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Regulating the Multi-Media Chimera: Electronic Speech Rights in the United States

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Regulating the Multi-Media Chimera:* Electronic Speech Rights in the United States

ALLEN S. HAMMOND**

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* The chimera is a mythological monster of divine origin. It was part lion, part goat and part dragon. THOMAS BULFINCH, BULFINCH'S MYTHOLOGY 918 (1979). The chimera provides an apt analogy for the converging telecommunications and video distribution media. One industry observer has already compared the multi-media phenomenon to the mythical beast. See Peter Lewis, Ex Machina, N.Y. TIMES, Jan. 7, 1990, at A4.

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1
Information technologies are inherently democratic. They force decentralization and individualism. They are designed for expansion, for interconnection, for networking. They have no respect for barriers or roadblocks or... boundaries.1

INTRODUCTION

Today, telecommunications network technology augmented by computers, telephones and fax machines, has increased the capability of network owners, information providers and users to manipulate and control the information transported over the

1. William G. McGowan, Remarks to the Society of Telecommunications Consultants (May 19, 1990), at 9. (McGowan is the former Chairman and CEO of MCI Communications Corp.) (source on file with author).
This increase in manipulation and control enhances opportunities to engage in electronic speech, assembly and associational activities for the purposes of creating and sharing information. The types of information that can be generated and shared on these networks can be personal, political, scientific, religious, artistic, commercial, philosophical or illicit.

Further enhancements to access and speech opportunities may result from two current network transitions. The first is the transition from current media distribution networks of cable and telephony to multi-media interactive networks. The second involves the transition from such current media distribution networks to programmable advanced intelligent networks. These transitions have the potential to affect the control of access and

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2. As used in this article, "network owner" means a firm having legal and physical ownership of the transmission network(s) over which information is carried. "Information provider" means a firm or individual which does not have any ownership of the network over which its information service or program flows. The information may take any of several forms including video, voice, print or data. "User" or "end user" means an individual or group that subscribes to the network to receive or to communicate information. Like the information providers, users have no ownership of the network.

3. Subscribers to "augmented telecommunications networks" have the ability to associate or assemble by voice and/or video in conference calls, via electronic mail and computer bulletin boards. By using 800 and 900 numbers, information providers can share information with hundreds of others interested in particular subject matters. Such information providers act as "broadcasters" in that they provide opportunities for information to travel widely to interested receivers.

In the near future, customer subscribers may be able to reconfigure network components allowing the subscriber to create customized services for the creation, transmission and sharing of information. For instance, as greater amounts of intelligence are migrated from central office switches to other locations in public and private networks, the opportunities for user creation, manipulation, dissemination and sharing of information increase. As a result, federal policies regulating the distribution of intelligence in advanced intelligent networks merit serious attention. These policies determine, in part, the specifications and standards for the equipment in which the intelligence will be housed; who may manufacture, own or have access to the equipment; and the manner in which the equipment may be incorporated into existing and future networks. In the process of making the above determinations, those who create the policies will determine how, to what extent, and for what purpose network user/subscribers will acquire technical access to the network. See Allen S. Hammond, Private Networks, Public Speech: Constitutional Dimensions of Access to Private Networks, 55 U. PITT. L. REV. 1085 (1994) [hereinafter Private Networks].
speech at the network function, network transmission and information content levels.

Multi-media convergence involves the transition from technologically separate, often mono-functional, one-way broadcast, cable and telephone transmission networks for video, voice, and data information, into broadband, multi-media, multi-functional, interactive networks. As presently configured, only telecommunications (telephony and data networks) allow two-way interactive communication, including equal capacity in both directions, on the same network. The convergence of network technologies, functions and information streams holds the promise of fully interactive, multi-media communication for American society. Moreover, it does so at a time when effective interpersonal and intergroup communications are becoming increasingly electronic. In addition to interactive voice, data and print communication, Americans will be able to engage in video and multi-media communication.

The transition to programmable advanced intelligent networks involves increased use of software intelligence housed in a variety of machines dispersed throughout a telecommunications network. This determines how information may be manipulated on the network. The machines and the software intelligence may potentially be owned by network owners and network users.

4. Broadband networks have a wider bandwidth than voice-grade telecommunications channels. See Data Communications Glossary, DATA COMM., Mar. 1988, at 229.

5. For example, interactive communication on cable networks consists of "pay-per-view" services which rely on two separate networks, telephony and cable, to accomplish two-way communication. However, the downstream capacity of the cable channel is far in excess of the upstream capacity of a digital telephone line. Otherwise, cable channels are one-way down stream modes of communication. Broadcast channels, whether radio or television, possess the same one-way downstream capability of cable channels. See Gibbons Burke & David Nusbaum, Cruising the Info Superhighway, FUTURES: MAG. OF COMMODITIES & OPTIONS, June 1994, at 48. To the extent broadcast channels may be used for two-way interactive communications, another network, telephony, is required. Id.

6. Policies addressing the evolution of intelligent networks seek to assure enhanced service providers and users network access and interconnection which is technically and financially equivalent to that which the network owner/provider enjoys. See Dawn Bushaus, Enhanced Services-ONA and AIN on Collision
MULTI-MEDIA CHIMERA

Furthermore, the transition to advanced intelligent networks ultimately holds the promise of user control, as well as network owner control of the networks over which information flows. Users will be able to program these networks to create communications using variables including, but not limited to: the intended recipients, locations, transmission paths, speeds, type of information and time of day.

The convergence transition concerns the type of media (e.g., voice, data, print or video) and complexity of information (single or multi-media) network owners and users may communicate to others on the network as configured and provided by the network owner (i.e., it depends upon the capabilities of the network as configured by the owner). On the other hand, the network intelligence transition concerns how the network may be reconfigured or programmed by the network owner or the network user to manipulate and move information; it provides the flexibility to change the configurations upon which the convergence transition depends.

Collectively, multi-media programmable networks could usher in a new era of electronic speech communication in the United States. As proponents of recent legislation acknowledged: "[a] broadband communications infrastructure will be every American's tool of personal emancipation; will generate a quantum increase in Americans' freedom of speech . . . and freedom of ideas; will allow Americans to recapture, yet expand upon, the democratic tradition and community spirit of the early years of this nation."

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Course, COMM. WK., June 17, 1991, at 32L. Presently, the Bell Operating Companies are operating under Open Network Architecture (ONA) guidelines established by the Federal Communications Commission in the 1980's. Id. ONA was intended to give enhanced service providers, such as voice messaging services, as well as on-line data services such as Prodigy and Compuserve, fair and equal access to the local exchange portion of the public switched network for provisioning their services. Id.

Though previous and current legislative efforts have attempted to regulate these evolving technologies, exactly who will be the recipients of this wealth of communicative power remains uncertain. The question of who will benefit from the development of networks with interactive, multi-media and programmable capabilities is subject to intense debate among industry, the general public, the courts, as well as previous and current congresses and presidential administrations. Most recently, the debate has been fueled by developments including the increase of proposed mergers of telephone, cable and video programming firms. The legal debate has also included industry-initiated constitutional challenges to video and information market entry restrictions on local telephone firms, unaffiliated party access requirements imposed on cable otherwise make information available in electronic form.

8. See infra part II.
11. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), aff'd, 42 F.3d 181 (4th Cir. 1994). While the Fourth Circuit affirmed the district court's decision which applied intermediate scrutiny to determine the constitutionality of § 533(b) of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended by the 1992 Cable Act in multiple sections of 47 U.S.C.) [hereinafter 1984 Cable Act], it did not adopt the lower court's reasoning. The district court concluded that the statute regulated the speech of telephone companies based upon the content of the proscribed speech. Because the statute required that the government determine whether video programming akin to that provided by broadcast stations was being provided by the telephone company, the lower court reasoned that the statute required reference to the content of the video message conveyed. 830 F. Supp. at 923. The Court of Appeals disagreed; citing Regan v. Time, Inc., 468 U.S. 641 (1984),
firms and challenges to congressional and administrative agency-authored restrictions on the transmission of indecent information over telecommunications and cable networks. Government it concluded that the statute's reference to broadcast television distinguished speech based on whether it was or was not video programming, rather than on the content communicated via the programming. 42 F.3d at 193-95.


13. At least two circuit courts have heard challenges to telephone company decisions to deny transmission of indecent communications. See Dial Info. Servs. Corp. of N.Y. v. Thornburg, 938 F.2d 1535 (2d Cir. 1991); Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291 (9th Cir. 1987); Information Providers Coalition for the Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

Additionally, the Court of Appeals for the District of Columbia ruled on a challenge to federal legislation authorizing cable operators to deny carriage of indecent programming on their leased and public access channels. See Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993). In response to a request for rehearing by the FCC and the Department of Justice, the court recently granted an en banc rehearing of the Alliance case.

efforts to revise the communications regulatory structure through legislation in an effort to stimulate rapid development of the "National Information Infrastructure" have also been controversial.\textsuperscript{14}

A central question in the debate concerns the control of access to the merging telecommunications and cable television networks and the flow of information. In other words, who will have access to these networks and what limitations will be imposed?

Privately-owned networks allow for the distribution of informa-

Cable Television Consumer Protection and Competition Act of 1992 properly permits cable operators to eschew carriage on access channels of programming the operators deem to be obscene or sexually explicit).  

tion generated by owners and information providers or users. The owners of local telephone and cable television networks have the ability to exercise bottleneck control over the flow of information to and from their information providers and users. In addition, because they are private, they arguably possess the constitutional right to generate, select and edit information transmitted over their networks. Consequently, just how the potential for private censorship will be balanced against the potential for governmental censorship in pursuit of expanded electronic speech for American society becomes an important issue.

Many industry observers, regulators and scholars anticipate the metamorphosis of telephone and cable television network firms into broadband, interactive, multi-media networks. As the distribution functions and information streams of cable and telephony merge, the issue of electronic speech conducted by network owners, information providers and users, which receive varying degrees of constitutional protection when conducted over the antecedent technologies, will shift to the merged networks. Moreover, as these networks become programmable, user capabilities to program the network will increase. As a result, the meaning of private ownership and control over access and speech via network technology and configuration may change.


Some of the strategic market and technical reasons for the merger of telephne and cable networks are explained in, S. Ronald Poster, CATV Systems are Evolving to Support A Wide Range of Services; Delivering Voice and Other Services Over Cable Television Systems, TELECOMM., Jan. 1994, at 95; Dave Schriftgiesser, Key Trends in Broadband Communications: the Next Five Years; Nobody is waiting for Alternatives to Asynchronous Transfer Mode, TELECOMM., Jan. 1994, at 101; Rick Pinkham, Combining Apples and Oranges; part 1, Telecommunications, and CATV Companies Merge to Form Full Service Hybrid Networks, TELEPHONY, Jan. 24, 1994, at 32; Alan Stewart, Classless Cables; Common Networks for Televisions and Telephones, COMM. INT'L., Oct. 1993, at 8.
Some preliminary guidance regarding the exercise of electronic speech rights on future broadband interactive networks may be gleaned from the judicial resolution of current challenges to government-apportioned access and speech rights on local cable television and telephone networks. These challenges address network owner control over access to the networks and regulation of the content of protected speech, such as indecency. As such, they address two of the three levels at which access and speech may be controlled: owner control over access and regulation of speech. The third level is the ability to program the network and thereby determine what speech may be transmitted by virtue of what the network makes possible. This level of control has been addressed in FCC administrative proceedings concerning advanced intelligent networks and recent congressional attempts to revise the Communications Act of 1934.

In recent challenges to the telephone-cable television cross-ownership prohibition of the 1984 Cable Act and the “must carry” provisions of the 1992 Cable Act, the courts have begun to address access and speech rights enjoyed by telephone and cable television network owners. The courts have also begun to determine the extent to which government may limit the ability of

16. See discussion infra parts III.B.2, III.C-III.D. Local telephone network owners have lodged challenges against government efforts to preclude them from engaging in video communications in their local service areas. See Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), aff'd, 42 F.3d 181 (4th Cir. 1994). Local cable television operators have challenged the government's attempts to mandate non-affiliated programmer access to cable networks. See Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993). Additionally, network information providers and users have levied constitutional challenges against government efforts to facilitate or sanction network owner control of indecent speech on telephone and cable networks. See Dial Info. Servs., 938 F.2d 1535; Carlin Communications, 827 F.2d 1291; Information Providers, 928 F.2d 866; Alliance for Community Media, 10 F.3d 812.

17. See supra note 13.


19. See supra note 14 and accompanying text.

20. See supra note 11 and accompanying text.


22. See discussion infra parts III.B.2, III.C-III.D.
future network owners to be information providers and the control such owners may exercise over the access and speech of actual and potential users of the network.\textsuperscript{23} In light of current litigation, telecommunications network owners may be granted speech rights commensurate with those of cable operators at a time when cable operators' speech rights have been expanded to preclude government-mandated access by certain non-affiliated users. Consequently, the scope of user access, speech opportunities and speech rights could shrink substantially.

Recent court decisions addressing challenges to government regulation of indecent programming via telephony or cable television may presage a revision of access and speech rights afforded network owners and subscribers. Telephone common carriers are increasingly viewed by the courts as private speakers with the corresponding right to refuse carriage or bill services to information providers seeking carriage of indecent programming that the carrier deems undesirable.\textsuperscript{24}

\textsuperscript{23} See discussion infra parts III.B.2, III.C-III.D.

\textsuperscript{24} See Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) (Scalia, J., concurring); Dial Info. Servs. Corp. of N.Y. v. Thornburg, 938 F.2d 1535 (2d Cir. 1991); Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291 (9th Cir. 1987); Information Providers Coalition for the Defense of the First Amendment, 928 F.2d 866 (9th Cir. 1991).

In each of the appellate cases, the issues concerned messages for which the telephone companies collected fees on behalf of the information provider. The information providers were allowed to provide messages for which the telephone companies did not provide billing services. However, the difficulties associated with collections absent the assistance of the phone companies rendered the information providers' businesses marginal at best. The carriers' provision of billing services was "voluntary" rather than required by law.

In Information Providers, the Ninth Circuit considered, inter alia, the petitioners' assertion that FCC regulations requiring an individual wishing to receive "dial-a-porn" messages to notify the carrier in writing, constituted a prior restraint. 928 F.2d at 877. The court concluded that no prior restraint was involved because there was no action on the part of the government to require governmental approval in advance for speech, or to enjoin, censor or license speech. Id. Instead, the court found that only telephone companies are involved. Id. at 877-78. Additionally, as they are private actors, they are constitutionally free to ban dial-a-porn from their networks and/or to refuse to provide billing services to dial-a-porn information providers. Id. Similar conclusions have been reached in other cases. See Carlin Communications, 827 F.2d at 1293, 1295, 1297; Dial Info. Servs., 938 F.2d at 1543.
Meanwhile, a recent District of Columbia Circuit opinion addressed the constitutionality of Section 10 of the Cable Television Consumer Protection and Competition Act of 199225 and subsequent implementing regulations issued by the FCC authorizing cable operators to refuse to carry indecent communication on their leased and public access channels.26 To date, the courts have upheld governmental efforts to regulate indecent programming on cable television and telephone networks by allowing network operators to exercise substantial control over the flow of such information in telephony. The courts may uphold such regulation for cable television.27

If these regulations continue withstand judicial scrutiny, they will provide precedent for network owners’ denial of access to users seeking to engage in constitutionally protected speech. While network owners have previously been prohibited from exercising editorial control over the content of protected speech on certain portions of their networks, they may be able to exercise such control as constitutionally protected speakers.28 Network owners


27. See Dial Info. Servs., 938 F.2d 1535; Carlin Communications, 827 F.2d 1291; Information Providers, 928 F.2d 866.

may also refuse to transact business with subscribers in order to avoid presenting undesirable viewpoints and refuse to provide services critical to the subscriber's ability to communicate because they are not classified as telecommunications services.  

The confluence of the technology-forged transitions creates important opportunities for the increased exercise of electronic speech, related assembly and associational activities by both network owners and users. Access to networks is increased while control over the creation, manipulation and movement of information is increasingly decentralized.

Simultaneously, the government's regulatory efforts also create opportunities for the potential loss of network owners' electronic speech rights. Judicial decisions opining that cable and local telephone network owners possess relatively unlimited speech rights increases the concentration of private control over electronic speech and its related activities. Similarly, allowing network owners to restrict the presentation of indecent material increases their control of electronic speech.

Finally, if state-encouraged "private" exercise of control over access and speech is distinguished from state action, constitutional justifications in support of retaining and expanding network user rights become ineffective. The justification for categorizing user and subscriber entitlements as rights of access and speech on current broadcast, cable and telephone networks depends upon a constitutionally sanctioned characterization of network transmission providers as quasi-private, quasi-public servants. These servants extend some measure of user and subscriber control over the network and the content of communication in exchange for the receipt of government benefits such as scarce public resources and monopoly status. In this fashion, "public" access and speech rights

29. Professor Jerome Barron has taken legitimate issue with the circuit court opinions. Jerome Barron, The Telco, The Common Carrier Model and the First Amendment - The "Dial-A-Porn" Precedent, 19 Rutgers Computer & Tech. L.J. 371, 385-91 (1993). He argues that the courts, in upholding the decisions of telephone common carriers to refuse carriage or the provision of billing services to dial-a-porn providers, have given telephone common carriers an unjustified measure of editorial control over the content of speech transmitted over their facilities. Id.
are counterbalanced against private rights in the interest of diversity and the relative free flow of information.

In its recent efforts to curtail the transmission of troublesome speech (i.e., indecency), the government has recast network providers as "private owners." As such, the owners' decisions to deny access to purveyors of indecent speech are constitutionally immune. This strategy has achieved mixed success to date. Where successful, the strategy has resulted in extending the domain of subscriber or user speech over which the network provider may exercise direct (or indirect) control. In the process, the government rewrites the balance in favor of network owners.

Intelligent network, media convergence, and indecency policies affect the evolution and exercise of electronic speech, assembly and association at the network function, network access and content levels. Moreover, they do so at a time when domestic and global reliance on electronic speech is growing, and substantial efforts

30. See Information Providers Coalition for the Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991); Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993).

31. These activities are increasingly taking place electronically on a global scale. Indeed, the globalization of the telecommunications infrastructure is extending to greater numbers of individuals in a growing number of countries with sometimes unsettling political consequences. For instance, fax machines were used to keep the Russian President, Boris Yeltsin, in contact with the rest of the world when "hardliners" captured the nation's broadcast facilities during the 1991 Soviet coup attempt. See Alfred C. Sikes (Chairman of the Federal Communications Commission), Remarks at Communications Week International's "The Networked Economy Conference" (Mar. 5, 1992) (citing the Feb. 8, 1992 issue of the ECONOMIST). See also John Perry Barlow, Electronic Frontier: The Great Work, COMM. OF THE ACM, Jan. 1992, at 25. See generally Gladys D. Ganley, Power to the People via Personal Electronic Media, WASH. Q., Spring 1991, at 2.

Direct-dial telephone lines, computer bulletin boards, fax machines and computer networks were used by the student dissidents in China to communicate with the rest of the world during the pro-democracy movement in 1989. Id. Alternative networks of fax machines and computers were also used in the 1988 Chilean plebiscite to guard against efforts by the "Pinochet" forces to compromise the vote. Id. Fax machines and personal computers allowed Panamanian dissidents in the United States, Switzerland, Spain, Great Britain and Latin America to communicate with Panama when Noriega seized control of the independent broadcast and news media in 1987. Id.

However, the political uses of telecommunications networks should not obscure
to merge the once competing network owners are well under way.

The judicial and administrative proceedings address access to programmable intelligent networks, multi-media convergence, and indecency and define the scope of electronic speech rights on the interactive, multi-media broadband networks which are evolving from the antecedent technologies of broadcast, cable and telephony. First, they significantly affect the physical network in terms of architecture, functionality and deployment, helping to establish the limits of what users may actually accomplish on the networks in terms of the manipulation, transportation and communication of information. Second, they establish the preliminary scope of user rights based on the extent to which the government sanctions owner-exercised control over network access and speech content. Finally, because they set a significant portion of the networks' functionality as well as the ownership structure, they set many of the boundaries and criteria for subsequent judicial adjudication and apportionment of speech rights. As a consequence, they go a

the underlying fundamental uses. These networks can be used to “increase the number of individuals who can initiate electronic speech and the number of electronic fora available for assembly within or between countries.” See Allen S. Hammond, Regulating Broadband Communications Networks, 9 Yale J. on Reg. 181, 190 (1992) [hereinafter Regulating Broadband]. The process of globalization is expected to continue as nations modernize their telecommunications infrastructures and the cost of transmission continues to drop. See Special Report: Universal Telephone Service; Ready for the 21st Century?, 1991 Annual Review of the Institute for Information Studies, EDGE, Dec. 2, 1991. In the process, there is a growing potential for new aggregations of users and individuals to develop, often forming ephemeral communities of interest or, what one scholar has called “electronic neighborhoods.” Id. Collectively, these communities could combine to become the “global networked society.” See Pekka J. Tarjanne, Open Frameworks for Telecommunications in the 1990s: Access to Networks and Markets, Telecomm., Apr. 1990, at 22.

32. Historically, much of the adjudication and subsequent apportionment of electronic speech rights has been based upon a technology's architecture and deployment, as well as the manner in which it is owned. As a consequence, technical and market-based decisions about network architecture, functionality and ownership affect the scope of subsequently adjudicated network access and electronic speech rights.

For instance, broadcast network architecture developed into a point to multipoint omnidirectional technology based in part on the peculiar characteristics of radio waves. Among the peculiarities was interference caused by adjacent frequencies. The technology's characteristics combined with the government's
significant way in establishing who shall have electronic access and speech rights and how such rights will be balanced against the rights of others.

This article examines recently proposed legislation, regulatory proceedings and current litigation related to the regulation of indecent speech and network owner control over access and speech in an attempt to propose how electronic speech rights might be apportioned in the future. Part I explores how evolving programmable, interactive, multi-media, broadband networks could facilitate the exercise of electronic speech, assembly and association. Part II reviews recent government efforts to revise the Communications Act of 1934 in response to expanded opportunities for speech which network convergence and programmability provide. Part III briefly discusses the constitutionality of governmental efforts to mandate user access and/or limit owner access and use of cable and telephone networks. Part IV briefly examines the constitutionality of recent government efforts to regulate indecent speech in cable and telephony by placing significant control over such speech with the network owner.

The article concludes that how current efforts to limit indecent
speech are accomplished,\textsuperscript{33} as well as the possible outcomes of current litigation concerning access to cable and telephone networks,\textsuperscript{34} could result in increased concentration of control over electronic speech at the network owner level.\textsuperscript{35} Such developments would conflict with government efforts to render current and future networks more open and subject to greater user control as opposed to owner control.\textsuperscript{36} Moreover, such developments could severely limit potential opportunities for expanded electronic speech, assembly and association by network users.

Ideally, policies placing the responsibility for electronic speech with the actual speaker, while encouraging owner and user access, speech, and control over the network, better assure the realization of electronic First Amendment rights. Further, such policies may be pursued and implemented consistently with First Amendment prohibitions on government regulation of protected speech and related associational and assembly activities.

Finally, the article concludes that the government, in the process of managing market entry and firm competition, runs the risk of ceding creation and control of speech activities to private firms. This is particularly true to the extent that the First Amendment is

\begin{itemize}
  \item \textsuperscript{33} For example, the dial-a-porn decisions arguably support the proposition that carriers may deny functional access to their networks. First, the services necessary to render a use viable are not "carrier" services but private. Second, access may be denied for "private business reasons" which may be motivated by constitutionally questionable government threats of prosecution or anti-competitive motivation. \textit{See supra} note 13.
  \item \textsuperscript{34} For instance, decisions that telephone and cable companies possess relatively unfettered speech rights over their facilities could result in the loss of the significant availability of non-discriminatory common carrier and public access.
  \item \textsuperscript{35} The confluence of increased network provider liability for user speech coupled with increased network provider control over access and editorial decisions could result in perfectly rational decisions to limit access and speech in order to limit liability. Broadcast licensees and cable franchisees have succumbed to such logic before.
  \item \textsuperscript{36} Much of the philosophical thrust of current legislative and administrative initiatives to create open, broadband platforms for the transmission of non-network provider information, as well as FCC efforts to facilitate open network architecture and advanced intelligent networks' policies, would be blunted by policies combining network provider liability for user speech with greater network provider control over access and content.
\end{itemize}
interpreted solely as a negative bar to government censorship rather than as an affirmative protection for speech activities threatened by private action.

I. ACCESS, ELECTRONIC SPEECH, AND CONVERGENCE

A. Electronic Speech

1. Video-Speech

Electronic video communication is a constitutionally protected form of speech. Some individuals and groups, in addition to the cable network owner, engage in video communication over cable television channels through a variety of access regulations. These regulations afford programmers unaffiliated with the cable owner (including commercial programmers, citizens, educators and government officials) an opportunity to communicate with a portion of the cable viewing audience.

Regardless of programmer affiliation, electronic video flows one way from the programmer to the cable subscribing audience via the cable network. The audience cannot interact directly with the programmer in real time without resorting to another communications network, such as a telephone network. As a result, the speaker and the audience cannot truly electronically assemble or associate in the "same place at the same time." Additionally, regardless of their interactive limitations, cable access channels, whether required by "must-carry" regulations, public, educational or government (PEG) access rules or by leased access rules, provide electronic speech opportunities to non-affiliated entities, groups and individuals. Consequently, they increase the diversity of speakers and information available to the subscribing audience. The information communicated includes that of a work-related,

38. See discussion infra part III.C.
39. See discussion infra part III.C.
40. See infra text accompanying notes 217-18.
41. See infra text accompanying note 219.
scientific, educational, political, personal and/or illicit nature.42

2. Tele-Speech

Individuals using telephone, computer and fax-augmented interactive telecommunications networks engage in electronic speech and assemble and associate electronically to share information. Through electronic mail services, on-line computer bulletin boards, computer conferencing services, host computer facilities and digital libraries,43 network users are able to interact by voice, text, and increasingly, by video.44 They become speakers and publishers45 who have the ability to electronically associate on a deferred or real-time basis in ephemeral or formal electronic

42. See Bill Duryea & Brad Snyder, They Preach Hate of Public Access TV, ST. PETERSBURG TIMES, July 12, 1993, at A1 (addressing the difficulties raised by the use of a cable public access channel to promote ideas of the Nazis and the Ku Klux Klan); Bill Duryea, Cable TV Obscenity Issue Flares, ST. PETERSBURG TIMES, Mar. 21, 1993, at 1B, (discussing difficulties in preventing the presentation of arguably obscene programming on cable public access channels); David McLemore, Trying to Pull the Plug; San Antonio Cable TV Suicide Guide Angers Many, DALLAS MORNING NEWS, Nov. 14, 1992, at A1; see also Kelly Thompson, Cable Channel Excites Interest Among Teachers, NEWS & RECORD, Aug. 17, 1994, at BG1 (education); Martin Miller, TV Brings City Councils to O.C. Homes – Warts and All, L.A. TIMES, Jan. 30, 1994, at A1 (politics); Jim Adams, This Town Meeting Will be Electric; Dakota County Goes Interactive, STAR TRIB., Jan. 12, 1994, at B1 (politics); Penny Roberts, Video Gives Poor Teens Their Voice, CHI. TRIB., Nov. 3, 1993, § 2 at 7 (individual speech); June Cavarretta, Teacher’s Videos a Class Act: Kids Get to Star and Learn at Same Time, CHI. TRIB., Jul. 25, 1993, at 1 (education); Ted Appel, Wilson Debuts ‘Infomercial’ on State Budget Woes, UPI, May 11, 1993 (politics); Anthony Milligan, Abortion Issue Aired on Cable TV; Broadcasting: Two Programs on Torrance Public Access Channel Present Opposing Views of the Volatile Topic, L.A. TIMES, Nov. 1, 1992, at B7 (public controversy debate).


communities. Similarly, users may electronically assemble in real
time by voice, video, text or multimedia via on-line computer
bulletin board services or conferencing services. The types of
speech engaged in over these networks range from activities related
to the creation, receipt, and editing of information to interactive
communication between two or more persons.46

Because of the broad access afforded to the public by the
switched voice and packet networks to which the above-referenced
services are connected, individuals and groups increasingly have
the means to call information to the attention of a far greater
portion of the public.47 The telephone, "the poor man's transmitter,"48
through the use of computers and telecommunications
networks, has become a powerful transmission tool which is
capable of turning private conversations into public discourses.49

The level of electronic speech, assembly and association afforded
to individual users and groups by the computer-augmented public
switched network stands in stark contrast to that of traditional
broadcast, cable and voice telephone networks. In the case of
broadcasting and cable, communication is overwhelmingly
"downstream" from the network owner/speaker to the mass
audience.50 Opportunities for assembling or associating for the
purpose of communicating or sharing information are limited by

46. See Steve Lohr, Sound Bytes: Therapy on a Virtual Couch, N.Y. TIMES,
Aug. 28, 1994, at 7; Sandy Rovner, Molesting Children By Computer, WASH.
POST, Aug. 2, 1994, at Z15; Patricia Horn, Computers Link Kids Worldwide,
CHRISTIAN SCI. MONITOR, May 9, 1994, at 12; Daniel Cerone, Hollywood
Office Workers Feel Cupid's Byte, N.Y. TIMES, Mar. 26, 1994, at 21; Brad Patten,
Sex Rides the Fast Lane on Info Superhighway, PHOENIX GAZETTE, Feb. 7, 1994,
at C1; James Crawley, Internet Serves Up the World A La Modem With Access
to a Huge Range of Data and Ideas; The Net Hauls In Computer Users
47. See Data Communications Glossary, DATA COMM., Mar. 1988, at 229;
Frank J. Derfler, Jr., Linking LANs: Making the WAN Connection, P.C. MAG.,
48. Stephen Carter, Technology, Democracy, and the Manipulation of
49. See Ethan Katsh, Law in a Digital World: Computer Networks and
Cyberspace, 38 VILL. L. REV. 403, 414 (1993); Brenda Sapino, Building the
50. See Burke & Nusbaum, supra note 5 and accompanying text.
technology, law and the network owner.\textsuperscript{51} Efforts to engage in interactive communication via broadcast television or cable television require a second network such as a telephone to communicate "upstream" from the audience to the owner/speaker.\textsuperscript{52} In the case of broadcasting or cable television, communication between members of the audience unmediated by the network owner is not possible.\textsuperscript{53} Thus, in contrast to broadcast and cable technology, the switched interactive technology upon which computer augmented public switched network (PSN) relies affords far greater opportunities for unmediated electronic speech, assembly and association between network users.\textsuperscript{54}

Plain old telephone service (POTS) is basically a one-to-one interactive service. This is in contrast to computer-augmented switched networks which allow interactive communications between two individuals, an individual and a group, or between groups. The more open, interconnected and accessible the switched network, the greater the opportunity individuals and groups have to impart, receive and share diverse information.\textsuperscript{55} Under such circumstances, individuals and groups gain greater speech empowerment and access to information is increasingly democratized.\textsuperscript{56}

3. \textit{Tele-Speech and Telecommunications Architecture}

Much of the current voice, fax and computer-augmented information services which have extended the scope of electronic speech, assembly and associational activities rely on switched voice and packet switching which is provided by the long distance and local exchange portions of the public switched telecommunications network (PSTN).\textsuperscript{57} Providers of future information and electronic

\begin{itemize}
\item \textsuperscript{51} \textit{See Regulating Broadband, supra note 31.}
\item \textsuperscript{52} \textit{See Burke \& Nusbaum, supra note 5 and accompanying text.}
\item \textsuperscript{53} \textit{See Regulating Broadband, supra note 31.}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{See Katsh, supra note 49.}
\item \textsuperscript{56} FCC Chairman Alfred C. Sikes, Remarks Before the Freedom Forum Media Studies Center, National Conference on Media, Democracy, and the Information Highway (Oct. 27, 1992).
\item \textsuperscript{57} The PSTN is the backbone telephone network over which the majority of voice, and a substantial portion of data information, is transmitted and received. It is composed of the local and regional networks of local exchange carriers such
\end{itemize}
publishing services will also rely on the PSTN. Presently, local exchange networks still rely on central office switches which house the computer intelligence needed to manipulate and route calls.\textsuperscript{58} Networks using this intelligence are called "intelligent networks."\textsuperscript{59}

In intelligent networks (INs), the software-defined\textsuperscript{60} network as the RBOCs and GTE, as well as the long distance networks of interexchange carriers such as AT&T, MCI and Sprint. It transports voice and/or data transmissions made by subscribers between central office exchanges on the local/regional networks and/or the long distance networks. See Regulating Broadband, supra note 31; Steve G. Parsons, Seven Years after Kahn and Shew: Lingering Myths on Costs and Pricing Telephone Service, 11 YALE J. ON REG. 149 (1994).

58. The current state of telecommunications network development is similar to that of the computer industry in the 1950s and early 1960s. See David G. Anderson & William C. Pennington, Service Creation and the AIN, TELEPHONY, May 18, 1992, at 28. During that time period, the development of software necessary to run computer applications was controlled by computer manufacturers. Id. However, as the computer became an essential part of business enterprises, and systems containing embedded processors were developed in the late 1960s, users and manufacturers established their own software and software development departments. Id. As a result of the computer industry's shift to open interfaces and standard products, almost anyone can produce software for any computer. Id. Consequently, software manufacturing has become a major industry. Id.

Today's telecommunications networks are controlled in much the same way that computer software manufacturers used to control software development. Id. Switched networks are essentially run by large, often monolithic, distributed computer systems relying on software controlled by network equipment manufacturers and telecommunications providers. Id.


60. In the past, the provision of services in the public switched network was essentially hardware-defined. New services were provided by configuration of transmission capacity and characteristics and the selection of differing methods of customer interconnection. At that time, switching was a relatively simple function of establishing a connection between two transmission paths. Today, the introduction of new services and features is increasingly software-defined. Switching has become more than the establishment of a transmission path; it includes the use of high-level intelligence to direct information to users based upon the place of origin, the time of day, user input, information stored in a
switching intelligence is located in central office switch databases and is connected to the PSTN. In this structure, the switching network's function is limited to recognizing that a dialed number corresponds to a particular IN service. The service relays the message to a database which then responds to instructions from the central office computer database. All of the "intelligence" in the IN is located in one central node called the Service Control Point (SCP) database and the off-line management systems which are used to program the SCP. However, as originally conceived and implemented, each SCP of an intelligent network offered only one service. A new SCP and significant programming work would be required to add a new service.

Currently, standardization bodies, operators and equipment manufacturers are attempting to create INs that are service and network-independent. In these Advanced Intelligent Networks
(AINs), some of the intelligence previously located in the central office switch would be distributed throughout the network to other nodes.65

AINs are intended to permit telecommunications and enhanced service providers, as well as their respective customers, to augment existing services or create new ones to meet customers' individual needs.66 It is anticipated that services will be augmented or created through the use of what some have called the "service creation environment."67 A service creation environment is composed of a central office switch and intelligence distributed among multiple nodes, each able to direct the central office switch to engage in specified manipulations of information. Regardless of its name or its ultimate components, enhanced service providers and users who have access to the telephone companies' service creation environments ultimately will be able to revise and/or create new services.68 In essence, the central office switching

65. Carol Wilson, CO Products Develop New Revenue Opportunities, TELEPHONY, Apr. 9, 1990, at 38. Many RBOCs are in the process of testing AIN applications. See Titch, supra note 61, at 30.

However, efforts to develop the AIN have received significant criticism. For instance, the Coalition of Open Network Architecture Parties (CONAP) has questioned whether RBOC designs for AIN comply with FCC requirements for Open Network Architecture. Id. CONAP has claimed that the design allows the RBOCs to concentrate control of the new service offerings in their hands alone. Id. at 30-31.

66. "Intelligent network choices include faster and more sophisticated voice and data capabilities; more flexible routing and distribution alternatives; and private telecommunications networks with unique, customer-specific designs." Commissioner Sherrie Marshall, Huck Finn and the Intelligent Network, Remarks Before the Advanced Intelligent Network Communications Forum (June 25, 1990) [hereinafter Huck Finn].

67. Anderson & Pennington, supra note 58, at 28-29. Some telco users and providers have argued that a "modular and transparent" network architecture with standard interfaces would allow end-users access to unbundled switch functionalities that they could use to write "service scripts" responsive to market needs. CONAP Petition, at 6, cited in In re Intelligent Networks, 6 F.C.C.R. 7256, 7257 (1991). RBOCs have already begun to use service creation technology to deliver new services to customers. See Titch, supra note 61, at 30.

68. Service creation flexibility within the intelligent network would allow enhanced service providers, large corporate users and individual consumers to "tailor basic communications services to meet their individual needs." See Huck Finn, supra note 66. Many of the services may simply consist of new ways to
system and the telecommunications networks it serves, would become more accessible and “user friendly.” Increased user access to service creation environments provide users with the ability to create, manipulate and route information in new and previously unanticipated ways. The ability to program the network to meet users’ particular communications needs could include accessing information residing on host computers, reorganizing and transmitting information and gaining access to widely dispersed individuals or groups who may have an interest in the created or reorganized information.

B. Constitutional Protection of Electronic Speech on Cable and Telephone Networks

Electronic communication by telephone, broadcast station or cable system which is not “obscene,” is constitutionally protected organize, house and manipulate information. Other services will consist of new ways of increasing access to information and/or creating information. Service creation flexibility is expected to evolve from the laboratory, to the telephone technician and marketer, and ultimately to the customer. See Titch, supra note 61, at 30.


70. It has been suggested that the achievement of such accessibility should be a goal of the nation’s telecommunications policy. See Perritt, supra note 59, at 71.

In the future, users will be able to use applications such as a service creation environment (SCE) to craft their own applications on a workstation with icon-based programming capabilities. Users could build links between on-screen icons that represent specific call processing tasks, such as collecting dialed digits or playing a recording. When completed, a file is uploaded to a carrier’s service management system (SMS), which replaces the icons with the actual lines of software code needed to build the application . . . In many ways, these icons can be viewed as building blocks for developing many services or applications . . . With each customer-initiated application, the [carrier’s] building block library grows, moving toward an environment in which customers can create their own services and applications from terminals in their offices.

_The Network Graduates: Carriers’ Gradual Installation of Equipment and Software Instills Networks with Newfound Intelligence_, NETWORK WORLD, Aug. 3, 1992, at 34.
speech. Thus, information transmitted in electronic form, whether in the form of print, video or voice, enjoys First Amendment protection. However, recognizing that electronic print, video and voice communications are constitutionally protected when transmitted over telephone, broadcasting and cable television does not end the inquiry because it does not indicate whose speech is protected.

The First Amendment protects the exercise of speech and editorial control over programming decisions and transmissions by broadcast licensees. It protects the exercise of speech and

71. Speech deemed "obscene" is not afforded constitutional protection and indecent communications via broadcasting, cable or telephony may be regulated to shield protected classes of individuals. See Miller v. California, 413 U.S. 15 (1973). Indecent communications via broadcast, cable or telephony may be regulated to shield protected classes of individuals. See Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1282 (1992); FCC v. Pacifica Found., 438 U.S. 726 (1978); Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993), vacated on other grounds, 15 F.3d 186 (D.C. Cir. 1994); Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989).

72. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In Red Lion, the Supreme Court recognized that broadcasters have a qualified right to free speech. Broadcasters' rights were held secondary to the rights of listeners and viewers to receive diverse information and ideas. Id. at 389. The Court stated:

[The First Amendment] has a major role to play [in public broadcasting] as Congress itself recognized in section 326, which forbids FCC interference with 'the right of free speech by means of radio communication' . . . But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters which is paramount . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than countenance monopolization of that market, whether it be by the Government itself or a private licensee. Id.

Over time, the broadcast licensee's right to free speech has been expanded. See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (holding that broadcasters may not be compelled to accept editorial advertisements for broadcast when they are already adhering to an obligation to present controversial issues of public importance fairly; they retain the right to decide what controversial issues are to be discussed, by whom, and when). Most recently, the D.C. Circuit affirmed that the Fairness Doctrine "chilled" broadcasters' exercise of their editorial discretion, caused a reduction in the
editorial discretion by cable television operators.\textsuperscript{73} Similarly, the First Amendment protects subscriber voice communications over the telephone\textsuperscript{74} and video communication by local exchange network operators.\textsuperscript{75}

While owners of broadcast and cable television facilities have a constitutionally protected right of speech, efforts of viewers and non-affiliated programmers to gain access to the facilities of broadcast and cable network entities or to mandate the carriage of certain speech have met with diminishing success in broadcasting and limited success in cable.\textsuperscript{76} Additionally, local telecommunications network owners have only recently been deemed video speakers for constitutional analyses. Meanwhile, users of telecom-


The Commission largely relied upon technological grounds to advocate the repeal of the Fairness Doctrine stating, "[w]e believe that the dramatic changes in the electronic media, together with the unacceptable chilling effect resulting from the implementation of such regulations as the fairness doctrine, form a compelling and convincing basis on which to reconsider First Amendment principles that were developed for another market." \textit{Syracuse Peace Council}, 2 F.C.C.R. at 5054.


74. Indecent communication by telephone is entitled to some protection under the First Amendment. \textit{See} Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 125-26 (1989) (telephone communications that are obscene according to some local standards will not be according to the standards of another community); American Info. Enters., Inc. v. Thornburgh, 742 F. Supp. 1255, 1260-62 (S.D.N.Y. 1990); Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 870 (9th Cir. 1991).


76. \textit{See} discussion \textit{infra} part III.C.
munications networks, information providers and subscribers are deemed to possess more expansive rights of free speech than the common carrier network providers upon whom they rely.

As antecedent technologies of telephony, broadcast, cable and print merge into a multi-functional broadband switched network, the voice, video and data information streams, as well as network transmission functions, also merge. Consequently, both the universe in which network owner and user speech rights were previously apportioned and the manner in which they are currently apportioned are changing. Since speech conducted over the broadcast, cable and telecommunications networks is constitutionally protected, it is reasonable that speech will be protected when conducted on a succeeding technology that merges speech modes and network functions. However, the critical question is not whether electronic speech merits protection, but rather, whose electronic speech will be protected? And furthermore, to what extent will such speech be protected in relation to the perceived speech rights of others?

The merger of network transmission functions and information streams changes the number of parties with potential claims of rights. Apportioning the relative weight assigned to the speech rights of network owners, information providers and network users on interactive, multi-media, broadband networks necessitates the development of a new paradigm as the existing regulatory structures for broadcasting, cable and telephony prove inadequate. Information providers and end users could become active rather than passive participants in the network communications, switching and call routing process. They would gain more control over how their information is routed to and from potential receivers. End users would also become potential information providers as opposed to mere information consumers. Network owners such as the local exchange telephone carriers (LECs) that come to the new merged technology without experience with owner-initiated video

77. The merger will not change the visual, aural or character elements which serve as the building blocks for speech, nor will it affect the manner in which the elements are combined to achieve mono-modal communication. Even when these separate streams are merged, no new set of basic elements is created.
speech may have opportunities for such speech. These owners, relying on the structure of rights developed in print, broadcasting and cable, may assert the existence of speech rights of their own. Finally, information providers having no ownership of the cable or telecommunications network may also assert speech rights.

Aside from the changing apportionment of speech rights, the merger of network functions and information streams raises another compelling question of whose speech the technology will be allowed to promote. This is not a restatement of the earlier question of protection. Recognizing that once the technical parameters and characteristics of a mode of information transmission and access are established, the courts necessarily look to application of prior precedent and comparative analysis of technology and markets to determine the relative rights a potential speaker may enjoy. However, another equally critical stage in the evolution of rights occurs and reoccurs when the parameters and characteristics of the technology of transmission are in substantial flux.

78. Ithiel de Sola Pool addresses this issue in part when he speaks of the "soft technological determinism" inherent in the interaction between changing technologies of communication and the practice of free speech. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 5-8 (1983).

79. Indeed, the time at which government has the greatest opportunity to promote expanded free speech opportunities or restrict them has historically been during times of technological change. For instance, between 1927 and 1934, Congress considered numerous ways in which access to the developing broadcasting technology might be assured. It considered and rejected requiring broadcasters to act as common carriers, deciding instead that they be regulated as businesses affected with a public purpose. It refused to prohibit broadcasters from charging for access to programming they might provide to the public, even though some members recognized that charging for service would potentially limit public access to broadcast information.

Finally, Congress and the FCC settled on an allocation scheme that ultimately limited the number and competitive nature of the broadcast marketplace. The establishment of clear AM channels assured that fewer channels could be allocated per market because of channel interference. The subsequent decision to intermix VHF and UHF television frequencies once UHF was introduced, doomed UHF stations to less competitive niches in their respective markets and viewers to technologically inferior access. Because of the intermixture decision, VHF stations not only enjoyed earlier market entry, but greater frequency propagation characteristics which assured greater market coverage and superior reception. From the viewers' perspective, greater access was provided in theory, but the
At such a time, legislative and regulatory choices regarding technical standards and technology configuration will lay the foundation for the exercise of speech activities and set the stage for subsequent judicial adjudication and apportionment of speech rights. At times, technology increases the number of speech activities by expanding the opportunities to exercise speech. The creation of UHF channels, VHF drop-ins and cable television are such instances. At other times, technology creates the opportunity to exercise speech in new ways such as the advent of broadband and distributed intelligence technologies.

II. CONVERGENCE, ELECTRONIC SPEECH AND GOVERNMENT REGULATION

Recent presidential administrations, Congress, and the FCC have been developing a new regulatory scheme which addresses various aspects of the convergence of industries and markets. For instance, the FCC sought to implement its video dial-tone policy as an alternative to congressional efforts to impose rate regulation on cable operators. The FCC reasoned that allowing telephone company entry into the video distribution marketplace would create competitive pressures to reduce prices for services while increasing poorer propagation characteristics of UHF coupled with the electronic industry's reluctance to manufacture televisions which could receive UHF signals rendered illusory.

Similarly, in the early seventies, as cable television evolved into a viable, high capacity, multi-channel distribution medium in urban areas, the FCC took the opportunity to expand public access to video speech via cable by promulgating public and leased access provisions.

80. The Supreme Court's recent opinion in Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), illustrates this point well. The majority based a substantial portion of its justification for distinguishing the type of constitutional scrutiny to be applied to cable as opposed to broadcasting or newspapers on the technical characteristics of the medium.

81. The creation of UHF, VHF drop-ins and cable television expanded the number of six megahertz video transmission channels available by spectrum (UHF and VHF) and by wire (cable) for the distribution of video communication. As such, they increased the number of opportunities to communicate in a manner previously established via the introduction of VHF frequencies.

82. See Private Networks, supra note 3; Regulating Broadband, supra note 31.

83. See sources supra note 14 and accompanying text.
access for nonaffiliated programmers. Similarly, the courts, Congress and the FCC have addressed issues arising out of local telephone entry into electronic publishing and information services. During recent administrations, the FCC has also sought to establish a structural safeguards policy to address the

84. See Edmund L. Andrews, In Twist, Consumer Group and F.C.C. Back Cable TV, N.Y. TIMES, May 12, 1994, at D1; Gene Yasuda, Phone Firms Covet Cable TV Market, and Cable Industry Raises the Alarm, L.A. TIMES, June 12, 1990, at D2A.

85. Newspaper publishers, cable programmers and broadcasters, who would comprise a significant portion of the potential information providers on a telecommunications-carrier-provided broadband network, have alleged that the local telephone companies would engage in anti-competitive activities if the telcos were allowed to become providers of information services. Thus, until recently, broadcasters and cable operators opposed limited local telephone company entry into the video distribution services market via FCC's video dial tone proposal absent significant structural safeguards. See Harry A. Jessell, Video Dial Tone Advances at FCC: Commissioners Propose to Establish Regulatory Framework for Telcos to Deliver TV Services, BROADCASTING, Oct. 28, 1991, at 26; Cable Attacks VDT, Rural Exemption Extension, TELEVISION DIG., Oct. 19, 1992, at 1; Charles Mason, Who are the Real Monopolists? Telcos, NCTA Trade Charges; Telephone Companies, National Cable Television Association, TELEPHONY, Dec. 26, 1988, at 10.


The FCC defined "enhanced services" as services "which employ computer processing applications that act on the format, content, code, protocol or similar aspect of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a) (1993). Enhanced services include data processing services as well as videotext, audiotext, database retrieval

The goal of open networks architecture (ONA) policies of which "structural separations policy" was a part, was to prevent the ability of the RBOCs to underwrite their provision of competitive enhanced and information services with monies garnered from their basic network monopoly. At least one court was highly skeptical of the ONA plan's efficacy in either its *Computer II* form or its subsequent *Computer III* form. See United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987). Ironically, the same mechanisms of the ONA plans which Judge Harold Greene found so ineffective in *Western Electric* are the very mechanisms the FCC proposes to implement under its post California v. FCC, 905 F.2d 1217 (9th Cir. 1990) modified *Computer III* regulations.


The FCC determined that it would be sufficient for the RBOCs to provide enhanced services as integrated entities and offer their "unbundled" basic network functions to other enhanced service providers on a tariffed, nondiscriminatory basis. See *Third Computer Inquiry*, 104 F.C.C.2d 958, 964-65, 1063-66 (1986); *Filing and Review of Open Network Architecture Plans*, 4 F.C.C.R. 1, *recon.*, 5 F.C.C.R. 3084, *amended plans conditionally approved*, 5 F.C.C.R. 3103 (1990).

The FCC concluded that the requirement to unbundle the network functions, combined with accounting and other non-structural safeguards would obviate the need to rely on the separate subsidiary requirement to prevent the RBOCs from engaging in access discrimination and anticompetitive cross-subsidization which would favor their enhanced service operations. See *Third Computer Inquiry*, 104 F.C.C.2d at 1007-12, 2 F.C.C.R. 3035, 3039 (1987).

The Court of Appeals for the Ninth Circuit vacated and remanded the FCC's *Computer III* rulings. The Ninth Circuit held that the FCC had not provided sufficient support in the record for its conclusion that structural separation was no longer needed to prevent RBOC attempts at cross-subsidization and that accounting safeguards alone would be sufficient. 905 F.2d at 1238-39. The court concluded instead that the FCC's proposed policy to allow the telephone
concern that the RBOCs would use cross-subsidies and accounting standards to compete unfairly in the competitive provision of enhanced and/or information services. The vast majority of the evolving regulatory scheme focuses on market entry and competition issues that attend the creation and deployment of the information highway.\(^7\)

companies into the enhanced services market on a vertically integrated basis would increase the RBOCs' incentives to engage in anti-competitive activity to maintain or increase their market share for enhanced services. \(\text{Id.};\) see also Public Service Commission Paper Attacks Computer III Ruling, WORLDWIDE VIDEOTEX TELE-SERVICE NEWS, July 1993.

In the FCC's Computer III proceedings following the court decision, the comments were predictable: "[t]he Bell regional holding companies (RHC) endorsed, and enhanced service providers (ESP) opposed, the FCC's hopes to slightly modify its accounting and non-discrimination rules." RHCS, ESPS, States Form Familiar Lines in Computer III Remand, BOC WEEK, Mar. 18, 1991. Subsequent to the court's decision, the FCC quickly reinstated its ONA requirements including its waiver of the structural safeguards.

It required that the RBOCs implement their plans to offer unbundled services regardless of its ultimate decision on structural separation. See In re Computer III Remand Proceedings, 5 F.C.C.R. 7719 (1990); In re Computer III Remand Proceedings, 6 F.C.C.R. 174 (1991). Pending the ultimate decision, the RBOCs were allowed to continue offering enhanced services previously approved by the FCC, as fully integrated companies.

The decision was not well received in some quarters. For instance, in response to the FCC's decision, the District of Columbia Pubic Service Commission (DCPSC) took issue with the FCC's justifications for removing the separate subsidiary requirement. The DCPSC argued that a separate subsidiary structure for the provision of new (competitive) services by the RBOCs would not inhibit the introduction of new services, nor would they impede competition in certain markets or cause consumer disruptions. See Robert J. Butler, In the Aftermath of California v. FCC: Computer III Remand Proceedings Pose Difficult Policy Choices For the Enhanced Services Industry, COMP. LAW., May 1991, at 24.

87. For instance, the Clinton Administration is seeking to stimulate economic development through the use of telecommunications networks. See Excerpt of the Hearing of the Senate Committee, FED. NEWS SERVICE, Feb. 24, 1993 (Remarks of Secretary of Commerce Ron Brown); see also Louis Uchitelle, Clinton's Point Man on Economics, N.Y. TIMES, Nov. 21, 1992, at A33.

Congressional efforts have been similar in focus. See Communications, Senate Subcommittee Examines Bill Allowing Telephone Companies Into Cable, DAILY REP. FOR EXECUTIVES, Mar. 2, 1992, at A14; Boucher: We Must Ensure Access For All, ELEC. MEDIA, Mar. 1, 1993, at 29 (emphasizing the need to have a telecommunications network that is universally available in order to assist in stimulating economic development and delivery of health and educational services); see also House Committee Okays Bill To Link Rural, Urban Schools,
The importance of merging networks to electronic speech and related activities has concerned various scholars and industry observers for some time. Although competing industries have

EDUC. TECH. NEWS, July 7, 1992 (discussing House approval of a bill that would authorize $20 million in grants to create a national telecommunications network linking schools in rural areas with their counterparts in urban regions); The Honorable Conrad Burns (Senator), The Cable TV Problem — A Procompetitive Approach, PUB. UTIL. FORTNIGHTLY, Aug. 16, 1990, at 16 (proposing to allow telephone companies into the video distribution market to compete against cable television firms as a way to increase consumer choices in price and service offerings and to assure timely deployment of fiber optic infrastructure).

For legislative proposals to reform the regulatory scheme, see Communications Competitiveness and Infrastructure Modernization Act of 1993, H.R. 1504, 103d Cong., 1st Sess. (1993) (a bill to encourage the modernization of the nation’s telecommunications infrastructure, to promote competition in the cable television industry and to permit telephone companies to provide video programming); Communications Competitiveness and Infrastructure Modernization Act of 1991, S. 1200, 102d Cong., 1st Sess. (1991) (a bill to advance the national interest by promoting the rapid development and deployment of a nationwide, advanced, interactive, interoperable, broadband communications infrastructure on or before 2015 by ensuring the greater availability of, access to, investment in, and use of emerging communications technologies, as well as for other purposes); Communications Competitiveness and Infrastructure Modernization Act of 1991, H.R. 2546, 102d Cong., 1st Sess. (1991) (same as S. 1200); Communications Competitiveness and Infrastructure Modernization Act of 1980, S. 2800, 101st Cong., 2d Sess. (1980) (a bill to permit telephone companies to engage in video programming); Cable Competition Act, S. 1068, 101st Cong., 1st Sess. (1989) (a bill to require actions to improve competition in the delivery of television programming, to prohibit discrimination by cable programmers, and to permit telephone companies to provide video programming); and The Cable Competition Act, H.R. 2437, 101st Cong., 1st Sess. (1989) (a bill to require actions to improve competition in the delivery of television programming, to prohibit discrimination by cable programmers, and to permit telephone companies to provide video programming).

88. Nolan Bowie, Equity and Access in Information Technology, ANN. REV. OF INST. FOR INFO. STUDIES 131 (1990) (proposing that an equitable information policy be established which assures access to enhanced technologies and services as they become indispensable to the information society); Angela J. Campbell, Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies, 70 N.C. L. REV. 1071 (1992) (anticipating and addressing arguments regarding the speech rights of local telephone network owners which were subsequently raised by the government in Chesapeake & Potomac Telephone Company v. United States, 42 F.3d 181 (9th Cir. 1994)); Mark S. Nadel, A Technology Transparent Theory of the First Amendment and Access to Communications Media, 43 FED. COMM. L.J. 157 (1991) (proposing that where access to networks is limited or non-existent, the First Amendment should allow the government to provide for access, and conversely, where access to networks is
tended to focus upon market entry and competition issues, they have also raised concerns about the future scope of electronic speech on the merging networks. Only recently, however, has Congress acknowledged the importance of assuring all Americans access to the merging networks to ensure opportunities for speech and speech-related activities.\textsuperscript{89}

reasonably affordable, the government should not be permitted to impose access obligations); Eli Noam, \textit{The Superstructure of Infrastructure: Thinking About a Future Without a Public Network}, or Principles for the Communications Act of 2034, Presented to the National Regulatory Research Institute (Oct. 22, 1991) (proposing that basic concepts of common carriage, interconnectivity and access provide the basis for development of future network infrastructure with the government acting as the integrator of the infrastructure) (source on file with author); Don Oldenburg, \textit{The Law: Lost In Cyberspace}, \textit{WASH. POST}, Oct. 1, 1991, at E5 (reporting on a proposal by Lawrence Tribe); Perritt, \textit{supra} note 59, at 131 (proposing that an appropriate regulatory scheme for digital electronic networks would be one in which networks exercising a high degree of control over access would experience higher degrees of tort liability while entities operating as common carriers would experience less or no tort liability for carriage of information); Pamela Samuelson, \textit{First Amendment Rights for Information Providers}, COMM. OF THE ACM, June 1991, at 19 (proposing that RBOCs be allowed to participate in the information services market as speakers and common carriers subject to regulation by the FCC to preclude anti-competitive activity); Hammond, \textit{Regulating Broadband}, \textit{supra} note 31; Laurence H. Winer, \textit{Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry Into Cable}, \textit{8 CARDOZO ARTS \& ENT. L.J.} 257 (1990).

89. Most recently, the House and Senate passed bills intended to revise the regulation of the telecommunications and cable television industries. This acknowledges that American society's access to a switched, digital telecommunications service would promote the core First Amendment goal of diverse information sources by "allow[ing] each individual the opportunity to contribute to the free flow of ideas and information through telecommunications services." \textit{See} Communications Act of 1994, S. 1822, 103d Cong., 2d Sess. (1994).

Prior to Senate Bill 1822, Congress had addressed the scope of a multi-channel network owner's speech rights in relation to those of its affiliated and non-affiliated users on several occasions. \textit{See} Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385 [S.12], §§ 4, 5, 9 (1992) (amending 47 U.S.C. §§ 533 and 531, requiring cable operators of a particular size to carry a number of commercial and non-commercial local broadcast signals and amending 47 U.S.C. § 532, requiring cable operators to provide opportunities for non-affiliated programmers to leased access, respectively).

The National Communications Competition and Information Infrastructure Reform Act, House Bill 3636, would have allowed local telephone companies to provide video service and cable television companies to provide telephone service in their respective markets. If enacted into law, telephone companies would have
In recent draft legislation, Congress appears to contemplate a merging industry composed of telecommunications firms and cable television firms, among others. Cable companies have not gained the ability to provide as well as transmit video programming. As a consequence, they would have become speakers and editors as well as carriers. The bill also would have required that telephone companies create a separate subsidiary, with separate books, to offer cable services. See Provisions Contained in House Legislation H.R. 3626, H.R. 3636, WASH. TELECOM NEWS, July 4, 1994; Major Telecommunications Reform Bills Overwhelmingly Pass in House, DAILY REP. FOR EXECUTIVES, June 29, 1994, at d35.


Many members of the 103d and 104th Congresses concurred that there is a need to reform the nation’s 60-year-old telecommunications law and that the rules limiting competition in the converging worlds of telecommunications, entertainment, and information must be reformed. See Catherine Arnst, I-Way Tie-Up on Capitol Hill, BUS. WEEK, Feb. 6, 1995, at 146; Major Telecommunications Reform Bills Overwhelmingly Pass in House, DAILY REP. FOR EXECUTIVES, June 29, 1994, at d35.

The “Pressler Bill,” also known as the Telecommunications Competition and Deregulation Act of 1995, recently was introduced during the 104th Congress. If enacted in its present form, the Pressler Bill would, among other things, remove all cable and telephone company cross-ownership restrictions within one year and eliminate cable rate regulation. However, the current mood on Capitol Hill is said to be so intensely partisan that Congress’ ability to achieve bill passage by Senator Pressler’s predicted date of July 4, 1995, is in doubt. See Arnst, supra, at 146; Sen. Pressler Releases Draft of Telecommunications Legislation, DAILY REP. FOR EXECUTIVES, Feb. 2, 1995, at d44.

One of the major areas of disagreement between Republican and Democrat approaches to any communications legislation concerns the timing on market entry. Last year’s Senate Bill 1822, the Communications Act of 1994 Telecommunications Equipment Research and Manufacturing Competition Act of 1994, if it had been enacted, would have opened local calling to competition immediately, while keeping the RBOCs out of the long distance and cable television markets until there was some measurable erosion of their local monopolies. The RBOCs and many Republicans favor a “date certain” concept after which the RBOCs would be free to enter unregulated industries, regardless of the extent of local competition. Democrats remain concerned that setting an arbitrary date would allow the RBOCs to use their monopoly power in anti-competitive ways. See Arnst, supra, at 146; Pressler, Fields Outline New Communications Bill to Governors, DAILY REP. FOR EXECUTIVES, Jan. 31, 1995, at d44.

Similarly, Title II of House Bill 3636, The National Communication Competition and Information Infrastructure Act of 1994, would have allowed local telephone companies to provide cable television service directly to their service area subscribers provided the video programming is supplied through a separate
MULTI-MEDIA CHIMERA

responded favorably to the current draft of the most recent legislation. The legislation reflects Congress’ assumption that

video programming affiliate having separate books, records and accounts. It also required telephone companies having video programming affiliates to establish a video platform and to provide capacity for unaffiliated video program providers. Finally, it would have prohibited a common carrier from buying out a cable system located within its telephone exchange area and owned by an unaffiliated person. See Kate Maddox, Cable, Telcos Weigh Telecommunications Bills, ELEC. MEDIA, Apr. 4, 1994, at 3.

In Title V of Senate Bill 1822, the Senate sought to establish the rules for assuring regulatory parity between telephone and cable companies. The bill would have prohibited carriers from providing video programming (cable) directly to subscribers in their telephone exchange service area unless the programming would be provided through a separate subsidiary, and the carrier was certified to be in compliance with other relevant safeguard provisions of the bill. Cable companies entering the telephone market were to be regulated in the same manner as the common carriers with whom they sought to compete. The bill would have prohibited local exchange common carriers from providing video programming by acquiring the cable system providing such service within the carrier’s telephone exchange service area or via a joint venture with the cable local system or systems.

91. The cable industry has not enthusiastically supported the Pressler draft legislation because it would allow the RBOCs to compete against cable one year after enactment. See Industry, Consumer Groups React to Draft Telecommunications Bill, DAILY REP. FOR EXECUTIVES, Feb. 3, 1995, at d31. The cable industry would prefer that local phone companies not be allowed to compete in cable markets until phone companies permit cable operators to interconnect with the telephone companies’ networks. Id. For a discussion on the considerations attending cable entry into telephony, see Larry J. Yokell, Cable TV Moves into Telecom Markets, BUS. COMM. REV., Nov. 1994, at 43.

Cable operators are particularly concerned that Congress will act in light of recent cases which declare the telco-cable cross-ownership provision unconstitutional. See Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), aff’d, 42 F.3d 181 (4th Cir. 1994); US West, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash. 1994), aff’d, No. 36775, 1994 U.S. App. LEXIS 39121 (9th Cir. Feb. 17, 1995); GTE California, Inc. v. FCC, 39 F.3d 940 (9th 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); see also, USTA, OPATSCO, NTCA Win Lawsuit to Lift Cable-Phone Ownership Ban, BNA MGMT. BRIEFING, Jan. 30, 1995, at d3. Representatives of the cable industry argue that the court rulings have opened their industry to competition from telephone companies, while various state and local regulations preclude cable companies from entering the local telephone market. See Industry, Consumer Groups React to Draft Telecommunications Bill, DAILY REP. FOR EXECUTIVES, Feb. 3, 1995, at d31.

Another critical issue is the manner of telephone company entry into the video market. For example, would they enter as additional competitors or merg-
telecommunications firms will enter the market for the provision of information, electronic publishing and video distribution services, and that cable television firms will enter the market for the provision of telecommunications services. This assumption is supported by recent developments in the industry.  

"Local" firms in both the telecommunications and cable industries are perceived as possessing bottleneck control over access by their subscribers, as well as the ability to engage in anti-competitive activities. For instance, telephone firms are believed to possess the means and the incentive to engage in anti-competiti-

tive activities once they enter the market for the provision of information, electronic publishing and video services. Consequently, structural safeguards would be imposed to reduce the likelihood of such behavior. While both local telephone and cable networks are subject to increasing competition, it has not been deemed sufficient to allow market entry without regulation. Therefore, limitations have been placed upon the ability of telecommunications and cable firms to: acquire corresponding local cable or telephone competitors; use monies generated in their primary line of business to underwrite the competitive provision of service in another; use facilities engaged in the provision of their primary line of business to engage in the competitive provision of service in another; use capacity they develop for the provision of information, electronic publishing or video services to the exclusion of others; and control the ability of their competitors to compete efficiently by limiting their efficient use of the telephone or cable system network to provide service based on cost or network provisioning.

Collectively, the bills reflect Congress' expectation that the provision of affordable telecommunications services via a multi-functional telecommunications network will promote diversity by creating opportunities for the free flow of ideas. Affordable access is to be assured by the creation of a new universal access policy with need-based subsidies for those unable to pay the full cost of access; establishment of preferential rates for educational, health care provider, government, public broadcaster and library access; and the development of network "gateways" and "platforms" for information and video program providers who do not

93. See S. 1822; H.R. 3626.
94. See supra notes 89-90.
95. See H.R. 3626.
96. See S. 1822.
97. Id.
98. Id.
own network facilities but have legitimate reasons for requesting access to network facilities.

The bills attempted to lay a foundation for an environment in which network owners, users and subscribers would have affordable and technically efficient access to the merging and merged telecommunications and cable television networks. The bills' affirmative requirement that network users and subscribers be granted access is justified as pro-competitive market regulation or as a quid pro quo for the network owners' use of terrestrial public rights of way and/or spectrum. Such access is based largely on economic criteria. To the extent that a network owner enjoys market power, it can be compelled to generate excess transmission capacity or set aside a portion of its transmission capacity to provide access. If the network owner does not possess market power, it is assumed that a competitive marketplace will facilitate the provision of access based upon consumer demand. To the extent that the marketplace fails to assure access, targeted subsidies, preferential rates and ownership enhancements for historically disenfranchised groups presumably will ensure that potential subscribers and socially valued speakers receive access. If these bills had become law, user and subscriber access would have become a statutory right. The strength of the right would have been dependent upon the relative market power of the network owners, the disposable wealth of potential users requesting the service, the desirability of such users as a market, and the ability of politically appointed bodies of state and federal regulators to establish, subsidize and enforce minimum access for those having little political power, or little desirability as a market, or both.

Pursuant to other provisions of the bills, access requirements for some groups are premised upon the network owners' use of public rights of way and/or spectrum. Unlike prior iterations of the "public rights of way" justification, there is no stated acknowledgement of a nexus between the existence of economic or

100. See S. 1822.
technical scarcity and the use of public rights of way.\textsuperscript{101}

In their current form, the bills adopt significant portions of the status quo which exists in the separate regulatory schemes allocating access rights in telecommunications and cable. In both, the requirement to provide access is premised on the local network owner's use of public rights of way and/or triggered by the existence of market power resting upon technical and economic scarcity. In the common carriage scheme, access is assured by a policy of universal service which encourages subsidization of costs for the provision of service to some subscribers, and a requirement to provide nondiscriminatory access and service to like situated subscribers.\textsuperscript{102} In the cable regulatory scheme, access is assured for public, educational and governmental entities, as well as local broadcasters. Opportunities for access are also made available to unaffiliated programmers through the leased access rules.\textsuperscript{103}

The incremental innovation in the bills is the active melding of the regulatory structures to facilitate the increasing convergence of network technologies and functions while fostering competition between the multi-functional networks that will evolve from telecommunications and cable firms. As envisioned by Congress, the regulatory environment of the merging firms is one in which firms providing telecommunications services are regulated as common carriers and firms providing video services are regulated as cable operators. As telecommunications and cable firms are not precluded from providing either telecommunications or video services or both, some firms would ultimately be subject to both common carrier and cable regulation. Firms seeking to provide electronic publishing or information services would do so under the

\textsuperscript{101} At best, it may be implied by the fact that in significant part, access is a function of market power which in both telecommunications and cable television is a function of bottleneck control over access to facilities as a technical and economic reality.


same regulatory regime regardless of evolutionary origin. The bills do not take the final step of establishing a single environment (whether regulatory or laissez faire) in which all firms would compete to provide any and/or all services. Rather, the management of the evolution to such an environment is to be delegated to the FCC and to the states.\textsuperscript{104}

The drafters of House Bill 3626 and Senate Bill 1822 focused upon maximizing access within a competitive market framework. The government would no longer prohibit network owners from using their network assets to communicate (i.e., to enter new markets for the transmission and dissemination of information), but would seek to restrict the owners' exercise of bottleneck control over access to the network and the market. This would be accomplished by: restricting the ability of local telephone and cable firms to merge, thereby consolidating bottleneck control; requiring local telephone and cable firms to compete in new markets through a separate subsidiary to limit their ability to engage in unfair competition via cross-subsidization or exclusive use of superior facilities; and requiring access to be provided at non-discriminatory prices. Finally, subscriber access would be maximized through a universal service policy with targeted subsidies for those unable to pay the going rate underwritten by all participating carriers.\textsuperscript{105} In this way, opportunities for electronic speech would be maximized.

While the proposed legislation established the opportunity to engage in electronic speech as a statutory goal, it did not elevate the opportunity to a constitutional right. Also, while it alluded to

\textsuperscript{104} See H.R. 3626; S. 1822.

\textsuperscript{105} See discussion of Pressler Bill, supra note 90. The proposals introduced in Congress did not fully embrace the goals and policies of the Clinton Administration, which recommended that telephone and cable companies be deregulated and allowed to compete if they opened their networks to all programmers and subscribers. Additionally, the Administration would have prohibited cable firms from acquiring their local telephone companies or vice versa. See Tom Steinert-Threlkeld, Gore Outlines Proposal to Create National Information Highway: Laws Would Update Regulations, Standardize Technology, DALLAS MORNING NEWS, Jan. 12, 1994, at A1; Bill Carter, Gore Outlines Data Highway Policy, N.Y. TIMES, Jan. 12, 1994, at D5; cf. Gore Alters Strategy for Policy Bill: Will Seek to Amend House, Senate Vehicles, DAILY REP. FOR EXECUTIVES, Feb. 10, 1994, at d37.
a nexus between access, diversity and the free flow of ideas, it was not explained. These shortcomings may have resulted from the legislative process. Clearly, there are a number of unascertainable or unknowable factors that led to the ultimate failure of the bills.106

Aside from recent legislation proposed in the 103rd and 104th Congress, the government's efforts to address the scope of evolving electronic speech rights have developed in a fragmented manner. Access and speech rights are developed in the context of controversies involving cable and telephone networks as they have arisen, such as in must-carry, leased access or telco-cable cross-ownership cases.107 Consequently, the articulation of the electronic speech rights of interactive broadband network owners and users has occurred in a piecemeal fashion, leaving the scope of such rights unresolved and some speech possibly unprotected.108

As network functions, information streams, industries and

106. For example, the composition of both chambers was greatly affected by the mid-term election and may have eroded support for the bills. See Industry Resumes Talks with Senate on Telecomm Bill After Flare-Up, COMMON CARRIER Wk., Aug. 1, 1994; Kate Maddox, Cable, Telcos Weigh Telecommunications Bills, ELEC. MEDIA, Apr. 4, 1994, at 3.


108. Two such areas are the current evolution of regulation of competition within and between firms in the video distribution (cable television) and local exchange (telecommunications) markets. As Congress and the FCC reimpose rate regulation and access requirements on cable operators, the regulatory requirements merge as the industries begin to merge. However, regardless of the growing similarities between the two, cable regulation continues to concern only video firm competition and consumer service within the video distribution market. Likewise, telephone regulation concerns competition and access only in the local loop.

To the extent that individual states have addressed the issue at all, their efforts have mirrored those of the administrative and legislative branches. They recognize that opportunities for increased speech are a potential product of building the electronic superhighway, but they have not sought as yet to define just what the constitutional, statutory, or common law parameters of such rights might be. See Renewing the Commitment to a Public Interest Telecommunications Policy: Statement of Principles by the Telecommunications Policy Roundtable, COMM. OF THE ACM, Jan. 1994, at 49; Lois F. Lunin, The Information Superhighway: Of the People, By the People but . . . for the People?, INFO. TODAY, Apr. 1994, at 49.
markets converge and realign, the relationship between network owners and users realigns as well. The major components of this realignment are: the transmission of information in a multi-media, interactive, digital format; the existence of network owners which are capable of becoming or are information providers; the existence of information providers which do not own a network; and network users which are capable of becoming or are information providers as well. In short, the network transmission and information functions merge as the potential opportunities for electronic speech and speech activities expand.

Prior articulations of electronic speech rights on cable and telephone networks provide some insight into the possible apportionment of the speech rights of multi-media, broadband, interactive network owners and network users, as well as non-facilities-based information providers. Ultimately, however, the regulatory paradigms may be of limited utility. As the transmission network functions and information streams merge, the criteria upon which the regulatory and market distinctions are based disappear, even as the number of potential speech rights claimants grows and the claims grow more complex. Moreover, the levels at which rights may be exercised increases. For example, potential rights exist at the content level, at the level of access to the network as it is configured by owners, and finally, at the level of access to the means of reconfiguring the network to achieve different distributions of information to different recipients.

This analysis is critical to an understanding of the relevance of judicial precedent. It is also critical to an understanding of more recent precedent, such as *Chesapeake & Potomac Telephone Company v. United States,*\(^{109}\) *Turner Broadcasting Systems, Inc. v. United States,*\(^ {110}\) and the Advanced Intelligent Network proceeding at the FCC;\(^ {111}\) they are the legal manifestation of the issues raised by the convergence of technology, markets and information. Accompanied by companion legislation and evolving

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110. 114 S. Ct. 2445.
law in the area of indecency, they will provide the basis for much of the allocation of electronic speech rights in broadband interactive networks.

III. CONVERGENCE AND THE REGULATION OF NETWORK ACCESS IN CABLE AND TELEPHONY

A. Mergers and Challenges

Many industry observers expect the merger of local cable and telephone industries and technologies to result in the development of interactive, broadband, multimedia networks or, alternatively, more multi-channel cable networks. If correct, judicial pronouncements on the relative rights of telephone and cable network owners to provide information over their networks and to determine who may have access to their facilities are critical to the evolution of access and speech rights on the merging infrastructures.

In regulations prohibiting local telco-cable cross-ownership,114

112. See discussion infra parts III.B.2 and III.C.

113. While some commentators question its advisability or necessity, cable television and regional telephone firms have begun to merge as a strategy for avoiding competition in existing markets and/or expanding into new markets. See Andrew Kupfer, The Baby Bells Butt Heads, FORTUNE, Mar. 21, 1994, at 76; Michael Botein, The AT&T-McCaw Merger: Need for Analysis, N.Y.L.J., Aug. 30, 1993, at 2; C. Edwin Baker, Tollbooths on the Information Superhighway, N.Y. TIMES, Oct. 26, 1993, at A21. Cable television firms have begun to enter the local telephone markets while opposing the imposition of common carrier regulation upon them. See Larry J. Yokell, Cable TV Moves into Telecom Market, BUS. COMM. REV., Nov. 1994, at 43; Martyn F. Roetter, The Genie in the Bottleneck, TELEPHONY, Oct. 10, 1994, at 30. Simultaneously, the regional telephone companies have challenged the constitutionality of the telco-cable crossownership restriction. See discussion infra part III.B.2. The restriction prohibits their entry into the local video programming and distribution market coinciding with their local service areas for provision of telephone service. Id.

114. The government's telco-cable cross-ownership restriction significantly restricts local exchange carrier entry into the video distribution market as programmers. In litigation challenging provisions of the 1984 Cable Act, the issue has been the extent to which the government may, in the guise of economic market regulation, require local telephone companies to extend access rights to network users and information providers while forgoing access to exercise video speech themselves. See discussion infra parts III.B.2 and III.C. The telephone companies also face opposition to their entry into the electronic publishing market
or requiring must-carry,115 leased and PEG access channels,116 the government requires that network owners forego access to all or a portion of their facilities to provide access to unaffiliated information providers. The government argues that the cross-ownership, must-carry and leased access regulations are justified as necessary prophylactic economic prescriptions to avoid the anticompetitive exercise of market power by telephone and cable network owners. In addition, they are justified as structural rather than content specific means to increase the diversity of speakers having access to telephone and cable subscribers.

However, when market regulations restrict the economic activities of industries engaged in creating, editing or distributing information, they also impact the network owner’s speech. The local telephone companies argue that when they are prohibited from providing video services in their subscription areas, they are simultaneously prohibited from engaging in protected speech.117 Cable television companies argue that when they are required to provide access to unaffiliated programmers, they must forego the exercise of their editorial rights over a portion of their channel capacity. The current resolution of these arguments is found in several recent judicial opinions.
B. **Telco-Cable Cross-Ownership: Constraining Network Owner Market Entry and Access**

1. **A Brief History of Telco-Cable Cross-Ownership**

Regulated telephone local exchange carriers (LECs) have been prohibited from providing video distribution in their local markets since 1970. At that time, the FCC issued a rule prohibiting a local telephone company from owning a cable concern in the same market. The rule was promulgated to prevent anti-competitive

118. Telephone companies were prohibited from providing video programming "to the viewing public in [their respective] telephone service area[s], either directly, or indirectly through an affiliate owned by . . . or under common control with the telephone [company in question]." 47 C.F.R. § 63.54(a) (1993). Moreover, telephone company provision of "channels of communications or pole line conduit space, or other rental arrangements" to any affiliate seeking to provide video programming to the public, was forbidden under § 63.54(b). An affiliation was deemed to exist if there was any "financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer." § 63.54(c). The only exception to the prohibition, was the carrier-user relationship whereby the carrier "indiscriminately held itself out to serve all similarly situated customers under the same conditions of service." See id. Consequently, a carrier was effectively precluded from establishing a unique relationship with a potential provider of video service.

In 1981, the FCC reviewed its rules and established limited exemptions. Telephone companies operating in rural areas with populations of less than 2,500 were exempted from compliance with the rule. 47 C.F.R. § 63.58(a). Also, the rule could be waived if it could be established that cable service "demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the local telephone common carrier, or upon other showing of good cause." 47 C.F.R. § 63.56(a). At the time the FCC promulgated its exemptions, its Office of Plans and Policy (OPP) issued a report recommending that the telco-cable cross-ownership restriction be maintained. In re Tel Company-Cable Television Cross-Ownership Rules, 3 F.C.C.R. 5849, 5850 (1988) (citing OFFICE OF PLANS & POLICY, FEDERAL COMMUNICATIONS COMMISSION, FCC POLICY ON CABLE OWNERSHIP: A STAFF REPORT (Nov. 1981)). The OPP suggested that the ban be retained because, in the pre-divestiture environment of 1981, regulated telephone companies could unfairly compete against other cable market entrants. Id.

While the OPP found that some potential benefits such as joint efficiency of operations and development of new technologies and services might accrue from telco provision of cable service, it ultimately concluded the ban was appropriate. Id. at 5871 n.18. The OPP reasoned that telephone firms would be able to subsidize their cost of competing in the unregulated cable market with revenues from their regulated telephone businesses. Additionally, they would be able to
activities of LECs who sought to control the entry of cable into their markets by restricting or controlling cable operator access to telephone facilities and pole attachments.\textsuperscript{119}

In 1984, Congress codified the FCC's telco-cable cross-ownership rules in the Cable Communications Policy Act of 1984.\textsuperscript{120} The legislative history of section 613(b) indicates that it was intended to codify the then current FCC telco-cable cross-ownership rules prohibiting telephone companies from directly providing video programming to subscribers in their telephone markets.\textsuperscript{121}

The FCC subsequently reversed its earlier decision, and concluded that the public interest would be better served by partially lifting the cross-ownership ban.\textsuperscript{122} The FCC concluded

\begin{itemize}
\item forestall facilities-based competition from potential cable entrants because the construction of competitive facilities would be a substantial economic bar to entry.
\item Finally, the telcos could control competitive entry by controlling competitors' access to pole attachments. \textit{Id.}
\item The OPP recommended that the telco-cable cross-ownership prohibition be retained until competition existed in the local loop, equal access to poles and attachments could be assured, and it became clear that cable would not compete against telephone companies or that the ban hindered the development of new technologies. \textit{Id.} The OPP also concluded that if the telephone companies were allowed to provide cable television service, the FCC lacked adequate regulatory mechanisms to protect the market against the potential anti-competitive abuses OPP had envisioned. \textit{Id.}
\item Efforts to have the rules repealed began immediately but were unsuccessful. Aside from the exemptions for small rural communities or a narrowly defined showing of good cause, the FCC refused to consider repeal of the rule. \textit{See In re Telephone Company-Cable Television Cross-Ownership Rules, 3 F.C.C.R. 5849 (1988); In re Elimination of Telephone-Company Cable Television Cross-Ownership Rules, 91 F.C.C.2d 622 (1982); In re Revision of the Processing Policies for Waivers of Telephone Company-Cable Television Cross-Ownership Rules, 82 F.C.C.2d 254, 266-75 (1980) (Separate Statement of Commissioner Joseph R. Fogarty).}
\end{itemize}

\textsuperscript{120.} 47 U.S.C. § 613(b) (1984).
\textsuperscript{122.} \textit{See In re Telephone Company-Cable Television Cross-Ownership Rules, 3 F.C.C.R. 5849 (1988); In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 to 63.58, 7 F.C.C.R. 5781, at ¶ 21 & n.43 (1992) (second report and order, recommendation to Congress, and second further
that, subject to safeguards, the public would receive significant benefits if telephone companies were allowed to provide cable television service. It tentatively concluded that construction and operation of technologically advanced, integrated broadband networks by carriers for the purpose of providing video programming and other services would constitute good cause for a waiver of the prohibition.\textsuperscript{123}

2. \textit{Chesapeake \& Potomac Telephone Co. v. United States}

Despite the FCC's reversal, Congress did not repeal its law prohibiting telco companies from providing video programming to subscribers in their areas. In response, Bell Atlantic filed suit alleging that the 1984 Cable Act prohibition violated its First and Fifth Amendment rights, as well as the First Amendment rights of subscribers.\textsuperscript{124} Bell Atlantic argued that video programming is a

\footnotesize{notice of proposed rulemaking).}

\textsuperscript{123} Id. at 5870 n.6 (1988) (citing 69 F.C.C.2d 1110). However, because Congress had codified the prohibition into law, the FCC alone could not implement its proposed change in policy. Instead, it solicited comments to assist it in developing a record which might persuade Congress to repeal the codified prohibition.

The FCC's proposal was met with substantial opposition from newspapers, broadcasters and cable operators, as well as members of Congress. Moreover, the proposal was formed at a time when the Commission's proposed \textit{Computer III} structural safeguards were under severe judicial and public criticism. In addition, congressional and public focuses had shifted away from a marketplace solution for the regulation of cable via telephone company provision of video programming, to direct governmental regulation of cable television rates, access and content. The Cable Competition and Consumer Protection Act of 1992 consequently failed to provide any relief from the 1984 Cable Act's prohibition.

Nevertheless, through aggressive use of its waiver policy and the issuance of its video dialtone rulemaking, the FCC paved the way for limited RBOC entry into the video distribution markets. \textit{See} Farrell, \textit{supra} note 114, at 5. These FCC efforts also engendered substantial opposition. Yokell, \textit{supra} note 113, at 43. Further, the RBOCs themselves deemed the limited video dialtone entry proposed by the FCC to be insufficient.

\textsuperscript{124} At least one scholar agrees with the telephone company's argument. \textit{See} Winer, \textit{supra} note 88; \textit{cf.} Campbell, \textit{supra} note 88.

The C&P suit is not the first effort undertaken by the RBOCs to defeat the cross-ownership ban on constitutional grounds. Prior to the C&P lawsuit, the government addressed the constitutionality of restricting telephone company access to information markets in proceedings before a district court, Congress and the FCC. The issue was first raised in court proceedings in 1982 and in 1987.

There were two stated rationales for the prohibition. First, absent the prohibition, the RBOCs would use the monopoly control of their facilities in anti-competitive ways which would impede the development of the nascent electronic publishing industry. AT&T, 552 F. Supp. at 181-82. Second, allowing RBOC entry into the information services industry would have a detrimental effect on First Amendment values because the RBOCs would, in pursuing their anticipated economic aims, preclude other programmers from gaining comparable access to RBOC facilities. Id. at 183.

In 1987, during the first triennial review of the decree, the Department of Justice and the RBOCs recommended that the ban on entry into the information services market be lifted because market conditions had changed significantly and entry would have positive effects on the industry. 714 F. Supp. at 3. Further, some RBOCs argued the ban should be removed because it infringed the RBOCs' First Amendment rights. 673 F. Supp. at 586 n.273. In response, the court ruled that the RBOCs could enter the information services market as transmission providers, but not as information providers. 673 F. Supp. at 567. The information services had to be owned by other non-affiliated firms. Id. The court also briefly addressed the RBOCs' First Amendment arguments and dismissed them on several grounds. Id. at 585-86. First, the RBOCs, like other companies were subject to antitrust regulations of which the consent decree restrictions are a part. Id. at 586 n.273. Second, because the RBOCs were common carriers, they enjoyed a different status from other network providers which retained speech rights. Id. Third, there was in fact no infringement of RBOC speech rights because, upon the proper showing, the previously agreed upon ban could be lifted. Id. On appeal, the court of appeals did not reach the First Amendment issue. 900 F.2d 283 at 299-300. However, on remand, the district court reluctantly removed the restriction. 767 F. Supp. 308, 327. Upon RBOC appeal of the court's decision, the court of appeals ruled that the lower court could not require the RBOCs to establish that market conditions had changed given the fact that no party to the consent decree had challenged the assertion. 900 F.2d at 305-07. Further, the district court was required to apply a different standard to assess the advisability of removing the restrictions, as the parties recommended. Id. Faced with the change in standard, the district court felt compelled, albeit reluctantly, to lift the ban. 767 F. Supp. 308, 327-332.

From 1988 to 1992, the RBOCs also sought relief from the cross-ownership ban through a variety of bills proposing to allow telephone company entry into the video transmission and provision market. See H.R. 1504, 103d Cong., 1st Sess. (1993); S. 1200, 102d Cong., 1st Sess. (1991); H.R. 2546, 102d Cong., 1st Sess. (1991) (companion legislation to H.R. 2546); S. 2800, 101st Cong., 2d Sess. (1990); S. 1068, 101st Cong., 1st Sess. (1989); H.R. 2437 101st Cong., 1st Sess. (1989) (companion legislation to Senate Bill 1068). However, the telco provision of video programming, which was seen as an alternative to re-regulation of cable
form of constitutionally protected speech which it is not allowed to present on its own network. According to the carrier, based on the statutory definition of video programming, the 1984 Cable Act prohibition directly infringes Bell Atlantic's First Amendment rights because it prohibits the company and its subsidiaries from engaging in video speech.

Cable television rates and practices, was not adopted by Congress despite significant support from the then president. Instead, the cable industry was substantially re-regulated. In 1993, Senate Bill 1504 proposed to remove the cross ownership restriction. Yet, in all the legislation which has addressed the issue of telco ownership of video distribution facilities, and despite efforts by telephone companies to raise the constitutional speech issue before the FCC and the MFJ court, to date, there are only two references to telephone company First Amendment speech issues in previously unsuccessful legislation. See H.R. REP. No. 934, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4668 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)) (explaining the relationship between the telephone-cable cross-ownership prohibition and the First Amendment goal of diversity of ownership and viewpoint). See also S. 1200, Communication Competition and Infrastructure Modernization Act of 1991, § 101(14), which states, “[t]he Congress makes the following findings: (14) A broadband communications infrastructure will be every American’s tool of personal emancipation; will generate a quantum increase in Americans’ freedom of speech.” Id.

The issue was addressed a second time when Congress determined that its codification of the FCC’s telephone-cable television cross-ownership rules was constitutional. Finally, the issue was addressed in the context of FCC deliberations concerning its telephone company-cable television cross-ownership restriction.

Collectively, in these proceedings, the government has set forth its rationale for why its decision to continue the imposition of the restriction on local telephone company provision of video programming is constitutional. See In re Telephone Company-Cable Television Cross-Ownership Rules, 3 F.C.C.R. 5849 (1988).

125. See Chesapeake & Potomac Tel. Co. v. United States, Complaint for Declaratory Judgment and Injunctive Relief [hereinafter Bell Complaint], at 5 ¶13; see also Judge Examines Telco Claims to First Amendment Cable Rights, COMMON CARRIER WK., June 21, 1993, at 3. In its Complaint, Bell Atlantic alleged that under sections 522(16) and 533(b) of the Act:

Congress has required government officials to decide whether telephone companies are providing prohibited speech that is 'generally considered comparable to' television programming or whether they are providing non-prohibited speech which may also involve video images. This . . . process . . . involves an evaluation of the video images and the
In retort, the government argued that the ban does not violate C&P Telephone's First Amendment rights and thus does not require heightened scrutiny for several reasons. First, C&P Telephone, as a common carrier, is treated differently from other information distributors under the First Amendment. Second, the ban is an antitrust prohibition similar to those to which other media companies are subject. Third, the ban is a content-neutral restriction incidentally affecting speech. Finally, the ban is narrowly tailored to meet the substantial government interests in preventing anti-competitive abuses by telephone carriers possessing monopoly power and maintaining a competitive environment for broadband communications.

Judge Ellis, writing for the court, held that the congressional prohibition against telco provision of video services was unconstitutional. He opined that the availability of workable regulatory alternatives which do not deny local video speech to the entire class of telephone company speakers rendered the prohibition overbroad.

The court rejected the government's "common carriage argu-
ment” as unpersuasive because the ban “directly abridge[d] [C&P Telephone’s] right to express ideas” via video communication.\textsuperscript{133} Furthermore, despite the ban’s primary economic regulatory thrust, its incidental impact on speech falls disproportionately on C&P Telephone’s ability to engage in protected speech.\textsuperscript{134} Finally, the court found that the government’s reliance on the ban’s status as an economic regulation was misplaced because the ban’s impact was deemed significant and proportional.\textsuperscript{135} The fact that the ban prohibited a specific class of speakers from engaging in protected speech was sufficient to warrant heightened constitutional analysis.\textsuperscript{136} Relying on precedent, the court concluded that an intermediate level of scrutiny was appropriate.\textsuperscript{137} The court

\begin{itemize}
  \item \textsuperscript{133} Id. at 918.
  \item \textsuperscript{134} See id. at 921-22.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id. at 921.
  \item \textsuperscript{137} Id. at 926. The court distinguished the judicial precedents upon which the government relied. Id. at 919. It found that the broadcast regulation precedents employing a rational basis test were inapposite because they are premised upon the scarcity of available spectrum frequencies. \textit{Id.} No such scarcity of frequencies was at issue in \textit{C&P Telephone}. \textit{Id.} Based on its rather broad reading of \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241 (1974), it also concluded that the existence of economic scarcity in cable television markets did not provide a justification for the application of the rational basis test. \textit{Id.}

  The government’s argument that its regulation of C&P Telephone’s video speech rights was a “quid pro quo” for its enjoyment of monopoly status was dismissed as well. \textit{Id.} at 921. According to the court, the argument was unavailing because the states rather than the federal government extended monopoly status to telephone companies such as C&P Telephone. \textit{Id.} at 920. Finally, the government’s reliance on \textit{Associated Press v. United States}, 326 U.S. 1 (1945), for the proposition that antitrust (and hence economic regulation) should be subject to rationality review, was deemed misplaced. \textit{Id.} at 921. The court found that the cross-ownership provision had a significant and disproportionate impact on C&P Telephone’s speech. \textit{Id.} at 921-22. According to the court, the Supreme Court has never held that rationality review could be employed where structural economic regulation prohibited a specific class of speakers from engaging in protected speech. \textit{Id.}

  The court also concluded that strict scrutiny analysis was inapplicable. It found that while the statute proscribed the protected speech of a particular class of speakers, strict scrutiny was not required unless the prohibition was also content-based. \textit{Id.} at 923 n.20 (citing \textit{Leathers v. Medlock}, 499 U.S. 439, 452 (1991) and \textit{Turner Broadcasting Sys., Inc. v. FCC}, 819 F. Supp. 32 (D.D.C. 1993), 114 S. Ct. 2445 (1994)). By implication, the court reasoned that the statute was not content-based. Yet several pages later, the court conceded that the application of the
determined that the statute would withstand constitutional scrutiny if it was "justified without reference to the content of the regulated speech, is narrowly tailored to serve a significant government interest, and leaves ample alternatives for the communication of information."\textsuperscript{138}

Analyzing the merits of the government's asserted interests of promoting competition and diversity, the court concluded that the government's use of the ban to promote competition in the video programming market was counterproductive.\textsuperscript{139} Rather than promote competition, the prohibition against the entry of telephone competitors into the multi-channel video distribution market actually limited competition.\textsuperscript{140}

On the other hand, the government's interest in preserving diversity in the ownership of communications media was deemed significant.\textsuperscript{141} However, the government's use of a flat market entry ban to protect against anti-competitive activity by C&P Telephone was held to be overly restrictive in light of alternative regulatory solutions and Congress' silence on the potential effectiveness of the ban.\textsuperscript{142} Furthermore, the court concluded that

statute "depends on the content of the telephone companies' proposed message." \textit{Id.} at 924. Its justification for the apparent inconsistency was that pursuant to its reluctant reliance on \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 791 (1989) and \textit{Renton v. Playtime Theatres, Inc.}, 475 U.S. 41 (1986), "[g]overnment regulation . . . is content neutral [and therefore not subject to strict scrutiny] so long as it is justified without reference to the content of the regulated speech." \textit{C&P}, 830 F. Supp. at 924 (alterations in original). Because the government justified the cross-ownership restriction on economic grounds alone, the court felt compelled to conclude that the statute was justified without regard to its impact on the content of regulated speech. \textit{Id.} at 924, 926.\textsuperscript{138} \textit{Id.} at 917 (citing \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 789-90 (1989)).\textsuperscript{139} \textit{Id.} at 927.\textsuperscript{140} \textit{Id.} The court concluded that the prohibition precluded the potential entry of the telephone companies, one of the potentially more viable multi-channel competitors to cable operators. As a consequence, it limited rather than enhanced diversity by limiting competition. \textit{Id.} at 928.\textsuperscript{141} \textit{Id.} at 929. The statute's original goal was to preclude telephone companies such as C&P Telephone from refusing cable companies access to telephone poles for the purpose of stringing cable, and engaging in the cross-subsidization of its forays into video programming and distribution with monies garnered from its provision of monopoly telephone service. \textit{Id.} In adopting the
the "ban does not fit with [the government's] asserted justifica-
tion." The court also held that the statute was not narrowly
tailored because the existence of effective alternatives allowed
telephone entry into the video programming market while prevent-
ing telephone company attempts at monopolization. Instead,
the statute burdens more speech than is necessary.

C. Turner Broadcasting Systems, Inc. v. FCC. Constraining
Network Owner Control of Market Entry and Access

The recent cable industry challenge to federal must-carry, leased
access and PEG provisions in the 1992 Cable Act again raised the
issue of the appropriate level of First Amendment protection
enjoyed by cable providers. This determination not only affects the
relationship between cable operators, information providers and
users; it also impacts the potential relationship between network
owners and users of multi-media broadband networks.

Sections 4 and 5 of the Act require cable systems of a certain
size to carry, upon broadcaster request, the signals of certain
licensed commercial and non-commercial broadcast stations in the
cable operator's market. Several cable operators challenged the

FCC's cross-ownership prohibition, Congress made no findings as to the
effectiveness of less restrictive regulatory alternatives. Id.
143. Id. The court reasoned that the statute prohibits telephone companies
from providing video programming to subscribers in their service areas but does
not preclude them from transporting video programming. Id. However, the
government's alleged justification for the ban is the prevention of telephone
companies such as C&P from engaging in discriminatory pole access and cross-
subsidization in the video distribution [transport] market. Id. Nevertheless, under
existing law, telephone companies could possibly secure supra-competitive prices
via cross-subsidization in the transport market despite the ban. Id. at 930.
Consequently, the government was left with the argument that the ban was
necessary to preclude telephone company attempts to monopolize the video
program market. Id. at 930-31. This argument failed for lack of evidence and
persuasiveness that other effective methods of regulating anticompetitive activity
in the video program market are unavailable. Id. at 930.

144. Id. at 931-32.
145. Id.

147. Id. at 2453-54 (citing 47 U.S.C. §§ 531, 534(b)(1)(B), requiring cable
systems with more than 12 active channels to set aside one third of their channel
capacities for commercial broadcasters requesting carriage; 534(b)(1)(A), requiring
constitutionality of the statute's provisions alleging that they violated the cable operators' First Amendment rights in three ways.\textsuperscript{148} First, they argued that the provisions inhibit cable operators' editorial discretion to choose what video programming to carry.\textsuperscript{149} Second, the provisions force cable operators to devote a portion of their finite channel capacities to other speaker-competitors.\textsuperscript{150} Third, they argued that these provisions are content-based restrictions favoring broadcasters over cable programmers and, in fact, discriminate against cable system owners.\textsuperscript{151}

The government responded that Congress implemented the provisions because cable systems possess excessive market power harmful to broadcast competitors.\textsuperscript{152} Mandatory carriage was designed to eliminate anti-competitive cable practices, preserve public access to over-the-air television broadcasting signals and ensure public access to diverse video programming.\textsuperscript{153} The provisions were touted as content-neutral, industry-specific legislation.\textsuperscript{154}

1. \textit{Turner Broadcasting Systems, Inc. v. FCC}\textsuperscript{155}

The district court panel\textsuperscript{156} ruled two-to-one upholding the constitutionality of the provisions. The court stated that the

cable systems with more than 300 subscribers but 12 or fewer active channels to carry signals of three commercial broadcasters; and 535(a), requiring carriage of public broadcast stations).


149. \textit{Id.}

150. \textit{Id. See also} Daniels Cablevision, Inc. v. United States, 835 F. Supp. 18 (D.D.C. 1993) (holding that §§ 612(b) and 611 of the 1992 Cable Act prohibit cable operators from exercising editorial control over its lessee's programming).


152. \textit{Id. at 40.}

153. \textit{Id.}

154. \textit{Id.}


156. The 1992 Cable Act provides that all challenges to must-carry provisions must be made to a three-judge panel of the District Court of the District of Columbia. 47 U.S.C. § 555 (Supp. IV 1992). Appeals from three-judge panels are taken directly to the Supreme Court. § 635(c)(1)-(2).
provisions are "essentially economic regulations designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." To the extent the First Amendment is implicated at all, it is a mere byproduct of the fact that cable operators transmit video signals to communicate information. As such, the must-carry provisions are "unrelated . . . to the content of any messages that these embattled cable operators, broadcasters and programmers have in contemplation to deliver."  

The Supreme Court affirmed the lower court's ruling. A majority of the Court found that the government's interests in promoting diversity of information from competing sources,

157. Turner, 819 F. Supp. at 40. The Senate reached the same conclusions. It viewed the signal carriage provisions as "economic regulations" intended to promote competition between broadcast and cable distribution systems and enhance viewpoint diversity available to cabled and non-cabled homes. S. REP. No. 92, 102d Cong., 1st Sess. 55 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1188. According to the Senate, Congress enacted the regulations to ensure that cable operators do not exercise control over their distribution facilities in a manner which discriminates against broadcasters. Id. at 56, 1992 U.S.C.C.A.N. at 1189. At least one legal scholar is skeptical of the court majority's holding (and the Senate's conclusion) that the regulations have minimal impact upon speech because they have been justified as economic regulation. Mark Peritz, Turner Broadcasting v. FCC: A First Amendment Challenge to Cable Television Must-Carry Rules, 3 WM. & MARY BILL OF RTS. J. 715 (1994).  

158. Turner, 819 F. Supp. at 40. The Senate stated that the signal carriage provisions are "not at all based on the content of those signals, but instead . . . counterbalance cable systems' commercial or economic incentives to exclude . . . [broadcast] signals." S. REP. No. 92, supra note 158, at 56, 1992 U.S.C.C.A.N. at 89. The Senate made only an oblique acknowledgement of the possible relevance of the First Amendment to cable operator speech rights, stating that: "[t]he First Amendment also supports government regulations intended to promote a diversity of voices, even if some incidental loss of editorial discretion results." Id.  


160. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994). The majority found that: Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming — whatever its content. Id. at 2462.
preserving forty percent of the society's access to economically viable broadcast stations, and promoting fair competition in the video distribution market were important governmental interests. However, the Court also stated that the government had failed to provide sufficient evidence to establish that broadcast stations are in economic jeopardy and that the must-carry rules will actually advance the government's interests by materially alleviating the economic harm. As a result, the Court remanded the case back to the district court panel.

The Supreme Court unanimously affirmed that cable operators engage in constitutionally protected speech activities. More importantly, the Court distinguished between the First Amendment regulation of cable television, and regulation of broadcast television and newspapers.

In response to the government's argument that the must-carry provisions should be analyzed under the same standard of review applied to broadcasting, a majority of eight justices held that broadcasting precedents do not apply to cable television. The majority looked to the technological differences between the broadcasting and cable technologies in making a distinction between the First Amendment standards to be applied to the two industries. The Court reasoned that cable does not possess the unique physical limitations of technical scarcity and interference that broadcasting does. Additionally, the cable industry's channel capacity is growing rapidly and speakers on adjacent cable channels suffer no degradation of signal due to interference. Consequently, the more relaxed review standard applied to government regulation of broadcast licensees does not apply to cable.

161. Id. at 2469-70.
162. Id. at 2470.
163. See id. at 2456 (citing Leathers v. Medlock, 499 U.S. 439, 444 (1991)).
164. Id. at 2456-57.
165. Id. at 2456.
166. Id. at 2456-57.
167. Id. at 2457.
168. Id.
169. Id. at 2457. The government also argued that the economic characteristics of the broadcast market rather than its technical characteristics served as the basis
Addressing the cable system operators and affiliated programmers' arguments that strict scrutiny analysis should apply to the must-carry provisions, a smaller majority of the Court determined that intermediate scrutiny was the appropriate standard of review. The majority reasoned that the requirement to carry a number of full powered broadcast stations is content-neutral. Signal carriage is solely a function of cable channel capacity. Thus, a cable operator cannot "avoid or mitigate" its carriage obligations by changing its programming. Finally, to the extent that the must-carry rules distinguish between speakers, they do not favor broadcast programmers over cable programmers on the basis of their speech content, but rather by their form of transmission. Because the rules do not evidence a governmental for broadcast regulation and the same consideration of economic characteristics should apply to cable regulation. A majority of eight justices rejected that argument for two reasons. First, it stated that the special technical characteristics of broadcasting and not the economic characteristics are the basis of broadcast jurisprudence. Second, it emphasized that unsubstantiated assertions of economic market dysfunction will not serve to shield speech regulation from the First Amendment standards applicable to non-broadcast media. A majority of eight justices also rejected the government's categorization of the must-carry rules as industry-specific antitrust legislation deserving of rational basis scrutiny. The Court found that the government's reliance on Associated Press v. United States, 326 U.S. 1 (1945) and on Lorrain Journal Co. v. U.S. 342 U.S. 143 (1951), was misplaced. The Court, 114 S. Ct. at 2458. Whereas both cases involved the actions against the press brought under a law of general application to all industries, the must-carry provisions have singled out the cable industry for special treatment. Consequently, heightened First Amendment analysis was warranted. The majority found support for its conclusion that Congress based its distinction between broadcast and cable speakers on the mode of transmission in the statutory findings accompanying the provisions. At 2461. According to the majority's reading of the statutory findings, Congress made the distinction to preclude cable operators from favoring their affiliated programmers over broadcasters in an effort to garner a larger share of advertising revenues. Absent the provisions, Congress reasoned that cable operators would favor their programmers to the severe economic disadvantage of broadcasters. Such economic detriment would result in the loss of free, over the air broadcasting to the viewing public, especially the forty percent unable to afford access to cable television. Given the vital part television plays in our communications
preference for one set of speakers over another based on the content of their speech, strict scrutiny analysis was not triggered.\textsuperscript{74}

system, the provisions were necessary to ensure all Americans access to such programming. \textit{Id.}

In discussing the merits of broadcast television, Congress emphasized its importance as a source of local news, public affairs and other programming essential to an informed electorate, as well as educational and informational programming. \textit{Id.} at 2462. Cable system owners and programmers had seized upon these statements as proof that Congress' provisions favored broadcasters over cable operators and programmers on the basis of content. \textit{Id.} According to the \textit{Turner} majority, Congressional statements merely constituted acknowledgements of the valuable role broadcasting plays, and did not imply a comparative valuation of broadcasting vis-a-vis cable. Consequently, the provisions are in fact content-neutral. \textit{Id.}

174. \textit{Id.} at 2467. The majority dispensed with three other arguments in favor of strict scrutiny analysis. The cable system operators and programmers argued that the must-carry provisions: 1) compel cable system owners to transmit speech they would not otherwise transmit; 2) favor broadcast programmers over cable programmers; and 3) single out cable system owners for disfavored treatment. \textit{Id.} at 2464-67.

In response to the "compulsion" argument, the majority held that the must-carry provisions are content-neutral and are not triggered by cable operator speech in the way that access rules in \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241 (1974) and \textit{Pacific Gas & Electric Co. v. Public Utilities Commission}, 475 U.S. 1, 11 (1986) activated the requirement to provide access. \textit{Turner}, 114 S. Ct. at 2465. In light of cable operators' long history of carrying broadcast stations without changing cable programming, the majority found no rational reason why cable operators would now alter their programming in response to broadcast station programming carried as a result of the must-carry provisions. \textit{Id.} Finally, the cable industry's reliance on \textit{Tornillo} was misplaced, according to the majority, because cable operators exercise far greater control over access to the relevant medium than do print publishers. Print publishers do not control distribution; thus, they cannot obstruct reader access to other publications. \textit{Id.} at 2466.

In response to the "media favoritism" argument, the majority distinguished between speaker-partial laws based on whether they actually reflect a government preference for the content of one speaker's speech over another's. \textit{Id.} at 2467. The majority found that the must-carry rules do not reflect such a preference; rather, they are justified because of the bottleneck power which cable systems possess and the possibility that such power may be used to undermine the economic viability of broadcast stations. \textit{Id.}

In response to the "disfavored treatment" argument, the majority stated that the First Amendment does not require the application of strict scrutiny to any speech regulation that applies to one rather than all communications media. \textit{Id.} at 2468. Where the laws are justified by special characteristics of the communications medium, strict scrutiny is unwarranted. \textit{Id.} In \textit{Turner}, the Court reasoned that the bottleneck power possessed by cable operators and the economic dangers that its exercise poses to broadcasters provided the justification for the provisions. \textit{Id.}
The five member *Turner* majority also distinguished between the First Amendment rights of cable system operators and newspaper publishers.\(^\text{175}\) Cable television operators, by virtue of the technology, possess bottleneck or gatekeeper control over subscriber access to other speakers.\(^\text{176}\) Consequently, First Amendment regulation of cable television requires a less stringent standard than that applied to newspapers.\(^\text{177}\)

While the Court did not address the potential distinctions or similarities between telephony and cable, it may have provided some guidance when it stated: "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."\(^\text{178}\)

However, the ultimate impact of *Turner* on cable network owners' First Amendment status is somewhat uncertain for at least two reasons. First, the composition of the Supreme Court has changed. Justice Harry Blackmun who aligned himself with the majority, has subsequently retired. It is unclear how his successor, Justice Stephen Breyer, would rule on the probative quality of the government's evidence of economic harm, or the basic constitutionality of the must-carry rules themselves.\(^\text{179}\) Thus, while majorities in both the district court and Supreme Court concluded that the must-carry rules are content-neutral and the government's interests are compelling,\(^\text{180}\) a new majority of the Supreme Court

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\(^\text{175}\) *Id.* at 2466.

\(^\text{176}\) *Id.*

\(^\text{177}\) *Id.* By comparison, newspaper publishers cannot obstruct or prevent reader access to other publications because they do not control the distribution of other publications. *Id.*

\(^\text{178}\) *Turner,* 114 S. Ct. at 2466 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)). For broadcast industry reaction to this portion of the decision see Halonen, *supra* note 12, at 3-4 (stating that the final decision will protect broadcasters against wired networks with regards to new information technology).

\(^\text{179}\) See Halonen, *supra* note 12, at 3.

\(^\text{180}\) The district court in *Turner* concluded that to the extent the First Amendment is implicated at all by the must-carry rules, it is a mere byproduct of the fact that cable operators transmit video signals having no other function than the communication of information. *Turner,* 819 F. Supp. at 40. As such, the must-carry provisions are, in the court's mind, "unrelated . . . to the content of
could conclude otherwise.\textsuperscript{181} Justice O'Connor, like Judge Williams below, concluded that Congress justified the must-carry rules on its desire to assure the continued availability of local news and public affairs, as well as educational programming by broadcasters.\textsuperscript{182}

any messages these embattled cable operators, broadcasters, and programmers have in contemplation to deliver." \textit{Id.}

And, to the extent that Congress may nevertheless be said to have authored content-related provisions, the relationship between the provisions and content is negligible, and is based at most on an assumption that broadcasters have as much to say of interest or value as cable operators. \textit{Id.} at 44. Furthermore, diversity is better served by having both available to the public on cable facilities. \textit{Id.}

Not surprisingly, the Senate stated that the signal carriage provisions are "not at all based on the content of [the broadcast] signals, but instead . . . counterbalance cable systems' commercial or economic incentives to exclude . . . [broadcast] signals." S. REP. No. 92, 102d Cong., 1st Sess. 56 (1991), \textit{reprinted in} 1992 U.S.C.C.A.N. 1133, 1189. The Senate made only an oblique reference to the relevance of the First Amendment to cable operator speech rights, stating that: "[t]he First Amendment also supports government regulations intended to promote diversity of voices, even if some incidental loss of editorial discretion results." \textit{Id.}

181. Doug Halonen asserts that the conclusion that the must-carry rules pass constitutional muster may be in jeopardy. The composition of the Court has changed with Justice Blackmun's retirement and Justice Breyer's succession. Halonen, \textit{supra} note 12, at 3. Consequently, there is no majority for much of the \textit{Turner} opinion as currently written. If the case returns to the Court subsequent to a full hearing in the district court, it is impossible to know with any certainty how Justice Breyer would decide. Moreover, while it is unclear what further evidence the parties will submit in the district court, it is likely that a future Supreme Court will have new information before it. Thus, there are opportunities for a new majority to emerge.

182. \textit{Turner}, 819 F. Supp. at 62. The Supreme Court also reached this conclusion. Justice O'Connor, in her dissent joined by Justices Ginsburg, Scalia and Thomas, concluded that Congress' reasons for adopting the rules certainly made significant reference to the content of information to be provided by broadcasters. \textit{Turner}, 114 S. Ct. at 2476-77. As such, strict scrutiny is required even where the government's goals may be laudable. Justice O'Connor wrote:

\begin{quote}
[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. . . . The controversial judgment at the heart of the statute is . . . that broadcasters should be preferred over cable programmers. . . . [T]he findings . . . represent Congress' reasons for adopting this preference; . . . these reasons rest in part on the content of broadcasters' speech.
\end{quote}

\textit{Id.} at 2477-78.

The dissent continued, "[i]t may well be that Congress also had other, content-neutral, purposes in mind when enacting the statute. But we have never held that the presence of a permissible justification lessens the impropriety of relying in
part on an impermissible justification.” *Id.* at 2478.

Judge Williams’ dissent in the district court opinion also took considerable exception to the impact of the must-carry rules on cable operators and programmers. According to Judge Williams, the must-carry rules impose a “burden . . . on one set of speakers for the direct and explicit advantage of a limited class of their competitors — a class whose programming must, as a matter of law, include content of a type specified by the government.” *Turner*, 819 F. Supp. at 60.

The Supreme Court majority’s conclusion that the must-carry rules are unrelated to the content of the messages that the respective broadcasters and cable casters carry is questionable. It ignores a major thrust of congressional and FCC broadcast policy stretching back more than 30 years.

The existence, quality and quantity of bona fide licensee-provided local news and public affairs programming has been a major broadcast regulatory issue almost from the inception of the service. Licensee provision of news and public affairs programming has affected its chances of receiving an initial grant of a license or a renewal of an existing license. See *In re* Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 44 F.C.C.2d 405 (1973). Such programming has figured prominently in FCC determinations of what constituted balanced programming under previous enforcement of the Fairness Doctrine. See *In re* The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 58 F.C.C.2d 691 (1976) (recognizing that coverage of public issues justifies regulation and is essential to balanced programming).

Definitions of what constitutes acceptable news and public affairs programming, including public oversight and agency enforcement, have evolved throughout the history of broadcast regulation from the 1940’s through successful deregulatory efforts in the 1980s. See generally *In re* The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984) (further deregulating the system by abandoning routine programming reviews, levels of commercialization, and formal ascertainment practice of TV licenses in uncontested renewal context); *In re* Amendment of the Commission’s Rules Concerning Program Definitions for Commercial Broadcast Stations by Adding a New Program Type, ‘Community Services’ Program & Expanding the ‘Public Affairs’ Program Category & Other Related Matters, 88 F.C.C.2d 1188 (1982) (refusing to adopt new programming category which could include religious programming under the guise of “public interest”); *In re* Deregulation of Radio, 84 F.C.C.2d 968, 988 (1981) (eliminating non-entertainment program guidelines; ascertainment primers, commercial guidelines and program logging requirements); *In re* Amendment of the Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants & Noncommercial Educational Broadcast Applicants, Permittees and Licensees, 76 F.C.C.2d 401 (1980) (amending ascertainment requirements by requiring non-listed checklist categories to come forward to determine if their element is significant); *In re* Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records, 43 F.C.C.2d 680 (1973) (holding that TV program logs should be made public under certain circumstances); *In re* Primer on Ascertainment of Community
Should the new sitting justice come to the same conclusion when and if the case comes before the Supreme Court again, a new majority could hold that Congress’ reasons for adopting the must-carry rules rest in part on the content of broadcasters’ speech and therefore, are impermissible.\textsuperscript{183}

Second, upon remand, evidence of economic harm may prove insufficient to establish a sufficient threat to the government’s interest in the retention of viable broadcast stations.\textsuperscript{184} Thus, it

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Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971) (clarifying guidelines for ascertainment of community problems requirement). Finally, the potential impact of competitive market entry on the provision of news and public affairs programming has served as the linchpin for congressional, judicial and administrative regulation of market competition. \textit{See In re Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations}, 3 F.C.C.R. 638 (1987) (eliminating policies which address “economic injury” to existing broadcast stations).

\textsuperscript{183} Both dissenting opinions assert that strict scrutiny is triggered by the rules’ impact. First, the must-carry rules mandate speech which the cable operators may not otherwise make and prohibit cable operators from programming a portion of their channels as they might otherwise have done. \textit{See Turner}, 114 S. Ct. at 2479; \textit{Turner}, 819 F. Supp. at 59. Second, the rules do so in a manner which directly burdens the cable operators’ exercise of editorial control and speech. \textit{Turner}, 114 S. Ct. at 2479; \textit{Turner}, 819 F. Supp. 59-60. As a consequence of the cable operators’ loss of control over their channels of transmission, they suffer a direct and palpable diminution of speech.

However, the dissenting opinions diverge after agreeing that the rules’ impact triggered strict scrutiny. Justice O’Connor concluded that the government’s interests were not sufficiently compelling to justify content-based speech restrictions. \textit{See Turner}, 114 S. Ct. at 2478. Unfortunately, Justice O’Connor does not state what would constitute such a compelling interest. On the other hand, Judge Williams concluded that while the government’s interest in diversity was sufficiently compelling, its means of achieving that goal was not sufficiently narrowly tailored. \textit{Turner}, 819 F. Supp. at 61-62. First, there was insufficient proof that requiring carriage of broadcasters will increase diversity. \textit{Id}. Second, there were less burdensome alternatives, such as the leased access channel provision which could accomplish Congress’ purpose. \textit{Id}. While unwilling to concede that the government showed a compelling interest, Justice O’Connor also concluded that the rules were insufficiently tailored to achieve the government’s stated goals. \textit{Turner}, 114 S. Ct. at 2479.

\textsuperscript{184} The district court’s dissent acknowledged as compelling the government’s goal of assuring access to television for Americans financially disinclined or incapable of subscribing to cable as well as Americans who remain geographically remote from areas where broadcasting is offered. \textit{Turner}, 819 F. Supp. at 62. However, the available evidence did not support the congressional finding that broadcasting is economically threatened by cable. \textit{Id}. Upon review of the
proffered evidence, the dissent concluded that:

the legislative findings do not support the inferences needed to sustain must-carry... (1) there is no finding of any present or imminent harm; (2) the evidence of some dropping of broadcast channels in itself fails to show any widespread problem; (3) the proliferation of local broadcast stations since the end of the FCC's must-carry rules undermines any inference of a problem; (4) the findings as to structure and incentives, taken together with the evidence of cable's dependence on broadcasting, fail to raise the concern beyond the level of speculation; and (5) even if the hazard were perceptible, the record does not address the less intrusive alternatives.

Id. at 65.

Moreover, Congress' efforts to compile evidence of broadcasting's economic demise prove no more effective than prior efforts by the FCC and broadcasters. The must-carry question is not the first instance in which economic harm to existing broadcast stations has been raised against new competitors. See In re Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 F.C.C.R. 638, 638 (1987). In the economic injury to broadcasting cases, the courts and FCC have concluded that an existing broadcaster could prevent the entry of a new broadcast competitor by pleading economic harm when its allegations of economic injury were supported by proof of a significant loss in news and public affairs programming occasioned by a loss of advertising revenues. Id. It would also have to establish that this loss in news and public affairs programming would not be alleviated by the new entrant. Id. After years of litigation before it, the FCC concluded that no broadcaster had been able to successfully meet the public interest burden. See id. (abolishing the Carroll doctrine and the UHF impact policy which allowed this). The consistent inability of broadcasters to meet the requisite burden of proof to establish an actionable economic detriment led to the abolition of the economic injury objection in comparative proceedings. Id. at 639-40. The FCC, in abolishing the objection, stated that:

By this action, the Commission abolishes certain policies that address the issue of economic injury to existing broadcast stations. Our decision is based on our experience in implementing these policies and the intervening growth of the electronic media which lead us to conclude that the public interest is no longer served by their retention. Id. at 638.

The FCC also stated that their "review of more than 80 cases... indicate[d] that, although parties may have routinely pleaded... [economic injury issues], they have been unable to demonstrate sufficient evidence to warrant a finding of harm that would result in a net loss of service to the public." Id. at 639-40. It continued:

We also conclude that the underlying premise of the Carroll doctrine, the theory of ruinous competition, i.e., that increased competition in broadcasting can be destructive to the public interest, is not valid in the broadcast field. The court, in Carroll, conceded that "private economic injury is by no means always, or even usually, reflected in public
is possible that the rules may be overturned on the grounds set forth by the dissent or the majority of the Supreme Court in *Turner*.

2. *The Precarious Constitutionality of Must-Carry*

The majority's conclusion that the must-carry rules are unrelated to the content of the messages that the respective broadcasters and 

detriment. Competitors may severely injure each other to the great benefit of the public."

*Id.* at 640 (quoting Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958)).

The FCC accordingly stated that it would no longer entertain claims of *Carroll* injury. *Id.* at 641. In reaching its conclusion, the FCC also cited congressional determinations that pleadings of economic injury would be insufficient to preclude competitive market entry. *In re Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, 2 F.C.C.R. 3134, 3135 (1987).*

The FCC's conclusions regarding existing broadcasters' inability to prove economic injury over many years in numerous licensing proceedings are substantially similar to the conclusions reached by the Court of Appeals for the District of Columbia in *Quincy Cable Television, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985)*, and those reached by the dissent in *Turner*. In each instance, the evidence proffered was overly speculative. In *Quincy*, the Court concluded that irrespective of the ultimate constitutionality of the rules: the Commission had not adequately substantiated its assertion that a substantial governmental interest existed. . . . *Even accepting the view that the preservation of free local television was an important regulatory goal . . . the problem the sweeping must-carry rules purported to prevent — the destruction of free, local television — was merely a "fanciful threat" unsubstantiated by the record or by two decades of experience with cable TV.*

*Century Communications v. FCC, 835 F.2d 292, 295 (D.C. Cir. 1987) (quoting *Quincy*, 768 F.2d at 1457).*

Indeed, in its subsequent effort to justify the must-carry rules, the FCC did not even advance an economic harm argument — a fact which the Court noted when it deemed that argument "foreclosed by *Quincy Cable TV.*" *Id.* at 299 n.4.

185. *Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994).* The Court remanded the case to the district court to hear further evidence because the government had failed to provide sufficient evidence to establish that broadcast stations are in economic jeopardy and that the must-carry rules would actually advance the government's interests by materially alleviating the economic harm. *Id.* Only Justice Stevens would have voted for affirmance of the district court opinion upon which the appeal was based. *Id.* at 2473.
cable operators carry is questionable.\textsuperscript{186} The must-carry rules are both content- and market-oriented regulations. They clearly affect cable operators' programming choices. At a minimum, they remove editorial discretion from the purview of the cable system. The net result favors local programming offered by broadcasters over programming chosen by cable operators. To argue otherwise ignores a major thrust of congressional and FCC broadcast policy that dates back more than thirty years. Moreover, Congress articulated its concerns about the continued availability of local programming as a partial reason for reinstating the local signal carriage rules.\textsuperscript{187}

Absent local news and public affairs programming, the difference between the movies and entertainment programming offered on cable, and entertainment programming offered on broadcast stations, is negligible because cable operators still voluntarily carry most broadcast stations and all network programming. Certainly, the same types of programming are represented amply on both distribution media. Accordingly, it is difficult to argue that the government's goal of diversity is furthered by having the same situation comedies, game shows, sports programs or movies aired on different channels at different times. Is the facilitation of viewer convenience in watching a particular program the diversity that the government seeks to protect with must-carry legislation?

Again, the inevitable conclusion is that the rules are indeed content-based. The fact that there is little distinction between broadcast and cable television programming fare outside of local news and public affairs supports the conclusion that Congress was motivated in part by concerns about content. Congressional statements and the history of broadcast regulation confirm this view as well. The gross similarity between broadcasting programming

\textsuperscript{186} The majority also concluded that the government's regulation of the programming content of broadcasting is minimal. Therefore, a conclusion that Congress sought to exercise control over what programming viewers see on cable by requiring the carriage of broadcast stations "is little more than speculation." \textit{Id.}

and cable programming undermines the assertion that the rules are necessary to achieve enhanced diversity.

The rules are also clearly economic. Given some cable operators' tendencies to favor affiliated programmers over non-affiliated ones and to move broadcast signals around or drop them from system offerings (albeit rarely), Congress might reasonably conclude that, at some future time, cable operators could decide to discontinue carriage of most broadcast stations. This could happen if the cable operators were able to deal directly with the current broadcast networks and other independent programmers for programming, thereby bypassing the affiliates and independent stations altogether. It could also happen if cable operators have programming from their affiliates which conflicts with that offered by broadcasters. The problem is that the demise is not imminent. Indeed, it has not been a threat over the past two decades despite the phenomenal change in the video distribution industry. Moreover, the impact on the broadcast market of cable has not been separated from the impact of other phenomena, such as the increase in multiple ownership limits and the current recession or FCC facilitation of new technologies competing with broadcasting.

In a representative democracy, access to information is a critical necessity. While there are significant drawbacks to relying on advertising subsidies to support news and public affairs programming, it is clear that giving access to these programs on the basis of the ability to generate advertising revenues would exacerbate the problem.

189. Reliance on advertising subsidies skews presentation of information consistent with the preferences of those whom advertisers wish to reach. To the extent that some members of the audience are more desirable than others, less desirable audiences receive less service. Paul Farhi, Minority Broadcasters Fault Rating Firms' Survey Results: Owners Say Errors Discourage Advertisers, WASH. POST, July 18, 1989, at C1.
190. Advertisers' assessments of the desirability of certain consumer groups often precludes the presentation of perspectives espoused by those which advertisers do not seek to reach. However, these individuals still receive general information about items of presumed public and political importance. Establishing the ability to pay as the price of access not only assures that certain perspectives will not be represented, but may preclude access to general information as well.
Nevertheless, it is appropriate to ascertain with some precision the manner and extent to which advertiser-subsidized local news and public affairs programming would suffer in the absence of must-carry rules for broadcast stations. Judicial and regulatory precedent exist and sets forth the manner in which such an inquiry might be made. The stringent requirements of the inquiry, however, do not facilitate a finding of economic harm.

According to Judge Williams' dissent in Turner, the evidence presented by broadcasters and the FCC in *Quincy Cable Television, Inc. v. FCC* did demonstrate a claim of economic harm to broadcasters. Judge Williams further argued that the evidence relied on by Congress in the *Turner* district court case did not support a conclusion of imminent harm. While there is some support for Congress' findings of economic harm, there is also economic evidence tending to show that whatever financial difficulties broadcasters currently suffer are a function of the FCC's pro-competitive policies which increased the number of broadcast and new technology competitors. Further, the continuing...
economic recession contemporaneous with the study, caused a significant drop in available advertiser revenues. In sum, the evidence of economic harm is, at best, inconclusive.

Moreover, even if the arguments of economic harm were compelling, the government has less intrusive alternative means available to assure the continued viability of over-the-air broadcasting. There are other methods of enhancing broadcasters' ability to compete as multi-channel providers. These include: relaxing cross-ownership restrictions between broadcasters and newer spectrum technologies such as multichannel, multipoint distribution systems (MMDS), instructional television fixed services (ITFS), operational fixed services (OFS) and Personal Communications Services (PCS); further relaxation of local and regional broadcast multiple ownership rules; expedited facilitation of multi-channel provider/carrier entry into the video distribution market, including telephone companies, direct broadcast satellites and multi-channel wave service access. All of the foregoing would increase the number of channels available to broadcasters. Introduction of DBS or another multi-channel provider such as local telephone companies would have a positive affect on diversity while providing increased economic viability for broadcasters. Another alternative would be to facilitate the development of a switched broadband carrier from whom the broadcasters could


200. Id.


202. Id.

203. Id.
acquire minimum access to the market.

In sum, congressional findings that the must-carry rules would enhance diversity and reduce the likelihood of economic harm are insufficient and speculative. Although compelling, the interests are not achieved by the regulations and are not supported by the adduced evidence. Moreover, there are less restrictive alternatives to achieve the government's goals. For these reasons, there is significant justification for challenging the rules' constitutionality.

D. *Daniels Cablevision, Inc. v. United States*: Constraining Network Owner Control Over Market Entry and Access

Section 7(b)(4)(B) of The Cable Act of 1992 allows franchising authorities to require cable systems to provide public, educational and governmental (PEG) access channels. Section 9 of the Act requires cable operators to make a portion of their channel capacity available for leased access by unaffiliated programmers.

The *Daniels* court quickly rejected the cable operators' claims that the PEG and leased access provisions were unconstitutional. Relying on the district court opinion in *Turner*, the district court in *Daniels* applied an intermediate scrutiny analysis and found that the provisions were content-neutral and served significant government interests. Consequently, the PEG and leased

205. Id.
206. Id.
207. Id.
210. Id.
211. Id.
214. The district court concluded that while the PEG and leased access provisions "may impose some limit on the autonomy of cable operators to speak only such speech as they would themselves pronounce, most do so only to serve
access provisions are constitutional if they also serve significant government interests and do not burden more speech than necessary to further those interests.\textsuperscript{215} The court determined that the PEG access provisions enhance market diversity by affording an opportunity for less popular speakers to gain access to cable's pervasive transmission technology and audiences.\textsuperscript{216} The court then concluded that the leased access rules also enhance market diversity by precluding cable operators from favoring affiliated programmers over non-affiliated programmers.\textsuperscript{217} Thus, the government interest in promoting a diversity of information is achieved.\textsuperscript{218} Further, the access provisions are narrowly tailored and burden speech no more than necessary.\textsuperscript{219}

Unlike the must-carry provisions, the leased access and PEG provisions can more readily be categorized as content-neutral.\textsuperscript{220} While other classes of speakers (non-affiliated commercial programmers as well as residents, educational institutions and governments of the service area) are afforded access, no particular form of programming or viewpoint has historically been associated with such speakers.\textsuperscript{221} Thus, once the provisions are interpreted as furthering a government interest unrelated to a purposeful suppression of speech by cable operators, they are deemed constitutional if narrowly tailored to serve the government interests.\textsuperscript{222}

E. The Constitutional Access Paradigm Circa 1994

\begin{footnotesize}
\textsuperscript{215} Daniels, 835 F. Supp. at 4-5.
\textsuperscript{216} id.
\textsuperscript{217} id. at 7.
\textsuperscript{218} id.
\textsuperscript{219} The court relied on the fact that PEG channel usage was negotiable between the franchisor and franchisee and that leased access channels were assigned on a proportional basis with an absolute limit on the number of channels which a cable operator could be required to provide. \textit{id.} at 7.
\textsuperscript{220} id.
\textsuperscript{221} id.
\textsuperscript{222} id. at 4-5.
\end{footnotesize}
1. Network Owner Access

It is possible to view *C&P*223 *Turner*224 and *Daniels*225 as addressing different aspects of the multi-media "chimera." Practically speaking, the cross-ownership requirement restricting access to one’s network is not very different from the cable access requirement precluding use of one’s network to allow others access. The difference is one of degree not of kind.

The market access regulations of telephone companies and of the cable industry exist on a continuum. At one end, local telephone companies cannot enter the market or access its facilities and are not permitted to engage in video speech on its own facilities. On the other hand, cable companies are allowed access and can exercise speech rights, but are required to forbear from such exercise on a portion of their channel capacity.226 In both instances, the requirement to forbear is justified as a content-neutral means of achieving diversity given the bottleneck control the telephone companies and cable networks currently enjoy. However, if the cable industry is afforded substantial access and speech rights and required to free up a certain amount of their capacity, it is inequitable to require telephone companies to do more.227

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226. *Id.*
227. A search for technical or economic grounds supporting a distinction between local telephone and cable networks proves relatively fruitless. Are the attempts to monopolize distinguishable as a matter of degree? For cable operators, vertical integration of the programming and distribution functions create conflicts of interest vis-a-vis other programmers. For telephone companies, vertical integration of the programming and distribution functions are expected to create the same conflicts.

While their architectures are different, the existence of substantial capacity on both systems would militate against making the distinction on the basis of architecture. Regardless of whether the non-affiliated speaker acquires access to cable’s point to multi-point network or the telephone company’s switched interactive system, arguably the more capacity the potential network provider possesses, the less intrusive the requirement of third party access becomes. Moreover, as the network technologies merge, it is likely that cable operators may
The cross-ownership prohibition that was struck down in C&P prohibited the carrier from accessing its local network for the purpose of engaging in video speech.\(^\text{228}\) In Turner, the cable operators argued and the Supreme Court agreed that the must-carry rules require them to forbear from engaging in access to a portion of their networks in order to provide third party access.\(^\text{229}\) The same assessment applies to the PEG and leased access channels addressed in Daniels.\(^\text{230}\) In sum, all of the provisions require the network owner to forbear from using some portion of its network capacity to engage in video speech.

Comparing C&P to Turner, it may be argued that the requirement to forbear from any access is more egregious than the requirement to forbear from a portion of one's network, because unlike the cable operator, a telephone company may not engage in access or speech at all.

C&P and US West, Inc. v. United States\(^\text{231}\) remedy this inequity. Local telephone companies may not be prohibited from engaging in protected speech.\(^\text{232}\) Although the government has a compelling interest in diversity, the flat ban is counterproductive and burdens more speech than necessary.\(^\text{233}\)

2. Non-Affiliated Programmer Access

While courts have now ruled that the government may not preclude the local telephone network owner from gaining access to its network to engage in video speech,\(^\text{234}\) two courts have ruled that the government may require the cable network owner to provide switched services and telephone networks may provide point to multipoint video services.

\(^\text{228}\) Daniels, 835 F. Supp. at 10.


\(^\text{230}\) Daniels, 835 F. Supp. at 7.


\(^\text{233}\) Id.

provide access to non-affiliated programmers and users.\textsuperscript{235} In particular, where the cable network owner possesses bottleneck control over access to the video market, requirements to provide access to speakers not associated or identified with particular content or speech will survive constitutional challenge.\textsuperscript{236}

3. Access to Network Programming Functionalities

Today, local telephone networks, because of greater distributed software intelligence, provide opportunities to alter the composition and flow of information. One significant issue left unresolved because of failed congressional efforts to revise communications legislation is whether access to the service environment housing the programming functionalities will be shared between the network owner, information providers and users. Cable networks incorporating many of the same network functionalities may provide similar opportunities. In the absence of legislative guidance, how would a regulatory decision requiring the network owner to provide access to the service creation environment fare on constitutional grounds? Is this ability to reconfigure the network part of the constellation of editorial functions or is the exercise of such flexibility constitute a content-neutral exercise?

Assuming the exercise of programming flexibility affects electronic speech, would regulatory provisions requiring shared control be deemed constitutional? To answer these questions, applications of the rational basis test is inappropriate. There is no technical interference or spectrum-based scarcity, and economic scarcity does not provide sufficient justification for implementing the rationality standard.\textsuperscript{237} However, strict scrutiny does not seem appropriate either. A provision requiring shared access to the

\begin{itemize}
  \item \textsuperscript{235} Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994); Daniels Cablevision, Inc. v. FCC, 835 F. Supp. 1, 7 (D.D.C. 1993). This presumes that the requirement is content-neutral, is justified by compelling interests, and is tailored to achieve the interests without burdening more speech than is necessary.
  \item \textsuperscript{236} For reasons previously stated, leased and PEG channels are likely to pass constitutional muster under intermediate scrutiny. \textit{See} discussion \textit{supra} parts II.C and III.D.
\end{itemize}
service creation environment would appear to be content-neutral.\(^\text{238}\) There is no particular class of speakers identifiable on the basis of the content of their speech, which would trigger a strict scrutiny analysis. Speakers who benefit are all speakers who do not own transmission facilities; this a technical distinction.\(^\text{239}\) There is no particular type, format or content of speech which is preferred over another.\(^\text{240}\) To the extent that network technology allows for interactive, multi-media communication, all types, formats and content combinations would be allowed.\(^\text{241}\) Finally, the requirement to share access to programming functionalities would not be triggered by the network owners' speech. Rather, consistent with FCC rationale, the possession of bottleneck control over essential facilities and extensive capacity trigger the requirement.

To survive intermediate scrutiny, the regulation must be content-neutral and narrowly tailored to achieve a compelling government interest.\(^\text{242}\) This regulation should be deemed narrowly tailored, because the networks in question possess growing capacity and access is shared with the network owner. Finally, the requirement to provide shared access to programming functionalities would serve the government's interest in promoting economic competition, and diversity of speakers and information sources. Opportunities for competition and electronic speech would arise if enhanced opportunities were provided for network owners, information providers and users to create, manipulate and control the composition and flow of information.

IV. INDECENT SPEECH AND REGULATION BY PRIVATE SURROGATE

Another area of recent government activity resulting in the articulation of electronic speech rights centers on attempts to limit the access of children and non-consenting adults to indecent

\(^{238}\) Id. at 922-26.
\(^{239}\) Id.
\(^{240}\) Id. at 924.
\(^{241}\) Id. at 923-24.
\(^{242}\) C&P, 830 F. Supp. at 917.
information regarding sex via broadcasting, cable or telephone.\textsuperscript{243} In related legislation and resulting litigation, a number of issues have arisen.

The primary issue is the extent to which the government may constitutionally prohibit or restrict consenting-adult-user access to obscene or indecent telephonic communication in an effort to limit access by non-consenting adults and children.\textsuperscript{244} The secondary issue is where tort liability will fall. The locus of liability can significantly affect the exercise of control over the flow of information.\textsuperscript{245}

\begin{footnotesize}
\begin{enumerate}
\item 243. FCC v. Pacifica Found., 438 U.S. 726, rev'g, 434 U.S. 1008 (1978) (holding that the FCC may constitutionally limit the time of day during which indecent speech may be broadcast); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1282 (1992) (holding the FCC's ban on broadcast of all indecent material unconstitutional). See also In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 998 (1993) (first report and order) (implementing Section IV of the Cable Television Consumer Protection and Competition Act of 1992, which allows cable operators to prohibit indecent programming on commercially leased access channels); Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) (establishing liability and exempting procedures for the transmission of pornographic voice communication); 47 U.S.C. § 223 (1989) (establishing liability and exempting procedures for the transmission of pornographic voice communication).

\item 244. Generally, the government possesses the constitutional authority to regulate indecent speech within certain parameters. See FCC v. Pacifica Found., 438 U.S. 726 (1978); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281 (1992); Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989)

\item 245. See Sable Communications, 492 U.S. at 131 (Scalia, J., concurring). In concurring with the majority's decision to overturn Congress' ban on indecent telephone speech, Justice Scalia stated that "while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it." \textit{Id.} at 133. This solution has met with criticism, however. "The thinking behind the shifting of responsibility for regulating information content from entities subject to the First Amendment to private-sector actors who are not is understandable. But the short-term benefits are exceeded by the costs of allowing monopoly LECs the power to determine freely, what is and what is not allowed on the network." Susan J. Drucker & Gary Gumpert, \textit{Desexualization of the Telephone}, N.Y.L.J., Jan. 19, 1990, (Outside Council Section) at 1 (questioning the efficacy of the ban); see also Roopali Mukh, \textit{Regulation of 976 Services and Dial-A-Porn: Implications for the Intelligent Network}, \textit{Telecomm. Pol'y}, Apr. 1991, at 151, 162.

For a discussion on cable network owner control of indecent speech, see Bruce
\end{enumerate}
\end{footnotesize}
In broadcast regulation, because the licensee has editorial control over the content of communication, imposing liability on the network provider is logical and practical. However, given the unique requirements of leased and public access channels, imposing liability and responsibility on the cable operator is problematic.

In 1976, the Court of Appeals for the District of Columbia refused to uphold an FCC requirement that cable operators exercise control over the presentation of obscene programming on access channels. The court found that the FCC's requirement was a veiled attempt to mandate cable operators to engage in prior restraint of access channel programmers. Accordingly, the attempt "to transfer to cable operators the very censorship power statutorily forbidden to the Commission in section 326 of the act . . . [was] ill founded."

Curiously, Congress and the FCC recently determined that cable operators should be encouraged to monitor access programming to preclude the transmission of indecent material. Also, where cable operators allow indecent programming on leased access channels, they must carry it on separate channels and only allow subscribers to view such programming subsequent to a written request. Congress also directed the FCC to promulgate regulations allowing cable operators to prohibit programming which was deemed obscene, constituted sexually explicit conduct, or solicited or promoted unlawful conduct. The statute also removed cable operators' immunity from state prosecution for obscenity. Thus, through the adoption of the Act, Congress reinvested in cable operators editorial control over the content of information transmitted on access channels. By imposing liability


247. Id. at 1052.

248. Id. at 1059.


250. Id. § 10(b).

251. Id. § 10(c).

252. Id. § 10(d).
and removing the operators' immunity from prosecution, Congress encouraged operators to assert control over obscene information.

The statute and the FCC's implementing regulations regarding government-initiated cable operator bans of indecent programming on access channels were challenged and subsequently declared unconstitutional. The court in *Alliance for Community Media v. FCC* held that "not only does the First Amendment prohibit the government from banning all indecent speech from access channels, it also prevents the government from deputizing cable operators with the power to effect such a ban." Although the

253. 10 F.3d 812 (D.C. Cir. 1993), vacated upon the granting of request for reh'g en banc, 15 F.3d 186 (D.C. Cir. 1994).


In *Alliance*, the circuit court considered, among other issues, the constitutionality of the FCC regulations requiring cable operators to prohibit or segregate any programming, on their leased access channels they believe to be indecent, and prohibit obscene or indecent programming as well as programming which solicits unlawful conduct. Although the government argued that the cable operators operating under the regulations are not state actors, the court concluded that the statute encourages the operators to ban indecent speech. Consequently, the operators' compelled action was held to be state action. *Alliance*, 10 F.3d at 822.

The circuit court applied the test set forth in *Reitman v. Mulkey*, 387 U.S. 369 (1967), to Section 10 of the 1992 Cable Act. *Alliance*, 10 F.3d at 820. Under that test, the immediate objective, historical context and ultimate effect of the cable statute were examined. The court determined that: 1) the immediate objective of the statute was to suppress indecent information by limiting its transmission on access channels; 2) the historical context in which the statute was promulgated strongly supported a conclusion that the government sought to use the statute to strip cable operators of editorial power over the content of information on leased and public access channels and then require the cable operator to identify and prohibit only indecent material; and 3) the statute had the ultimate effect of encouraging a number of cable operators to ban indecent programming from leased and access channels altogether. *Id.* at 820-22. Based on these findings, the court concluded that the statute's encouragement of total denial of indecent speech by cable operators constituted impermissible state action. *Id.* at 822.

The court ultimately found that the ban was unconstitutional because it was not the least restrictive means for achieving the government's goal of regulating children's access to indecent programming. *Id.* at 823-24.
decision was subsequently vacated and the case was set for
rehearing en banc,\textsuperscript{255} it is consistent with prior precedent.\textsuperscript{256}

In telephony, the responsibility for containment of indecent
speech was collectively placed on the network, information
providers and the subscriber.\textsuperscript{257} The information provider can
avoid liability by offering services that segregate the information
such as prepayment by credit card, use of an authorization number,
or message scrambling.\textsuperscript{258} As a result, the subscriber/consumer
has the option of requesting access to such information, assuming
control over its availability and receipt.\textsuperscript{259} Notification by the
subscriber absolves the information provider and the network
provider of liability.\textsuperscript{260} Finally, the network provider can avoid
liability by declining to provide billing services or acquiring
subscriber permission to make indecent information available.\textsuperscript{261}
The network provider is absolved of liability if it is not notified
that the transmitted information is indecent.\textsuperscript{262} Despite the
relatively "user friendly," albeit complex compromise embodied in
the statute, courts have held that network providers are "free under
the Constitution to terminate service to dial-a-porn operators altogether."\textsuperscript{263}

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{255}
\footnotetext{Alliance, 10 F.3d 812.}
\footnotetext{See Midwest Video Corp. v. FCC, 571 F.2d 1025, 1058 (8th Cir. 1978),
aff'd, 440 U.S. 689 (1979).}
\footnotetext{47 U.S.C. §§ 223(a)-(c) (1988).}
\footnotetext{47 U.S.C. § 223(b)(3).}
\footnotetext{47 U.S.C. § 223(c)(3).}
\footnotetext{Id.}
\footnotetext{Id.}
\footnotetext{47 U.S.C. § 223(c)(2)(B)(i).}
\footnotetext{Information Providers' Coalition v. FCC, 928 F.2d 866, 877 (9th Cir.
1991). Courts have reasoned that because telephone carriers are private companies
rather than state actors, they are not obligated by the Constitution to provide
transmission and billing services to any particular group of subscribers. \textit{Id.; see also}
Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d
1291 (9th Cir. 1987), \textit{cert. denied}, 485 U.S. 1029 (1988); Dial Info. Servs. Corp.
of N.Y. v. Thomburg, 938 F.2d 1291 (2d Cir. 1991), \textit{cert. denied}, 112 S. Ct. 966
(1992). The reasoning in these cases follows the dicta of Justice Scalia in \textit{Sable
In each of the appellate cases, the issues concerned messages for which the
telephone companies collected fees on behalf of the information provider. The
information providers were allowed to provide messages for which the telephone
companies did not provide billing services. However, the difficulties associated
with collections without the assistance of the phone companies rendered the
\end{enumerate}
\end{footnotesize}
The cable indecency and telephone dial-a-porn precedents enable the government to pursue a policy which imposes liability for the content of information on the network provider. By making the network provider responsible for the speech of others, the government undermines efforts to expand access to networks and opportunities for speech. The government suppresses unwanted or problematic speech because often simple self-preservation will dictate that the network provider curtail all "offensive speech" to avoid liability. Both cable and telephone network providers have resorted to this strategy.

Moreover, to declare network providers as private actors and speakers responsible for the carriage of public information encourages and justifies private censorship of public speech. There is also significant potential for programmers and users to lose speech opportunities when carriers possess bottleneck control over the flow of information into the homes and businesses of the American public. Not only may cable and telephone network providers decide to eschew carriage to avoid liability, they may also do so to preclude competition or to suppress speech with which they disagree.

It seems clear that the greater the control an entity exercises over information providers' businesses marginal at best. The carriers' provision of billing services was voluntary rather than required by law.

In Information Providers, the petitioners argued that FCC regulations requiring an individual wishing to receive "dial-a-porn" messages to notify the carrier in writing constituted a prior restraint. The court disagreed, concluding that no prior restraint was involved. According to the court, there was no government action to enjoin speech, require advanced governmental approval for speech, censor or license speech. Instead, only the telephone companies were involved and because they are private actors, they are constitutionally free to ban dial-a-porn from their networks and/or refuse to make available billing services to dial-a-porn information providers. 922 F.2d at 877. Similar conclusions have been reached in the other cases. See, e.g., Carlin Communications, 827 F.2d at 1293, 1295, 1297 n.10; Dial Info. Servs., 938 F.2d at 1543.

Professor Jerome Barron has questioned the wisdom of the circuit court opinions. He argues that upholding the decisions of telephone common carriers to refuse carriage or the provision of billing services to dial-a-porn providers allows the carriers to exercise an unjustified measure of editorial control over the content of speech transmitted over their facilities. See Jerome Barron, The Telco, The Common Carrier Model and the First Amendment - The "Dial-A-Porn" Precedent, 19 Rutgers Computer & Tech. L.J. 371, 385-91 (1993).
speech, the greater its liability for the impact of the speech. However, where the government artificially imposes liability as it does when it attempts to hold cable operators responsible for the speech of third parties on access channels or hold telephone companies responsible for the information of third parties transmitted over switched facilities, the rational relationship between speech and responsibility is subverted. Moreover, the government, if allowed to impose liability, succeeds in transferring to private network providers the very censorship power it is forbidden to exercise under the Constitution.

Ideally, technology should be fashioned so that the responsibility for speech lies with the information providers and users. While some may argue that this arrangement does not promote the maximum flow of information, it does place the burden for the information's impact on its beneficiaries. Moreover, it exposes government efforts to suppress speech rather than permitting them to hide behind a veil of alleged private action.

CONCLUSIONS

In light of the failure of recent congressional efforts to revise the 1992 Cable Act, and the significant likelihood that current efforts may fail as well, the current judicial resolution of challenges to the telephone-cable cross ownership ban, must-carry, leased access and PEG provisions merits attention. As previously mentioned, the decisions address the constitutionality of speech regulation in the two industries from which much of the broadband infrastructure is likely to emerge, regardless of the architecture which ultimately prevails.

Collectively, the decisions establish the following tentative guidelines. First, the government may not prohibit network owners


(a specific class of speakers) from engaging in protected speech by prohibiting entry into the video marketplace. Although they reflect compelling government interests, such prohibitions are counterproductive and burden more speech than necessary. Second, the government may require network owners controlling bottleneck facilities to provide access to unaffiliated programmers or information providers as well as users, provided that the requirement is content-neutral, achieves a compelling government interest and burdens no more speech than necessary.

A. Network Owner Access to the Video Marketplace

As recently decided by different federal courts, government regulations precluding telephone company use of their network for video speech will be revised to accommodate network owner access and control. However, the scope of the new access control is tentative and ill-defined. While the government may not preclude local telephone entry into the video distribution market, what form may that entry take? May the local telephone company merge with the local cable company? In the alternative, may the government require the telephone company to build an independent cable network and operate it via a separate subsidiary?

The government is likely to opt for “separate but equal” if given a choice between encouraging the merger of local telephone and cable networks or requiring that they remain separate while allowing the owners to merge technologies. Allowing a merger of two local competitors results in a net loss of one competitor. The loss of the only potentially powerful competitor to an entity controlling essential facilities in the market is not likely to enhance competition or diversity. As a practical matter, opting for separate competitors does not prohibit network owner access; rather, it enhances competition and maximizes market-based opportunities.

266. In defining the scope of section 533(b), the FCC concluded that multimedia graphics and information services were not video programming. Therefore, C&P’s holding applies to entry into the electronic publishing and the information services markets. See C&P, 830 F. Supp. at 923 (quoting In re Telephone Company-Cable Television Cross-Ownership Rules, 7 F.C.C.R. 5781, 5882 (second report and order, recommendation to Congress, and second further notice of proposed rulemaking)).
for speech and diversity. In addition, this option is content-neutral; therefore, it is likely to withstand constitutional scrutiny. Moreover, it enjoys industry wide support and is the policy choice articulated by Congress in its recent efforts to amend the 1992 Cable Act.

If the court decisions in the telephone company-cable industry cross-ownership remain as precedent, absent the application of cable regulations to the new telephone-cable video provider, the scope of user access and speech rights will likely be established by tariff and/or contract, reflecting the relative bargaining power of the parties. As a result, in the absence of state action, small providers and users will have access and speech rights solely at the sufferance of the network owner. The specter of private censorship, unmediated by government, could become quite apparent.

B. Non-Affiliated Programmer and User Access

May the local telephone network owner qua cable operator retain all of its capacity for the transmission of programming provided by its affiliated programmers? If not, must it provide free access to all broadcasters who request it? Must the new cable system owner comply with leased access and PEG provisions? What if the telephone companies' version of video transmission is switched and not multi-channel, point to multi-point? What difference does this make and what regulations apply?

Given the high stakes which attend telephone company entry into the video market, government, cable television, broadcast and public interests are likely to successfully lobby for the application of cable access regulations to the new telco-based cable competitor. In the event that the new competitor provides service via a point to multi-point architecture possessing discrete channels, access will be determined on the basis of capacity, the bargaining power of the franchising authority and the new video provider. If the new video provider employs a switched architecture, a platform of video functionalities will be established. Efforts would then be made to assure speaker beneficiaries ample, affordable access. Such efforts would include amending the must-carry, leased and PEG access rules to cover switched interactive video transmission architecture. These efforts would be made regardless of whether the local
telephone company or the local cable firm opts for a switched architecture.

Should the must-carry, leased access and PEG rule decisions ultimately be affirmed by the Supreme Court, opportunities for access and speech will continue to incorporate the current statutory delineations of leased access, public access and network owner access, as well as their switched interactive analogues. The scope of access and speech rights each group enjoys would continue to be defined by statute and supported by case precedent.

Assuming C&P,\textsuperscript{267} Turner\textsuperscript{268} and Daniels\textsuperscript{269} remain as precedent, telephone and cable network speakers, unaffiliated information providers and users would be provided outlets for speech. Arguably, under this scenario, the focus of access and speech policy shifts to a government-mediated inquiry into the extent and the manner in which the owner/provider may limit or prohibit the exercise of access and speech rights by potential and actual users/subscribers. The First Amendment is better served when network owners, providers and users retain access and speech rights.

If the must-carry provisions are overturned in a subsequent appeal, broadcasters and the forty percent of Americans who do not have access to cable would be the immediate losers. The impact of a reversal on the PEG and leased access provisions would be significant as well. The loss of leased access and PEG channels would preclude non-affiliated programmers and members of the public having little or no money, from communicating via cable television.

C. Electronic Schizophrenia?

Whether heralded as the coming of electronic empowerment, chided skeptically as superhighway hype, or viewed dimly as the ill-advised coronation of a private version of "Big Brother," the multi-media convergence is upon the nation and we are poised at its brink. Congress, the Clinton Administration and the FCC are

\textsuperscript{267} 830 F. Supp. 909 (E.D. Va. 1993), aff'd, 42 F.3d 181 (4th Cir. 1994).
\textsuperscript{268} 114 S. Ct. 2445 (1993).
actively considering how the cable, local telephone and other media industries may compete, merge and interconnect technically and economically. Meanwhile, the judiciary is establishing the constitutional limits of recent legislative initiatives to maintain market separation and ensure access. Industry seeks to preempt the government's regulatory efforts by proposing a spate of mergers which would create fewer, larger and more vertically integrated multi-media companies.

In the rush to implement, decisionmakers should step back and consider the interrelationships between our conflicting regulatory goals and their probable impact on the freedom of speech, a most cherished right. In electronic media regulation, our technical, economic and constitutional policies are at odds.

Telecommunications, computer and broadband technologies evolve toward architectures affording greater access and speech opportunities for larger numbers of American citizens. Switched interactive broadband communications networks, when outfitted with distributed intelligence and augmented by computers, could transform each American into an electronic speaker potentially as powerful as broadcasters and cable operators are today.

However, in its growing, often justified discomfort with unpopular ideas, the government is privatizing the technologies and network architectures while constitutionally justifying the placement of control over access and speech activities in fewer and more private hands. Even when constitutional policies have been used to enhance access and speech opportunities, the government reacts almost immediately to limit the exercise of the opportunities that technology and the Constitution have conferred. For example, while the government seeks to assure public and unaffiliated programmer access to cable operators' multi-channel networks, it imposes liability for content on the operators, thereby placing them in an untenable situation.

In telephony, the government espouses policies of universal service and privacy while electing to impose liability for third party content on the network provider, as well as on the beneficiaries of the information transaction. Meanwhile, the judiciary upholds policies that allow network providers, upon whom ninety-three percent of the nation relies to communicate personal and intimate
information, to refuse carriage of information it deems indecent.

The most damaging aspects of this regulatory philosophy are clear. First, efforts to extend meaningful access and speech rights to the society at large are undermined. Second, by resort to private proxy, the government effectively censors speech and accomplishes through the network provider what the Constitution will not allow outright. Third, liability for the impact of speech is misplaced. A regulatory philosophy which encourages government censorship and unfairly imposes liability is not only inequitable; it is also constitutionally suspect.