First Amendment Trump?: The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video

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First Amendment Trump?: The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video

Susan Dente Ross*

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"Today, the First Amendment has become a first line of legal attack."\(^1\)

I. INTRODUCTION

The United States Supreme Court, in *Turner Broadcasting System, Inc. v. FCC (Turner II)*, held that the 1984 Cable Communications Act’s (Cable Act) must-carry provisions were constitutional regulations of the marketplace.\(^2\) In its earlier decision, *Turner Broadcasting System, Inc. v. FCC (Turner I)*,\(^3\) a fractured Court determined that the must-carry provisions were content neutral and subject to an intermediate level of scrutiny but failed to ultimately determine the constitutionality of the provisions—instead remanding the case for further factual development.\(^4\) When the case returned, Justice Breyer had replaced Justice Blackmun on the bench. Nevertheless, the *Turner II* Court again issued an occasionally caustic and severely splintered ruling, narrowly holding that laws requiring cable systems to carry local broadcast programming were content neutral. The justices strongly disagreed about the means to determine content neutrality and about the purpose of the must-carry laws. Despite acknowledging that Congress expressly designed must-carry to encourage local and educational programming and to ensure diversity of voices in the video market, a plurality of the Supreme Court said the law’s purpose was to structure the economic marketplace, not to stifle or compel speech.\(^5\) Justice O’Connor’s stinging dissent challenged the Court’s holding and its rationale, suggesting Justice Breyer’s concurrence was actually a dissent and therefore the panel below should be reversed.\(^6\) The fractured decision offered little guidance to lower courts seeking a consistent test to determine the constitutionality of purportedly structural regulations of media.\(^7\)

The Supreme Court earlier rejected another opportunity to establish a

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4. Id.
6. Justice O’Connor argued that Justice Breyer had not joined the majority because his concurrence relied on distinct, and conflicting, reasoning. Id. at 1208 (O’Connor, J., dissenting).
constitutional standard of review for structural regulations of telephone companies. Rather than decide whether the First Amendment prohibits a federal statutory ban on telephone company provision of video to its subscribers, the Court asked the Fourth Circuit Court of Appeals to determine whether the case was made moot by passage of the Telecommunications Act of 1996 (Act or 1996 Act), which repealed the challenged provision of the Cable Act. The Fourth Circuit Court of Appeals ruled the question moot and left telephone companies, like cable operators, with little understanding of their constitutional status.

In the meantime, other courts face an increasing array of constitutional challenges from new First Amendment players grappling with federal regulations that distinguish among and differentially constrain the business operations and services of communications industries. Courts continue to confuse the constitutional protection of communications industries and will undoubtedly cite Turner II just as they have cited Turner I as justification both to sustain and to overturn the constitutionality of media structural regulations. Thus, this Article maintains that the constitutional question at the heart of the First Amendment challenges to the Cable Act ban on telephone company provision of video is not moot. Rather, this Article examines the context and content of the Cable Act-telco cases

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11. See Robinson, supra note 1, at 1023 (suggesting the Turner rulings will “inspire First Amendment challenges to all manner of economic restrictions on media.”); Fred H. Cate, Telephone Companies, the First Amendment and Technological Convergence, 45 DEPAUL L. REV. 1035, 1036 (1996) (arguing that the constitutional question is not moot because of technological convergence and industry-specific regulation); see also, e.g., NCTA OVS Appeal Focuses on Cable System Rights to Launch Service, COMM. DAILY, Aug. 29, 1996, at 2 (discussing the NCTA constitutional challenge to FCC’s open video system rules).
to explore the power of the First Amendment to eliminate structural and economic regulation of communications carriers. The consistency and speed with which lower courts affirmed telephone company First Amendment rights; struck down decades-old rules excluding telephone companies from the local video market; and ignored nearly a century of statutory and common law excluding common carriers from content control suggests the fragility of regulation of communications firms premised purely on changeable market conditions. Indeed, as Frederick Schauer argues, the First Amendment appears to be a uniquely effective tool in the legal marketplace.\(^\text{13}\)

The effectiveness of constitutional assault on the video programming ban is illustrated by contrasting this approach with previous ineffectual economic challenges to the structural regulations. Thus, Part II outlines the long history of fruitless telephone company attempts to eliminate the ban. In juxtaposition, Part III surveys the rapid and unanimous success of First Amendment arguments against the ban. Part IV then outlines how the telephone companies reframed themselves as speakers whose opposition to the ban was constitutional, not economic. This transformation, Part V suggests, coincided with and was abetted by deregulatory initiatives of the Federal Communications Commission (FCC or Commission) and Congress. In the final Parts of the Article, the Author suggests that the power of the First Amendment is impressive but far from certain, considering court rulings may be influenced by powerful players and dominant public policy positions.

### II. STRUGGLING TO ELIMINATE THE BAN

The recent use of the First Amendment to challenge the Cable Act video ban represents the latest strategy in a long-standing battle. Telephone companies had challenged the video programming ban virtually from its 1970 inception\(^\text{14}\) as an FCC rule adopted out of fear that huge, 


powerful telephone companies would dominate the then-fledgling cable industry. The FCC said the rule, known as the cross-ownership ban, would eliminate both the opportunity and the incentive for telephone companies to discriminate in carriage and other terms of service against independent cable video operators in favor of their own video affiliates. In 1984, the Cable Act ban codified the FCC’s established rule with virtually no independent fact finding. The record indicates that neither the FCC nor Congress viewed the ban from a First Amendment perspective. The dominant policy intent was to promote competition and increase regulatory efficacy in a dynamic communications environment.
Yet the ban withstood years of FCC and congressional scrutiny and repeated telephone company claims that changed economic and market conditions eliminated the need for and utility of the ban. Market changes that radically redefined telecommunications were overshadowed by policy debate between those favoring unfettered competition as the means to efficiently achieve public policy objectives and those arguing that (past and present) monopolists required heavy government oversight. The regulatory/deregulatory debate masked a similar dialectic tension between free speech and economic, structural regulation. Telecommunications policy debate rarely recognized that common carriage might serve a dual function: to reduce transaction costs in the use of infrastructure and to enhance free speech.

(1994) (superseding the Modified Final Judgment and broadly amending the Communications Act of 1934).


21. Noam, supra note 20, at 320. But see Amendment of Pt. 74, Subpart K, of the
Then, in the late 1980s, Robert Pepper pointed out the potential conflict between common carrier regulation and the First Amendment.22 In an FCC planning paper, Pepper suggested that established First Amendment protection of cable systems might logically invalidate regulatory constraint of telephone company broadband networks if telephone companies provided cable-like content over their common carrier facilities.23 He also questioned whether common carrier safeguards would become unconstitutional when a carrier provided content, thus foreclosing telephone companies from entering into content.24

Without adopting Pepper's First Amendment reasoning, the FCC formally recommended that Congress eliminate the cross-ownership ban in the early 1990s.25 In its 1992 Second Report and Order on the Cable Act cross-ownership ban, the FCC told Congress that elimination, not continuation, of the ban would “promote [the Commission's] overarching goals . . . by increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services made available to the public.”26 Despite growing policy consensus that regulatory inconsistencies between private and common carriers distort economic markets and dissuade rapid development of infrastructure, Congress failed to repeal the ban.27 In response, the FCC introduced a series of cumbersome and evolving video dialtone rule makings to permit telephone companies to provide video.28 However, “the
courts [took] the lead in rearranging the telecommunications industry."

III. CHANGING THE LINE OF ATTACK

Although the telephone industry had been regulated as a carrier of others' goods for most of a century, by the mid-1990s, telephone companies had assaulted regulations, which confined them to serve as pure vehicles, with a barrage of lawsuits claiming a First Amendment right to provide content as well. Like the cable companies before them, the telephone companies chaffed at the restricted role of transporter and


moved to embrace a dual function as both content suppliers and carriers. To effect this shift in status, telephone companies claimed they were being unconstitutionally deprived of their right to speak by regulations the government claimed merely constrained the economic structure of the communications industry.

The telephone companies' First Amendment argument arose en masse virtually overnight. It followed closely upon a variety of market changes that boded ill for the continued growth of traditional telephone company services, revenues, and technological developments that enabled telephone to readily transport video programming. The local telcos were asking the courts to take action "where Congress had failed or declined to adapt telecommunications law to changing technological and economic circumstances." Assertions of First Amendment rights were calculated to expand the economic market of telephone companies. The telephone companies wanted to speak to their network of customers through lucrative cable video.

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33. See generally Daniel Brenner, Cable Television and the Freedom of Expression, 1988 DUKE L.J. 329 (concluding that the First Amendment does not prohibit exclusive franchising or access requirements imposed on cable).


36. See generally Barrett, supra note 29 (providing an overview of the logic and utility of current telephone-cable alliances).


The initial constitutional challenge to the Cable Act’s ban on video programming came when Chesapeake and Potomac Telephone Co. of Virginia (C&P Telephone) brought suit in December 1992 against the city of Alexandria, Virginia. The city had cited the Cable Act’s ban as grounds for its denial of the telephone company’s request for a cable franchise to provide a competitive cable video system. C&P Telephone challenged the ban as an unconstitutional denial of its right to free speech.

Both the federal district and the circuit courts ruled that the so-called cross-ownership ban unconstitutionally restricted C&P Telephone’s First Amendment right to free speech. Both courts subjected the ban to the intermediate scrutiny test articulated in United States v. O’Brien and found the ban failed to overcome O’Brien’s requirements that content-neutral regulations of speech “(1) further an important or substantial governmental interest; (2) that the interest be unrelated to the limitation of expression of views; and (3) that the incidental limitation of free expression be no greater than is necessary to achieve the governmental interest.” Both courts accepted the government’s interest as important and unrelated to the content of speech, but focused on the third prong, finding that the ban was unconstitutionally overbroad.

By 1995, a string of federal courts, unanimously applying intermediate scrutiny, found the ban unconstitutionally overbroad. In none of these cases did the government dispute the telcos’ claims that the ban abridged speech. The government instead defended the ban as essential to promote phone companies is indistinguishable from, and in some cases identical to, that distributed by cable operators.

40. Id. at 911 (citing Cable Communications Policy Act of 1984, 47 U.S.C. § 533(b)).
43. Chesapeake & Potomac, 42 F.3d at 202 (4th Cir. 1994); Chesapeake & Potomac, 830 F. Supp. at 917.
45. Chesapeake & Potomac, 42 F.3d at 202; Chesapeake & Potomac, 830 F. Supp. at 931-32.
competitive and diverse local media ownership, and to prevent telephone company anticompetitive practices. The courts dismissed government efforts to analogize the ban to laws of general application which are subject to only rational review.

The courts also clearly distinguished the Cable Act-telco cases from precedents which upheld bans on newspaper and broadcasting cross-ownership. The courts reiterated that the scarcity principal was the foundation for the Supreme Court’s ruling in *FCC v. National Citizens Committee for Broadcasting* and provided no justification for the telephone and cable cross-ownership ban.

While the courts found “a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media,” they consistently cited *Turner I* to hold that the government’s market or antitrust concerns were insufficient to shield the law from heightened First Amendment scrutiny. The courts also turned to *Turner I* to justify independent court evaluation of the facts purportedly supporting the ban. The courts refused to defer to congressional judgment about the need for the ban because of vast changes in the cable television market since the ban’s 1984 enactment. In addition, the congressional record failed to show independent congressional fact finding about the need for and utility of the ban. In rulings focusing on the third prong of the *O'Brien* test, the courts concurred that the government had failed to prove that the ban advanced its intended goals with no greater burden on speech than necessary.

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728; *US West*, 855 F. Supp. at 1191; *Chesapeake & Potomac*, 830 F. Supp. at 917-18. But see GTE Cal., Inc. v. FCC, 39 F.3d 940, 943 (9th Cir. 1994) (holding that constitutional issue was raised untimely and reporting FCC’s argument that ban was a legitimate structural economic regulation).

48. See, e.g., *Ameritech*, 867 F. Supp. at 730; *Chesapeake & Potomac*, 42 F.3d at 191.


50. See, e.g., *US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), vacated and remanded for consideration of mootness, 116 S. Ct. 1037 (1996); *Chesapeake & Potomac*, 42 F.3d at 191.


54. Id. at 734-35 (asserting the court’s duty to independently assess the necessity of the ban to achieve its stated goals).

55. Id.; see also, *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (holding that rules that implicate First Amendment freedoms must be supported with factual evidence, not unsupported theory, hypothesis, or speculation).

The courts consistently sidestepped the thorny issue of reconciliation of First Amendment freedom with common carrier regulation and judicial precedent that categorically separates common carriage from content control. Only the U.S. Court of Appeals for the 4th Circuit, in affirming the lower court’s C&P Telephone ruling, mentioned the apparent tension between established common carrier principles and the assertion of First Amendment rights by telephone companies. After concluding that physical and market characteristics of cable justified regulation and that intermediate scrutiny should be applied to the content-neutral ban, the court said:

Although common carriers are not members of “the press” insofar as 47 U.S.C. § 202 precludes them from exercising editorial control over the communications they transmit, the foregoing would nevertheless seem applicable to Section 533(b), which restricts a class of speakers from joining the press by operating, with editorial control and within certain areas, cable systems.

This nonsensical statement appears to state that although Title II does not define telephone companies as protected speakers and, indeed, proscribes their exercise of editorial control over the messages they carry, the Cable Act ban nevertheless unconstitutionally restricts this “class of speakers” from exercising certain types of editorial control. The rest of the First Amendment rulings in favor of telephone companies preferred to avoid this imbroglio.

Yet at least one district court apparently would subject any regulation of telephone companies to heightened scrutiny. In dicta, the district court in Southern New England Telephone Co. v. United States noted that “even if the statute was directed at non-speech activity ... it must be subjected to heightened scrutiny because it ‘impose[s] a disproportionate burden upon those engaged in protected First Amendment activities.”’ Seemingly, then, no regulation of any aspect of the operation of a telephone company could be justified purely as rational, economic regulation.

Although the Supreme Court chose not to address the question of the extent of a telephone common carrier’s First Amendment rights, lower courts consistently affirmed First Amendment protection of telcos. The mere mention of the First Amendment by telcos effectively eliminated any

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58. Id. at 192-96.
59. Id. at 196.
discussion by the government of the core premise and goal of common carriage: to segregate content and carriage. Indeed, the Cable Act-telco decisions render classification as a communications common carrier virtually meaningless. By eliminating the distinction between speakers and carriers, the courts opened the spectrum of telephone regulation to constitutional challenge. In addition, the Cable Act-telco rulings may open the door to more intrusive carrier-type regulation of any speakers or communications technologies, subject only to intermediate—not strict—scrutiny. 62

IV. REFRAMING THE PLAYERS AND THE QUESTION

A. Challenging the Mandated Silence of Common Carriers

Neither statute nor common law clearly defines common carrier. 63 The Communications Act of 1934, which outlines the obligations of communications common carriers, circularly defines a common carrier as

62. See Turner II, 117 S. Ct. 1174, 1186, in which the Court applied intermediate scrutiny based on the plurality's opinion in Turner I, 512 U.S. 622, 640-41 (1994) (holding that speaker- or medium-partial regulations are always subject to some degree of heightened scrutiny). Some justices, led by Justice O'Connor, have alternatively argued that speech-related regulation of cable must be assessed under strict scrutiny standards. Turner II, 117 S. Ct. at 1208 (O'Connor, J. dissenting) (arguing that Justice Breyer's view of the must-carry rules as "speech enhancing" should have subjected the rules to strict scrutiny); Turner I, 512 U.S. at 675 (O'Connor, J., concurring in part and dissenting in part).

Intermediate scrutiny as applied in United States v. O'Brien, 391 U.S. 367 (1968), has been established as the appropriate standard of review for regulation of cable. Most recently, the Court adopted the O'Brien test in Turner II. When compared to strict scrutiny, the intermediate O'Brien test requires that regulation (1) address an "important or substantial," rather than a compelling, government interest; and (2) be narrowly tailored, rather than the least intrusive, means of achieving that interest. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (re-articulating the second O'Brien prong to require only that regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests"); see also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (holding that regulatory distinctions for media are presumptively invalid unless justified by "some special characteristic"); Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 573-579 (1980) (Blackmun, J., concurring) (warning against the expanded application of the intermediate standard). Justice Rehnquist dissented, arguing that state-created monopolies enjoy no First Amendment protection. Id. at 584.

63. The U.S. Code states that a "common carrier" shall be defined by common law. Statutes, however, mandate that communications common carriers, such as telephone and telegraph companies, shall provide access to anyone who can pay and shall not alter the content of the senders' messages. 47 U.S.C. § 201 (1994); see also FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979); National Ass'n of Reg. Util. Comm'r's v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976) [hereinafter NARUC I] (holding that common carriers may not discriminate between two like customers); National Ass'n of Reg. Util. Comm'r's v. FCC, 533 F.2d 601, 609-610 (D.C. Cir. 1976) [hereinafter NARUC II] (deciding that common carriers do not control the content they transmit).
"[a]ny person engaged as a common carrier for hire." The FCC provided a similarly unenlightening definition when it said a common carrier is "any person engaged in rendering communication service for hire to the public." The common law is no more helpful. In National Association of Regulatory Utility Commissioners v. FCC (NARUC I), a case cited by numerous courts struggling with common carrier doctrine, the D.C. Circuit defined a common carrier firm as a firm "that engages in common carriage." The NARUC I court also offered the functional definition that common carriage arises from "hold[ing] oneself out indiscriminately to the clientele one is suited to serve . . ." Thus, subsequent court and FCC decisions focused on whether a firm affirmatively held itself out to offer nondiscriminatory service to like customers.

In general, courts and regulators agreed that regulated common carriers must provide access to anyone who can pay and may neither disseminate their own messages nor alter the content their customers send. Telephone common carriers must: 1) offer their services to the general public; 2) permit subscribers to control the messages they send; and 3) engage in interstate commerce. Rather than attempt to define common carriage, courts and the FCC instead delineated conditions that justified common-carrier-type regulation. Common law established that control of common carriers is justified to minimize disruption of public property, to assure the greatest service to the greatest number of citizens, and to control monopoly power and prevent abusive business practices. Thus, the 1934 Communi-

65. 47 C.F.R. § 21.1 (1996). Historically, communications common carriers have been required to (1) offer their services to the general public; (2) permit subscribers to control the messages they send; and (3) engage in interstate commerce. See generally Midwest Video, 440 U.S. 689; Frontier Brdcst. Co., Memorandum Opinion and Order, 24 F.C.C. 251, 16 Rad. Reg. (P & F) 1005 (1958) [hereinafter Frontier Memorandum Opinion and Order].
66. ROBERT W. POOLE, UNNATURAL MONOPOLIES 43 n.7 (1985) (citing NARUC I, 525 F.2d at 633).
67. NARUC I, 525 F.2d at 641.
68. See generally Wold Comm., Inc. v. FCC, 735 F.2d 1465, 1471 (D.C. Cir. 1984); NARUC I, 525 F.2d at 641-42; NARUC II, 533 F.2d 601, 609 (D.C. Cir. 1976).
69. See generally Midwest Video, 440 U.S. 689; Frontier Memorandum Opinion and Order, 24 F.C.C. 251, 16 Rad. Reg. (P & F) 1005 (1958); see also NARUC I, 525 F.2d at 641; NARUC II, 533 F.2d at 609; Industrial Radiolocation Serv., Report and Order, 5 F.C.C.2d 197, para. 19, 8 Rad. Reg. 2d (P & F) 1545 (1966) ("The fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. . .").
70. See Section 214 Final Report and Order, 21 F.C.C.2d 307, 18 Rad. Reg. 2d (P &
cations Act contains a recurrent theme that communications carriers should be regulated to serve the public interest, convenience, and necessity.  

In light of this quasi-public character, free speech rights to communicate over telephone wires generally were the exclusive province of the individual users of the telephone, and extensive telephone regulation was upheld as a reasonable means to advance the First Amendment right of telephone users to have nondiscriminatory near-universal service and interconnection. To protect the citizens' right of free speech, regulation generally barred both the telephone system operator and the government from control of telecommunications content.

Historically, then, telephone and telegraph services were common carriers while broadcasting was not. This distinction resulted from the

71. Telecommunications Act of 1996, sec. 104, § 151, 47 U.S.C.A. 151 (West Supp. 1997); Id. §§ 214, 310(d); see also Munn v. Illinois, 94 U.S. 113 (1876) (sustaining legislative policy on rates for grain elevators and introducing the leitmotif of the “public interest”).

72. Limited but notable exceptions to the autonomy of telephone callers include obscenity and harassment.


74. See WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 18-20 (1994) (examining the economic and competitive disadvantages of current common carrier regulations).


Much common carrier regulation is designed to offset market imperfections. Com-
unique market conditions of the two nascent industries, not from any explicit functional distinction between the two communications services. This experience-based categorization failed to provide explicit definitional criteria to help determine the carrier status of emerging technologies, such as cable. The resulting categorical confusion was exacerbated by rapidly changing technologies and markets in the 1980s.

In response, the FCC attempted to tie common carrier regulation to actual or historical market power. This approach allowed the FCC to ease regulation of select telephone providers but did little to justify the First Amendment distinction between common carriers and speakers.

The absence of a clear meaning for the term “common carrier” offered courts hearing the Cable Act-telco cases an opportunity to clarify the nexus between speakers and carriers. Instead, the courts avoided the terrain of common carrier definition, ignored a basis to rule that telephone companies might not exert editorial control over their own communicative channels, and muddied established First Amendment jurisprudence.

common carriers, such as railroads and telegraphs, historically were viewed as natural monopolies because the high cost of installation and the limited customer base made it economically impossible for competitors to enter the market. Although competition now exists in long-distance telephone service, Regional Bell Operating Companies (RBOCs) continue to exert market power over local telephone service within their operating areas. See ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 95-98 (1983).


79. Phil Nichols, Note, Redefining “Common Carrier”: The FCC’s Attempt at Deregulation by Redefinition, 1987 DUKE L.J. 501; see also General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971) (reasoning that although CATV systems were neither broadcasters nor common carriers, the common carrier status of telephone companies involved in CATV service was determinative); General Tel. Co. v. FCC, 413 F.2d 390 (D.C. Cir. 1969).
B. Blurring First Amendment Categories

Historically, the courts, Congress, and the FCC applied the First Amendment's prohibition against restraint of free speech to each communications medium either through analogy to or distinction from established media. A trifurcated system of First Amendment jurisprudence developed wherein telephony was virtually devoid of First Amendment protection, print media was sacrosanct, and broadcast and a broadening array of newer electronic technologies were somewhat free from regulation.

80. U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press . . . .") While interesting, the ultimate resolution of the debate over constitutional intent is less important to this Article than is the day-to-day interpretation and application of that document to telecommunications. For relevant discussions of the philosophical underpinnings of free press in America see, for example, Elliot D. Cohen, Philosophical Issues in Journalism (1992); Levy, supra note 38; J. Herbert Altschull, From Milton to McLuhan: The Ideas Behind American Journalism (1990).

81. For a discussion of how this premise has been called into question, see, for example, De Sola Pool, supra note 75. Also, for a general discussion of the objectives of FCC licensing, see Douglas H. Ginsburg et al., Regulation of the Electronic Mass Media: Law and Policy for Radio, Television, Cable and the New Video Technologies 138 (2d ed. 1991).


84. See, e.g., Campbell, supra note 82 (discussing the trifurcated regulatory system that distinguishes among newspapers, broadcast, and cable); Barron, supra note 73 (asserting that regulation is necessary to assure public access to monopolistic media).

Also note that certain types of speech (e.g. obscenity and libel) present separate regulatory rationales, and their regulation may not pose constitutional questions. See, e.g., Miller v. California, 413 U.S. 15, 18-19 (1973) (holding that a legitimate government interest exists sufficient to prohibit dissemination of obscene material); cf. Tornillo, 418 U.S. 241 (holding that government-mandated access to newspaper columns violated the First
Telephone services fell outside the ambit of First Amendment jurisprudence because the telephone was treated as an essential utility, not a speaker. For print, the underlying theory was that all had access to the press, and government intervention was unnecessary to effect an open-market exchange of ideas. However, when speech was delivered by radio or television via the scarce and public electromagnetic spectrum, regulation which limited the owner's editorial freedom was constitutionally permissible to assure the First Amendment rights of the audience.

Courts extended the broadcast regulatory model in varying degrees to other electronic media. From the outset, cable was an enigma. It was a functional equivalent of television but did not rely upon the scarce spectrum. Courts feared the market power of cable but likened its programming to newspaper content, a form of speech strictly protected by the First Amendment.

The confusion escalated with the advent of video telephony in the 1990s. Regulatory distinctions became increasingly suspect as private and common carriers became virtually indistinguishable. Differential regulation of telephone companies and cable operators seemed increasingly inequitable and conflict-ridden. Video delivered over telephone lines converged the three branches of First Amendment jurisprudence and presented a new issue to the courts.

C. Raising a New Question

Although the FCC had spent years attempting to balance First Amendment and common carrier doctrines, references to FCC debate, or even more generally to common carrier principles, were notably absent...
from federal court decisions affirming telephone companies' First Amendment right to provide video telephony. This omission severed a critical thread of policy because, prior to the mid-1990s, almost no common law precedent existed to support the assertion of editorial control by a common carrier. Indeed, prior to the 1993 ruling of the U.S. District Court in C & P Telephone, few courts had ever been asked to consider the extent of First Amendment protection enjoyed by a traditional common carrier when it also functioned in part as a private speaker.

A handful of cases and FCC rulings suggests that a First Amendment speaker may function in part as a common carrier. However, neither the courts nor the FCC had explored the implications of the reverse: allowing a regulated common carrier to assert autonomous First Amendment control over a portion of its capacity.


94. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), aff'd, 42 F.3d 151 (4th Cir. 1994), vacated and remanded for consideration of mootness, 116 S. Ct. 1036, vacated as moot, No. 93-2340 (4th Cir. Apr. 17, 1996) (lifting the ban and permitting the regional Bell companies to offer cable and other information services); see also Northwestern Ind. Tel. Co. v. FCC, 872 F.2d 465 (D.C. Cir. 1989) (declining to address an issue raised on appeal by telephone companies to have the cross-ownership ban declared unconstitutional); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994).

95. See, e.g., An Inquiry Relative to the Future Use of the Frequency Band 806-960 Mhz, Second Report and Order, 46 F.C.C.2d 752, paras. 34-35, 30 Rad. Reg. 2d (P & F) 75 (1974), Memorandum Opinion and Order, 51 F.C.C.2d 938, paras. 39-44 (1975); Community Antenna TV Sys., First Report and Order, 20 F.C.C.2d 201, para. 16, 17 Rad. Reg. 2d (P & F) 1570 (1969) (holding that designation as a program and as a common carrier are not mutually exclusive); see also United States v. Southwestern Cable Co., 392 U.S. 157, 172 (1968) (citing respondent's argument that cable partakes of "characteristics both of broadcasting and of common carriers but with all of the characteristics of neither . . . . "); Frontier Memorandum Opinion and Order, 24 F.C.C. 251, para. 8, 16 Rad. Reg. (P & F) 1005 (1958) (holding that one-way cable services are not engaged in common carriage because the content is not under the control of the subscriber). But see NARUC II, 533 F.2d 601, 610 (D.C. Cir. 1976) (holding that two-way cable systems are common carriers if customers have explicit or implicit discretion over content).

96. See, e.g., Telephone Co.-Cable TV Cross-Ownership Rules, Fourth Further Notice
In general, courts attempted to avoid ruling on the constitutionality of structural regulations imposed on communications industries and to rest holdings upon statutory grounds whenever possible. However, in 1977 the D.C. Circuit Court in *National Citizens Committee for Broadcasting v. FCC (NCCB)* upheld diversity as a sufficient justification for the newspaper and broadcast cross-ownership ban. In *NCCB*, the D.C. Circuit said regulation of the scarce broadcast spectrum was justified and did not violate the newspaper’s First Amendment rights because it “neither mandates nor prohibits what may be published” and is “an attempt to enhance the diversity of information heard by the public . . . .” The court called a constitutional challenge to the rule “ironic,” and, in dicta that may prove prescient, warned that regulated separation of media protected the full editorial autonomy of newspapers:

[It may be that newspapers can not truly be free of government interference so long as they operate government licensed broadcast stations. An unsavory fact of life is that government has the power to regulate expression by a “raised eyebrow” reminding the broadcaster of the triennial government renewal process. A newspaper opens itself up to similar intimidation by affiliation with a broadcast station.]

This language suggests that at least one judge believed the extension of First Amendment protection to regulated communications firms could erode the unequivocal nature of freedom of speech.

For most of the 1980s, the D.C. Circuit Court, the venue of many telephone company suits, suggested that it legally was “constrained to turn a deaf ear to these [First Amendment] complaints.” In a rather typical response to a 1987 First Amendment challenge to restrictions of the *Modi-

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99. *Id.* at 954-55. While apt in many respects, this case is distinguishable at least on the ground that broadcast precedents apply uniquely to that medium characterized by spectrum scarcity. See *Turner I*, 512 U.S. 622, 638-39 (1994).

100. *National Citizens Comm. for Brdcst.*, 555 F.2d at 954.

101. *Id.*

District Court Judge Harold Greene said the challenge was without merit: "These [telephone] companies, which have never been publishers, thus cannot bootstrap their own failure to make the showing necessary for the relief of their obligations under an antitrust decree into an infringement of their First Amendment rights." The district court cited **FCC v. Midwest Video Corp.** and **Columbia Broadcasting System, Inc. v. Democratic National Committee (CBS)** as establishing the principle that "common carriers are quite properly treated differently for First Amendment purposes than traditional news media." Both precedents, however, are readily distinguishable from telephone company constitutional challenges. In **Midwest Video**, the Supreme Court held that the FCC could not impose common-carrier-type access requirements on cable operators who enjoyed "journalistic freedom." Similarly, in **CBS**, the Court affirmed that broadcasters enjoyed editorial autonomy and, consequently, could not be required to carry paid editorial announcements. The cases cited by Judge Greene to establish that speech protection shall not be afforded to common carriers instead represent the opposite principle that common carrier regulation shall not be imposed on speakers.

A question more analogous to telephone company First Amendment challenges to the Cable Act ban was presented in **Central Hudson Gas & Electric Corp. v. Public Service Commission**. The question before the **Central Hudson** court was whether a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. The Supreme Court answered yes and ruled that the utility had a constitutional right to promote its services through advertising. But the lone dissent of Justice William Rehnquist urged that those constitutional rights be narrowly defined. Justice Rehnquist argued that "[w]hen the source of the speech is a state-created monopoly such as this, traditional First Amendment concerns, if they come into play at all, certainly do not justify the broad interventionist role adopted by the Court to-
day."  In arguing against application of the First Amendment to the utility company, Justice Rehnquist warned that the Court’s ruling "could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee...." 

Beginning in August 1993, a string of federal courts ignored that warning. Observers echoed Justice Rehnquist and expressed fear that the extension of First Amendment protection to telephone companies would adversely affect all First Amendment speakers. Mark Director and Michael Botein said the rulings might have "possible cataclysmic effects on the entire market." Others said the rulings "frayed [the] fibers of social policy, economic reality, and constitutional constraint...." Asserting that trifurcated First Amendment jurisprudence lay in tatters, scholars urged reliance upon laws of general application, such as antitrust, to gird the ongoing transformation of the media.

V. CAPITALIZING ON AN OPPORTUNITY

Antitrust rulings in telecommunications, however, also were under assault during the 1990s. Arguing that market conditions had changed vastly, the RBOCs continued to attack and wear down constraints imposed on them by the Modified Final Judgment that broke up AT&T in 1982. For example, early in 1995 Judge Harold H. Greene of the federal dis-

112. Id. at 585 (Rehnquist, J., dissenting).
113. Id. at 589 (Rehnquist, J., dissenting).
114. See generally Pacific Telesis Group v. United States, 84 F.3d 1153 (9th Cir.), vacated and remanded for consideration of mootness, 116 S. Ct. 1037 (1996); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); NYNEX Corp. v. United States, Civ. No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994); Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), aff’d, 42 F.3d 181 (4th Cir. 1994), vacated and remanded for consideration of mootness, 116 S. Ct. 1036, vacated as moot, No. 93-2340 (4th Cir. Apr. 17, 1996) (lifting the ban and permitting the RBOCs to offer cable and other information services); see also Bell Atlantic Files Brief, supra note 31 (quoting the Bell Atlantic brief which states that "every one of the 16 federal judges who has considered the question has concluded that the [video program ban] is invalid under the First Amendment" (alteration in original)).
117. Id. at 229.
120. Judge Greene was charged with oversight of the rules governing the post-
strict court in Washington, D.C., permitted one RBOC to provide long-
distance video programming. 121 Telephone companies had argued that the economies of scale in a national broadband network were critical to the economic viability of telephone video efforts. 122 Some observers expected similar court rulings to allow all local Bell companies to establish nationwide video networks, but it was Congress’s passage of the Telecommunications Act of 1996, not court action, that effectively extended Judge Greene’s ruling to all telephone companies nationwide. 123

Prior to the 1996 Act, amid nascent competition between telephone and cable operators, the FCC initiated inquiries to determine how best to regulate video telephony in order to minimize regulatory disparities between telephone and cable and to enhance opportunities for new services. 124 In 1995, the FCC began to expand its video dialtone rules to permit telephone entry into video programming as well as delivery. 125

During that same period, congressional debate over the Telecommunications Act expressed an intent to broadly deregulate electronic communications firms to ensure the economic benefits of competition. Aside from the requisite number of references to diversity of voices, congressional debate did not reflect a desire to deregulate as a means to enable telephone companies to advance First Amendment interests in public discourse. 126 Policy makers instead argued that telephone competition would counteract the market power of cable monopolies 127 and speed deployment of a national broadband telecommunications network. 128

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122. Id.


125. Id.; For an example of early scrutiny of the cross-ownership ban, see Telephone Co.-Cable TV Cross-Ownership Rules, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd. 5849 (1988) (holding that greater participation of telephone companies in providing cable services pursuant to appropriate safeguards created greater competition in cable television service, and therefore, in greater public interest benefits to consumers).


VI. ANALYSIS

In the 1990s, the FCC, the courts, and Congress reconceptualized telephony's regulatory status. An array of decisions transformed telephone providers from passive, nondiscriminatory conduits to active speaker conduits but failed to determine how to reconcile telephone common carrier obligations with newly established First Amendment freedoms or to distinguish between expressive and nonexpressive activities. Yet it is self-evident, as Jerome Barron has noted in another context, that "not all [cable] activities are First Amendment fungible. Some [cable] activity has characteristics that should invoke First Amendment protection, but much does not." The failure of policy makers to draw this difficult line may have opened regulation of all telephone activities to First Amendment attack.

Yet technological innovations during the 1990s blurred any historical bright line between media and telephony, or speech and economic activity. Although First Amendment jurisprudence long had distinguished among speakers and applied different regulation to each according to its unique characteristics, such distinctions became increasingly impractical as technological convergence erased any "special characteristic" that distinguished one medium from another. Indeed, economic or technological distinctions between video telephony and cable systems seemed arbitrary, speculative, or capricious.

Yet regulatory barriers to telephone entry into video delivery and programming dissolved not because of a showing either that the market had changed, or that regulations no longer advanced a legitimate government economic objective, but because the courts displayed what Jerome Barron has called "modish deference to even the faintest mention of the First Amendment." Lower courts consistently upheld telco First Amendment rights while ignoring common carrier precedent and govern-

129. Brenner, supra note 33.
131. Section 214 Certificates for Channel Facils. Furnished to Affiliated Community Antenna TV Sys., Memorandum Opinion and Order, 22 F.C.C.2d 746, 18 Rad. Reg. 2d (P & F) 1798 (1970) (holding that no telephone common carrier subject to the Communications Act could supply CATV service to the viewing public in its area unless a waiver of the rules had been granted under specified conditions).
132. See, e.g., Campbell, supra note 82 (detailing the theory and application of trifurcated First Amendment jurisprudence).
134. Barron, supra note 130, at 1504.
ment concerns about market power. The FCC simply followed the courts’ lead, and Congress codified the status quo.

VII. DISCUSSION

The Cable Act-telco cases embody a dramatic change in telephone company strategy, but the success of these deregulatory efforts lies in the well-documented power of the First Amendment. In recent years, prominent First Amendment scholars have decried the power of the First Amendment to stultify debate and truncate analysis in a variety of policy arenas. Criticized as narrow, simplistic, and empty, First Amendment jurisprudence has been contrasted to "the kind of careful analysis of costs and benefits that is practiced in virtually every other policy field in government." Indeed, scholars argue that rather than facilitate wide-open deliberations, "the First Amendment in legal and policy analysis has been ... an analytical stopper, a chiller of discourse.

The Cable Act-telco cases bear this out. The mere mention of the First Amendment foreclosed detailed exploration of the goals and effects of the Cable Act ban, or of the intents and efficacy of common carrier constraints, or of the distinction between speech and economic activities.

In the hands of the telephone companies, the First Amendment became a litigatory weapon to eliminate unwanted regulation and to redefine the battlefield of communications regulation/deregulation. Here, both the occasions for litigation and the terms of engagement reflected existing distributions of power and resources, and helped those already advantaged in other aspects of their business. As "repeat players" in the litigation game, telephone companies also sought the positive externalities that would accrue from developing reputations as powerful adversaries.

The questions thus raised are political. Telephone companies seek telecommunications deregulation not primarily, or even necessarily, to re-


137. Entman, supra note 136, at 72.

138. Id. at 80.

139. See, e.g., Shiffrin, supra note 13, at 713; Braman, supra note 136; Schauer, The Political Incidence of the Free Speech Principle, supra note 136, at 950-51, 957.

140. See Robert H. Gertner, Asymmetric Information, Uncertainty, and Selection Bias in Litigation, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 80 (exploring the nonrandomization of cases filed, settled, and litigated).
duce government intrusion into the communications market. Rather, deregulation is desirable because it changes the mix of government influences, and shifts the locus of power toward those with power, resources, and advantage. The courts resolving the questions are both an instrument and an embodiment of the existing social, economic, and political environment.

In that context, the courts logically chose to construe the issue before them narrowly. Direct consideration of the constitutional question—that is, which telephone company activities truly are imbued with First Amendment rights—was not politically expedient and was not necessary to resolution of the cases at hand. Again and again, the federal courts demonstrated a willingness to view the First Amendment as a trump that obviated the need for fundamental doctrinal analysis.

By relying on the First Amendment trump, the courts failed to provide guidance on how to distinguish between economic and expressive activities, or to suggest mechanisms to replace the historical carrier/speaker dichotomy that would permit more logical determinations of the rights and responsibilities of various members of the electronic press. The courts failed to offer a useful definition for common carriers that would help clarify which communications entities qualify and under what conditions, or to determine whether common carrier status is a self-imposed condition or a regulatory mandate. The courts failed to determine what evidence is necessary to justify regulatory distinctions, or to establish the degree of deference that should be given to historical or contemporary administrative judgment when the two conflict. The courts consistently failed to demonstrate how extension of First Amendment protection to video telephony conformed with precedent or furthered the goals of free expression.

Certainly, the Cable Act-telco cases raise difficult issues. The uncertainty inherent in industries and markets undergoing rapid and extensive transformation exacerbates the difficulty of fact finding that should underlie rational, legal decision-making. Available data are largely speculative, predictive, and incomplete. Yet the decisions that spring from these data may aid or handicap the development of unforeseen services.

Thus, courts, regulators, and Congress face a conundrum. Decisions of potentially enormous impact must be made within an historical frame-

141. See Entman, supra note 136.
work ill-suited to contemporary conditions and based on partial information supplied by parties with vested interests. Moreover, technological, economic, and regulatory uncertainty increase the likelihood of error and the uncertainty of jurists.

The telephone companies, however, were certain. The telephone companies knew what could have been gained through successful litigation. They understood the failure of prior efforts to eliminate regulations based upon claims of changes in the marketplace or in technology. The telephone companies had the power, the resources, and the ability to choose to pursue their goals in the courts using the First Amendment hammer.

Exercise of power in the legal marketplace is not inherently problematic. When power arises from superior knowledge, efficiency, or quality, its exercise—even in contravention of established public policy—may increase social welfare and benefit the public. However, when power results, even in part, from government grant, the exercise of that power is unfettered from market demand. Accession to such power may undermine public policy and ill serve the public, particularly when politicization of the courts undermines the ability of the judiciary to police and protect the interests of the powerless.

It falls outside the purview of this Article to explore whether the outcome of the Cable Act-telco cases serves, or disserves, public policy objectives. Rather, the goal herein is to identify the new-found constitutional weapon of telephone companies, and to suggest that the First Amendment presents a real, and a substantial, threat to established, economic-based regulation of communications firms. The Cable Act-telco cases demonstrate the power and the efficiency of First Amendment arguments to eliminate constraints imposed by Congress, and offer a timely example of the creative use of the law to elude regulation in a rent-seeking environment.

Congress too is caught in the web of complex issues and of conflicting goals of powerful players. The Telecommunications Act solved none of the problems underlying the Cable Act-telco cases; it simply shifted the battlefield. Policy makers wishing to give the government a stronger defense against constitutional arguments seeking to unravel the Telecommunications Act should seek to justify regulations on both economic and speech grounds.
VIII. CONCLUSION

The Cable Act-telco cases effectively were over once the telephone companies transformed themselves into speakers, and the statute’s market constraints into abridgements of free speech. Indeed, the cases demonstrate the "strange power of speech" to efficiently open markets to competitive entry when the FCC and Congress fail to deregulate. The cases suggest, as Stanley Fish has noted, that "[i]n our legal culture as it is presently constituted, if one yells 'free speech' in a crowded courtroom and makes it stick, the case is over." But how did the telephone companies make it stick?

That crucial question remains unanswered. The Cable Act-telco cases suggest that the power of constitutional arguments may be responsive to prevailing public policy and to gaming by industries frustrated by the glacial pace of administrative and legislative reform. Turner I and II would not dictate otherwise. For while the Supreme Court has said that the power of constitutional challenges depends upon the purpose of the challenged law (as determined by Congress), the Court did not say how to properly determine congressional purpose.

Clearly then the Cable Act-telco cases could have gone the other way—as could have Turner I or II. Indeed, the Cable Act-telco cases demonstrate the absence of any grand, unifying constitutional jurisprudence. The First Amendment power is both uncertain and situational.

144. See Laurence H. Winer, The Red Lion of Cable, and Beyond?—Turner Broadcasting v. FCC, 15 CARDozo ARTS & ENT. L.J. 1, 5 (1997) (disagreeing with First Amendment challenges to economic regulations as "Lochnerizing" and arguing for presumptive application of strict scrutiny because "[w]e should not assume that we can easily or meaningfully distinguish, for First Amendment purposes, inappropriate content regulation of the media from what appears to be largely economic or structural regulation.").


146. Robinson, supra note 1, at 1023 n.27 (providing an example of “the extent to which the First Amendment has become a routine part of the opposition to ordinary economic regulation.” (citing Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996))).


148. Turner II, 117 S. Ct. 1174 (1997); see also Bhagwat, supra note 7 (asserting that content neutrality is determined by the purpose of the challenged law).