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TELEPHONE COMPANIES, THE FIRST AMENDMENT, AND TECHNOLOGICAL CONVERGENCE

Fred H. Cate*

INTRODUCTION

On February 1, 1996, Congress passed the Telecommunications Act of 1996 (Telecom Act or Act).\(^1\) After more than a decade of debate and delay, Congress cut a broad path through much of the regulatory underbrush surrounding electronic communications in the United States. An important component of the deregulatory scythe was Congress's repudiation of its 1984 cross-ownership rules,\(^2\) which had prohibited local telephone companies from offering cable television or other video information services to customers in their own service areas.

Ironically, by the time Congress acted, eight federal courts had already declared the rules unconstitutional under the First Amendment.\(^3\) In fact, the Supreme Court had already heard oral argument on a writ of certiorari from the Fourth Circuit's affirmance of the first of those cases, *Chesapeake & Potomac Telephone Co. v. United States.*\(^4\) After a half-century of extensive, intrusive regulation—without any mention of the First Amendment, even by telephone companies themselves—local phone companies had finally joined the ranks of publishers and street corner protesters in the full light of the First Amendment. After Congress acted and President Clinton signed the bill into law, however, the Supreme Court remanded the case to the

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4. 830 F. Supp. at 909.
Court of Appeals to consider whether the legislation rendered the issue moot.

This Article considers the First Amendment rights of telephone companies, particularly in light of rapid and extensive technological convergence. Part I examines the history of common carrier regulation in the United States and early administrative steps toward deregulation. Part II addresses the recent judicial recognition of telephone companies’ First Amendment rights. Part III considers Congress’s efforts to deregulate the telephone industry and the Supreme Court’s subsequent refusal to rule on the application of the First Amendment to telephone companies. Part IV analyzes the significance of telephone companies’ First Amendment rights in light of those companies’ significant roles on the information superhighway. The Article concludes that the status of telephone companies’ First Amendment rights is not moot in the face of the Telecom Act for two important reasons. First, under Title II of the Communications Act of 1934 and subsequent legislation, including the most recent bill, telephone companies continue to be subject to substantial federal and state regulation. Much of that regulation directly affects the capacity of telephone companies to speak. The constitutionality of that regulation will be significantly affected by a definitive statement from the Supreme Court concerning telephone companies’ First Amendment rights. Second, in light of the convergence of technologies that make up the information superhighway, it is no longer reasonable, and certainly not informative, to speak of the information services and products provided by telephone companies as constitutionally distinct from those provided by publishers and broadcasters.

I. REGULATING THE TELEPHONE COMPANIES: THE CONCEPT OF COMMON CARRIAGE

A. The Telegraph

The first commercially viable form of electronic communication was the telegraph. Deployed in the United States during the middle part of the 19th century, the telegraph could reliably send short messages in Morse code through electrical wires. In 1851, there were fifty telegraph companies operating in the United States. Ten years later, following a series of mergers, the Western Union Company spanned the

continent. In 1866, Congress, in an effort to encourage expansion of the telegraph system, offered telegraph companies rights of way along post roads and across public lands and permitted the companies to cut trees for poles on public lands without charge. In exchange for these privileges, telegraph companies had to provide service to all would-be customers without discrimination, the hallmark of common carriage.

By the turn of the century, telegraph companies were routinely treated by courts as common carriers, analogous to the railroads that their lines so often ran along, rather than as the press or other speakers whose messages their lines carried. As common carriers, telegraph companies were subject to significant legislative and judicial regulation. They were required to serve all who requested carriage, provide service for a reasonable price, obey reasonable regulations, and refrain from discriminating among customers or other carriers. The First Amendment played no role in the evaluation of these restrictions on telegraph companies.

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10. See Pool, supra note 6, at 95 ("By 1880 press telegrams were 11 percent of the total [telegraph traffic].").

11. See State ex rel. Gwynn v. Citizens' Tel. Co., 39 S.E. 257, 263 (S.C. 1901) (finding that once a carrier had opened its service to the public it could not refuse to supply selected individuals); Cook v. Chicago, R. I. & P. Ry. Co., 46 N.W. 1080, 1082 (Iowa 1880) (stating that a "carrier is bound by law to carry everything which is brought to him"); State ex rel. Webster v. Nebraska Tel. Co., 22 N.W. 237, 239 (Neb. 1885) ("[W]hen a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike, who are alike situated, and not discriminate in favor of nor against any."); McDuffee v. Portland & Rochester R.R., 52 N.H. 430, 449 (1873) ("The right to the transportation service of a common carrier is a common as well as a public right, belonging to every individual as well as to the State.").

12. See Cook, 46 N.W. at 1082 (imposing a duty to carry at "reasonable compensation").

13. See Western Union Tel. Co. v. Call Publishing Co., 62 N.W. 506, 510 (Neb. 1895) (analogizing the duties of telegraph companies to railroads and other carriers); Shepard v. Milwaukee Gas Light Co., 6 Wis. 526, 534 (1858) ("The very fact of this exclusive right conferred upon the company to manufacture and sell gas in the city, to be consumed therein by the citizens thereof, would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply on reasonable terms.").

14. Missouri Pac. Ry. v. Larabee Flour Mills Co., 211 U.S. 612, 619 (1909) ("This lies at the foundation of the law of common carriers. Whenever one engages in that business, the obligation of equal service to all arises, and that obligation . . . can be enforced by the courts."); Scofield v. Lake Shore & Mich. S. Ry., 3 N.E. 907, 919 (Ohio 1885) ("The duty to receive and carry was due to every member of the community, and in an equal measure to each."); (quoting Messenger v. Pennsylvania R.R., 36 N.J.L. 407, 410 (1873)).

15. A telegraph company "represents the public when applying to [another telegraph company] for service and no discrimination can be made by either against the other, but each must render to the other the same services it renders to the rest of the community under the same conditions." People ex rel. Western Union Tel. Co. v. Public Service Comm'n, 129 N.E. 220, 222 (N.Y. 1920); see generally Henry H. Perritt Jr., Tort Liability, the First Amendment, and Equal
B. The Telephone

1. The Communications Act of 1934

Laws governing the telegraph were the obvious model for the telephone when it was invented in 1876. The speed with which telephone technology developed and spread is reflected in this fact: Western Union, then the largest corporation in the United States, refused to purchase the telephone patent in 1876 for $100,000. Thirty-four years later, in 1910, AT&T bought control of Western Union for $30 million dollars. That same year Congress passed the Mann-Elkins Act, classifying telephone companies as common carriers and subjecting them to the regulations of the Interstate Commerce Commission (ICC). Although the ICC was preoccupied with regulating the railroads, the states and the courts had already imposed an array of common carrier obligations on telephone companies. In 1934, Congress passed the Communications Act, which regulates common carriers, was taken almost intact from the


17. POOL, supra note 6, at 29.

18. Id. AT&T was forced to divest Western Union in 1913. Id. at 30.


20. See Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 100 (1901) ("As a consequence of [public service], all individuals have equal rights both in respect to service and charges."); Central Union Tel. Co. v. State ex rel. Falley, 19 N.E. 604, 511 (Ind. 1889) (restating the well established rule that a common carrier may be compelled to render services); State ex rel. Webster v. Nebraska Tel. Co., 22 N.W. 237, 239 (Neb. 1885) (holding that a telephone company has a duty to furnish service to all customers without discrimination).


22. Although it imposes substantial regulations on "common carriers," the Act provides a meaningless, circular definition of who fits within the term. See 47 U.S.C. § 153(h) (1994) ("‘Common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy... but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."). Professor Henry Perritt writes, "Historically, one of the most important determinants of common carrier status was whether one held oneself out as a common carrier... [T]he justification for the 'holding out' theory was contractual." Perritt, supra note 15, at 77.

Modern case law has developed a series of tests for determining who is a "carrier" and when is that carrier's business "common." These inquiries, consistent with the traditional "holding out" theory, focus on the undertakings of the entity. To determine who is a carrier, Professor Perritt writes, courts focus on three inquiries: (1) Does the entity provide services on a "for hire" basis, i.e., "for the purpose of generating revenue directly"?; (2) Is the entity "primarily engaged in the business in question"?; and (3) Does the entity conduct the service on a regular basis? Id. at 81-
Mann-Elkins Act. As with regulation of the telegraph, there was no mention of the First Amendment; a law designed for regulating the nation's railroads had been given a new name and applied to the nation's largest communications industry.23

The provisions of Title II impose significant restrictions on the activities of common carriers. In addition to a variety of filing and recordkeeping requirements,24 Title II obligates "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."25 It requires that all "charges, practices, classifications, and regulations for and in connection with such communication service ... be just and reasonable."26 Title II forbids common carriers to "make or give any undue or unreasonable preference or advantage to any par-

82. To determine what is common, courts ask: (1) Does the entity hold itself out as willing to serve all who apply?; (2) Does the entity serve the public without discrimination?; (3) Does the entity perform a service "cloaked with the public interest," i.e., essential to the public in a monopolistic environment?; and (4) Does the entity have "control over the content of the goods being transported?" To be a common carrier, in decisions involving telecommunications carriers, the entity must not control the content of the message." Id. at 82-83.

In the specific context of Title II, the FCC and courts have focused on two factors: "holding out" the provision of service on a nondiscriminatory basis, and carriage of messages, the content of which is controlled exclusively by the customer. See National Ass'n of Regulatory Util. Comm'r's v. FCC, 525 F.2d 630, 641 (D.C. Cir.) ("What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently ...'") (quoting Semon v. Royal Indem. Co., 279 F.2d 737, 739 (5th Cir. 1960)), cert. denied, 425 U.S. 992 (1976); National Ass'n of Regulatory Util. Comm'r's v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976) (stating that the "second prerequisite to common carrier status ... is the requirement ... that the system be such that customers 'transmit intelligence of their own design and choosing'") (quoting Industrial Radiolocation Serv., 5 F.C.C.2d 197, 202 (1966)).

23. "Telephone companies" include both local exchange carriers (LECs), which provide local telephone service and access to long-distance service providers, and interexchange carriers (IXCs), which provide telephone service between local exchanges. There are approximately 1400 LECs providing service in the United States, most of which are very small. U.S. DEPT. OF COMMERCE, U.S. INDUSTRIAL OUTLOOK, 28-1 (1993). The 22 Bell Operating Companies (BOCs), the nation's largest LECs, are organized into seven regional holding companies (RHCs) and provide about 80% of local telephone service. NAT'L TELECOMMUNICATIONS & INFO. ADMIN., U.S. DEPT OF COMMERCE, NTIA TELECOM 2000: CHARTING THE COURSE FOR A NEW CENTURY 203 (1988). Interexchange service is dominated by three carriers: AT&T (which controls 63% of the long distance market), MCI (15%), and Sprint (9.5%). U.S. DEPT. OF COMMERCE, supra, at 28-7. Telephone customers usually have no choice as to LEC, but are free to choose among IXCs. Collectively, the telephone companies provide service to more than 88 million households (about 93% of all U.S. households) and 30 million businesses (near 100%). Id. at 28-1. Local exchange service was expected to generate more than $84 billion and interexchange service almost $62 billion in 1993. Id. at 28-6, 28-7. Including cellular, satellite, and data services, the entire U.S. telecommunications services industry was predicted to have revenues in 1993 exceeding $184 billion. Id. at 28-1.

25. Id. § 201(a).
26. Id. § 201(b).
ticular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."27 Common carriers must "designate, file with the Commission and print and keep open for public inspection schedules showing all charges."28 Those charges may not be altered without giving 120 days notice to the Federal Communications Commission (FCC or Commission).29 Title II empowers the Commission to hold public hearings regarding proposed charges,30 prescribe minimum and maximum charges and "reasonable" classifications of service,31 and order payments of damages to third-party complainants.32 In perhaps the Act's most extraordinary grant of authority, Section 214 of Title II forbids any interstate carrier from constructing a new line, extending or discontinuing an existing line, or providing service over any such line without a certification from the Commission that "the present or future public convenience and necessity require or will require" the new line or service.33

In *Federal Communications Commission v. RCA Communications, Inc.*,34 the Supreme Court interpreted this last provision of Title II to forbid the FCC from granting authorization for a new telephone service without making a specific finding that the new service was necessary.35 This requirement, Pool has written:

[T]urned the whole set of presumptions under the First Amendment on its head. Even under the most eviscerated interpretation of the First Amendment, the presumption is made that anyone can engage in communicative activities freely, unless there are over-balancing considerations . . . . The presumption was exactly the opposite: no license to communicate was to be issued unless the state in its majesty concluded that such was desirable.36

In 1994, the Court struck down another effort by the Commission to reduce regulation of telephone companies. In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,37 Justice Scalia wrote for the majority that the Commission did not have the authority

27. Id. § 202(a).
28. Id. § 203(a).
29. Id. § 203(b)(1).
30. Id. § 204(a)(1).
31. Id. § 205(a).
32. Id. § 209.
33. Id. § 214(a) (emphasis added). For an example of a state statute requiring similar approval for changes in intrastate facilities or services, see CAL. PUB. UTIL. CODE § 1001 (West 1994).
34. 346 U.S. 86 (1953).
35. Id. at 96-97.
36. Pool., supra note 6, at 104-05.
to abandon the requirement of Title II that telecommunications carriers file tariffs with the FCC.\textsuperscript{38} Neither the majority opinion, nor Justice Stevens' dissent, mentioned the First Amendment.

In addition to restrictions on creating, expanding, or discontinuing telephone service and regulations on the operation of a telephone business, the government has restricted the capacity of telephone companies to offer information services. In 1970, the FCC determined that it would not grant telephone companies the certificates required under Section 214 to offer cable television service in the area where they provided telephone service.\textsuperscript{39} The Commission was concerned about potential for "unfair or anticompetitive practices" that might arise from telephone companies owning or controlling cable television service providers.\textsuperscript{40} Under the FCC’s ruling, a local telephone company may lease transmission capacity to an unaffiliated video programmer, but it may not own, operate, or control such a programmer.\textsuperscript{41} The First Amendment was not addressed by the FCC when it adopted the rules, nor by the reviewing court in upholding them.\textsuperscript{42} Congress codified these cross-ownership rules in the Cable Communications Policy Act of 1984.\textsuperscript{43}

\textsuperscript{38} See id. at 2233 (discussing 47 U.S.C. § 203(a)).

\textsuperscript{39} \textit{In re Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems}, 21 F.C.C.2d 307, 325 \textit{recons. in part}, 22 F.C.C.2d 746 (1970), \textit{and aff’d sub nom.} General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).

\textsuperscript{40} Id. at 308.

\textsuperscript{41} 47 C.F.R. §§ 63.54-.58 (1995). The FCC’s ruling prohibits a local telephone company from providing “video programming to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier.” Id. § 63.54(a). The ruling also prohibits a local telephone company from providing “channels of communications or pole line conduit space, or other rental arrangements”\textsuperscript{40} to any affiliated companies for the purpose of providing video programming to the public. Id. § 63.54(b).


\textsuperscript{43} 47 U.S.C. § 533(b) (1994). The Act states, in pertinent part:

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

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

Concurrent with the activities of the FCC and Congress, the judiciary had also prohibited the largest telephone companies in the United States from providing electronic information services. A 1956 decree, which settled an antitrust case against AT&T, forbade the company from offering any service unrelated to common carriage communications.\(^4\) In 1982, the Modified Final Judgment\(^5\) relieved AT&T from the earlier decree on the condition that it divest itself of its local telephone operations, that it not engage in electronic publishing over its own long-distance network for seven years, and that the twenty-two newly created providers of local telephone service not offer electronic information services "via telecommunications" of any form.

Ironically, it was in Judge Harold Greene's 1982 decree, which upheld the most extraordinary restrictions on the telephone companies' ability to speak, that the First Amendment first appeared in a case dealing with regulation of telephone companies. It was raised not as an obstacle to restrictions on telephone companies, but rather as an argument in favor of the restrictions. Citing Associated Press v. United States,\(^6\) a case involving the application of antitrust laws to the Associated Press, Judge Greene wrote that the "goal of the First Amendment is to achieve 'the widest possible dissemination of information from diverse and antagonistic sources.'"\(^7\) Judge Greene analogized the market for information services with the spectrum used by over-the-air broadcasting, which the Supreme Court had characterized as scarce and therefore justifying upholding regulations that the First Amendment would prohibit in nonelectronic settings.\(^8\) Follow-

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\(^{5}\) United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The Modified Final Judgment (MFJ) modified and then entered a consent decree that broke up AT&T's monopoly over telephone service in the United States. Id. at 226. The MFJ created seven Regional Holding Companies and 22 Bell Operating Companies to provide local telephone service on a regulated, monopoly basis, and left AT&T free to compete in the long distance market. Id. at 141-42 & n.41; United States v. Western Elec. Co., 569 F.Supp. 1062 n.5 (D.D.C. 1986) (listing the seven RHCs and 22 BOCs). The MFJ, however, restricted AT&T and the RHCs from entering certain lines of businesses where the court believed AT&T could unfairly take advantage of its former monopoly powers or that the RHCs could unfairly take advantage of their new monopoly powers within their geographic markets. See AT&T, 552 F. Supp. at 178-86 (imposing line of business restrictions on AT&T); id. at 186-95 (imposing line of business restrictions on the RHCs).

\(^{6}\) 326 U.S. 1 (1945).

\(^{7}\) AT&T, 552 F. Supp. at 183 (quoting Associated Press, 326 U.S. at 20).

\(^{8}\) Id. at 184.
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ing this analogy, Judge Greene linked the FCC's statutory responsibility to award licenses to broadcasters with the proposed restrictions on AT&T's entry into electronic publishing:

Certainly, the Court does not here sit to decide on the allocation of broadcast licenses. Yet, like the FCC, it is called upon to make a judgment with respect to the public interest and, like the FCC, it must make that decision with respect to a regulated industry and a regulated company.49

The First Amendment entered Judge Greene's balancing of interests only once: "In determining whether the proposed decree is in the public interest, the Court must take into account the decree's effects on other public policies, such as the First Amendment principle of diversity in dissemination of information to the American public."50

Judge Greene's analogy was flawed; the spectrum scarcity that affects broadcasting, even if it exists and warrants a lesser standard of First Amendment protection,51 plays no role in telephone service and the provision of information services by telephone.52 Moreover, the analogy was misapplied. Even in the context of over-the-air broadcasting, the Court recognizes the First Amendment rights of broadcasters.53 As important as access to a diversity of voices may be, the Court balances that interest with the rights of broadcasters under the Constitution to speak without government restraint.54 Judge Greene erred by considering only the First Amendment interests of the public and not those of the telephone companies. Finally, Judge Greene turned a blind eye to the important First Amendment principles identified by the Supreme Court, such as the application of the First

49. Id.
50. Id.
52. See Richard A. Hindman, Comment, The Diversity Principle and the MFJ Information Services Restriction: Applying Time-Worn First Amendment Assumptions to New Technologies, 38 CATH. U. L. REV. 471, 498-505 (1989) (discussing First Amendment implications of the MFJ's information services prohibition). The author argues that Judge Greene equated "competitive scarcity"—defined as "the general lack of competitors in an industry or market notwithstanding entry barriers"—with spectrum scarcity in imposing information restrictions on AT&T and the BOCs. Id. at 501 & n.217.
53. FCC v. League of Women Voters, 468 U.S. 364, 378, 380 (1984) ("[T]he First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power . . . . [As a result, government restrictions on broadcasters are constitutional only when the] restriction is narrowly tailored to further a substantial governmental interest.").
54. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In Red Lion, for example, after balancing these rights, the Court concluded: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id. at 390.
Amendment to corporations\textsuperscript{55} and even to regulated utilities,\textsuperscript{56} and the constitutional impermissibility of "restrict[ing] the speech of some . . . in order to enhance the relative voice of others," a government purpose that the Supreme Court in \textit{Buckley v. Valeo},\textsuperscript{57} found to be "wholly foreign to the First Amendment."\textsuperscript{58}

Judge Greene considered the First Amendment again in his triennial review\textsuperscript{59} of the Modified Final Judgment.\textsuperscript{60} After reiterating his conclusion from three years earlier (that the First Amendment was relevant to telephone companies offering electronic information services only insofar as it supported a prohibition on the practice) Judge Greene offered a footnote—the first ever in the long history of the AT&T break-up—on the possible First Amendment interests of the telephone companies. Judge Greene wrote: "There is no merit to the contention raised by some that the information services restriction infringes the Regional Companies' own First Amendment rights."\textsuperscript{61} Judge Greene offered two single sentence justifications for his conclusion. First, he wrote, "[l]ike all business establishments, those engaged in, or those that, as the Regional Companies here, consider engaging in, publishing are subject to the antitrust laws."\textsuperscript{62} Of this there is no doubt. The Court has repeatedly found that laws of general application, such as antitrust laws, apply to publishers and others whose activities are imbued with First Amendment interests.\textsuperscript{63} This says nothing, however, about what the First Amendment rights of tel-

\textsuperscript{57} 424 U.S. 1 (1976) (per curiam).
\textsuperscript{58} Id. at 48-49. In \textit{Buckley}, the Court addressed a broad range of election finance reforms enacted as part of the Federal Election Campaign Act of 1971, including a $1,000 limitation on expenditures by supporters "relative to a clearly identified candidate" for federal office and limitations on expenditures by candidates themselves. \textit{Id.} at 7. The Court, in a per curiam opinion, noted from the outset that although the restrictions were content-neutral, they restricted the ability of some to communicate in order to enhance the capacity of others to express themselves. \textit{Id.} at 17, 39. Such discrimination among speakers, the Court held, is constitutionally impermissible. \textit{Id.} at 48-49.
\textsuperscript{61} Id. at 586 n.273 (citation omitted).
\textsuperscript{62} Id.
\textsuperscript{63} \textit{See} Associated Press v. United States, 326 U.S. 1, 20 (1945) ("The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."); \textit{see also} Western Elec., 673 F. Supp. at 586 n.273 (citing sources).
ephone companies may be. Judge Greene's second justification was that "common carriers are quite properly treated differently for First Amendment purposes than traditional news media." This is also undoubtedly true, as evidenced by almost a century of restrictions on telephone companies without a mention of the First Amendment. However, Judge Greene's unremarkable observation is somewhat confused by the fact that he cited for support two cases, both of which dealt with television, not telephone, service. This might suggest that, as was the case three years earlier, Judge Greene was viewing the telephone market as sharing the same characteristics as the broadcast spectrum. In any event, this disappointing debut for the First Amendment rights of telephone companies serves to confirm that common carriers have been accorded no First Amendment protection for their use of their own transmission capacity.

3. First Steps Toward Deregulation

The seven-year electronic publishing ban on AT&T expired in 1989. The information services restriction on the Regional Holding Companies (RHCs) was lifted by a very reluctant Judge Greene in 1991, following a decision by the U.S. Court of Appeals for the District of Columbia that the District Court had applied the wrong standard in reviewing whether to lift the information services restriction. Judge Greene wrote:

In the opinion of this Court, informed by over twelve years of experience with evidence in the telecommunications field, the most probable consequences of such entry by the Regional Companies into the sensitive information services market will be the elimination of competition from that market and the concentration of the sources of information of the American people in just a few dominant, collaborative conglomerates, with the captive local telephone monopolies as their base. Such a development would be inimical to the objective of a competitive market, the purposes of the antitrust laws, and the economic well-being of the American people.

64. Western Elec., 673 F. Supp. at 586 n.273.
66. See United States v. Western Elec. Co., 1989-2 Trade Cas. (CCH) ¶ 68,673 (granting AT&T's motion to remove the electronic publishing ban).
69. Western Elec., 767 F. Supp. at 326 (footnote omitted).
Judge Greene did not mention the First Amendment: "The issue simply did not arise. The telephone was seen as a successor to the telegraph; the telegraph in turn was seen as a common carrier like the railroad; and so that was the law applied. The phone was not seen as a successor to the printing press."\(^7\)

In 1991, the National Telecommunications and Information Administration, the President’s principal telecommunications policy advisor, concluded that telephone companies “should be permitted to offer programming in their service areas,” subject to appropriate safeguards.\(^7\) That same year, as part of a five-year proceeding on “video dialtone,” the FCC determined that the cross-ownership ban did not apply to interexchange carriers.\(^7\) The following year, the FCC recommended to Congress that it “amend the Cable Act to permit the local telephone companies to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards.”\(^7\) Although the First Amendment was not in evidence, the

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70. Pool, supra note 6, at 103.
72. See In re Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 F.C.C.R. 300, 302 (1991) (concluding in the First Report and Order that the telephone-cable cross-ownership ban does not apply to interexchange carriers); see also National Cable Television Ass’n v. FCC, 33 F.3d 66, 68 (D.C. Cir. 1994) (denying petitions for judicial review).
73. In re Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 F.C.C.R. 5781, 5847 (1992) [hereinafter Second Report & Order]. In the Second Report & Order, the FCC modified its rules to permit LECs to provide video dialtone. Id. at 5783; see also National Cable Television Ass’n, 33 F.3d at 68 (denying petitions for judicial review). The Commission in its “Video Dialtone” decision adopted a two-tier approach:

The first tier would be common-carrier based, giving multiple service providers equal, nondiscriminatory access to the basic functions necessary to connect them to video dialtone subscribers . . . .

The second tier would allow telcos to provide some video dialtone services in competition with other providers. Telcos could provide services such as video gateways, which allow consumers to access video dialtone services; video processing functions, which would allow subscribers to store programs or replay portions of programs without a video cassette recorder; tailored menus, searches or other functions; billing and collection; order processing; video customer premises equipment; and inside wire maintenance.

Terry L. Etter & Rick D. Rhodes, Sorting Through the Vision and the Vagueness of the FCC’s Video Dialtone Decision, 1 CommLaw Conspectus 56, 60 (1993) (footnotes omitted); see also Second Report & Order, supra, at 5788, 5806-07, 5810-11. The FCC also redefined the meaning of “control,” which is essential to interpreting § 533(b)’s prohibition on telephone companies providing video programming through any affiliate “owned by, operated by, or under common control with the telephone common carrier.” Id. at 5819; 47 U.S.C. § 533(b)(1) (1994) (repealed 1996). Under the Commission’s new interpretation of “control,” a telephone company may have a cognizable interest in a video programmer of up to five percent and go beyond the usual
Commission concluded that elimination of the ban would "promote our overarching goals in this proceeding by increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services made available to the public." As part of the FCC's proceeding, the Antitrust Division of the Department of Justice, which had originally supported the ban, recommended that local phone companies be permitted "to own and directly provide video programming." The Department of Justice argued that "because the benefits of allowing the LECs [local exchange carriers] to provide video programming outweigh the anticompetitive risks involved they should be allowed to enter this market" and recommended "lifting the telephone company-cable television cross-ownership prohibition contained in the Cable Act." Congress toyed with the idea of repealing the cross-ownership ban throughout the first half of the 1990s, but nonetheless failed to act.

II. THE FIRST AMENDMENT RIGHTS OF TELEPHONE COMPANIES

As a result, the telephone companies turned to the courts for relief under the First Amendment. In August 1993, two subsidiaries of Bell Atlantic Corp. challenged the constitutionality of the ban in the U.S. District Court for the Eastern District of Virginia. Judge Thomas Selby Ellis III, wasted little time in recognizing the First Amendment implications of the ban:

[T]he provision in question must be subjected to a higher standard than mere "rationality review." Section 533(b) directly abridges the plaintiffs' right to express ideas by means of a particular, and significant, mode of communication—video programming. . . . As such, a statute that directly abridges the right to engage in this form of speech must be evaluated under the heightened standards that have evolved under the Supreme Court's First Amendment decisions.
This is true even when the abridgment is an incidental effect of a statute directed at non-speech activity, such as "structural" economic regulation, if such a statute disproportionately impacts entities engaged in speech protected by the First Amendment.79

The cases the government cited in opposition were the same as those relied upon by Judge Greene in his 1982 decree80 and the first triennial review.81 As Judge Ellis noted, those cases were inapplicable, because all but one dealt with broadcast media and therefore premised on scarcity of electromagnetic spectrum, a feature that is not present in telephony.82 Judge Ellis also rejected application of an economic scarcity argument:

The only scarcity argument that defendants could legitimately advance to make the broadcasting cases apposite is that the cable television industry is a natural monopoly and, therefore, that certain economic factors conspire to create a condition of scarcity in the market for cable television analogous to the scarcity imposed on broadcasting by the physical properties of the electromagnetic spectrum. This argument has been foreclosed, however, by the Supreme Court's decision in Miami Herald Publishing Co. v. Tornillo... The clear implication of Tornillo is that the principle that allows an increased level of government intervention under conditions of physical scarcity is inapplicable when scarcity results from purely economic forces.83

The one nonbroadcast case that both Judge Greene and the government relied upon was Associated Press, which, Judge Ellis wrote, "stands only for the proposition, confirmed in numerous other decisions, that the media may be subjected to economic regulations that are generally applicable to all industries without triggering heightened review of such regulations under the First Amendment."84 The cross-ownership ban, however, "is not a generally applicable statute" and it "achieves its aim by means of a direct abridgment of the telephone companies' right to participate in a protected form of speech."85 Associated Press is therefore not relevant.

Judge Ellis made equally quick work of the government's claim that telephone companies waived their First Amendment rights in exchange for "a government-sanctioned monopoly for the provision of

79. Id. at 918 (citations omitted).
82. Chesapeake & Potomac, 830 F. Supp. at 918.
83. Id. at 919 (citation omitted).
84. Id. at 921.
85. Id.
local wireline telephone exchange services.”86 The argument failed on both factual and legal grounds. The plaintiff’s monopoly over local telephone service was granted by the Commonwealth of Virginia; the cross-ownership ban was imposed by the federal government. “[T]he sovereign which purportedly provided the benefit to the plaintiffs is not the same sovereign that placed the condition on the benefit.”87 Moreover, the state-sanctioned monopoly was granted long before the federal condition was imposed.88 “In no way is there a quid pro quo relationship between § 533(b) and the local exchange monopoly.”89

More importantly, the grant of monopoly powers or other benefits by the government has never been found sufficient to justify abridging the recipient’s First Amendment rights. The Supreme Court rejected such arguments in Central Hudson Gas & Electric Corp. v. Public Service Commission90 and Consolidated Edison Co. v. Public Service Commission.91 As the Supreme Court wrote in Perry v. Sinderman:92

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.93

As a result, Judge Ellis rejected the government’s arguments to the contrary in Chesapeake & Potomac.

Having determined that the telephone company’s First Amendment rights were implicated by the cross-ownership ban, Judge Ellis considered whether to apply strict or intermediate scrutiny. He categorized the ban as “content-based” because “[t]he 1984 Cable Act defines ‘video programming’ as ‘programming provided by, or generally considered comparable to programming provided by, a television broadcast station.’”94 “Despite defendants’ protestations to the contrary, there is simply no way that § 533(b), incorporating as it does the

86. Id. at 919.
87. Id. at 920.
88. Id. at 921.
89. Id.
90. See 447 U.S. 557, 568 (1980) ("[Central Hudson’s] monopoly position does not alter the First Amendment’s protection for its commercial speech.").
91. See 447 U.S. 530, 534 n.1 (1980) ("Nor does [Consolidated Edison’s] status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights.").
92. 408 U.S. 593 (1972).
93. Id. at 597.
§ 522(19) definition, can be applied without reference to the content of the message being conveyed." 995

Despite his conclusion that the restriction was content-based, Judge Ellis determined that strict scrutiny was not necessary because he interpreted the Supreme Court’s recent decisions to require strict scrutiny of content-based restrictions only where the government’s purpose is to discriminate on the basis of content. 996 He therefore applied the intermediate scrutiny of Ward v. Rock Against Racism 997 and United States v. O’Brien 998 to determine that while the government’s asserted interest—protecting diversity of ownership of communications outlets—was substantial, the cross-ownership ban “does not fit with [the government’s] asserted justification.” 999 The cross-ownership ban protects against anticompetitive conduct by telephone companies in the video programming market, where telephone companies have no greater market power or incentive to act anticompetitively than any other programmer or cable operator, not in the video transmission market, where the potential for cross-subsidization is highest. 1000 The court therefore found the cross-ownership ban to be “facially unconstitutional as a violation of plaintiffs’ First Amendment right to free expression” and enjoined its enforcement. 1001 Judge Ellis’s decision

95. Id.
96. Id. at 924-26 (interpreting Renton v. Playtime Theatres, Inc. 475 U.S. 41 (1986); Ward v. Rock Against Racism, 491 U.S. 781 (1989); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)); see Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 622-23 (1991) (“Under the Court’s present approach, a regulation will qualify as content discrimination only if the government purpose served by the regulation is related to the content of the speech.”).
97. 491 U.S. at 781. In Ward, the Court reaffirmed that regulations of the time, place, and manner of expression are constitutional if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Id. at 797-98. For prior cases in which the Court applied intermediate scrutiny to time, place, and manner restrictions, see generally Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (National Park Service regulation permitting camping only in designated grounds); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-812 (1984) (municipal ordinance prohibiting the posting of signs on public property); Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 44-46 (1983) (collective-bargaining agreement providing differential access to interschool mail system).
98. 391 U.S. 367 (1968). The Court in O’Brien elaborated:

[W]hen “speech” and “nonspeech” elements are combined in the same course of conduct, . . . [government regulation of that conduct is] sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77.
100. Id. at 930.
101. Id. at 932.
was affirmed by the Fourth Circuit Court of Appeals in 1994. The Supreme Court granted a writ of certiorari and heard oral argument in the case in 1995.

Other telephone companies did not wait for a final result. Within a few weeks of Judge Ellis's decision, Ameritech brought two similar suits, followed shortly by GTE, US West and Pacific Telecom, NYNEX, BellSouth, Southern New England Telephone Company (SNET), and Southwestern Bell. The suit brought by US West and Pacific Telecom was decided in June 1994 by the U.S. District Court in Seattle. Judge Barbara J. Rothstein found that heightened scrutiny was necessary because the cross-ownership ban "directly abridges the plaintiffs' right to express themselves by prohibiting them from engaging in video programming," but that it was not necessary to determine the precise level of heightened review because the ban failed even intermediate scrutiny. Following the same reasoning used by the Eastern District of Virginia, Judge Rothstein concluded:

The complete ban on telephone company participation in the provision of video programming in their service areas is an unnecessarily severe means of achieving the government's objectives. In fact, based on the evidence submitted, it appears that §553(b) does not actually serve the interests it allegedly advances, and if it does serve those objectives, it does so in a manner that sacrifices the First Amendment rights of plaintiffs.

Her opinion was upheld by the U.S. Court of Appeals for the Ninth Circuit in 1994.

BellSouth's case was decided in September 1994. Ameritech's two suits were consolidated and decided in October. NYNEX's suit

108. Id. at 1190.
109. Id. at 1191.
110. Id. at 1193.
111. US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994).
was decided in December,¹¹⁴ and SNET's suit was decided in April 1995.¹¹⁵ All of the suits were decided on similar grounds: The cross-ownership ban “directly abridges the plaintiffs’ right to express themselves by prohibiting them from engaging in video programming.”¹¹⁶

III. CONGRESSIONAL DEREGULATION

A. The Telecommunications Competition and Deregulation Act of 1996

On February 1, 1996, Congress finally acted to repeal the 1984 cross-ownership ban,¹¹⁷ to terminate the FCC's video dialtone regulations,¹¹⁸ and to exempt LECs from having to obtain a Section 214 certificate in order to provide video services to their own subscribers.¹¹⁹ Under a new part added to Title VI of 47 U.S.C., “Cable Communications,” LECs that provide video services within their own service areas will be subject to the existing regulation otherwise applicable to those services.¹²⁰ The Act, however, imposes stringent prohibitions on investments in, and operations with, existing cable systems. No LEC or any of its affiliates may acquire, directly or indirectly, more than a ten percent financial interest, or any management interest, in any cable operator providing service within the LEC's telephone service area.¹²¹ Conversely, no cable operator or affiliate may acquire, directly or indirectly, more than a ten percent financial interest, or any management interest, in any LEC providing service within the cable operator's franchise area.¹²² Moreover, LECs and cable operators whose service and franchise areas overlap are prohibited from joint ventures to provide video programming or telecommunications serv-


¹¹⁹. Id. § 302(a).

¹²⁰. 47 U.S.C.A § 651(a). Local exchange carriers providing video programming to subscribers are subject to Title III if by radio communication, Title II if on a common carrier basis, and Title VI if by any other transmission technology. Id. § 651(a)(1)-(2).

¹²¹. Id. § 652(a).

¹²². Id. § 652(b).
ices within their respective service areas. There are some limited exceptions to these prohibitions, including those for rural systems and for smaller cable systems that are not owned or controlled by the top fifty cable systems and that compete in non-top twenty-five markets with larger cable systems that are owned or controlled by one of the ten largest cable systems. The FCC may also waive the new cross-ownership and joint venture prohibitions under limited conditions.

Finally, the Act directs the FCC to promulgate regulations that exempt LECs that offer video programming to their customers, through what the Act designates "open video systems," from certain regulatory burdens. The Act does not define "open video systems," but they appear to include those services encompassed by the FCC's video dialtone proceeding. LECs offering open video systems to their customers are subject to substantial common carrier-like obligations, including among others: nondiscrimination requirements, regulation of rates, terms and conditions of service, and a prohibition on selecting the video programming services for carriage on more than one-third of available channels where the demand for channels exceeds the supply. LECs providing open video systems are also subject to a number of regulations previously applicable to cable television systems, such as sports exclusivity, network nonduplication, and syndicated exclusivity regulations.

Neither the deregulatory provisions—repeal of the 1984 cross-ownership ban, termination of the FCC's video dialtone regulations, and the exemption from Section 214 certification requirements for video services—nor the new regulatory provisions contain any reference to the First Amendment rights of telephone companies. The Conference Committee report speaks only of "encourag[ing] investment in new technologies" and "maximiz[ing] consumer choice." As has been the case for more than a century, the First Amendment played no apparent role in federal regulation or deregulation of communications common carriers.

123. Id. § 652(c).
124. Id. § 652(d)(1)-(5).
125. Id. § 652(d)(6).
126. Id. §§ 651(a)(3)-(4), (b), 653.
129. Id. § 653(b)(1)(D).
B. The Mootness Argument

As a result of the Telecom Act, the Supreme Court, which on December 6, 1995 heard oral arguments in Chesapeake & Potomac, remanded the case to the Fourth Circuit for a determination of whether it was moot.\textsuperscript{131} Solicitor General Drew Days III argued on the government's behalf that because the Telecom Act repealed Section 533(b), the plaintiff's challenge—which sought a declaration of the section's unconstitutionality and an injunction against its enforcement, but no damages or other relief based on its past enforcement—was now moot.\textsuperscript{132} In their response, attorneys for C&P Telephone disagreed strenuously, arguing that the Act's new regulations and the six-month delay between the Act's adoption and the FCC's promulgation of regulations governing open video systems "does not moot a controversy concerning the continuing ban on speech over an open video system," precisely the sort of service at issue in C&P's case.\textsuperscript{133}

A ban on the provision of video programming to subscribers, whatever its scope or duration, cannot survive even intermediate scrutiny (let alone strict scrutiny), because its focus on the editorial function as such assures that it cannot meet the requirement that it be narrowly tailored to an important government interest.\textsuperscript{134} "Far from mooting the controversy," C&P's counsel wrote, "the Act perpetuates the controversy."\textsuperscript{135}

IV. The Future of Telephone Companies' First Amendment Rights

Why is determining the First Amendment rights of telephone company to provide video programming significant? After all, even if the Supreme Court does not ultimately decide the constitutional issues in Chesapeake & Potomac, there is no suggestion that common carriers have no First Amendment rights. A telephone company is as free as any other company to express itself through media other than its own transmission capacity.\textsuperscript{136} It can buy advertising space on billboards, in

\textsuperscript{133} Respondent's Brief at 4, Chesapeake & Potomac (Nos. 94-1893, 94-1900).
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} See, e.g., Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, 919 n.19 (E.D. Va. 1993) ("Section 533(b) only prohibits plaintiffs from directly providing video programming to their subscribers. Plaintiffs are not prohibited from producing their own video programming and marketing it to broadcasters or cable operators for transmission by means other than the plaintiff's own facilities."). aff'd, 42 F.3d 181 (4th Cir. 1994), and vacated and remanded per curiam for consideration of mootness, 116 S. Ct. 1036 (1996).
newspapers and magazines, and on television and radio. Such communications receive the same level of First Amendment protection as any other speakers. Common carriage is not a First Amendment void. Expression by telephone receives constitutional protection just like expression through any other medium.\textsuperscript{137}

Telephone companies also receive substantial benefits as part of their common carrier status. In many cases, they are protected absolutely from competition by local or state franchise agreements.\textsuperscript{138} In all cases, they receive some protection from competition through the requirements of Section 214; whereas would-be providers of new, competing services must justify that there is an unmet need that “dictates” the new service.\textsuperscript{139} Common carriers often act with government-like authority to cross privately owned land, to dig up public streets, and to string cable along public rights of way. Because they have little or no ability or authority to control the content of the messages they carry, common carriers are usually immune from liability from the harmful effects of those messages.\textsuperscript{140}

In light of these realities—that the First Amendment protects both the right of telephone companies to speak elsewhere and the speech of others transmitted by the telephone company, and that benefits attend common carrier regulation—what really rests on the failure of the Court to identify and protect telephone companies’ First Amendment rights to provide video and other information services via their own lines and switches? The resolution of those rights is important both for telephone companies in their own right, and because of the convergence of technologies—including those of modern telephony—that make up the information superhighway.


\textsuperscript{139} See Hawaiian Tel. Co. v. FCC, 498 F.2d 771, 774 (1974). In rejecting the FCC’s issuance of a § 214 certificate to RCA to offer leased-line voice service via Comsat in competition with Hawaiian Telephone Company, the Court found that “the FCC has not conformed to the requirement that it find the public convenience and necessity dictate the new service.” Id. at 774 (emphasis added).

\textsuperscript{140} See RESTATEMENT (SECOND) OF TORTS § 612 (1977) (setting forth the privilege afforded public utilities who accept and transmit defamatory messages); see also Western Union Tel. Co. v. Lesesne, 182 F.2d 135, 137 (4th Cir. 1950) (stating that because of the duty imposed on telegraph companies to transmit messages for all who request the service, “it is only when the company has knowledge or reason to know that the messages are not privileged that it becomes liable for libelous matter contained therein”); O’Brien v. Western Union Tel. Co., 113 F.2d 539, 543 (1st Cir. 1940) (holding that a telegraph company could be held liable for the transmission of a defamatory message only if its transmitting agent knew that the message was defamatory).
A. Continued Regulation of Telephone Companies

Whether it is carrying its own expression or that of others, or whether it is providing basic telephone transmission or an enhanced electronic information service, the telephone company is engaging in activities that, but for the history of common carrier regulation, would be entitled to First Amendment protection. The application of First Amendment principles from the nonelectronic context would not prohibit all regulation of telephone companies; it would, however, frame the analysis so that policy makers and courts considered not only the objectives of the regulations, but also the vital purposes served by the First Amendment.

Telephone companies and would-be competitors continue to be subject to regulations affecting their ability to offer expressive services. The Telecom Act itself is the source of additional regulation. Much of the panoply of common carrier regulation continues to restrict phone companies. The application of the First Amendment to these regulations, although not specifically at issue in the Chesapeake & Potomac case before the Supreme Court, would certainly be affected by the Court's interpretation of the constitutional rights applicable to telephone companies' provision of video services. Recall that Judge Ellis, after concluding that the First Amendment applied to the telephone companies' challenge to the cross-ownership rules, used intermediate scrutiny to evaluate the constitutionality of those rules. Judge Rothstein, however, concluded that strict scrutiny was the appropriate standard of review, although she found that the rules failed constitutional review even under intermediate scrutiny. A Supreme Court decision would provide necessary guidance to future regulators, litigants, and lower courts about the application of the First Amendment to other regulations applicable to telephone companies.

B. A Constitutional Response to Technological Convergence

Telephone companies do not operate in a technological or market vacuum. Increasingly, the expressive activities of phone companies are intrinsically linked with the technologies of publishing, broadcasting, and particularly electronic information networks, and the expression of the people who use those media. Yet the Court's technology-

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focused approach to analyzing First Amendment rights treats these media differently.

I. Technological Dependency of the First Amendment

Beginning with its earliest free expression cases, the Supreme Court has found that First Amendment protection depended upon the medium of communication involved. Where traditional media, such as newspapers, books, and pickets were involved, the Court has interpreted the First Amendment to prevent the government from restricting expression prior to its utterance or publication, or merely because the government disagrees with the sentiment expressed.\textsuperscript{143} Under the Court's interpretation, the First Amendment also forbids the government from making impermissible distinctions based on content\textsuperscript{144} or compelling speech or granting access to the expressive capacity of another\textsuperscript{145} without demonstrating that the abridgment is narrowly tailored to serve a compelling governmental interest. These First Amendment principles restrict not merely Congress, but all federal and state governmental agencies.\textsuperscript{146} Moreover, these principles may also apply to expression that the Court has determined does not independently warrant protection,\textsuperscript{147} conduct that involves no speech,\textsuperscript{148} and activities ancillary to expression.\textsuperscript{149}

\textsuperscript{143} See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (invalidating statute proscribing expressive conduct that was based on the city's disapproval of the ideas expressed); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (vacating injunction enjoining the New York Times from publishing a classified Government study); see generally Cate, supra note 51, at 10-11 (discussing the principle against prior restraints).

\textsuperscript{144} See, e.g., R.A.V., 505 U.S. at 393 (cross burning); Texas v. Johnson, 491 U.S. 397, 406 (1989) (flag burning); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (nuclear power); see generally Cate, supra note 51, at 11-12 (discussing the principle against content discrimination).


\textsuperscript{146} See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500 (1952).


\textsuperscript{148} See, e.g., United States v. Eichman, 496 U.S. 310, 315 (1990); Texas v. Johnson, 491 U.S. 397, 404 (1989); see generally Cate, supra note 51, at 16 (discussing expressive conduct and symbolic expression).

However, when the government sought to impose similar restrictions on newer media, such as sound trucks, telephones, or broadcast television, the Court has assumed that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." The Court first suggested that First Amendment protection was technology-dependent in *Kovacs v. Cooper*, a case involving a New Jersey statute that forbade the use of a "loud and raucous" sound truck. Justice Jackson wrote in support of the ordinance's constitutionality:

I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of "communication of ideas." The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself.

Nowhere was this made clearer than in *Red Lion Broadcasting Co. v. Federal Communications Commission*. There, Justice White wrote for a unanimous Court that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." In *Red Lion*, he identified the scarcity of radio frequencies as justifying restraints on licensees. At issue was an FCC rule permitting persons attacked by broadcasts to be notified of the attack and given an opportunity to respond. As a result of scarcity, the Court found that broadcasters—unlike publishers—owe a duty to the public to provide them with "suitable access to social, political, esthetic, moral, and other ideas and experiences." Rather than occupy the spectrum for their own expressive purposes, broadcasters are to serve the interests of the public as identified by the FCC and enforced by the courts. Like other trustees, broadcasters can be restrained from, or compelled to, action to serve the interest of their trust beneficiaries. "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as prox-

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150. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 (1969). In *Red Lion*, the Court held that the special characteristics of the broadcast spectrum justified lower First Amendment protection. *Id.* at 400-01.


152. *Id.* at 97 (Jackson, J., concurring).

153. 395 U.S. at 367.

154. *Id.* at 386.

155. *Id.* at 388-89.

156. *Id.* at 378.

157. *Id.* at 390 (citations omitted).
ies for the entire community, obligated to give suitable time and attention to matters of great public concern.”

Only five years after Red Lion was decided, the Court unanimously struck down a far more limited intrusion into the First Amendment rights of newspaper publishers. The interests of the public in a competitive and responsible press in Miami Herald Publishing Co. v. Tornillo\(^\text{159}\) could not justify “[c]ompelling editors or publishers to publish that which “reason’ tells them should not be published.”\(^\text{160}\) In Red Lion, similar interests were used by the unanimous Court to justify obliterating the independent First Amendment interests of broadcasters. The only difference between the two cases was the medium involved. This focus on the distinctiveness of the medium has been the Court’s consistent approach to First Amendment cases in electronic contexts ever since: The First Amendment means something different depending upon the technologies involved.\(^\text{161}\)

\(^{158}\) Id. at 394.

\(^{159}\) 418 U.S. 241 (1974).

\(^{160}\) Id. at 256 (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945).

\(^{161}\) The Court explained:

In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in Red Lion and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation . . . .

This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994) (citation omitted); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (“In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis.”); FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (“[W]e have recognized that ‘differences in the characteristics of new media justify differences in the First Amendment standards applied to them.’”) (quoting Red Lion, 395 U.S. at 386); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 818 (1984) (Brennan, J., dissenting) (“The Court recognizes that each medium for communicating ideas and information presents its own particular problems. Our analysis of the First Amendment concerns implicated by a given medium must therefore be sensitive to these particular problems and characteristics.”); Bigelow v. Virginia, 421 U.S. 809, 825 n.10 (1975) (“[T]he ‘unique characteristics’ of this form of communication ‘make it especially subject to regulation in the public interest.’”) (quoting Capitol Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), aff’d, 405 U.S. 1000 (1972)); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (“Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”); Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 387 (1973) (referring to the “peculiar characteristics of the electronic media”); see generally Note, The Message in the Medium: The First Amendment on the Information Superhighway, 107 Harv. L. Rev. 1062 (1994) (describing the hierarchy of protections accorded various technologies).
This technologically-determinant approach to the First Amendment yielded no First Amendment protection for telephone companies until the six district and two appellate court cases striking down the cross-ownership ban. We have yet to hear from the Supreme Court. In the nonelectronic context, the Supreme Court has applied the First Amendment to invalidate prohibitions on expression without a license, such as that required by Section 214. "Any system of prior restraints on expression comes to the Court bearing a heavy presumption against its constitutional validity." The Court struck down laws requiring one speaker to subsidize the expression of others or mandating access to the speaking capacity of another: "[B]urdening the speech of one party in order to enhance the speech of another [is one government objective] that the First Amendment disallows." The Court has repeatedly held that even if a regulation targets expression that is "commercial," false and defamatory, uttered by a regulated utility, or even does not target expression at all, but rather some action necessary to effective communication, First Amendment interests are implicated. It is irrational to treat speech in one medium different than in another.

2. Convergence

First Amendment interests are implicated more than ever, and the irrationality of technology-dependent interpretations of the First

162. See cases cited supra note 3.
163. See, e.g., Staub v. City of Baxley, 355 U.S. 313, 325 (1958) (striking down ordinance requiring a permit to solicit membership in any organization); Schneider v. New Jersey, 308 U.S. 147, 153-54 (1939) (invalidating several ordinances prohibiting entirely or requiring police approval before handbills could be distributed in public); Lovell v. City of Griffin, 303 U.S. 444, 450-51 (1938) (invalidating a city ordinance prohibiting distribution of literature without first obtaining permission from the city manager).
169. See, e.g., Pacific Gas, 475 U.S. at 1; Central Hudson, 447 U.S. at 557.
170. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm’t of Revenue, 460 U.S. 575, 591 (1983) (invalidating special use tax on ink and paper products targeting a small group of newspapers); Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) ("[W]e think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (holding that freedom of the press applies not only to publication, but also to its distribution).
Amendment clearer than ever, by the convergence now dominating all communications media. The majority of communication in the United States today crosses the boundaries that once separated telegraphy, telephony, and broadcasting from each other and from print. Written words are composed on word processors, stored in computer memories, transmitted via local networks, telephone lines, and satellites, and then preserved on paper through printers and facsimiles. Images and sounds are captured by cameras, scanners, microphones, and other sensors, stored on tape or disc, broadcast over the air or through coaxial cables or optical fibers, displayed on television or computer screens, heard on radio, or printed on paper. Data and voice signals are collected by telephones, computers, and remote sensors, and transmitted via pairs of copper wires, optical fibers, and satellites, or beamed through the air. Documents are printed, photocopied, facsimiled, scanned, and increasingly stored electronically.

3. Digital Information Networks

Nowhere is this convergence more clear, and the status of the First Amendment more critical, than in digital information networks. These networks are perhaps the single most influential innovation of the 20th century. Whether joining the computers in a single office or spanning the globe, these networks have rapidly become a dominant force in business, government, education, and recreation in the United States and throughout the world. The International Telecommunication Union predicts that by the turn of the century information services and products—already the world's largest economic sector—will account for $3.5 trillion in revenue.

The Internet—the most ubiquitous of information networks—connects more than 45,000 separate networks and 37 million users in 161 countries. As of January 1996, there were 9.4 million advertised hosts, representing an annual growth rate of 85%. There are 76,000 advertised World Wide Web hosts—offering the sites to which the majority of people who have used the Internet in the past three months...

report having connected—and that figure represents an annual growth rate of 2,400%.

Telephone companies already provide one of the most essential components of both the Internet and many other networks: the local user’s connection—the so-called on-ramp to the information highway. Phone companies also, of course, offer Web pages and participate in on-line discussions. In the future, these companies are likely to play an even more significant role as providers of valuable network services, local access with greatly expanded bandwidth and intelligent services, and backbone transmission capacity. The current and future roles of telephone companies have caused concern among many legal scholars and others about the public’s right of access to networks. As a result, they have called for continued and expanded common carrier regulation.

As important as access is, the failure to identify and protect telephone companies’ First Amendment rights will contribute even more in the future to confusion over the First Amendment status of expression on the Internet and other digital networks. As other provisions of the Telecom Act make clear, digital information networks are critical new battlegrounds for First Amendment freedoms. As was the case with telegraphy, telephony, and broadcasting, neither Congress nor the Administration seems overly concerned about the role of the First Amendment in cyberspace. This is surprising, given the breadth of issues addressed in the Clinton Administration’s Agenda for Action and the variety of committees, working groups, and subworking groups that are part of the Administration’s Information Infrastructure Task Force, The National Information Infrastructure: Agenda for Action 5 (1993).


Yet the First Amendment isn't mentioned in the *Agenda for Action* nor in any of the Administration's pronouncements concerning the National Information Infrastructure (NII). Nor does the First Amendment appear in speeches by Vice President Gore, Secretary Brown, or other senior administration officials.179

This omission of the First Amendment from information policy is even more significant in light of the substantial regulatory role the administration anticipates that the government should play in implementing that policy. On December 21, 1993, Vice President Gore delivered the Administration's first major policy address on the NII at the National Press Club in Washington. In his speech, the Vice President, the intellectual and political force behind the Administration's NII initiative, analogized the current information marketplace to the environment that, in his view, permitted the sinking of the *Titanic*. The Vice President argued that the *Titanic*'s radio operators did not receive the warnings about icebergs in the vicinity and so few ships responded to the *Titanic*'s distress signals, because "the wireless business then was just that, a business. Operators had no obligation to remain on duty. They were to do what was profitable. When the day's work was done—often the lucrative transmissions from wealthy passengers—operators shut off their sets and went to sleep."180 Just as that tragedy "resulted in the first efforts to regulate the airwaves," the Vice President urged, so do the many issues posed by the NII require the government to "get involved" to protect "public needs that outweigh private interests."181 The First Amendment was not mentioned.

The Vice President's vision of the proper role of the government's information policy, judging from the *Titanic* example, is to regulate

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178. President Clinton created the Information Infrastructure Task Force on September 15, 1994, chaired by then-Secretary of Commerce Ron Brown. *Id.* at 7. The Task Force is charged with articulating and implementing the administration's vision for the National Information Infrastructure (NII). *Id.* at 19. The Task Force is divided into three committees: the Telecommunications Policy Committee, the Information Policy Committee, and the Applications and Technology Committee. *Id.* at 19-20. These committees are subdivided into working groups and, in some cases, even subworking groups, reflecting the breadth of issues that the Task Force is addressing. *Id.* at 20. For further discussion and critique of the Clinton Administration's information policymaking, and call for a more comprehensive and balanced approach to information policymaking that includes critical First Amendment concerns, see Fred H. Cate, *The National Information Infrastructure: Policymaking and Policymakers*, 6 STAN. L. & POL'Y REV. 43 (1994).

179. Cate, *supra* note 178, at 54.

180. *Id.*

181. *Id.*
the NII by restraining those “private interests” that unspecified “public needs” outweigh.\textsuperscript{182} Such restraints, however, pose constitutional issues when the private interests—whether of a telephone company, another business, or an individual—are engaged in providing information services and products. The complete absence of the First Amendment from the policy making debate exacerbates these issues because it suggests that the government has ignored, rather than identified and resolved, them.

The protection of expression in this new, electronic medium will fall to the Supreme Court, as it has in the past. The Court’s fascination with the technological aspects of media of communication and its willingness to condition fundamental First Amendment freedoms on those aspects, raises the specter that it may fail to extend the full protection of the First Amendment not only to the expression of telephone companies, but also to expression on the Internet—a medium that for the first time since the invention of the printing press gives real meaning to the concept of a “marketplace of ideas.”

V. Conclusion

Despite an historically broad interpretation of the First Amendment to provide significant protection to a wide range of communication and expressive activity, the Supreme Court has repeatedly assumed that technological differences among media involved may justify diminished application of the First Amendment. In the case of telephone companies—the largest, farthest reaching communications medium in the world—there has been a longstanding, historical assumption that the First Amendment did not apply to those companies’ own expressive activities via their own networks.

In \textit{Chesapeake \& Potomac}, two federal courts reversed that assumption and found that the First Amendment prohibits government restrictions on video expression by telephone companies. Although passage of the Telecom Act repeals the specific provision at issue in \textit{Chesapeake \& Potomac}, the legislation does not eliminate all restrictions on such video expression—in fact, it creates new ones—nor does it affect a wide range of other restrictions on the expressive capacity of telephone companies. As a result, the issues on writ of certiorari before the United States Supreme Court are neither moot in a legal sense, nor irrelevant. The constitutionality of those restrictions and of future regulations will be significantly affected by a definitive statement from the Supreme Court concerning telephone companies’ First Amendment freedoms.

\textsuperscript{182} \textit{Id.}
Amendment rights. Moreover, in light of the convergence of information technologies, it is no longer reasonable to speak of the information services and products provided by telephone companies as constitutionally distinct from those provided by publishers and broadcasters. *Chesapeake & Potomac* offered the Court a long overdue opportunity to bring its constitutional analysis in line with technological convergence and to bring the process of examining increasingly overlapping media under one First Amendment standard that protects the speech marketplace and the rights of all who use it.