THE (UNCONSTITUTIONAL) TELCO-CABLE CROSS-OWNERSHIP BAN: IT SEEMED LIKE A GOOD IDEA AT THE TIME

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Until recently, dominant local telephone companies were prohibited from providing video programming to subscribers in their telephone service areas. A series of court cases has changed all that, striking down 47 U.S.C. § 533(b) and the corresponding Federal Communications Commission (FCC) regulations[1] (collectively, the "telco-cable cross-ownership ban") as placing an impermissible burden on the telephone companies' First Amendment rights.[2]

This article is a survey of the law regarding the federal government's ability to regulate a telephone company's provision of video programming to subscribers in its service area. Part I of the article is a history of the telco-cable cross-ownership ban. Part II is an analysis of the cases striking down the ban, exploring the rationale of these cases on a consolidated basis. Part III is a summary of the applicable standards by which to evaluate future attempts by Congress or the FCC to regulate telephone companies' provision of video programming.

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1. 47 C.F.R. § 63.54–.58 (1993).

2. US West, Inc. v. United States, No. 94-35775, 1994 WL 760379 (9th Cir. Dec. 30, 1994); Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181 (4th Cir. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); NYNEX Corp. v. United States, No. 93-323-P-C (D. Me. Dec. 8, 1994); United States Tel. Ass'n v. United States, No. 1:94CV01961 (D.D.C. Feb. 13, 1995); Southwestern Bell Corp. v. United States, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995). *See also* Pacific Telesis Group v. United States, No. 94-16064, 1994 WL 719063 (9th Cir. Dec. 30, 1994).

I. History of the Telco-Cable Cross-Ownership Ban

A. *The FCC Origins of the Ban*

In 1969, cable television (then known as Community Antenna Television or CATV) was subscribed to by about six percent of the population[3] and mainly carried broadcast signals via coaxial cable to remote areas afflicted with poor television broadcast reception or no reception at all.[4] Telephone companies were well-positioned to provide cable television facilities, as coaxial cables could be run along existing telephone poles to each subscriber's home. The FCC required telephone companies to obtain section 214 certification[5] prior to the provision of video transport to any CATV company.[6] When the section 214 applications indicated that many of the telephone companies had ownership interests in the CATV companies they were seeking to serve, the FCC issued a notice of proposed rulemaking soliciting comment on whether or not telephone companies should be permitted to provide CATV service, either on their own or through an affiliate.[7]

In 1970, the FCC decided that telephone companies and their affiliates would be prohibited from providing CATV service within their telephone service areas.[8] The FCC further decided that any telephone

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3. *See* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 Law & Contemp. Probs. 77, 79 (1981).

4. *See id.*; General Tel. Co. of the S.W. v. United States, 449 F.2d 846, 850–51 (5th Cir. 1971).

5. 47 U.S.C. § 214 (1988). The Communications Act requires that a common carrier wishing to extend its lines or construct new facilities must first receive a certificate from the FCC. 47 U.S.C. § 214(a). Section 214 purportedly protects telephone ratepayers from paying for unnecessary telephone company facilities by providing that the FCC not allow any such unnecessary facilities to be built and included in the rate base.

6. *See* General Tel. Co. of Cal., 13 F.C.C.2d 448, 460–61 (1968), *aff'd*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

7. Applications of Tel. Companies for Section 214 Certificates for Channel Facilities, 34 Fed. Reg. 6290, 6292 (1969)(codified at 47 C.F.R. § 63).

8. Applications of Tel. Companies for Section 214 Certificates for Channel Facilities, 21 F.C.C.2d 307, 325 (1970) [hereinafter *1970 Order*], *aff'd sub nom.* General Tel. Co. of S.W. v. United States, 449 F.2d 846 (5th Cir. 1971). The ban was then codified at 47 C.F.R. § 64.601:

§ 64.601 Furnishing of Facilities for CATV Service to the Viewing Public.

(a) No telephone common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall directly or indirectly through an affiliate owned or controlled by or under common control with said telephone communications common carrier, engage in the furnishing of CATV service to the viewing public in its telephone service area.

(b) No telephone common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall provide channels of communications or pole line, conduit space or other rental arrangements to any entity which is directly or indirectly owned, operated or controlled by or under common control with such telephone communications common carrier, where such facilities or arrangements are to be used for or in connection with the provision of CATV service to the viewing public in the service area of the said telephone common carrier.

company seeking section 214 authorization to provide service to a CATV company would be required to show that the CATV company was unaffiliated before section 214 authorization would be granted.[9]

In its decision, the FCC found that pole and conduit access was essential to the provision of CATV, and that the telephone companies controlled the poles and conduits.[10] Because of this control, the FCC determined that telephone companies had the ability to "preempt the market" for CATV through discriminatory access.[11] Furthermore, according to the FCC, the telephone companies had the incentive to extend their regulated telephone monopoly into the area of CATV service.[12]

Thus, the FCC banned telephone companies from providing CATV service, fearing that they would exclude competitors from the CATV market by engaging in discriminatory provision of pole and conduit access. The FCC stated that the ban would preserve "a competitive environment for the development and use of broadband cable facilities and services" and avoid the "concentration of control over communications media."[13]

In 1978, Congress passed the Pole Attachment Act[14] which gave the FCC jurisdiction over the "rates, terms, and conditions for pole attachments."[15] The Pole Attachment Act and implementing regulations[16] addressed independent CATV operators' fears of discriminatory access to telephone poles. Further, the cable market had become much stronger since the initiation of the ban. Thus, three years after the Pole Attachment Act was enacted, the FCC staff issued a report[17] which noted that the fear of pole and conduit attachment discrimination did not, "by itself," justify the cross-ownership ban.[18]

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47 C.F.R. § 64.601 (1971).

9. *1970 Order*, *supra* note 8, at 325.

10. *See id.* at 324. The FCC noted that CATV systems would have to use the same poles and conduits as the telephone companies since the communities would not usually permit the construction of duplicate sets of poles or lines. *Id.*

11. *Id.* at 324.

12. *Id.* The FCC pointed out that "numerous parties" had complained that the telephone companies had, in fact, already discriminated against unaffiliated CATV companies. *Id.*

13. *Id.* at 325.

14. Pub. L. No. 95-234, § 6, 92 Stat. 35 (codified as amended at 47 U.S.C. § 224 (1988)).

15. 47 U.S.C. § 224(b)(1). "The term 'pole attachment' means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

16. 47 C.F.R. §§ 1.1401–.1415 (1994).

17. KENNETH GORDON ET AL., FEDERAL COMMUNICATIONS COMMISSION, FCC POLICY ON CABLE OWNERSHIP (1981) (Office of Plans and Policy Staff Report) [hereinafter *1981 Staff Report*].

18. *Id.* at 162.

Nonetheless, the staff recommended that the ban remain in force, with a new justification: the problem of cross-subsidization.[19] The *1981 Staff Report* found that a telephone company could hide cable costs in its telephone rate base.[20] The fear was that by including cable costs in its telephone rate base, the telephone company could provide cable service at a lower cost than independent cable operators. Because the telephone company could create this artificial cost advantage over independent cable operators, it would have the ability to price its cable service so low that the independent cable operators could not compete, possibly leaving the telephone company with a second monopoly.

B. *Congress Makes the Ban Statutory*

In 1984, Congress passed the Cable Communications Policy Act of 1984.[21] Section 613(b) of the 1984 Act, codified at 47 U.S.C. § 533(b), made the FCC's ban statutory. Section 533(b) tracked the language of the ban adopted in the *1970 Order*, except that the 1984 Act banned a telephone company's provision of all "video programming" over its own facilities in its service area,[22] rather than prohibiting only "CATV service," as the *1970 Order* had.[23]

The legislative history of the statutory ban is limited. The House Committee Report states that the intent of section 533(b) was simply "to codify current FCC rules."[24]

C. *The Executive Agencies Question the Ban's Usefulness*

In 1988, the FCC concluded that the telco-cable cross-ownership ban was constitutional,[25] but sought comment on whether it should recom-

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19. *Id.* at 175–77.

20. *Id.* at 153.

21. Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521–611 (1988 & Supp. V 1993))(the "1984 Act").

22. 47 U.S.C. § 533(b)(1) (1991). The 1984 Act defines video programming as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(16) (1991). The FCC has interpreted video programming as programming comparable to that being provided by broadcast television stations in 1984. *See* Telephone Co.-Cable Television Cross-Ownership Rules, 7 F.C.C.R. 5781, 5820 (1992) (second report and order, recommendation to Congress and second further notice of proposed rulemaking) [hereinafter *First Video Dialtone Order*]; Telephone Co.-Cable Television Cross-Ownership Rules, 10 F.C.C.R. 244, 296–97 (1994)(memorandum opinion and order on reconsideration and third further notice of proposed rulemaking) [hereinafter *Second Video Dialtone Order*].

23. *See* 47 C.F.R. § 64.601 (1971).

24. H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4693. The Committee Report states that § 533, as a whole, was intended "to prevent the development of local media monopolies and to encourage a diversity of ownership of communications outlets." *Id., reprinted in* 1984 U.S.C.C.A.N. 4692.

25. Telephone Co.-Cable Television Cross-Ownership Rules, 3 F.C.C.R. 5849, 5864 (1988) (further notice of inquiry and notice of proposed rule making).

mend that Congress repeal section 533(b) in favor of less restrictive alternatives.[26] The FCC made this recommendation in 1992.[27]

In the *First Video Dialtone Order*, the FCC found that the growth of the cable industry since 1970 mitigated the danger that the telephone company[28] could exclude independent cable television operators from the cable market.[29] The FCC found that with appropriate safeguards, there would be little risk of anticompetitive conduct.[30]

Among other safeguards, the FCC suggested that telephone companies should be required to provide video programming through a separate subsidiary if the FCC determines that this is necessary after a balancing of the costs and benefits to the public interest.[31] Additionally, the FCC proposed that telephone companies be allowed to provide video programming only through their basic video dialtone platform, which would provide service to multiple programmers.[32] The FCC further proposed limiting a telephone company's provision of video programming to a certain percentage of common carrier capacity.[33] These safeguards would be in addition to the requirement, which also currently exists for the provision of channel service, that the telephone company provide the service on a common carrier basis.[34] Furthermore, the FCC found

26. *Id*.

27. *First Video Dialtone Order*, *supra* note 22, at 5847. The video dialtone proceedings represent somewhat of a new concept in the delivery of video programming. Instead of providing "channel service" to a single cable operator in an area, a telephone company would provide a "basic platform," which, taken to its extreme, would amount to a delivery system much like the current telephone network over which video could be transmitted on a common carrier basis. *See id.* at n.3, 5797–98, 5811–12. The FCC at least stated that it would try to avoid premature regulatory classifications, however, in order to allow new services to develop. *See id.* at 5812.

28. Competitive entry into the local exchange and exchange access markets may render "*the* telephone company" an anachronism. True local competition, if achieved, would provide the ultimate safeguard against potential local exchange company (LEC) abuses of monopoly power. To the extent that a LEC's local monopoly diminishes with successful entry of competitive access and competitive exchange service providers, any supposed ability to exclude independent cable operators decreases.

29. *First Video Dialtone Order*, *supra* note 22, at 5848–49.

30. *See id.* at 5849. The FCC affirmed this recommendation without additional consideration of the proposed safeguards in 1994. *Second Video Dialtone Order*, *supra* note 22, at 366–68.

31. *First Video Dialtone Order*, *supra* note 22, at 5847–50.

32. *Id.* at 5850. The FCC counselled against statutorily mandating this or other safeguards, recommending instead that the FCC have the discretion as to what safeguards should be imposed, and when, if ever, those safeguards should be removed. *Id.* at 5850–51.

33. *Id.* at 5850–51. The FCC stated that a limit of 25%, which Congress was then considering, was reasonable. *Id.* at 5850–51 n.360.

34. *Id.* at 5787; *see also id.* at 5823 ("We conclude that the public interest in preventing anticompetitive conduct will be served by requiring that our current safeguards designed to prevent discrimination and cross-subsidization by local telephone companies apply fully to the provision of services under our video dialtone policy.").

that the telephone company's entry into the cable market, subject to these safeguards, would bring public interest benefits by initiating competition in markets that had, themselves, become increasingly concentrated.[35]

Other executive agencies reached the same conclusion. In response to the notice of proposed rulemaking leading up to the *First Video Dial-tone Order*, the Department of Justice ("DOJ") submitted comments advocating that the FCC recommend repeal of section 533(b).[36] The DOJ argued that the potential procompetitive benefits of telephone companies' competition with cable companies would outweigh potential anticompetitive risks.[37] The DOJ suggested that the efficiencies gained by allowing telephone companies to vertically integrate would make it more likely that such competition would develop.[38] The comments of the National Telecommunications and Information Administration (NTIA) also supported the removal of the ban.[39] The NTIA has argued for removal of the restriction in other reports as well, finding that the dangers of allowing telephone companies to provide video programming were either exaggerated or subject to minimization by the safeguards proposed by the FCC,[40] and that competition would be encouraged by the removal of the ban.[41]

D. *The 1992 Cable Act Leaves the Ban Intact*

In 1992, Congress overrode President Bush's veto to enact the Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act).[42] The 1992 Cable Act, however, did not act on the suggestions of the FCC, the DOJ, and the NTIA to repeal section 533(b).[43] In-

35. *See id*. at 5850. The FCC had previously found that "the multichannel video marketplace is not as fully competitive as it could be because of the limited presence of alternative multichannel distribution technologies to provide consumer choice." *Id*. at 5796 (citing Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C.R. 4962, 5002–07 (1990)(report)).

36. *Id.* at 5841–42.

37. *Id.* at 5842.

38. *Id.* at 5843, 5849.

39. *Id.* at 5847.

40. *See* NTIA, U.S. DEP'T OF COMMERCE, THE NTIA INFRASTRUCTURE REPORT: TELECOMMUNICATIONS IN THE AGE OF INFORMATION 234 (1991).

41. See NTIA, U.S. DEP'T OF COMMERCE, GLOBALIZATION OF THE MASS MEDIA 144 (1993).

42. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C. §§ 521–611 (Supp. V 1993)).

43. Congress has considered removing the ban on numerous occasions, in hearings as well as bills. *See* Chesapeake & Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909, 914–15 nn.9–10 (E.D. Va. 1993) (citing hearings and bills), *aff'd*, 42 F.3d 181 (4th Cir. 1994).

stead, the Senate Committee Report merely noted that fears of "anticompetitive abuse" had originally motivated section 533(b).[44]

II. The Courts Strike Down the Ban

On August 24, 1993, the United States District Court for the Eastern District of Virginia struck down the telco-cable cross-ownership ban as a violation of the First Amendment.[45] The Fourth Circuit affirmed.[46] The Ninth Circuit,[47] and district courts in five other jurisdictions,[48] have also found the ban unconstitutional. This article examines these cases to determine the legal standards to apply to future questions regarding the FCC's authority to restrict the ability of telephone companies to provide video programming to subscribers in their service areas.

A. *Video Programming Delivered Via Cable is "Speech" Protected Fully by the First Amendment*

As a threshold matter, the sort of communication sought to be provided by the telcos and prohibited by the telco-cable cross-ownership ban qualifies as constitutionally protected speech.[49] A telephone company seeking to provide video programming would, like a cable company, "communicate messages on a wide variety of topics and in a wide variety of formats,"[50] by providing self-produced video programming or by

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44. S. Rep. No. 92, 102d Cong., 1st Sess. 17 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1150.

45. *Chesapeake & Potomac*, 830 F. Supp. 909.

46. Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181 (4th Cir. 1994).

47. US West, Inc. v. United States, No. 94-35775, 1994 WL 760379 (9th Cir. December 30, 1994).

48. Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); NYNEX Corp. v. United States, No. 93-323-P-C (D. Me. Dec. 8, 1994); United States Tel. Ass'n v. United States, No. 1:94CV01961 (D.D.C. Feb. 13, 1995); Southwestern Bell Corp. v. United States, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995). *See also* Pacific Telesis Group v. United States, No. 94-16064, 1994 WL 719063 (9th Cir. Dec. 30, 1994).

49. *Chesapeake & Potomac*, 42 F.3d at 190; *US West*, 1994 WL 760379 at *4; *BellSouth*, 868 F. Supp. at 1338; *Ameritech*, 867 F. Supp. at 728. *See also* Turner Broadcasting Sys., Inc. v. United States, 114 S. Ct. 2445, 2456 (1994); Leathers v. Medlock, 499 U.S. 439, 444 (1991).

50. *See Turner,* 114 S. Ct. at 2456 (quoting Los Angeles v. Preferred Communications, 476 U.S. 488, 494 (1986)). In *Turner*, cable operators appealed a grant of summary judgement that the must-carry provisions of the 1992 Cable Act, 47 U.S.C. §§ 534, 535 (Supp. V 1993), did not violate the First Amendment. The Supreme Court held that cable programming was speech that deserved constitutional protection, *Turner,* 114 S. Ct. at 2456, and that the must-carry provisions were subject to intermediate level scrutiny, *id.* at 2469. The Supreme Court then reversed the district court, finding that there were genuine issues of material fact as to

"exercising editorial discretion over which stations or programs" to provide.[51] Furthermore, while video programming in the form of broadcast television signals is subject to regulations that would be considered unconstitutional when applied to other media,[52] "the physical characteristics" of cable transmission "do not require the alteration of settled [First Amendment] principles."[53] Thus, video programming transmitted via cables is fully protected speech for First Amendment purposes, not subject to the lower protection given to broadcast speech.[54]

B. *Levels of Scrutiny*

1. Minimal Scrutiny or Rational-Basis Review

While the lower standard applied to broadcast speech is inapplicable to cable programming, the government has urged that the telco-cable cross-ownership ban should be subject to the rational-basis level of scrutiny often given to the enforcement of laws of general application that incidentally burden speech.[55]

Rational-basis review requires only that a court find that the regulation in question "is rationally related to a legitimate government objective" before sustaining the regulation's constitutionality.[56]

Rational-basis review is often applicable in cases where a law of general operation works, in a specific case, to burden a speaker's First Amendment rights. Fundamentally, this means that "the press is not im-

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whether or not local broadcasting was in jeopardy from cable competition, and whether there were less restrictive means available to achieve the asserted governmental interests. *Id*. at 2472.

51. *Turner,* 114 S. Ct. at 2456.

52. *See id.* at 2456 ("Our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."). *Compare* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) *and* National Broadcasting Co. v. United States, 319 U.S. 190 (1943), *with* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

The different treatment of the broadcast media is justified by the so-called scarcity rationale. The scarcity rationale posits that the state is allowed more invasive regulation of broadcast speech because there is a "inherent physical limitation on the number of speakers who may use the broadcast medium." *Turner,* 114 S. Ct. at 2457. As the *Turner* court points out, the scarcity rationale has been subject to much criticism. *Id*. at 2457 n.5.

53. *Turner,* 114 S. Ct. at 2457.

54. *Id.* at 2457–58; Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 191 (4th Cir. 1994); US West, Inc. v. United States, No. 94-35775, 1994 WL 760379 at *5 (9th Cir. December 30, 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335, 1339 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721, 730–31 (N.D. Ill. 1994).

55. *See Chesapeake & Potomac*, 42 F.3d at 192; *BellSouth*, 868 F. Supp. at 1338; US West, Inc. v. United States, 855 F. Supp. 1184, 1190 (W.D. Wash. 1994), *aff'd,* No. 94-35775, 1994 WL 760379 (9th Cir. December 30, 1994). *See also* Ameritech, 867 F. Supp. at 730–31.

56. *US West*, 855 F. Supp. at 1190.

mune . . . from regulations of general applicability."[57] In the antitrust context, *Associated Press v. United States*[58] provides an example of such an application. The *Associated Press* Court held that the Sherman Antitrust Act[59] could be enforced against a news distribution organization comprised of newspaper publishers, despite the organization's arguments that the enforcement of the Sherman Act would abridge the organization's First Amendment rights.[60]

The *Turner* Court held, however, that rational-basis review is not the proper standard when the regulation at issue is a law directed specifically at members of the press, rather than at the population or industry as a whole.[61] Likewise, all of the courts reviewing the telco-cable cross-ownership ban have rejected the notion that because section 533(b)'s purpose was, at least in part, to promote competition in the cable television market, the statute would only be subject to rational-basis review.[62] As in *Turner*, "some measure of heightened First Amendment scrutiny {was} demanded"[63] because the telco-cable cross-ownership ban applies solely to the press and not to all industries generally.

2. Strict Scrutiny

As the government argued for the lowest level of judicial scrutiny, the telephone companies, not surprisingly, argued that the highest form of judicial scrutiny should be applied to the telco-cable cross-ownership ban.[64] Strict scrutiny analysis requires that the challenged law be

57. *Chesapeake & Potomac*, 42 F.3d at 193 n.17 (citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192–93 (1946); Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)).

58. 326 U.S. 1 (1945).

59. 18 U.S.C. §§ 1–7 (1988).

60. *Associated Press*, 326 U.S. at 19–20. *See also* Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951). It may not always be the case, however, that a law of general applicability will be subject to mere rational-basis review. In Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458 (1994), the Court stated that "the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment." The *Turner* Court did not specify exactly when the enforcement of a generally applicable law would trigger heightened scrutiny.

61. *Turner*, 114 S. Ct. at 2458.

62. US West, Inc. v. United States, No. 94-35775, 1994 WL 760379, at *5 (9th Cir. Dec. 30, 1994); Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 192 (4th Cir. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721, 731 (N.D. Ill. 1994). *See also* BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994) (rejecting rational-basis review because the scarcity rationale was inapplicable).

63. *Turner*, 114 S. Ct. at 2458.

64. *See, e.g., US West*, 1994 WL 760379, at *5; *BellSouth,* 868 F. Supp. at 1339; *Ameritech*, 867 F. Supp. at 731; Chesapeake & Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909, 922 n.20 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994).

"necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[65]

Strict scrutiny is applicable in cases involving content-based regulation of speech.[66] The difficult issue is whether or not a ban on telephone companies' speech (in the form of video programming provided over transmission facilities owned by the telephone company in its own service area) is content-based.

The telco-cable cross-ownership ban is not content-based on its face.[67] Section 533(b) makes no mention of what messages are being provided except to say that they are in the form of video programming.[68] And while the ban certainly differentiates among speakers, there is no indication that the ban distinguishes speakers based on the "[g]overnment's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)," as required by *Turner* to classify a speaker-partial law as content-based.[69]

On the facts of *Turner*, it could be argued that the Court was mistaken in finding that the must-carry rules were not content-based. The *Turner* court found it unproblematic that Congress preferred broadcasters to cable programmers, even though the broadcast programmers are subject to greater government intrusion on the content of their speech than the cable programmers burdened by the must-carry rules.[70] The Court

65. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

66. *See Turner*, 114 S. Ct. at 2458–59; Texas v. Johnson, 491 U.S. 397, 412 (1989); Burson v. Freeman, 112 S. Ct. 1846, 1850–51 (1992). *See also* R.A.V. v. St. Paul, 112 S. Ct. 2538, 2542 (1992)("Content-based regulations are presumptively invalid.").

67. US West, Inc. v. United States, No. 94-35775, 1994 WL 760379, at *5 (9th Cir. Dec. 30, 1994); Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 194 (4th Cir. 1994).

68. In Chesapeake & Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), the district court found that the determination of whether a particular message qualifies as video programming, rather than some other form of programming, required reference to the content of the programming, and therefore that the ban was content-based. *Id.* at 922–23. The court of appeals disagreed, stating "that a regulation requires some examination of the speech upon which it has impact does not make the regulation content-based." *Chesapeake & Potomac*, 42 F.3d at 193. The court of appeals found that the telco-cable cross-ownership ban was "not content-based because, in determining whether 'video programming' is being transmitted, 'the Government does not need to evaluate the nature of the message being imparted.'" *Id*. at 194–95 (quoting Regan v. Time*,* 468 U.S. 641, 656 (1984)).

69. *See Chesapeake & Potomac*, 42 F.3d at 195 (quoting *Turner*, 114 S. Ct. at 2467). The fact that the affected group of speakers turns out to be small does not necessarily mean that strict scrutiny is required. *See id.* at 197; *US West*, 1994 WL 760379, at *6.

70. *See Turner*, 114 S. Ct. at 2462–63. In addition to emphasizing its belief that the must-carry provisions were not intended to favor the content of broadcasters' speech, the court minimized the extent to which the FCC is permitted to regulate the content of broadcast programming. *Id*. at 2462–64.

also dismissed the arguments of the cable operators, and of Justice O'Connor's partial dissent[71] and Justice Ginsburg's partial dissent,[72] that the many statements in the legislative history of the 1992 Cable Act indicate that Congress saw locally-oriented programming as beneficial and deserving of protection.[73]

These issues, however, are not present with respect to the telco-cable cross-ownership ban. Cable companies are, in general, subject to no greater government regulation of content than telephone companies, and no suggestion has been seriously made that programming provided by cable operators would be any different, not to mention more attractive to the government, than that provided by telephone companies.

Strict scrutiny is also triggered when there is evidence that the government had an "improper censorial motive" in enacting the regulation.[74] None of the reviewing courts found such a motive in Congress' or the FCC's enactment of the telco-cable cross-ownership ban.[75] The courts found no evidence to suggest that Congress was motivated by a desire to suppress the message that telephone companies might provide, rather than by a desire to achieve economic goals not related to the content of the speech. Thus, the telco-cable cross-ownership ban is not subject to strict scrutiny analysis.

3. Intermediate-Level Scrutiny

Turner reaffirmed the principle that laws that "single out the press" must be subjected to "some degree of heightened First Amendment scrutiny."[76] If the law is not subjected to strict scrutiny or rationale-basis review, then the intermediate scrutiny test applies.[77] Courts use intermediate scrutiny when a content-neutral regulation burdens speech.[78]

Under the intermediate scrutiny test, a content-neutral regulation which burdens speech must be "narrowly tailored to serve a significant

71. *See Turner*, 114 S. Ct. at 2476–79 (O'Connor, J., dissenting in part).

72. *Turner*, 114 S. Ct. at 2481 (Ginsburg, J., dissenting in part).

73. *Turner*, 114 S. Ct. at 2462.

74. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); R.A.V. v. St. Paul, 112 S. Ct. 2538, 2544 (1992).

75. *See, e.g.,* US West, Inc. v. United States, No. 94-35775, 1994 WL 760379, at *6 (9th Cir. Dec. 30, 1994); Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 197 (4th Cir. 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335, 1339 (N.D. Ala. 1994).

76. *Turner*, 114 S. Ct. at 2458 (citing *Arkansas Writers' Project*, 481 U.S. at 228).

77. *See US West*, 1994 WL 760379, at *7.

78. *Turner*, 114 S. Ct. at 2469 (citing *Ward*, 491 U.S. at 799; United States v. O'Brien, 391 U.S. 367, 377 (1968)); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

government interest, and . . . leave open ample alternative channels for communication of the information."[79] As the *Turner* court expressed,

> a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[80]

The Court has recognized that these two tests are essentially the same.[81] Application of intermediate scrutiny to the telco-cable cross-ownership ban requires the courts to answer (1) whether the ban serves a significant, important or substantial government interest, and (2) whether the ban is narrowly tailored, or no greater than necessary, to further the purported interest. The next section describes the courts' responses to these issues.

C. *Application of the Intermediate Scrutiny Test*

1. Does the Ban Serve a Significant Government Interest?

The government put forth a number of justifications for the telco-cable cross ownership ban. As discussed earlier, the original reason for the ban was the fear that the telephone company would use its "gatekeeper" function over the telephone poles to disadvantage independent CATV operators.[82] Another justification was that the telephone companies' provision of video programming would create opportunities for cross-subsidization.[83] A third justification was that the telco-cable cross-ownership ban promotes diversity in the provision of video programming.[84] No court questioned the government's assertion that these

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79. *Clark*, 468 U.S. at 291, 293.

80. *Turner*, 114 S. Ct. at 2469 (quoting O'Brien, 391 U.S. at 377).

81. *See Ward*, 491 U.S. at 798. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993).

82. *See supra* notes 10–13 and accompanying text.

83. *See supra* notes 19, 20 and accompanying text.

84. *See*, *e.g.*, *US West*, 1994 WL 760379, at *10; Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 188(4th Cir. 1994). 47 C.F.R. § 63.57 allows a telephone company to provide "channel service" (video distribution) to independent cable companies so long as the telephone company can demonstrate that it made pole attachment rights available to the cable system at reasonable, nondiscriminatory charges and terms. 47 C.F.R. § 63.57 (1985). *See also* Indiana Telephone Co., Inc. v. F.C.C., 824 F.2d 1205, 1209 (D.C. Cir. 1987)(cross-ownership rule does not prohibit a telephone company from owning channel distribution facilities and using them "to transmit television signals for *independent* cable operators").

were all significant governmental interests.[85] However, the courts did question whether or not the purported interests were actually served.

a. Pole Access

The government has claimed that the ban restricts the incentive of a telephone company to engage in the provision of discriminatory access to telephone poles and conduits. All of the cases question whether or not this fear is addressed by the ban. The Court of Appeals for the Ninth Circuit in the *US West* case suggests that because video transport is allowed by the ban,[86] the ban does nothing to prevent incentives for pole and conduit access discrimination.[87] The telephone company, even with the ban, has the ability to engage in pole access discrimination and could, therefore, under the government's theory, monopolize the video transport market.[88] The court of appeals in *Chesapeake & Potomac* focused on the more narrow alternatives available to the government, such as the Pole Attachment Act, or even stronger legislative prohibitions against discrimination if the Pole Attachment Act could not entirely guarantee nondiscriminatory access.[89] The *BellSouth* court noted that the FCC had already rejected the need for a complete ban,[90] and pointed out that at this point the cable industry has "become entrenched firmly in communities."[91] Discriminatory access to telephone poles and conduits is a threat only to those who cannot provide video programming through other means, such as, (1) through poles and conduits not controlled by the local telephone company, or (2) through the use of other technologies. While prospects for non-LEC provision of pole and conduit access do exist, the most promising possibility lies in other distribution technologies. Broadcast television stations, of course, have been providing video programming without the use of telephone poles ever since video programming could be delivered to a viewer's home at all. Other technologies such as direct broadcast satellite (DBS) and "wireless cable," and even VCRs and laser videodiscs, have already minimized any

85. *See*, *e.g.*, *Chesapeake & Potomac*, 42 F.3d. at 199 ("There can be no question, then, but that the interests Section 533(b) serves are 'significant.'"); Ameritech Corp. v. United States, 867 F. Supp. 721, 734 (N.D. Ill 1994). The *US West* court could not discern any Congressional intent, but found that the interests suggested by the FCC and DOJ were important. *US West*, 1994 WL 760379, at *9.

86. *See First Video Dialtone Order*, *supra* note 22 at 5787.

87. *See US West*, 1994 WL 760379, at *10.

88. *Id*.

89. *Chesapeake & Potomac*, 42 F.3d at 200 (quoting Chesapeake & Potomac Tel. Co. of Va. v. United States, 830 F. Supp. 909, 930 n.9). *See also Ameritech*, 867 F. Supp. at 736 n.8 (following *Chesapeake & Potomac*, 830 F. Supp. 721, regarding pole attachments).

90. BellSouth Corp. v. United States, 868 F. Supp. 1335, 1343 (N.D. Ill. 1994).

91. *Id*.

potential threat of (harmful) discriminatory pole access. Emerging technologies will blunt this alleged threat further.

b. Cross-Subsidization

Another governmental interest advanced was that the ban is necessary to protect against cross-subsidization. As the appellate courts observed, it is difficult to believe that a telephone company could engage in cross-subsidization with respect to its provision of video programming, as opposed to video transport.[92] The salaries of writers, actors, producers, directors and, so forth, could not likely be hidden in the accounts for local telephone service. Indeed, it is difficult to imagine any costs associated with the production of video programming that would resemble those of local telephone service. For the sake of argument, the *BellSouth* court, however, did accept the possibility that cross-subsidization might be more likely to occur when a telephone company was allowed to provide video programming due to greater incentives to monopolize the industry.[93] Still, the court noted that the FCC already has in place a regulatory scheme designed to prevent anticompetitive actions by LECs, such as accounting safeguards, and also pointed out that these regulations could be strengthened.[94] Further, the *BellSouth* court found that alternatives advanced by the FCC in its *First Video Dialtone Order*, such as structural separation and providing that a telephone company's provision of video programming be limited to a percentage of common carrier capacity, would be less burdensome on the telephone companies' speech.[95]

The *Ameritech* court also considered the possibility that a telephone company's ability to provide video programming might increase the incentives of the telco to cross-subsidize, but found that the statements in favor of repeal by the FCC and the DOJ undercut the government's positions.[96] Not surprisingly, it proved difficult for the FCC and DOJ to argue for the ban on the grounds that it promoted competition after having pre-

92. *See* US West, Inc. v. United States, No. 94-35775, 1994 WL 760379, at *11 (9th Cir. Dec. 30, 1994); *Chesapeake & Potomac*, 42 F.3d at 200.

93. *BellSouth*, 868 F. Supp. at 1342.

94. *Id*. (citing *First Video Dialtone Order*, *supra* note 22, at 5828).

95. *Id*. at 1342–43. These less restrictive alternatives are discussed *supra* 11–13 and note 27. The *BellSouth* court further suggested the possibility that even less restrictive alternatives to these might be found. The court did not find that any of these regulations were sustainable under an intermediate scrutiny analysis. Rather the court merely noted that there were substantially less restrictive alternatives.

96. *See* Ameritech Corp. v. United States, 867 F. Supp. 721, 734–36 (N.D. Ill. 1994). The statements by the FCC and DOT, as well as by the NTIA, are discussed *supra* 14.

viously argued against the ban on the grounds that it harmed competition.

c. Fostering Diversity or Thwarting Monopolistic Tendencies

As two courts pointed out, the robust economic health of the cable television industry made claims that the telephone company would monopolize the provision of video programming doubtful.[97] What once might have been a sufficient reason for the ban has since changed, as the cable industry has grown enormously since the ban was first implemented, and now passes by over 90% of the homes in the United States.[98] Again, the statements of the DOJ and the FCC regarding the anticompetitive impact of the ban, coupled with the fact that Congress never made any definitive findings with respect to the ban, caused courts to seriously question whether or not the ban had the effect of preventing monopolies.[99] None of the courts considering this question found that the government could show, even when viewing the evidence in the light most favorable to it, that the telco-cable cross-ownership ban was narrowly tailored to promote the government's purported interest in promoting diversity in the provision of video programming and in preventing a monopoly in that market.[100] *BellSouth* pointed out that the ban may actually diminish diversity because telephone companies are precluded from competing with the cable monopolists in the telephone companies' service areas.[101]

D. *The Telco-Cable Cross Ownership Ban Fails the Intermediate Scrutiny Test*

No court could find that the ban was a narrowly tailored means of promoting the government interests.[102] Therefore, the ban was struck down by each court to which it was presented.[103] At present, nearly all the telephone companies have an injunction prohibiting the government

97. *See US West*, 1994 WL 760379, at *10; *BellSouth*, 868 F. Supp. at 1341.

98. *See BellSouth*, 868 F. Supp. at 1341.

99. *See*, *e.g.*, *BellSouth*, 868 F. Supp. at 1341 n.9; *Ameritech*, 867 F. Supp. at 734–35.

100. *See US West*, 1994 WL 760379, at *11; *BellSouth*, 868 F. Supp. at 1342. *See also Ameritech*, 867 F. Supp. at 736.

101. *See BellSouth*, 868 F. Supp. at 1341.

102. *US West*, 1994 WL 760379, at *14; Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d at 202; *BellSouth*, 868 F. Supp. at 1344; *Ameritech*, 867 F. Supp. at 736.

103. *See US West*, 1994 WL 760379, at *14; *Chesapeake & Potomac*, 42 F.3d at 185; *BellSouth* 868 F. Supp. at 1344; *Ameritech*, 867 F. Supp. at 737. *See also* NYNEX Corp. v. United States, No. 93-323-P-C (D. Me. Dec. 8, 1994), United States Tel. Assoc. v. United States, No. 1:94CV01961 (D.D.C. Feb. 13, 1995).

from enforcing the ban against them.[104] The FCC announced that it would not enforce the ban against any company that was a party in one of the cases where an injunction against the FCC's enforcement was issued or against any company as to the extent it operates within the Fourth and Ninth Circuits.[105]

III. GOING FORWARD

While the unconstitutionality of an outright ban against telephone companies' provision of video programming in their service areas appears to be beyond question,[106] the question of how other, less restrictive regulations will be treated remains open.

The FCC has initiated proceedings seeking comment on, *inter alia*, how it should alter its video dialtone regulations to reflect the entry of telephone companies into the video programming market.[107] In the *Fourth Further NPRM*, the FCC proposes a number of "safeguards," many of which burden the provision of video programming by telephone companies.[108]

For example, the FCC seeks comment on whether it should allow telephone companies to provide video programming *only* over video dialtone platforms.[109] This requirement would prevent a telephone company from operating a traditional-style cable system in its service area, as well as prohibit it from acquiring the existing facilities of a cable company operating within the telephone company's service area.

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104. The companies that are parties to suits in which an injunction has been issued include Bell Atlantic, US West, BellSouth, Ameritech, NYNEX, GTE, SBC Communications (formerly Southwestern Bell) and most members of the United States Telephone Association ("USTA"). SNET is the major exception, having not participated in the USTA suit. *See* cases cited *supra* note 2.

105. Comm'n Announces Enforcement Policy Regarding Tel. Co. Ownership of Cable Television Sys., DA 95-520 (FCC Apr. 3, 1995) (public notice).

106. A number of the decisions discussed in this article are pending further review. While it does not appear likely, subsequent Supreme Court or appellate decisions could, of course, reverse the decisions.

107. Tel. Co.-Cable Television Cross-Ownership Rules, 60 Fed. Reg. 8996 (1995) (to be codified at 47 C.F.R. § 63) (proposed Feb. 16, 1995) (fourth further notice of proposed rulemaking) [hereinafter *Fourth Further NPRM*].

108. The FCC continues to require telephone companies to obtain § 214 approval, *see supra* note 4 and accompanying text, prior to constructing or acquiring cable or video dialtone systems in their service areas. Comm'n Announces Enforcement Policy Regarding Tel. Co. Ownership of Cable Television Sys., DA 95-520 (FCC Apr. 3, 1995)(public notice). The FCC also states that any § 214 certificates "granted will be conditioned on the outcome of the {*Fourth Further NPRM*}." *Id.*

109. *Fourth Further NPRM*, *supra* note 107, at 8997.

This sort of prohibition would burden a telephone company's ability to provide video programming in the manner it finds most advantageous, without banning the provision of video programming outright. Because it infringes to some degree on the telephone companies' First Amendment interests, any regulation along these lines will be subject to some amount of review.

Since this regulation is not applicable to the industry generally (quite obviously, since a cable company can operate a traditional cable system), the regulation would be subject to heightened scrutiny. Such a regulation would also be no more content-based than the cross-ownership ban, and therefore would not be subject to strict scrutiny. Thus, a regulation prohibiting telephone companies from providing video programming via a traditional cable system, like most of the other possible regulations suggested in the *Fourth Further NPRM*, would be subject to the same intermediate-level scrutiny as the telco-cable cross-ownership ban itself.

The results, however, could be quite different, and will certainly depend on the particular regulations actually implemented by the FCC. In addition to the proposal mentioned above, the FCC has also discussed a wide variety of other "safeguards."[110] These safeguards include limiting telephone companies to a certain percentage of their common carrier platform's capacity, regulations regarding non-discriminatory access to technical network information and customer proprietary network information (CPNI),[111] structural separation,[112] and others.

The cases striking down the ban left the possibility for less restrictive regulation wide open, and did not comment on whether or not any of the less restrictive regulations would be constitutional. The mere mention of a less restrictive alternative, however, hardly amounts to a judicial determination that the alternative is constitutional. Indeed, the court of appeals in *Chesapeake & Potomac* specifically pointed out that it was not passing on the constitutionality of anything except the ban.[113]

Nonetheless, the cases striking down the cross-ownership ban do illustrate the most likely framework for how regulations emerging from the *Fourth Further NPRM* will be evaluated by the courts: are the regulations narrowly tailored to serve a substantial government interest? A ban on acquisitions to advance the FCC's two-wire policy will be evaluated on (1) whether the two-wire policy is a substantial governmental

110. *Id.* at 8998–9000.

111. *Id.* at 8999.

112. *Id.* at 9000.

113. Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 202 n.34 (4th Cir. 1994).

interest,[114] (2) whether the ban on acquisitions actually serves the purported interest, and (3) whether the ban on acquisitions is narrowly tailored.

The regulations proposed by the *Fourth Further NPRM* will probably be justified by reference to the same governmental interests which supported the ban. Whether or not the restrictions serve the ban, and whether or not they are narrowly drawn will prove difficult questions which will not be resolved without reference to the provisions and effects of the regulations actually promulgated. An inquiry will necessitate a fact-specific analysis of the regulations in order to determine how narrowly drawn they are and whether they actually serve one or more of the purported government interests. It is likely, however, that the more burdensome any particular restriction is on a telephone company's provision of video programming, the more difficult it will be for the government to show that it is narrowly drawn.

Limiting a telephone company's provision of video programming to a specified percentage of common carrier capacity would probably be more suspect than a requirement of structural separation. The percentage limit prohibits a telephone company from engaging in a particular type of speech at a certain point. Structural separation, on the other hand, while perhaps placing some burden on speech by increasing the costs of providing video programming by limiting economies of scope, does not, at any point, prohibit programming. Structural separation is more narrowly drawn because it focuses on the telephone company's corporate structure instead of its speech.

Requiring non-discriminatory access and confidential treatment of CPNI in video dialtone platforms presents a different issue. If the telephone company elects common carrier treatment of its provision of video dialtone, there is little chance that the non-discriminatory access and confidential treatment of CPNI will be considered overly burdensome. If the telephone company does not wish to operate under these typical common carrier obligations, allowing it to operate as a traditional cable system would allow it to avoid them. However, if the telephone company is required to provide video programming under the common carrier model, the requirement of nondiscriminatory access may prove too great a restriction, as such a requirement would prohibit any editorial discretion which might be exercised by the telephone company.[115]

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114. The two-wire policy may not, itself, be a substantial government interest. Instead, the governmental interest may be more broadly stated as an interest in encouraging multiple providers of video programming. Stating the governmental interest in this manner greatly increases the number of potentially less restrictive alternatives.

115. Confidential treatment of CPNI is less obviously a restriction on the telephone company's speech than non-discriminatory access. While it may force the telephone company to

In addition to providing a framework for future regulation of video programming provided by a telephone company, the cases striking down the cross-ownership ban help to drive home the federal courts' shift away from medium-based First Amendment standards. Although broadcast remains subject to more intrusive regulation,[116] cable, print, video dial-tone, and most other communications media are being evaluated under the same standards. Application of these standards may vary somewhat due to the factual situations (such as market conditions and technical properties), but these variations only matter insofar as they relate to the government's goals or the feasibility of more or less narrow regulation.

These cases indicate that courts may be moving towards an acceptance of the idea that technological advances should not, at least on their own, bring about new and discrete areas of First Amendment jurisprudence.

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forgo revenues from joint marketing operations (while no similar restriction adheres to all providers of video programming), the requirement does not seem overly burdensome.

116. *See supra* note 52 and accompanying text.