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Turner Broadcasting and the Bottleneck Analogy: Are Cable Television Operators Gatekeepers of Speech

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Essays

TURNER BROADCASTING AND THE BOTTLENECK ANALOGY: ARE CABLE TELEVISION OPERATORS GATEKEEPERS OF SPEECH?

Ronald W. Adelman*

TABLE OF CONTENTS

I. INTRODUCTION	1549
II. THE IMPACT OF <i>TURNER BROADCASTING</i>	1551
III. ARE CABLE OPERATORS MONOPOLISTIC GATEKEEPERS?	1554
A. THE DEMISE OF EXCLUSIVE FRANCHISES	1555
B. COMPETITION FROM TELCOS	1557
C. ADDITIONAL ALTERNATIVES TO TRADITIONAL CABLE SERVICE.....	1558
IV. CONCLUSION	1559

I. INTRODUCTION

THE Supreme Court has long held that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”¹ The Court has recognized for almost a decade that cable television is a First Amendment medium.² But it did not have an opportunity to assess in detail the characteristics of that medium until 1994, when it did so in its opinion in *Turner Broadcasting System, Inc. v. FCC*.³ In the course of affirming the constitutionality of the “must-carry” provisions of the Cable Television Consumer Protection

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1. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 (1969) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

2. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986).

3. 114 S. Ct. 2445 (1994).

and Competition Act of 1992 (the "1992 Act"),⁴ the Court justified the restrictions on the First Amendment rights of cable operators inherent in those provisions by citing the operators' "bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."⁵ In other words, according to the Court, cable operators are capable of "silenc[ing] the voice of competing speakers [*i.e.*, over-the-air broadcasters] with a mere flick of the switch."⁶

The Court has indicated that it might reconsider its characterization of a First Amendment medium when warranted by "technological developments."⁷ Despite the fact that the *Turner Broadcasting* decision was issued just over two years ago, it is already ripe for such reconsideration. The de facto monopoly that most cable operators have historically enjoyed in their service areas—a prerequisite to the Court's bottleneck analysis—may soon be a thing of the past. Maintenance of that monopoly has been possible only through legal restrictions on competition: (1) exclusive franchising laws in most service areas; and (2) a federal ban on the entry of telephone companies ("telcos") into cable television. Although both of these restrictions were likely to be relegated to oblivion on constitutional grounds,⁸ they were killed off by Congress in the 1992 Act and the Telecommunications Act of 1996 (the "1996 Act") before a final constitutional determination was ripe.⁹ Moreover, the number of households that subscribe to cable alternatives such as satellite services will more than double in the next four years.¹⁰ Congress has retained the must-carry provisions in the 1996 Act, but the statute and accompanying legislative history are devoid of any showing of the need for this continuation.

In *Turner Broadcasting*, the Supreme Court accepted, without meaningful scrutiny, Congress's findings, in connection with the 1992 Act, concerning the "bottleneck" characteristics of cable with respect to the need for the must-carry provisions. As discussed in this Essay, that reflexive acceptance was a mistake. Similar acceptance of Congress's non-findings on the same issues, in connection with the 1996 Act, would be an even

4. The must-carry provisions of the 1992 Act are codified at 47 U.S.C. §§ 534, 535 (1988 & Supp. V 1993). Section 534 requires cable systems with more than 12 channels and 300 subscribers to set aside up to one-third of their channels for a defined class of "local commercial television stations." *Turner Broadcasting*, 114 S. Ct. at 2453. Section 535 requires carriage of local "noncommercial educational television stations" on a sliding scale. Cable systems with 12 or fewer channels must carry at least one such station; systems with 13 to 36 channels must carry up to three; systems with more than 36 channels must carry all stations requesting carriage. *Id.* at 2453-54.

5. *Id.* at 2466.

6. *Id.*

7. *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) (discussing rationale for broadcast scarcity doctrine).

8. See *infra* notes 45-71 and accompanying text.

9. The ban on exclusive franchising laws was enacted as part of the 1992 Act and is codified at 47 U.S.C. § 541(a)(1). The repeal of the ban on the entry of telcos into the cable television business was enacted as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 124 (1996) (repealing 47 U.S.C. § 533(b)).

10. See *infra* notes 65-69 and accompanying text.

greater mistake. Judicial misperception of the state of a medium "is an incubus on later understanding."¹¹ Shortsighted action based on an incomplete cognizance of legal and technological developments can, as here, serve to deprive speakers of their First Amendment rights without justification. Such a misperception by the Court denied First Amendment protection to motion pictures for thirty-seven years.¹² Reconsideration of *Turner Broadcasting* is necessary to avoid a similar mistake with regard to cable television.

Fortunately, a call for such reconsideration is not simply an idle hope. Although the *Turner Broadcasting* Court held that the must-carry provisions would survive First Amendment scrutiny in the abstract, it remanded the matter to the district court for development of a more complete factual record concerning the need for those provisions.¹³ The Court seemed particularly bothered that the district court had granted the government's motion for summary judgment on the record before it. On remand, though, the district court held, on the same record, that Congress's findings were more than sufficient to support the must-carry provisions, and once again granted summary judgment in favor of the government.¹⁴ The Supreme Court once again decided to review the district court's holding.¹⁵ It is premature to speculate about whether the Court acted out of displeasure with the district court's stubborn refusal to try the case or whether it perceived the need to reconsider its earlier holding.¹⁶ Whatever the Court's motivations, its decision to rehear the action—immediately following the passage of the 1996 Act—presents the ideal opportunity to correct its earlier conclusory determination about the bottleneck characteristics of cable television.

II. THE IMPACT OF *TURNER BROADCASTING*

Turner Broadcasting was the Supreme Court's first attempt to answer a question that had intrigued observers for many years: Was cable television analogous to broadcast television (thereby permitting at least the potential for a broad range of content-related regulations¹⁷), to newspapers and other print media (thereby forbidding essentially all content-

11. ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 7 (1983).

12. *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 244 (1915) ("the exhibition of moving pictures is . . . not to be regarded . . . as part of the press of the country"), *overruled by Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). The significance of *Mutual Film* is detailed by Ronald W. Adelman in *The First Amendment and the Metaphor of Free Trade*, which will be published in the *Arizona Law Review* later this year.

13. *Turner Broadcasting*, 114 S. Ct. at 2470-72.

14. *Turner Broadcasting v. FCC*, 910 F. Supp. 734, 751 (D.D.C. 1995) (three-judge panel).

15. *Turner Broadcasting Sys., Inc. v. FCC*, 116 S. Ct. 907 (1996).

16. *But cf.* Linda Greenhouse, *Justices Reconsider Law Requiring Cable TV to Carry Local Stations' Signals*, N.Y. TIMES, Feb. 21, 1996, at A16 ("The very fact that the Court decided on a second, full-dress review of the case suggests that the Justices were not satisfied with their 1994 ruling as the last word.").

17. *Red Lion Broadcasting*, 395 U.S. at 387-90.

related regulations¹⁸), or to nothing? In *Turner Broadcasting*, the Court chose the third alternative. Instead of relying on the old analogies, it chose a new one: the cable operator as the gatekeeper of the televised images received by subscribers.¹⁹ Relying on that characterization, the Court found that the must-carry provisions are content-neutral regulations which further an important governmental interest and which are narrowly tailored to advance that interest.²⁰

There is an interesting parallel between the Court's treatment of cable operators and its treatment of broadcasters. Over the years, the Court and commentators have come to characterize broadcasters as "public trustees" with affirmative duties to avoid simply advancing their "own political, social and economic views."²¹ Although the *Turner Broadcasting* Court explicitly rejected reliance on the "scarcity doctrine" which underlies broadcast regulations,²² it is difficult to distinguish between the trusteeship burdens imposed by the Court on broadcasters and cable operators in practical terms. It is true that the subject matter of broadcasters' trusteeship duties is wider. Over the years, broadcasters have been compelled (or at least prodded) by the government, *inter alia*, to refrain from airing editorials;²³ to present "controversial" programming (including editorials);²⁴ to refrain from airing songs "tending to promote or glorify the use of illegal drugs";²⁵ and to refrain, at least at certain times of the day, from airing "indecent" programming.²⁶ In contrast, the only trusteeship duties imposed on cable operators so far are must-carry provisions, indecency restrictions,²⁷ and, arguably, rate regulation.²⁸ But the

18. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255 (1974).

19. *Turner Broadcasting*, 114 S. Ct. at 2466.

20. *Id.* at 2469-72. In other words, the Court applied a version of the test from *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which assesses the constitutionality of "content-neutral restrictions that impose an incidental burden on speech." *Id.* at 2469. The *O'Brien* test has been applied in all of the primary cable cases addressed in this Essay.

21. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973). See also THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 157-74 (1994).

22. *Turner Broadcasting*, 114 S. Ct. at 2456-57. The scarcity doctrine holds that "the inherent physical limitation on the number of speakers who may use the broadcast medium . . . require[s] some adjustment in traditional First Amendment analysis to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees." *Id.* at 2457.

23. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-40 (1940).

24. *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1252-53 (1949).

25. *Licensee Responsibility to Review Records Before Their Broadcast*, 28 F.C.C.2d 409, 409 (1971). See also LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 176-82 (1987) (discussing effects of FCC pressure on radio programmers concerning drug-related lyrics).

26. *Action for Children's Television v. FCC*, 58 F.3d 654, 657-59 (D.C. Cir. 1995) (discussing background of efforts to limit indecent programming), *cert. denied*, 116 S. Ct. 701 (1996).

27. See generally 47 U.S.C. §§ 531-32, 559-61 (as amended by the 1996 Act).

28. *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 186 (D.C. Cir. 1995) (upholding rate regulation under the 1992 Act), *cert. denied*, 116 S. Ct. 911 (1996). At first glance, rate regulation is even further removed from regulation of content than is a must-carry provision. But, as the D.C. Circuit observed, "[T]he government could not, consistently with the First Amendment, cap the price of a newspaper at 25 cents in order to limit

principle is the same. After *Turner Broadcasting*, the perceived physical characteristics of cable render it, like broadcast, a disfavored First Amendment medium.

There is significant irony in this fact. Broadcasting has served as a convenient governmental target for decades, due in part to the perception of the broadcast media as a powerful and pervasive influence on society.²⁹ Now the broadcast industry is allegedly in such grave danger from cable television that imposition of a must-carry obligation on cable operators is necessary.³⁰

It is this discriminatory treatment of cable operators vis-à-vis traditional First Amendment speakers such as the print media, rather than the content-neutrality or content-specificity of the must-carry provisions, which threatens to be *Turner Broadcasting's* lasting legacy.³¹ After all, there can be little doubt that a law requiring newspapers to carry television listings would be struck down, regardless of whether or not that law was deemed content-neutral (and whether or not it was premised on a legitimate concern over the possible demise of broadcast television). "Laws that single out particular speakers are substantially more dangerous [than generally applicable laws], even when they do not draw explicit content distinctions."³² That is precisely the purpose and effect of the must-carry provisions. Congress decided that broadcast television must be "saved" at the expense of a portion of the cable operators' First Amendment rights.³³

monopoly profits and make the paper more affordable." *Id.* at 183. Implicitly, then, cable's disfavored First Amendment status vis-à-vis newspapers permits the imposition of an obligation to the public to charge no more than "reasonable" rates. The 1996 Act retains rate regulation largely in its preexisting form, but only through March 31, 1999. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 115 (codified at 47 U.S.C. § 543(c)(4)).

29. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

30. It is hard to avoid being cynical about Congress's findings in this regard when the passage of the must-carry provisions were at least partly due to "a giant lobbying effort" by "television stations and the broadcast networks." Edmund L. Andrews, *Re-Regulation of Cable Is Likely to Pass House*, N.Y. TIMES, July 23, 1992, at D21.

31. The question whether the must-carry provisions are content-neutral or content-specific is outside the scope of this Essay. The *Turner Broadcasting* majority held that the must-carry provisions were content-neutral. *Turner Broadcasting*, 114 S. Ct. at 2460-64. That holding, however, provoked a heated four-person dissent. *Id.* at 2475-78 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., dissenting). The question is equally controversial among commentators. Compare Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 109-10 (1995) (arguing in favor of content-neutrality) with Erik F. Ugland, *Cable Television, New Technologies and the First Amendment After Turner Broadcasting System, Inc. v. F.C.C.*, 60 MO. L. REV. 799, 827-31 (1995) (arguing in favor of content-specificity).

32. *Turner Broadcasting*, 114 S. Ct. at 2476 (O'Connor, J., dissenting) (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 584, 591-92 (1983)).

33. One less intrusive alternative to a must-carry provision is the requirement that cable operators who elect not to carry broadcast signals provide subscribers with an "A/B switch," permitting subscribers to toggle between cable and broadcast signals. At one time, the FCC considered this to be a promising alternative. Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C.R. 864, 886 (1986). Unfortunately, this alternative proved ineffective

The *Turner Broadcasting* majority acknowledged that “[r]egulations that discriminate among media . . . often present serious First Amendment concerns,”³⁴ but added that strict scrutiny of such regulations “is unwarranted when the differential treatment is ‘justified by some special characteristic of’ the particular medium being regulated.”³⁵ “The must-carry provisions,” the Court added, “are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses [sic] to the viability of broadcast television.”³⁶ Therefore, if cable lacks this “bottleneck monopoly power,” the Court’s entire analysis necessarily collapses.

III. ARE CABLE OPERATORS MONOPOLISTIC GATEKEEPERS?

One of the striking features of *Turner Broadcasting* is the rigor with which the Supreme Court analyzed the government’s factual showing that must-carry rules are necessary to preserve broadcast television.³⁷ That rigor stands in marked contrast to the Court’s unquestioning acceptance of the characterization of cable operators as the gatekeepers of all television programming. The opinion’s sole factual citation in support of that characterization is to an eleven-year-old book.³⁸

To be sure, that book, *Technologies of Freedom* by Ithiel de Sola Pool, is a landmark analysis of the First Amendment issues raised by electronic media. In the 1983 world of exclusive municipal franchises, disruptions of public rights-of-way required to lay coaxial cable, and lack of viable com-

because subscribers failed to use it. *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 47 (D.D.C. 1993) (citing congressional findings), *vacated and remanded on other grounds*, 114 S. Ct. 2445 (1994).

34. *Turner Broadcasting*, 114 S. Ct. at 2468.

35. *Id.* (quoting *Minneapolis Star*, 460 U.S. at 585).

36. *Id.*

37. *Id.* at 2470-72 (remanding case to district court for “the parties to develop a more thorough factual record”). On remand, the district court once again held that Congress had made factual findings in support of the must-carry provisions sufficient to warrant summary judgment in the government’s favor. *Turner Broadcasting*, 910 F. Supp. 734, 751 (D.D.C. 1995) (three-judge panel), *prob. juris. noted*, 116 S. Ct. 907 (1996). To be precise, however, only Judge Stanley Sporkin believed that summary judgment in the government’s favor was appropriate. Judge Stephen F. Williams, in dissent, argued that, to the contrary, summary judgment striking down the must-carry provisions were warranted. *Id.* at 755 (Williams J., dissenting). Judge Thomas Penfield Jackson, “[l]eft to [his] own inclination,” would have required a trial on the validity of the must-carry rules, but sided with Judge Sporkin in order to avoid a “stalemate.” *Id.* at 752 (Jackson, J., concurring). Judge Jackson’s concurrence permitted Judge Sporkin’s reflexively pro-government, anti-cable opinion, which merely rehearsed the majority’s findings from the first district court’s opinion, to carry the day. Judge Sporkin’s unblinking hostility to the cable industry is not surprising, though, in view of his concurrence in the earlier opinion. There, he argued in favor of denying even minimal First Amendment protection to cable operators, in large part because “[i]t is inconceivable that our forefathers contemplated at any time that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted.” *Turner Broadcasting*, 819 F. Supp. at 56 (Sporkin, J., concurring). That “reasoning” is alien to established First Amendment jurisprudence.

38. *Turner Broadcasting*, 114 S. Ct. at 2466 n.8 (citing DE SOLA POOL, *supra* note 11, at 168).

petition, concern over the bottleneck tendencies of cable television was inevitable. De Sola Pool's innovative solution was to treat cable systems as outright common carriers.³⁹ He foresaw effective competition for cable through a broadband integrated services digital network (ISDN) as lying ten or twenty years down the road. In the interim, he argued, common carrier status would avert a "troubled decade or two of cable system dominance."⁴⁰ It is somewhat misleading, therefore, for the Court to have cited de Sola Pool's statement without assessing whether the factual predicate for his statement was still valid. That is particularly true in light of de Sola Pool's conviction that regulation of electronic media was "a last recourse."⁴¹ This section, then, is devoted to the analysis that the *Turner Broadcasting* Court failed to undertake.⁴²

As a threshold matter, there is no evidence that cable operators are engaged in widespread "monopolistic practices" in the legal sense, as defined by the antitrust laws.⁴³ The Court's reference to cable operators' "bottleneck monopoly power"⁴⁴ is therefore a more informal characterization of the state of the television market.

A. THE DEMISE OF EXCLUSIVE FRANCHISES

Most of us (including, probably, the Justices of the Supreme Court) are personally unfamiliar with access to competitive cable, or cable-like, service providers. We were equally unfamiliar at one time with access to competitive long distance telephone services. The Court's conclusions concerning the monopolistic tendencies of the cable industry reflect that lack of familiarity. In fact, there is nothing inevitable about having access to only one cable operator, even in the short run.

For most of cable's history, systems have been authorized to operate through governmental (most often, municipal) franchises. Municipal *regulation* is perfectly sensible in view of a cable system's need for access to physical infrastructure (*i.e.*, streets, poles) in order to operate.⁴⁵ "Regulating such use and inconvenience, however, is quite different from restricting access" through the use of a rigid exclusive franchising rule.⁴⁶ In

39. DE SOLA POOL, *supra* note 11, at 171-76.

40. *Id.* at 186. The common carrier solution, of course, never managed to win governmental favor.

41. *Id.* at 246.

42. On remand, the *Turner Broadcasting* district court also failed to consider the issue in any meaningful detail. *Turner Broadcasting*, 910 F. Supp. at 740.

43. There is no question that the antitrust laws apply fully to media entities. See *Associated Press v. United States*, 326 U.S. 1 (1945).

44. *Turner Broadcasting*, 114 S. Ct. at 2468.

45. See, *e.g.*, *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377-78 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

46. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir. 1985) (hereinafter *Preferred I*), *aff'd in part and remanded in part*, 476 U.S. 488 (1986) (hereinafter *Preferred II*), *aff'd and remanded*, 13 F.3d 1327 (9th Cir.) (hereinafter *Preferred III*), *cert. denied*, 114 S. Ct. 2738 (1994). In *Preferred III*, the Ninth Circuit specifically adopted the analysis and conclusions of *Preferred I*. *Preferred III*, 13 F.3d at 1330 n.4.

other words, minimizing disruption of the streets is a substantial governmental interest, but an exclusive franchising rule—in the absence of proof that the infrastructure could not accommodate a second franchise—is not narrowly tailored to serve that interest.⁴⁷

In *Preferred Communications, Inc. v. City of Los Angeles*,⁴⁸ the City of Los Angeles also contended that its “one area/one franchise” rule was justified as a recognition that cable service is in fact a “natural monopoly.”⁴⁹ The Ninth Circuit dismissed this contention as a “[r]epackaging” of the City’s interests in “avoiding traffic disruption and visual blight.”⁵⁰ On a more abstract level, the City’s justification is an exercise in circular reasoning. There is nothing “natural” about a monopoly that was created by governmental fiat.⁵¹ Whether or not cable service has the characteristics of a natural monopoly, the City failed to give nature a chance to take its course. It was therefore unable to demonstrate the factual premise behind its justification.

The Supreme Court, of course, is not bound by the Ninth Circuit’s interpretation of constitutional law. It is, however, bound to consider the effect of federal statutory law. The 1992 Act provides that “a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.”⁵² That provision was not directly before the *Turner Broadcasting* Court, but it was certainly relevant to the Court’s analysis and should have been addressed in the opinion. How can the speech rights of cable operators be regulated on the theory that they are quasi-monopolists when the legal predicate behind the very conditions that created that status have been abolished?

One answer may be the determination (albeit conclusory) of the D.C. Circuit that the effects of the pre-1992 status “linger on.”⁵³ On the other hand, there is evidence that effective competition may already, or soon will, be a reality in many parts of the country, including New York,⁵⁴ Los

47. *Preferred I*, 754 F.2d at 1405-06 (applying the *O’Brien* test to Los Angeles’ exclusive franchise rule).

48. 13 F.3d 1327 (9th Cir.), *cert. denied*, 114 S. Ct. 2738 (1994).

49. *Id.* at 1332.

50. *Id.*

51. *Cf. Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985) (cable television’s “tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal franchising process—than to any ‘natural’ economic phenomenon”), *cert. denied*, 476 U.S. 1169 (1986).

52. 47 U.S.C. § 541(a)(1). The circuit courts are divided over the retroactive effect of this provision to governmentally-designated exclusive franchises in existence before the 1992 Act became effective. *Compare Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178, 1181-82 (11th Cir. 1993) (provision must be applied retroactively) with *James Cable Partners, L.P. v. City of Jamestown*, 43 F.3d 277, 279-80 (6th Cir. 1995) (provision may not be applied retroactively).

53. *Time Warner*, 56 F.3d at 184. The court’s position in this respect would be stronger but for the imminent entry of the telcos into the cable market and the other factors portending increased competition in the cable industry. See *infra* notes 52-62, 67 and accompanying text.

54. Jay Romano, *Saving Money on Your Cable TV*, N.Y. TIMES, Feb. 19, 1995, § 9, at 5, col. 1.

Angeles,⁵⁵ Chicago,⁵⁶ Baltimore,⁵⁷ and Hartford.⁵⁸ In any event, the legal bar on exclusive franchises merited consideration by the Court as a prerequisite to upholding the significant regulation of speech inherent in the must-carry provisions.

B. COMPETITION FROM TELCOS

One of the curiosities of the 1992 Act is its implicit contradictory stance on competition in the cable industry.⁵⁹ Congress determined that viewers were disserved by the lack of competition in the provision of cable services, but deliberately declined to repeal the ban on the provision of services by the likeliest competitors to incumbent cable operators: the telcos.⁶⁰ That decision—taken in spite of findings by the FCC and the Department of Justice that repeal of the cross-ownership ban would enhance competition—spurred the telcos to seek a judicial declaration of the ban's unconstitutionality.⁶¹

Congress has reversed itself in the 1996 Act. Telcos are now free to enter the cable market essentially without restriction.⁶² But that action probably only hastened the inevitable. The telcos' efforts to have the cross-ownership ban declared unconstitutional met with resounding success. Every court that considered the question struck down the ban under the *O'Brien* test as not sufficiently narrowly tailored to the governmental interest in preventing telco domination of the cable industry.⁶³ In the words of one court, Congress chose the most "draconian" approach without any proof that a less restrictive measure would suffice.⁶⁴

55. Jennifer Pendleton, *In the Oncoming Lane of the Info Highway; Television: Cable Operator CVI Is Planning a Fiber-Optic Upgrade to Deliver Expanded Services, Including, Potentially, Telecommunications*, L.A. TIMES, Sept. 13, 1994, at 4.

56. Martha Russis, *Ameritech Cable Targets Hoffman Estates*, CHICAGO TRIB., Sept. 12, 1995, at 1.

57. JoAnna Daemmrich, *Bill Would Give Franchise to Second Cable Company*, BALTIMORE SUN, June 7, 1995, at 1A.

58. Susan E. Kinsman, *Court Gives Cable Firm the Green Light; Fibervision Can Build Competing Franchise*, HARTFORD COURANT, Aug. 22, 1995, at B7.

59. *Ameritech Corp. v. United States*, 867 F. Supp. 721, 726-27 (N.D. Ill. 1994).

60. 47 U.S.C. § 533(b) (the "cross-ownership ban") (repealed at 110 Stat. 124). The ban was enacted in 1984 in order "to prevent the development of local media monopolies." *US West, Inc. v. United States*, 48 F.3d 1092, 1096 (9th Cir. 1994) (quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 55 (1984)).

61. *Ameritech*, 867 F. Supp. at 727.

62. Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 124 (1996) (repealing 47 U.S.C. § 533(b)).

63. *US West*, 48 F.3d at 1105-06; *Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181, 202 (4th Cir. 1994), *vacated for consideration of mootness*, 116 S. Ct. 1036 (1996); *Southern New England Tel. Co. v. United States*, 886 F. Supp. 211, 219 (D. Conn. 1995); *NYNEX Corp. v. United States*, No. CIV 93-323-P-C, 1994 WL 779761, at *1 (D. Me. Dec. 8, 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335, 1343 (N.D. Ala. 1994); *Ameritech*, 867 F. Supp. at 736.

64. *Southern New England Tel.*, 886 F. Supp. at 219 (quoting *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 928 (E.D. Va. 1993)). The cross-ownership ban is premised on the fear that telcos, if permitted to compete, "would engage in the anti-competitive practices of cross-subsidization [use of revenues from telephone operations to subsidize incipient cable operations] and pole-access discrimination." *Chesapeake and Po-*

The Supreme Court had already agreed to hear one of the cross-ownership ban cases⁶⁵ when Congress repealed the ban. The Court responded by summarily remanding the case to the Fourth Circuit for consideration of whether that repeal rendered the case moot,⁶⁶ which was undoubtedly the correct result. Hopefully, though, the Court will give at least some consideration to the significance of the repeal when it reviews the *Turner Broadcasting* remand.

C. ADDITIONAL ALTERNATIVES TO TRADITIONAL CABLE SERVICE

Wholly apart from the foregoing, the next few years are likely to bring a decline in the "market power" (to borrow an antitrust term) of traditional cable operators. This decline will be caused by the growth of cable alternatives, including direct broadcast satellite (DBS), satellite master antenna TV (SMATV), backyard satellite dishes, and wireless cable. One study predicts that traditional cable will have a subscription of 61.5 million households in 1999, up from the current 59.4 million households.⁶⁷ In contrast, subscriptions to the alternative media should reach 10.3 million homes by 1999, up from 5 million at the end of 1995.⁶⁸ In addition, the study expects the telcos' cable service to have 1.8 million subscribers by 1999, with rapid acceleration thereafter.⁶⁹ Currently, cable accounts for 62.3% of U.S. households with television, cable alternatives for 5.2%, and broadcast for 32.5%.⁷⁰ In 1999, cable will account for a slightly smaller percentage of households. The overall non-broadcast percentage, though, will increase to 73.7% due to the rise of the cable alternatives.⁷¹

Further down the road, the relative abundance created by these alternatives will be dwarfed by the growth of television over the Internet or other online networks to be developed.⁷² Although large-scale access to video programming is currently unfeasible due to the state of technology (a half-hour show requires almost twenty-four hours to download),⁷³ established video programmers such as NBC, CBS, and CNN have already established systems for transmission via cyberspace.⁷⁴ The ability to transmit audio in real time, on the other hand, already exists. Using a

tomac Tel., 42 F.3d at 200. There is no reason, however, why both potential practices cannot be prevented by regulations narrowly tailored to address those practices. *Id.* at 207.

65. *United States v. Chesapeake and Potomac Tel. Co.*, 115 S. Ct. 2608 (1995).

66. *Chesapeake and Potomac Tel.*, 116 S. Ct. at 1036.

67. John M. Higgins, *Cable Won't Lose Subs Quickly, Study Predicts*, MULTICHANNEL NEWS, Aug. 7, 1995, at 31 (citing the annual Communications Industry Forecast prepared by the investment banking firm of Veronis, Suhler & Associates).

68. *Id.* DBS is expected to have 4 million subscribers in 1999; backyard dishes are expected to have 3 million subscribers; wireless cable is expected to have 2 million subscribers; and SMATV is expected to have 1.3 million subscribers.

69. *Id.*

70. *Id.*

71. *Id.*

72. See, e.g., Chris Woodyard, *Pairing of TV, PC Not So Remote*, HOUSTON CHRON., Mar. 31, 1996, at 5.

73. Joshua Quittner, *Radio Free Cyberspace*, TIME, May 1, 1995, at 91.

74. Kevin Coughlin, *Net Video, The Future Doesn't Work Very Well at the Moment*, STAR-LEDGER, Feb. 5, 1996.

technology called "RealAudio," 350 radio stations have made programs, including the 1996 Super Bowl, available on the Internet.⁷⁵ There is no reason to believe that video will not catch up in a few years.

Eventually, new technology will foster the rise of interactive television. At that point, a programmer "would need little more than a microphone, a camcorder and a PC" to compete in the video "marketplace of ideas."⁷⁶ When that occurs, the current controversies over abundance and diversity will seem ludicrous.

It is possible that the *Turner Broadcasting* Court, after considering the relevant data, would nevertheless have determined that traditional cable operators exercise gatekeeper control over the dissemination of video images. The problem is that the Court did not consider them at all, but rather accepted on blind faith the notion of cable operators as gatekeepers.

IV. CONCLUSION

The legal establishment has historically looked down on new forms of media, even to the extent of proposing that they be denied First Amendment protection altogether. One example is the Supreme Court's treatment of movies.⁷⁷ A second example is Alexander Meiklejohn's assertion that radio speech was not entitled to protection because it had "failed" in its promise to assist in our national education; it was engaged in making money, not in "enlarging and enriching human communication."⁷⁸ A third example is Jerome Barron's conclusion that cable operators are not engaged in First Amendment speech in their basic function of selecting and transmitting programming.⁷⁹

The Supreme Court has not taken such an extreme position with respect to broadcast media and cable. But its leading opinions on those media, respectively *Red Lion* and *Turner Broadcasting*, demonstrate the Court's deep distrust of their First Amendment worthiness. The Court's implicit wariness about cable led it to accept on blind faith the popular assumption that cable is a gatekeeper, even to the extent of ignoring signs that those gatekeeper characteristics were waning.

75. *Id.* See also Quittner, *supra* note 73, at 91 (National Public Radio and the ABC Radio Network have made news programs available on the Internet through the use of RealAudio).

76. *Webbed: Video on the Internet*, *ECONOMIST*, Jan. 20, 1996, at 82.

77. See *supra* note 12 and accompanying text.

78. POWE, *supra* note 25, at 30 (quoting A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) revised as *POLITICAL FREEDOM* 78-89 (1960)).

79. Jerome A. Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 *GEO. WASH. L. REV.* 1495, 1505 (1989). Professor Barron, through his article, *Access to the Press—A New First Amendment Right*, 80 *HARV. L. REV.* 1641 (1967), was an early advocate of the view that all mass media, including large newspapers could be compelled to publish opposing views. The Supreme Court rejected that approach in *Miami Herald v. Tornillo*, a case which Professor Barron, on behalf of Pat Tornillo, argued before the Court.

The 1996 Act removes the last official barrier to the existence of a wide-open market for the provision of cable services. Yet, the 1996 Act also retains the must-carry provision, which is premised on a closed market. If First Amendment scrutiny, even under the more lenient *O'Brien* test, means anything at all, the Court should use its review of the *Turner Broadcasting* remand to assess critically the continued need for must-carry rules in view of that fact.