telephone companies, from entering the mass media.(note 53) The statute seeks to suppress the speech of a class of speakers based simply upon the nature of the business in which they engage.(note 54)

This situation is analogous to a licensing statute. In *City of Lakewood v. Plain Dealer Publishing*,(note 55) the Court stated that a licensing statute concerning the freedom of expression, which places unbridled discretion in the hands of the government, constitutes a prior restraint and may result in censorship.(note 56) The unfettered discretion to censor, held in the hands of an administrative agent, coupled with the power of a prior restraint, can intimidate a party into censoring its own speech, even if the discretion is never abused.(note 57) Control of expression through this scheme of administrative fiat results in a total exclusion of speech, a result that is more insidious and loathsome than one that selects only specific victims. "Proof of an abuse of power . . . has never been deemed a requisite for attack on the constitutionality of a statute . . . ."(note 58)

The Supreme Court has consistently condemned licensing schemes that vest an administrative official with discretion to approve or disapprove of a person's attempt at self-expression.(note 59) The Commission defends the constitutionality of the ban by claiming that although the "restrictions implicate First Amendment rights, as content neutral regulations that affect speech incidentally they can be sustained as narrowly tailored to achieve a substantial government interest."(note 60) The Commission relies on *United States v. O'Brien*(note 61) for the proposition that the ban can be sustained as narrowly tailored to achieve a substantial government interest.(note 62) The FCC concluded that the current ban, in light of the contemporary technological, competitive, and regulatory conditions, was an effective method to curb anticompetitive behavior that would otherwise work to the public's detriment and impede the development of competition in the provision of broadband services.(note 63)

It is unlikely that a court would accept the Commission's interpretation of the law, since this approach is similar to the strategy that the Commission employed unsuccessfully in defense of must-carry regulations.(note 64) In *Quincy Cable*, the Commission used the more lenient First Amendment scrutiny of the *O'Brien* standard to attempt to defend the constitutionality of the must-carry rules,(note 65) casting the rules as having only an incidental burden on speech. The FCC maintained that these regulations evinced a content-neutral standard in which the government interest was unrelated to the suppression or protection of a particular set of ideas.(note 66) However, the court had "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" to the must-carry rules,(note 67) thus damning them to certain failure under the more critical examination required by strict scrutiny.

The court found that these regulations favored one class of speakers over another, thereby negating the Commission's claim that it incidentally intruded upon speech.(note 68) The must-carry rules were created so as to bolster the fortunes of one business over another.(note 69) The court further held that the "mere abstract assertion of a substantial government interest" is insufficient to maintain a law that subordinates First Amendment freedoms.(note 70)

This case is analogous to the telco-cable cross-ownership ban, in that Congress and the FCC have claimed that a situation exists that demands the protection of a restrictive regulation. They have not put forth any credible substantiation as to why the ban must continue. They have undermined the constitutional rights of the telcos in order to bolster the fortunes of a potential competitor, a competitor that has cornered its market and has been accused of monopolistic abuses. The prohibition is not a mere incidental burden on the telcos' ability to express themselves. By administrative fiat, telcos are completely excluded from a medium of expression. This ban cannot withstand the lenient threshold of the *O'Brien* standard proffered by the Commission. Accordingly, the ban should be struck down as an obsolete and burdensome prior restraint.

III. Section 613 as an Infringement on Commercial Expression

The prohibition on telco entry into the cable market circumscribes the telcos' desire to communicate with potential subscribers. Inevitably, this communication would involve commercial speech, such as self-promotional advertisements and those of program sponsors. This commercial speech could be understood as video programming much like that which would be seen on broadcast stations and, therefore, a direct violation of the ban. Further, this step into the information age would be part of a larger scheme to interconnect the nation. Therefore, cable would be a stepping-stone to a greater design, which would, by plan and necessity, be built partially upon commercial speech. Thus, the prohibition collides with the First Amendment doctrine that protects commercial speech.(note 71)

"[T]he Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self- expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas."(note 72) Commercial speech is thus constitutionally protected because it furthers the societal interest in the free flow of commercial information.(note 73)

Speech in which telcos would engage is analogous to that of current cable operators. The Supreme Court has held that the cable television industry's operations plainly implicate First Amendment interests,(note 74) including the protection of commercial speech.

> "The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communications of others, while at the same time providing some original content."(note 75)

This view was recently reaffirmed by the Supreme Court in *Leathers v. Medlock*.(note 76)

Traditional First Amendment doctrine does not lose its validity simply because it involves an analysis of the protection afforded to a unique and new mode of communication.(note 77) In fact,

> the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed. Rather, the objective is to recognize that those values are best served by paying close attention to the distinctive features that differentiate the increasingly diverse mechanisms through which a speaker may express his view.(note 78)

It is unlikely that a viewer would be able to differentiate between cable service brought to the home through a cable-owned coaxial cable and that of the telco-owned fiber optic cable. Therefore, the application of the appropriate jurisprudence should not turn on this distinction.

The Supreme Court outlined its criteria for upholding the rights of commercial speakers in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.(note 79) The Court developed a four-part analysis to determine if commercial speech rights have been abridged by a government regulation. Initially, a court must determine whether the expression is protected by the First Amendment. For commercial speech to be protected, it must neither concern an unlawful activity nor be misleading.(note 80) Next, the court must ascertain whether the asserted government interest is substantial.(note 81) If both inquiries yield positive responses, the third and fourth parts of the test consist of determining whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest.(note 82) The fourth part of the analysis was modified in *Board of Trustees of State University of New York v. Fox*,(note 83) where the Court "conclude[d] that the reason of the matter require[d] something short of a least-restrictive-means standard."(note 84)

The Supreme Court reaffirmed the *Central Hudson* test as modified by *Fox* in *City of Cincinnati v. Discovery Network, Inc.*(note 85) This case involved a city zoning ordinance that prohibited Discovery Network from placing newsracks for distribution of commercial handbills on city streets, but permitted newspapers to use newsracks. The City claimed that it wanted to improve the safety and aesthetics of the area. The Supreme Court, after analyzing the facts of the case against the backdrop of the standard, held that the city ordinance was a violation of Discovery's First Amendment rights, because it infringed on its ability to engage in commercial expression.(note 86)

The Court noted that ample evidence existed that the City did not establish the necessary reasonable fit between the purpose of the statute and the factual result.(note 87) "The ordinance on which it relied was an outdated prohibition against the distribution of any commercial handbills on public property. It was enacted long before any concern about newsracks developed."(note 88) The Court also stated that the obsolescence of the statute was apparent by the fact that the City did not carefully calculate the burden that it imposed on free speech, as exemplified by the removal of sixty-two Discovery newsracks, while allowing about two thousand other newsracks to remain.(note 89)

If the Section 613 ban were tested against the *Central Hudson* and *Fox* standard, it would be found an unconstitutional intrusion on commercial speech. The ban prohibits lawful commercial speech. As stated by the Court in *Virginia State Board of Pharmacy*, speech does not lose its First Amendment protection simply because money is spent to project it.(note 90)

The speech that is transmitted would pass the first prong of the *Central Hudson* test, in that it would concern a legal activity and would not be misleading to the viewer. No evidence exists that suggests that the telcos would engage in the transmission of speech banned by other statutes or precedent. In fact, it is likely that they would deliver programming similar to that of the current cable operators, as well as develop interactive programming that could take advantage of the capacity of broadband technology.

It must be determined then if the cross-ownership prohibition advances a substantial government interest. As stated earlier, the purpose of the ban was to prevent the telcos from using their superior market and financial position to the disadvantage of the nascent cable companies. This threat became moot almost as soon as the provision became law. The cable companies grew at an exponential rate and soon gained a financial status tantamount to that of the telephone companies. Therefore, the ban, when viewed in a contemporary light, must fail the second test.

Ordinarily, since the second question yielded a negative response, the ban would fail the modified *Central Hudson* test and be found unconstitutional as an infringement upon the First Amendment rights of the telephone companies. However, assuming arguendo that the second question yielded a positive response, it is improbable that the ban could withstand the scrutiny of the final tests. It must next be determined whether the regulation directly advances the governmental interests asserted.

The government's interest, as established earlier, was to protect the cable companies. The prohibition does protect the cable industry from substantial competition. However, the government asserted that the original need for the protection was to create a base upon which a broadband information highway could be built.(note 91) This, in effect, would be giving a monopoly to the cable industry on the technology of the future, a policy argument but not a legal assertion. A close examination of the facts reveals that telcos, due to the nature of their business, are in an equally sound position to build this highway, either by themselves or in conjunction with the cable industry.

Section 613 also fails to advance Congress's purpose of promoting competition in cable communications. In the findings of the Cable Act of 1992, Congress asserted that a goal of the legislation was to create fair competition in the delivery of television programming and thus foster the greatest possible choice of programming and lower prices for consumers.(note 92) In the exclusion by statute of a formidable competitor in the marketplace, Congress has expressly circumvented one of the preeminent goals of the reregulatory legislation.

The ban fails the final prong because it is more extensive than is necessary to achieve the stated interest. This analysis focuses on Congress's goal to protect the cable companies from undue competition. Other means exist by which to protect the cable companies from such a threat by the telcos. If telcos do have a history of cross-subsidization, whereby they assign costs from their unregulated ventures to their regulated phone business, this practice would then force the rate payer, and not the shareholder, to bear the burden of the telcos' forays into new lines of business. However, a ban on entry into the provision of cable television is not narrow enough to achieve the goal of preventing cross-subsidization. A more appropriate measure would be to forbid this practice with legislation aimed at addressing this issue specifically.

For the purpose of argument, the Supreme Court, in *City of Cincinnati v. Discovery Network, Inc.*, assumed that the City could prohibit the use of all newsracks for the reasons claimed.(note 93) It declared, however, that "as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech."(note 94)

This is analogous to the scenario involving the Section 613 ban. Congress could opt to ban cable operators, satellite dish operators, and telephone companies from disseminating information to subscribers because it would impinge upon the broadcasters' fiduciary and public interest responsibilities and the goal of localism. This would, of course, stunt the evolution of the information age in the United States and place the nation's telecommunications companies at a severe disadvantage. Therefore, as long as the avenue for communication remains open, Congress must open it to everyone. Otherwise, it is unconstitutionally foreclosing a means of commercial communication to a potential speaker.

The ban's underinclusiveness highlights its inherent unconstitutionality and its fatal burden on a particular speaker's desire to engage in commercial speech. The ban targets telcos. It does not attempt to thwart the entry of municipalities, electric companies, or film studios into the cable business, all of which maintain interests in this industry.(note 95) These enterprises are capable of posing a financial and competitive danger to the cable operators. Cities could use their franchise powers to monopolize a market; electric companies could be accused of building a system on the backs of their rate payers; and film studios could limit the distribution of their product.

The prohibition also precludes telcos from delivering one form of speech, video programming, that is comparable to broadcast television.(note 96) Yet, the telcos can provide video transmissions, such as graphics, video conferencing, and videotext services to customers in their service area.(note 97) Even the Commission has come to the realization that the technological metamorphosis has caused the lines between voice, data, graphics, and video transmissions to blur.(note 98) Therefore, the ban on video programming is actually a ban on the provision of commercial speech to subscribers.

One court has found these arguments persuasive. On August 24, 1993, the U.S. District Court for the Eastern District of Virginia, Judge T.S. Ellis presiding, held in *Chesapeake and Potomac Telephone Co. of Virginia v. United States*(note 99) that the Section 533 ban was an unconstitutional burden on the telco's freedom of speech. Specifically, the court held that the ban failed the *O'Brien* intermediate scrutiny test. In a footnote, the court also stated that if the "analysis regarding the appropriate standard of review is flawed, and 533(b) is properly subject to strict scrutiny, then the provision would fail the `narrowly drawn' element of that test as well."(note 100)

The court, in accepting the fact that telecommunications is a rapidly evolving industry, opted not to rely on precedent from previous First Amendment broadcasting cases. "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."(note 101) Furthermore, it limited the possible standards of review to either strict scrutiny or intermediate level scrutiny, since the ban directly abridged the telephone company's "right to express ideas by means of a particular, and significant, mode of communicationvideo programming."(note 102) In support of this rationale, the court noted that the Supreme Court has recognized that video programming, as offered by cable companies, is a form of speech protected by the First Amendment.

Although the court recognized that the statute must be viewed within the parameters of heightened scrutiny, it did not feel that the statute's wording and intention merited review under strict scrutiny. Therefore, the ban was analyzed against the backdrop of intermediate level scrutiny. In making this decision, the court held that the statute was not a content-based restriction. In fact, it was content-neutral, since it was "`justified' on grounds unrelated to the suppression of speech . . . ."(note 103)

In addition to being content-neutral, to overcome intermediate level scrutiny, the statute must be narrowly tailored to serve a significant government interest and allow alternative channels for communication.(note 104) The ban does not foreclose all channels of communication through video programming for the telcos. The telcos can provide programming to subscribers outside their specific service areas. Furthermore, they can produce programming and market it within their service areas to broadcasters or cable operators.(note 105)

Therefore, the crux of constitutionality is whether the ban is narrowly tailored to serve a significant government interest. The court examined the government's justifications for the statute, which were twofold: (1) the promotion of competition in the video programming market, and (2) the preservation of diversity in the ownership of communication media.(note 106) However, it discerned quickly and correctly that only one of these reasons was valid, since the ban "simply does not, in a direct fashion, promote competition in the video programming market."(note 107) In fact, the provision serves as a bar to entry into the market "by the one class of potential competitors that has exhibited an inclination to compete with the entrenched monopolists."(note 108)

Therefore, the court concentrated on the government's second justificationpreservation of diversity of ownership. The government has a justifiable concern with the implications of having a single entity in control of all telecommunications conduits to the home. Thus, the court focused on whether the regulation was narrowly tailored as required by the *O'Brien* test.

The court concluded that less restrictive means could have been chosen by Congress or the FCC that would have allowed the telephone companies to enter the video programming market while limiting their ability to force cable operators out of the market.

> In short, if there exists a range of regulatory strategies that would effectively eliminate the threat of anticompetitive conduct by the telephone companies in the cable television industry, then 533(b) would "burden substantially more speech than is necessary to further the government's legitimate interests," and would therefore violate the First Amendment.(note 109)

The government, to substantiate its "diversity of ownership" argument, claimed that the elimination of Section 533(b) would allow the telephone companies to engage in pole access discrimination and cross-subsidization in order to monopolize the market. The court determined that the statute does not address the telephone companies' ability to undertake these practices. It made clear that "it is the concern the telephone companies will act anticompetitively in the *video programming* market, not the *video transport* market, that ultimately must provide the justification for 533(b)."(note 110)

The court further noted that the telephone companies do not have any inherent advantage that would allow them to evade the regulation of anticompetitive behavior in the video programming market. It also noted that there were other regulatory options available to achieve the government's interests, but it opted not to explore these since Section 533(b) did not even address the behavior the government was seeking to prevent.(note 111)

The court concluded that Section 533(b) is not narrowly tailored to serve a significant government interest. Rather, the law substantially burdens more speech than is necessary to further the government's legitimate interest. Therefore, it fails the *O'Brien* test and is facially unconstitutional as a violation of the telephone company's First Amendment rights.(note 112)

IV. A More Rational and Contemporary Approach to the Regulation and Development of the Broadband Infrastructure

Congress and the Commission wish to regulate telco entry into cable service. However, as discussed above, the current method has become unconstitutional through obsolescence. Therefore, a new method must be proposed. In the last three Congresses, several of my colleagues and I have introduced legislation that would fulfill the desires of those who wish to regulate, while simultaneously giving telcos the freedom to diversify into cable programming.(note 113) The current House version of the bill is House Bill 1504, the Communications Competitiveness and Infrastructure Modernization Act of 1993.(note 114) The purpose of the bill is to encourage the modernization of the nation's telecommunications infrastructure. It would also promote competition in the cable television industry by permitting telephone companies to provide video programming.(note 115)

The bill, if enacted, would amend Section 613(b) of the Communications Act of 1934 to allow any common carrier subject to Title II of the Act to provide video programming directly to subscribers in its telephone service area, either through its own facilities or through those of an affiliate under the control of that common carrier.(note 116) Second, any common carrier subject in whole or in part to Title II would be allowed to provide channels of communication, pole line conduit space, or other rental arrangements to any entity controlled or connected to the carrier, so long as these arrangements are used for the provision of video programming to subscribers in the telephone service area.(note 117)

The telco would be required to establish a separate affiliate to manage the cable distribution portion of the business. The affiliate would also be required to maintain all necessary books and accounts, and to carry out the bulk of its own marketing, but would be allowed to engage in institutional advertising by the parent telephone company. The affiliate would be prohibited from owning real or personal property in conjunction with the common carrier. The bill would subject all business transactions between the telco and the video programming affiliate to regulation by the Commission.(note 118)

In order to ensure equal access and competition within the industry, the telco would be required to establish a basic video dialtone platform, to be regulated by the Commission.(note 119) The telephone company would have to make available such capacity as is requested by an unaffiliated video program provider. However, the telco would not be required to provide more than 75 percent of the equipped capacity of its basic video dialtone platform to the unaffiliated video program providers.(note 120)

To prevent uncompetitive behavior on the part of the telcos, the bill prohibits cross-subsidization. The common carriers would be forbidden to include costs or expenses associated with provision of video service in their rates for telephone exchange service. Furthermore, the telephone company would be prohibited from purchasing or retaining control over any cable system that is in its telephone service area and owned by an unaffiliated person. However, it could obtain a noncontrolling interest in a cable system through a joint venture. The bill also provides that the Commission could waive the prohibition if the buyout would result in a substantial upgrade through the deployment of modern technology, if it would expand the capacity and services of the cable system, if the purchase would be in the public interest, and if the local franchising authority approves the waiver.(note 121)

This provision does not attempt to regulate the speech of the common carriers. Instead, by focusing specifically on business practices, it attempts to quell the concerns of those who believe that a telephone company might use its financial strength to overpower a competing cable company. This is a narrowly tailored approach to achieve the government's interests in allowing competition to flourish and providing advanced telecommunications services to those areas that are most often underserved.

Furthermore, the bill empowers the Commission to assess fines and penalties as it deems appropriate in the event a common carrier knowingly and willfully violates any provision. Penalties could range from fines to a mandated complete divestiture of the video programming affiliate.(note 122) These penalties could be categorized as a subsequent punishment, as opposed to a prior restraint. Even so, the penalty strikes not at punishing the expression, but at punishing the business practices that resulted in the exclusion of or the limitation upon a competing speaker in the marketplace.(note 123)

V. The Benefits of an Open and Competitive Telecommunications Marketplace

The Section 613 prohibition has a direct and immediate effect on the lives and futures of the citizens of the United States that extends beyond home entertainment. The prohibition is not designed to cope with the technological convergence and evolution of two traditionally separate wings of the United States' telecommunications industry. Together, these two wings provide the two essential items in the American home: the television and the telephone.

Currently, cable operators are deploying advanced technology in order to offer an expanded array of video programming, and to experiment with two-way and point-to-point communications. Simultaneously, the telcos are deploying fiber optic cable within their public switched networks. This technology holds out the promise of providing video, audio, and high speed data transmission. The removal of the ban would create a competitive atmosphere in which to expedite the development of public networks with switched broadband capabilities.

The repeal of the cable-telephone company cross-ownership ban would promote and expedite the continued development of the United States' telecommunications infrastructure. It would provide an incentive to the telcos to replace copper wires with broadband fiber optic cable more quickly than the current rate of depreciation.

The argument that the telephone companies can already facilitate the provision of video programming ignores the risk that competitors to the current cable operators would not want to invest in a market in which the latter already has a stake. Furthermore, cable operators would not deploy programming over a telco distribution facility because they have already made an infrastructure investment and can sustain market power in their current service areas.

If the telcos are not allowed to provide their own programming, they may not be able to secure programming to be carried over their video dialtone. By 1990, large multiple system operators (MSOs) held ownership interests in six of the eight national pay cable networks, and thirteen of the top twenty national basic cable networks.(note 124) It is reasonable to expect the competing MSOs to prohibit distribution of their property to a new competitor. In fact, Congress found that this practice had become so egregious that in the Cable Act of 1992 it passed an access to programming provision.(note 125)

The NTIA also cited arguments that if Local Exchange Carriers (LECs) could provide programming, they "could realize revenues in the programming market . . . which revenues could then be used to fund `investment in a broadband public network.'"(note 126) Although the NTIA recognized that LECs might conceivably realize efficiencies as program providers and stimulate a competitive video market, the NTIA, based on the sparse record before it, concluded "there will not be any long-term excess profits available to subsidize" network development activities.(note 127)

The most tangible result from the elimination of the cross- ownership ban would be lower rates and increased efficiency of service. Currently, cable companies have little incentive to improve either program choices or services. However, the advent of a potential competitor in the marketplace would provide the impetus for progress. Furthermore, a recent study concluded that the elimination of Section 613 would result in $74.9 billion in consumer surplus from price reductions by the year 2003.(note 128)

The revolution in communications extends beyond the mere provision of programming. Health care, education, business communications, and residential communications will undergo a significant change in the wake of the deployment of a broadband network, whether provided by cable operators or telephone companies.

Broadband networks threaten to break down the four walls of the traditional classroom. Experiments in distance learning occurring nationwide highlight the advantages of interconnecting students and teachers from different areas and backgrounds. College professors can reach an exponentially larger field of high school students in order to teach advanced level classes. The new technology allows these professors not only the ability to teach, but also the ability to interact with the students as though they were in the same classroom. Fiber optics also brings new opportunities to rural area students, who have traditionally been deprived of the benefits of being in a large city. The students now have access to college libraries and computers through the use of the telephone lines.

Mississippi 2000, an experiment implemented by BellSouth, IBM, Apple, and Northern Telecom, has improved educational facilities available to students in the Mississippi Delta region of the state. Fiber optics connects three colleges, four high schools, and the Mississippi Educational Television Network studio. It allows the institutions to interact in simultaneous, two-way, full-motion instructional programming.(note 129) Michigan Bell has linked six school facilities through fiber optics in the Lansing-Jackson area. Besides other benefits, it allows high school students from Pottersville High School to receive classes from Lansing Community College.(note 130) Finally, students in the Findlay, Ohio, School District have been interconnected to the facilities of two area colleges by a fiber optic system deployed by Ameritech.(note 131)

Health care providers are using broadband telecommunications facilities to improve health care. Of course, this benefits hospitals and patients in major urban centers. However, the most beneficial impact is felt by patients in traditionally underserved areas. Since 1980, more than two hundred rural hospitals have closed and one-fifth of the remaining rural institutions are at risk of closing.(note 132) From a technological standpoint, the average rural hospital is a generation or more behind its urban counterpart.(note 133) Employment of a broadband network would allow these hospitals to engage in rapid transfer and information sharing, such as the transmission, storage, and retrieval of x-rays and other medical images. Experiments in this field are still in the early stages, but the initial results are encouraging.

By turning the home into an office, telecommuting promises to improve the quality of life for millions of Americans.

President Bush declared, "Millions have already found their productivity actually increases when they work nearer the people they're really working for: their families at home."(note 134) Telecommuting can reduce stress and lost time, while increasing job satisfaction. Furthermore, it can help businesses reduce office overhead and allow them to reap the benefits of increased productivity. These benefits have been enjoyed by only a handful. The infrastructure for this sort of experiment is not yet in place. As a broadband fiber optics network is deployed, telecommuting may become more commonplace.

Elimination of the cross-ownership ban will allow the United States to remain competitive in the international marketplace. The first country to have nationwide implementation of a fiber optic network will lead the world in the telecommunications race in the twenty-first century. The United States has begun developing this infrastructure. However, Japan and other nations are surpassing us. The Japanese government plans to have 100 percent fiber penetration by the year 2015.(note 135) In comparison, at the current rate, the United States will reach this mark by the year 2030 or 2045.(note 136)

The United States is the standard-bearer of telecommunications technology. However, its position is beginning to erode in the wake of the farsighted policy decisions of other countries. U.S. companies have the knowledge and technology that will allow them to retain the lead, but current policies prevent them from utilizing this potential and may eventually cost us the advantage in the international marketplace.

Conclusion

Telecommunications regulatory policies are necessary to ensure that the benefits of the evolving technology reach all sectors of the United States. However, the policymakers must avoid stifling the expression of speakers in the marketplace. An infringement on their First Amendment rights injures speakers and has serious repercussions on all those who benefit from the advances that they may make. In an era of technological upheaval in telecommunications, policymakers must not act on the basis of a particular industry's past. Instead, they should look to the benefits that this industry and its competitors can bring to the future generations, not only in terms of technology, but in the ability of the citizens to express themselves.

Notes

*United States Representative, 4th District of Ohio, elected 1981. House Committee on Energy and Commerce Subcommittee on Telecommunications and Finance. B.A. 1966, Miami University (Ohio); J.D. 1969, Ohio State University. I wish to thank Carl Artman, Esq., legislative assistant, for his help in researching and writing this article.Return to Text

1. *In re* Telephone Co.-Cable TV Cross- Ownership Rules, 63.54-63.58, *Further Notice of Inquiry and Notice of Proposed Rule Making*, 3 FCC Rcd. 5849 (1988) [hereinafter Telco-Cable Cross-Ownership Rules] (to be codified at 47 C.F.R. 63.54). Return to text

2. Applications of Tel. Cos. for Certain Certificates for Channel Facils., *Notice of Inquiry and Notice of Proposed Rule Making Regarding Community Antenna TV Sys.*, 34 Fed. Reg. 6290 (1969). Return to text

3. *In re* Applications of Tel. Cos. for 214 Certificates for Channel Facils. Furnished to Affiliated Community Antenna TV Sys., *Final Report and Order*, 21 F.C.C.2d 307, para. 43 (1970). Return to text

4. National Telecommunications and Information Administration, U.S. Dep't of Commerce, Globalization of the Mass Media 141 (1993) [hereinafter NTIA, Globalization] (discussing the history of the cable-telco cross-ownership prohibition). Return to text

5. *Id.* Return to text

6. *Id.* Return to text

7. *Id.*; *see also* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C. (1988)). Return to text

8. 47 U.S.C. 533(b)(4) (1988). This, according to the legislative history of the law, overruled the previous rural exemption under the FCC rules. Congress intended to permit telcos into rural areas to provide cable television service without qualification. Therefore, a telco could deliver video programming in its service area even if there was a preexisting system or one under construction. This was prohibited in the FCC rules. *See* H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4693-94. Return to text

9. *See In re* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable TV Serv., *Report*, 5 FCC Rcd. 4962, para. 6 (1990) [hereinafter Policies Relating to the Provision of Cable TV Serv.]. Return to text

10. *Cf. id.* paras. 69-70 ("Generally there is no close substitute for that steadily expanding complement of specialized program services offered by the typical cable system at this time."). Return to text

11. H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 56 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1238. Return to text

12. *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 30 (1992). It is estimated that more households in America have televisions than telephones. Industry studies have concluded that 98% of U.S. households have a television set, Gregory Cerio & Lucy Howard, *Tale of the Tube*, Newsweek, Aug. 2, 1993, at 6, 6; 93% of U.S. households subscribe to telephone service, Sandra Sugawara, *Firm Urges FCC to Alter Phone Policy, `Universal Service' Revision Proposed*, Wash. Post, Nov. 2, 1993, at C4. Return to text

13. L.J. Davis, *Television's Real-Life Cable Baron*, N.Y. Times, Dec. 2, 1990, 6 (Magazine), at 16, 52. Return to text

14. *Id.* Return to text

15. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.A. 521-611 (West Supp. 1993)). Return to text

16. 47 U.S.C.A. 541(a)(1) (West Supp. 1993). Return to text

17. H.R. Rep. No. 628, *supra* note 12, at 26. Return to text

18. *Id.* at 14. Return to text

19. *Id.* Return to text

20. *Id.* Return to text

21. *Id.* Return to text

22. *Cf.* Policies Relating to the Provision of Cable TV Serv., *supra* note 9, para. 91 ("[W]e find it unnecessary to propose any specific structural limitations."). This is consistent with the Commission's earlier conclusion that "greater participation in the provision of cable television service by telephone common carriers pursuant to appropriate safeguards would result in greater, not lesser, competition in cable television service and, therefore, in greater public interest benefits to consumers." Telco-Cable Cross-Ownership Rules, *supra* note 1, para. 1. Return to text

23. *See* NTIA, Globalization, *supra* note 4, at 144. Return to text

24. *Id.* Return to text

25. National Telecommunications and Information Administration, U.S. Dep't of Commerce, Telecommunications in the Age of Information 235 (1991) [hereinafter NTIA, Age of Info.]. Return to text

26. *Id.* Return to text

27. Brief for Plaintiff at 16, Chesapeake and Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909 (E.D. Va. 1993) (No. 92-1751-A) . Return to text

28. *Id.* (quoting Reply Comments of the U.S. DOJ, Telephone Co.-Cable TV Cross-Ownership Rules, CC Dkt. No. 87-266, at 44 (Mar. 13, 1992) (Doc. App., Tbl. 6)). Return to text

29. 4 William Blackstone, Commentaries *151-52 (emphasis in original) (referring to the English Licensing Act of 1662). Return to text

30. *Near*, 283 U.S. 697 (1931). Return to text

31. *Id.* at 701. Return to text

32. *Id.* at 704. Return to text

33. *Id.* at 706. Return to text

34. *Id.* at 722. Return to text

35. *New York Times Co.*, 403 U.S. 713 (1971). Return to text

36. *Nebraska Press Ass'n*, 427 U.S. 539 (1976). Return to text

37. *Id.* at 542. Return to text

38. *Id.* at 554. Return to text

39. *Id.* at 563. Return to text

40. *Id.* at 570. Return to text

41. *Id.* at 556. Return to text

42. *Id.* at 559. Return to text

43. *Id.* Return to text

44. *Id.* at 564 (paraphrasing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand Jr.) *aff'd*, 341 U.S. 494 (1958)). Return to text

45. John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L.J. 409, 426 (1983). Return to text

46. *See generally id.* at 422-26. Return to text

47. *Shuttlesworth*, 394 U.S. 147 (1969). Return to text

48. *Id.* at 148. Return to text

49. *Id.* at 149-50. Return to text

50. *Id.* at 150-51. Return to text

51. *Id.* at 151 (quoting Staub v. City of Baxley, 355 U.S. 313, 322 (1958)). Return to text

52. *Id.* at 153. Return to text

53. Laurence H. Winer, *Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry Into Cable*, 8 Cardozo Arts & Ent. L.J. 257, 290 (1990). Return to text

54. *Id.* Return to text

55. *Lakewood*, 486 U.S. 750 (1988). Return to text

56. *Id.* at 757. See also Niemotko v. Maryland, 340 U.S. 268 (1951), in which the Court stated, "[T]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has firmer foundation than the whims of personal opinions of a local governing body." *Id.* at 272. Return to text

57. *Lakewood*, 486 U.S. at 757. Return to text

58. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). Return to text

59. *See, e.g.*, Kunz v. New York, 340 U.S. 290, 294 (1951). Return to text

60. Telco-Cable Cross-Ownership Rules, *supra* note 1, para. 76. Return to text

61. *O'Brien*, 391 U.S. 367 (1968). Return to text

62. Telco-Cable Cross-Ownership Rules, *supra* note 1, para. 76. "As the Supreme Court has interpreted and applied the `narrowly tailored' standard of *O'Brien v. FCC*, content- neutral government regulation will be upheld if it in fact, `. . . promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). Return to text

63. *Id.* para. 77. Return to text

64. Winer, *supra* note 53, at 291. These regulations required cable television operators, upon request and without compensation, to transmit every over-the-air broadcast signal that was significantly viewed in the local area. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1437 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Return to text

65. *Quincy Cable*, 768 F.2d at 1448. Return to text

66. *Id.* at 1450. This regulation would only be "sustained if `it furthers an important or substantial government interest * * * and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Id.* at 1451 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). Return to text

67. *Id.* at 1453. Return to text

68. *Id.* Return to text

69. *Id.* Return to text

70. *Id.* at 1454. Return to text

71. The Court, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748

(1976), succinctly sums up the history of constitutional protection for commercial speech:

> We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is "sold" for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money.
>
> If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet speech whose content deprives it of protection cannot simply be speech on a commercial subject.

Id. at 761 (citations omitted). Return to text

72. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); *see also* Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969). Return to text

73. *Bellotti*, 435 U.S. at 783. Return to text

74. City of Los Angeles v. Preferred Comm., Inc., 476 U.S. 488, 494-95 (1986). Return to text

75. *Id.* at 494 (quoting Joint Appendix at 3a, *Preferred Comm.*, 476 U.S. 488 (1986)(No. 85-390)). Return to text

76. *Leathers*, 499 U.S. 439 (1991). The *Leathers* case concerned the taxation of media. Arkansas had imposed a tax on receipts from the sale of all tangible personal property and specified resources. This was later amended to include cable television, while still excluding newspapers. Cable operators filed a class action claiming that their expressive rights under the First Amendment and their rights under the Equal Protection Clause of the Fourteenth Amendment were violated. The Supreme Court ruled on appeal that cable television is engaged in "speech" under the First Amendment, and is, to a substantial degree, part of the press. It also stated, however, that the mere fact that cable television is taxed differently from other media does not by itself raise First Amendment concerns. Return to text

77. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Return to text

78. *Id.* Return to text

79. *Central Hudson*, 447 U.S. 557 (1980). Return to text

80. *Id.* at 566. Return to text

81. *Id.* Return to text

82. *Id.* Return to text

83. *Fox*, 492 U.S. 469 (1989). Return to text

84. *Id.* at 477. Return to text

85. *Discovery*, 113 S. Ct. 1505 (1993). Return to text

86. *Id.* at 1517. Return to text

87. *Id.* at 1510. Return to text

88. *Id.* Return to text

89. *Id.* Return to text

90. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). Return to text

91. Telco-Cable Cross-Ownership Rules, *supra* note 1, para. 3 (quoting *In re* Applications of Tel. Cos. for 214 Certificates for Channel Facils. Furnished to Affiliated Community Antenna TV Sys., *Final Report and Order*, 21 F.C.C.2d 307, para. 48 (1970)). Return to text

92. H.R. Rep. No. 628, *supra* note 12, at 2. Return to text

93. *Discovery*, 113 S. Ct. 1505, 1516 (1993). Return to text

94. *Id.* Return to text

95. Brief for Plaintiff at 95, Chesapeake and Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909 (E.D. Va. 1993) (No. 92-1751-A) . Return to text

96. *Id.* at 40. Return to text

97. *In re* Telephone Co.-Cable TV Cross- Ownership Rules, *Further Notice of Proposed Rulemaking*, *First Report and Order*, *and Second Further Notice of Inquiry*, 7 FCC Rcd. 300, para. 11 (1991). Return to text

98. *In re* Telephone Co.-Cable TV Cross- Ownership Rules, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 5781, para. 90 n.232 (1992). Return to text

99. *Chesapeake*, 830 F. Supp 909 (E.D. Va. 1993) Return to text

100. *Id.* at 932 n.35. Return to text

101. *Id*. at 919 (citing Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 557 (1975)). Return to text

102. *Id.* at 918. Return to text

103. *Id.* at 926. Return to text

104. *Id.* at 917 (citations omitted). Return to text

105. *Id.* at 926. Return to text

106. *Id.* at 927. Return to text

107. *Id.* The court, in support of this contention, noted that the United States cable television industry is a monopoly service. "Of the approximately 10,000 communities served by cable, as of 1991, 53 communities had more than one competing cable system in the same locality." The ban clearly operates to stifle competition by limiting the number of potential providers. "Thus on the most elemental level, section 533(b) actually reduces competition, both in the market for video transport services and the market for video programming." Return to text

108. *Id.* Return to text

109. *Id.* at 928 (quoting -------- 533(b)). In fact, as the court notes, Congress, according to the legislative history, did not even reach a conclusion regarding the effectiveness of less restrictive regulations. It only examined and expressed opinions with regards to the effectiveness of 533(b). *Id.* at 929. Return to text

110. *Id.* at 930 (emphasis added). Return to text

111. *Id.* at 931 n.34. Return to text

112. *Id.* at 931-326. Return to text

113. *See* H.R. 1504, 103d Cong., 1st Sess. (1993); H.R. 3701, 102d Cong., 2d Sess. (1992); H.R. 2546, 102d Cong., 1st Sess. (1991); H.R. 1523, 102d Cong., 1st Sess. (1991); H.R. 2140, 101st Cong., 2d Sess. (1989). Return to text

114. H.R. 1504. Return to text

115. *Id.* 2. Return to text

116. *Id.* Return to text

117. *Id.* Return to text

118. *Id.* Return to text

119. Under the video dialtone concept, a common carrier could construct and operate a facility within its local service area that would be capable of transporting video images, audio messages, and graphics. The space would be leased to an unaffiliated programmer. The rates would be regulated to ensure reasonable and nondiscriminatory prices and practices. Return to text

120. H.R. 1504. This may seem like an unreasonable infringement upon the telco. However, broadband technology promises to deliver an extremely high level of channel capacity. In the current market, it would be almost impossible to meet this capacity. Therefore, the telcos would still be able to provide as much programming as they want, without restriction. Return to text

121. *Id.* Return to text

122. *Id.* Return to text

123. *Id.* Return to text

124. Policies Relating to the Provision of Cable TV Serv., *supra* note 9, para. 78. Return to text

125. 47 U.S.C.A. 548 (West Supp. 1993). Return to text

126. NTIA, Age of Info., *supra* note 25, at 240 (citations omitted). Return to text

127. *Id.* at 241. Return to text

128. The WEFA Group, Economic Impact of Eliminating the Line of Business Restrictions on the Bell Companies 85 tbl. 10, July 1993 (on file with the *Federal Communications Law Journal*). Return to text

129. John L. Clendenin, *Bringing Technology to the Classroom*, Pub. Util. Fort., Dec. 20, 1990, at 18, 19. Return to text

130. *Students, Teachers Interact with Fiber Optics*, PR Newswire, Nov. 14, 1990, *available in* LEXIS, Nexis Library, Wires File. Return to text

131. Scott Bargelt, *Video Teaching System to be Installed Locally*, Findlay Courier, Nov. 12, 1991, at A1. Return to text

132. *Better Health Care for Rural America: Hearing Before the Joint Economic Comm.*, 101st Cong., 1st Sess. 1 (1989). Return to text

133. *Id.* at 65. Return to text

134. Remarks at the National Transportation Policy Meeting, 1 Pub. Papers 336, 337 (Mar. 8, 1990). Return to text

135. H.R. 2546, 102d Cong., 1st Sess. 4 (1991). Return to text

136. *Id.* Return to text