1994

Panel III: Cable Versus the Telephone Companies: Can Telephone Companies Be Constitutionally Barred From Delivering Video Programming?

David E. Bronston  
New York City Department of Telecommunications & Energy

James J. Gilligan  
U.S. Department of Justice

Mark C. Hansen  
Kellogg, Huber & Hansen

Joseph A. Post  
NYNEX Corporation

Follow this and additional works at: https://ir.lawnet.fordham.edu/iplj

Part of the Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation

Panel III: Cable Versus the Telephone Companies: Can Telephone Companies Be Constitutionally Barred From Delivering Video Programming?

Moderator: James C. Goodale, Esq. 
Panelists: David E. Bronston, Esq. 
James J. Gilligan, Esq. 
Mark C. Hansen, Esq. 
Joseph A. Post, Esq. 
John Thorne, Esq.

PROFESSOR GOODALE: We're going to begin today's third panel. The subject is whether telephone companies, or telcos, can be banned from providing video programming. I want to welcome to the panel on my right, David Bronston, General Counsel, New York City Department of Telecommunications & Energy, and on my far right, Joseph A. Post, who is counsel for NYNEX. On my left is Mark C. Hansen, who's a partner of Kellogg, Huber & Han-
sen. James J. Gilligan, trial attorney with the Department of Justice, is next to him, and John Thorne, who is Vice President and Associate General Counsel of Bell Atlantic, is on my far left.

This morning, I seemed to say that not only were telcos, as common carriers, the enemy of the First Amendment, but also somehow got myself in the position of saying that the only thing they brought to the table in media alliances was cash. I wish to make it clear for the record that I am withdrawing and modifying each of those two statements. It is important to note that the telcos obviously have all the telco experience that the cable companies don't have. Cable companies can provide telephone service, but they don't have the switching technology or the experience in that area and that, of course, is one of many things that the telcos bring to the table.

But more important and more relevant to this discussion, what the telcos have brought to the table in First Amendment jurisprudence is one of the most interesting First Amendment cases that I know of which is Chesapeake and Potomac Telephone Co. v. United States ("C & P"). The telcos have to be complimented, it seems to me, for bringing this case and arguing it the way that they did. They showed more First Amendment sophistication than practically any other entity I can think of in the communications business. This is a great case, it was decided in the district court last August, and the appeal was just argued before the Fourth Circuit Court of Appeals this week. I suppose it's got legs, as they say, to go even further than the court of appeals.

Here is what we're going to do: first, Joe Post is going to set the table, so to speak, and tell us about the case, the reason for its existence—namely, the provision in the 1984 Cable Act that raises the question of cross-ownership—and where the case stands.

Then we're going to have a seven-minute moot court argument. Mr. Hansen, representing the telcos, is going to argue why that

---

provision is unconstitutional. Jim Gilligan, taking the government's position, is going to respond in similar fashion, arguing why the statutory provision is constitutional. Then John Thorne, acting as intervenor, is going to speak on behalf of the cable companies, saying what they think about all of the above. Mr. Bronston is to be our first commentator after the moot court.

So, gentlemen, let's begin.

MR. POST: In 1984, Congress enacted the Cable Communications Policy Act ("1984 Cable Act"). Included in the 1984 Cable Act was a provision that was aimed at preventing telephone companies from entering the video programming market along with the then-fledgling cable television industry. Although it's frequently called a cross-ownership ban, what § 533(b) of the 1984 Cable Act actually does is prohibit the delivery of video programming by telephone companies. Specifically the section provides, "It shall be unlawful for any common carrier . . . 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."°

Now, there are a few terms in that definition that require some close attention. The first is "common carrier," which is the subject of the prohibition. In this context, the Federal Communications Commission ("FCC" or "Commission") has interpreted the term common carrier to refer to traditional local-exchange telephone companies.° The cross-ownership ban, therefore, does not apply, for example, to interexchange carriers (long-distance companies).

Another noteworthy term in the prohibition is "video programming." The 1984 Cable Act defines video programming as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."° Now this has been interpreted to mean the type of programming that was 

---

offered by broadcast stations at the time the Cable Act was enacted, that is, 1984.\(^7\)

So, in effect, the 1984 Cable Act has frozen traditional television broadcasting as it existed in 1984, and defined that as video programming. Anything qualitatively different than that is presumably not video programming, although it’s really not clear at this point what it would take to make that qualitative distinction.

Another important feature of the cross-ownership ban is that it only applies within a telephone company’s telephone service area.\(^8\)

There’s nothing in §533(b) that prevents a telephone company from offering video programming outside of its service area, and one consequence of that is a number of telcos have acquired interests in out-of-area cable companies.

Now it’s also important to note that §533(b) is a ban on the provision of video programming, not a ban on the carriage of video programming. Telephone companies can and do offer services by which video programming that is originated or selected by others can be delivered to subscribers. A number of companies, including my own, are now engaged in a very brisk effort to develop a service called “video dialtone,” which will be a sort of service platform that will enable an independent source of programming to deliver its programming to customers through telephone company facilities.

As we’re all aware, there’s an active debate going on in Congress concerning whether the cross-ownership ban serves any useful purpose,\(^9\) particularly in light of the changes that have taken place in the cable and telephone industries since 1984. Parallel to that policy debate is a legal debate about the constitutionality of the cross-ownership ban, and that’s the debate to which we’re going to try to contribute here today. The premise of the debate is the

---

fact—which I don’t think is really contested by any of the participants in the debate—that video programming is a type of “speech” within the meaning of the First Amendment. Thus, the real question—once you accept the premise that the First Amendment applies—is the types of restrictions that are permissible and the types of restrictions that are impermissible.

Interestingly, the cross-ownership ban isn’t the first context in which this sort of First Amendment question has arisen. The consent decree that broke up the Bell system in 1983—the “MFJ,” as it’s known to connoisseurs—prohibited the newly divested Baby Bells from providing a variety of services.10 One of these was what were known as “information services.”11 Information services include a broad variety of services that essentially deliver information over telephone wires. It might include, for example, a stock quote dial-up service. But it would also include most forms of the type of video programming we’re considering today.

The information services ban was lifted by the District Court for the District of Columbia in July 1991,12 but soon after it was lifted, there were efforts to re-impose the ban through legislation. Particularly notable in this regard is Representative Brooks’ bill, the Antitrust Reform Act of 1992.13 Although that bill was never enacted, there was considerable debate in Congress when it was proposed concerning whether such a ban would advance or inhibit the purposes of the First Amendment. It was quite an interesting debate. A number of opponents of the information services ban testified that the ban was merely a prohibited restriction on speech.

11. Pursuant to the MFJ, “information service” was defined as: [T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system of the management of a telecommunications service. 552 F. Supp. at 229.
The supporters of the ban argued that the ban itself actually advanced the purposes of the First Amendment by prohibiting one set of speakers—telephone companies—from dominating the information marketplace. That same issue is really quite central to the debate over the constitutionality of the video programming ban.

Now in recent years, as we’re all aware, telephone companies and cable companies have begun to become actively interested in entering each other’s traditional markets. As a result, the question of the validity of the video programming ban has become a very high-profile issue.

The issue came to a head in December 1992, when the Chesapeake and Potomac Telephone Company (“C & P”) brought a suit against the government, challenging the cross-ownership ban on First Amendment grounds.\(^\text{14}\)

C & P is a Bell Atlantic subsidiary which provides local telephone service in, among other areas, Alexandria, Virginia. C & P wanted to do two things. First, it wanted to upgrade its local telephone network so that it could carry video programming for unaffiliated programmers. But it also wanted to be able to carry on that network programming that was originated by another Bell Atlantic subsidiary, Bell Atlantic Video Services Company. If it were able to do so, C & P would become a competitor of the incumbent cable company in Alexandria, which is Jones Intercable. Of course, the delivery of video programming by Bell Atlantic Video Services would be flatly contrary to the cross-ownership ban, hence the need for the lawsuit.

The suit was filed in the United States District Court for the Eastern District of Virginia—a court sometimes affectionately known as the “rocket docket” for the speed with which it processes cases. The National Cable Television Association (“NCTA”) intervened in support of the statute.\(^\text{15}\) There were 33 entities that took an amicus position, including a number of telephone companies.\(^\text{16}\)

---

15. Id. at 911.
16. See id. at 912 n.3.
The case moved along fairly briskly and was ultimately submitted to the court on cross-motions for summary judgment, based, the Court tells us in its opinion, on thousands of pages of affidavits, exhibits and briefs, including a joint stipulation of facts. Based on this detailed record, the District Court issued its carefully reasoned, well-considered opinion in August of 1993.

First, it determined that there was a First Amendment issue to be resolved. That is, it concluded that, on its face, § 533(b) restricted speech. Section 533(b) restricted one significant mode of speech—video programming—and the court noted that video programming, when it's offered by cable operators, has been recognized by the Supreme Court as a protectable form of speech under the First Amendment. After accepting the fact that a First Amendment issue existed, the Court moved on to the question of the applicable level of First Amendment scrutiny.

The Government argued for a mere rationality standard, and the telephone companies argued for strict scrutiny. The court rejected both those standards and applied an intermediate degree of scrutiny. That is, it applied the standard of United States v. O'Brien and Ward v. Rock Against Racism. Essentially it's a two-part test. First, you ask whether the statute is narrowly tailored to serve a significant governmental interest, and second, you ask whether the statute leaves open ample alternative channels of communication.

The court concluded that the statute was not narrowly tailored. The government had identified two objectives: promoting competition and preserving diversity in the ownership of communications

17. See id. at 912.
18. Id. at 918.
19. Id.
20. Id.
21. Id.
22. Id. at 926.
26. Id. at 931.
media outlets.\textsuperscript{27} The court found that the cross-ownership ban was not narrowly tailored to serve either of those objectives.\textsuperscript{28}

As Professor Goodale has pointed out, the district court's judgment has been appealed. In fact, the appeal was argued earlier this week before the Fourth Circuit, and it seems likely that whatever the outcome in the court of appeals, the case may well be headed for the Supreme Court.

In the wake of the \textit{C \& P} decision, most of the other regional Bell companies have filed their own constitutional challenges in district courts around the country. NYNEX's suit, for example, is pending in Portland, Maine,\textsuperscript{29} and although I haven't taken a census, I understand that there's something like a dozen of these suits pending now.

Also somewhat relevant to the ongoing litigation is the \textit{Turner Broadcasting System, Inc v. FCC} case,\textsuperscript{30} which was the subject of a panel this morning. In \textit{Turner}, the cable industry is challenging, on First Amendment grounds, the "must carry" rules of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").\textsuperscript{31} The case was very recently argued before the Supreme Court and a number of telephone companies filed amicus briefs, essentially supporting the position that the "must carry" rules are unconstitutional, but also urging the Court not to draw artificial distinctions between different media for First Amendment purposes, as some parties had urged.\textsuperscript{32}

Finally, the cross-ownership ban is currently being focused on by Congress. The pending Markey-Fields bill, H.R. 3636,\textsuperscript{33} would essentially lift the cross-ownership ban, subject to certain conditions. Various agencies of the executive branch have testified in Congress in favor of cross-ownership relief, stating that the ban in

\begin{itemize}
  \item \textsuperscript{27} Id. at 927.
  \item \textsuperscript{28} Id. at 931.
  \item \textsuperscript{29} NYNEX Corp. v. FCC, No. 93-CV-323-PC (D. Me. filed Nov. 15, 1993).
  \item \textsuperscript{32} \textit{Turner}, 819 F. Supp. at 38-39, 43-45.
  \item \textsuperscript{33} H.R. 3636, supra note 9, at 25-39.
\end{itemize}
its current form no longer serves the public interest.\textsuperscript{34} I think we can expect First Amendment issues to play a very prominent role in the debate going on in Congress, just as it's playing a primary role in the debate in the courts.

I hope that sets the table for the debate. It's probably one of the most fascinating issues around today and I hope you enjoy our presentation.

PROFESSOR GOODALE: Thanks very much. Mr. Hansen, you're on defending the telco position.

MR. HANSEN: Thank you, Professor Goodale.

A number of very distinguished lawyers have opined at a number of public forums on this very interesting issue, including: Jim Gilligan of the Department of Justice; John Thorne of Bell Atlantic; and Professor Laurence Tribe of Harvard. But the cases that Joe Post described a moment ago, percolating up through the federal district courts, will allow a number of lesser lights their chance at the lectern, present company included. What we want to do for you today is give you a miniature argument to a hypothetical district court by both a telco and the government. We're going to try and do a stripped-down version, but we want you to get a sense of the interplay of the arguments.

So with your indulgence, Judge Goodale, on behalf of Fordham Telco, I'm Mark Hansen. Ninety-eight percent of the United States is served by a single cable monopoly, No Choice Cable Co. At Fordham Telco, we want to break into their market. We provide local telephone service to customers here at Fordham, and we want to provide them with 500 channels of video programming. Remember the Bruce Springsteen song that talks about fifty-seven channels and nothing on?\textsuperscript{35} Well, even Bruce is going to find


\textsuperscript{35} BRUCE SPRINGSTEEN, Fifty Seven Channels (and Nothing On), on HUMAN TOUCH
something to like on our system. The system that we’re going to provide, Judge, will allow us to provide our own content and exercise our own editorial function. It’s a system that our customers want to have and a system that even the government wants to see provided. By the government, I mean the FCC, the Attorney General, and various other government officials with expertise in this area.

They think that it’s a good idea for us to be doing this. But we can’t. Section 533(b) of the 1984 Cable Act is a total ban on our ability to provide video programming to our local service customers—a flat prohibition. We’re here today to ask the court to declare that prohibition invalid under the First Amendment, just as the only court that has considered this question, the U.S. District Court for the Eastern District of Virginia in Alexandria, declared it unconstitutional recently. Here’s why you should declare it unconstitutional: the government cannot demonstrate that it has a compelling interest in gagging the telephone companies and that its gag is narrowly tailored to be the least restrictive alternative. Why is that the standard? It’s a standard familiar to the courts, called strict scrutiny. And here’s why it should be applied here.

First, this statute flat-out regulates content. Why does it regulate content? Because it says that what is prohibited is broadcast television the way it was in 1984. As Judge Ellis found in C & P, there’s no way you can say that doesn’t involve some bureaucrat sitting in the Office of Programming Regulation, figuring out if what he’s seeing looks like the television programming that was provided in 1984.

Second, there are no standards or meaningful guidelines for the exercise of the government’s discretion. If you look at the FCC’s attempt to parse this, you see that there’s nothing other than arbitrariness that explains the kind of things the Commission says are

(Columbia Records, 1992).
36. 47 U.S.C § 533(b).
38. See Video Dialtone Order, supra note 7, at 5820-21.
video programming and those it says aren't. This is the very kind of unbridled discretion that we don't want to cede to bureaucrats.

If strict scrutiny is applied, I don't think even the government will stand before you and say that the statute ought to be upheld. It fails.

But what the government will say is that strict scrutiny shouldn't apply. All right, let's take them up on that. Although you can play a lot of games with the wording of the various standards, the next level down from strict scrutiny certainly involves checking to see whether the government has an important interest that's served directly and effectively in a narrowly tailored way by the ban. The government fails that test as well. And it's the government's burden to show that it meets the test because the government is the one restricting speech.

Here's why no government interest is served. There are three interests that have been asserted and it's important to follow them through.

First, the government argues that § 533(b) is narrowly tailored to promote competition and that it's an important government interest to promote competition in the video programming market. That's easy to refute. There is no competition. As a result of § 533(b), in large part, there are cable monopolies over 98 percent of the country. Even the government believes that these monopolies need to be broken up, and the telephone companies are the most likely people to come into the cable market. So you can throw that justification out the window.

The second justification is that, if the phone companies are allowed to come into the cable market, they'll cut off all the pole attachments that the cable companies use and unfairly compete. That's real easy to refute, too. The government has found on a full administrative record that the cable companies have all the attachments they need. There's no evidence of unfair denial of access to pole attachments, and there are numerous and ample regulatory safeguards in effect to prevent it. There's a federal statute and in

California there’s a state statute.\textsuperscript{41} Thus, there is ample protection against something that has not even been a problem.

Finally we come to the government’s last justification. It’s called cross-subsidization, and it is the myth that the government tries to keep courts from penetrating. It’s a phrase that can be very confusing, so I want to spend just a minute to get clear on it. This is what it is: if you let the telephone companies provide video programming, the argument goes, they’re going to take the cost of making those movies and smuggle it into the cost of providing telephone service. The telcos will make Ma and Pa in Omaha pay a higher phone bill, while telcos get to reap bigger profits on the movie. It’s absurd, and here’s why. First of all, in order to be able to do what the government says could be done, there has to be an incentive to do it. The incentive the government asserts is higher profits in programming. But there’s no way of shifting because there are no common costs. In order to be able to shift costs and cross-subsidize, you have to be able to find some way to smuggle costs into the unrelated service.

Just step back for a minute. If you don’t have common costs, how can you cross-subsidize? How can you smuggle the cost of one service into another? The reason why you can’t is, if you’re going to take a secretary who is on a movie production crew and smuggle her cost into the telephone service, it’s readily detectable, and so the government has found.

Secondly, there has to be a lack of regulatory safeguards. But there are ample existing regulatory safeguards, and the responsible officials have concluded that they are adequate to prevent cross-subsidization.\textsuperscript{42}

Finally, the statute clearly doesn’t attack the harm it supposedly addresses because there’s already ample opportunity for cross-subsidization fully permitted. Let me give you two examples.

The phone companies are already permitted to provide out-of-

\textsuperscript{41} CAL. PUB. UTIL. CODE § 767.5 (West Supp. 1994).
\textsuperscript{42} See Video Dialtone Order, supra note 7, at 5823-32.
region video programming, with all the attendant cross-subsidization that that supposedly involves. If you accept the cross-subsidization premise, then there is every bit as much of a danger here as in within-region video programming.

Second, the government concedes that the phone companies can already provide other information services—a much broader pool of services on which, presumably, the phone companies can cross-subsidize. Video programming is just a small piece of this larger pool of things called information services. That’s all permitted; they can do that now. If there’s any opportunity for cross-subsidization, it’s already there, and the video programming prohibition does nothing to address it in any meaningful way. Section 533(b)—which just singles out speech, and singles out one speaker, doesn’t address the alleged problems the government uses to provide it with a rationale. Under any reasonable level of constitutional analysis, the statute cannot be justified, and for that reason we ask the court to declare it invalid.

PROFESSOR GOODALE: Thank you, counselor. Does the government wish to respond?

MR. GILLIGAN: Yes, it does, your Honor. Well, you’ll all be stunned to hear that I am not speaking today in my official capacity as a Department of Justice attorney, but in my individual capacity, and the views expressed by me are not necessarily those of the FCC, the Department of Justice, or the U.S. government.

It’s interesting to note that my opponent at the Bar today focused first on a number of policy reasons why telephone companies should be permitted to enter local cable programming markets, but I want to return us to the constitutional debate.

The question before us is not whether Congress should, as a matter of public policy, bar telephone companies from local cable markets. The FCC and the Department of Justice have concluded that they should not be barred, and the court challenges—like Mr. Hansen’s remarks—have relied heavily on these policy judgments

---

43. See 47 U.S.C. § 533(b).
44. See Video Dialtone Order, supra note 7, at 5847.
as reason to strike the statute down. But these arguments are
directed toward the wrong question.

No matter what the Executive Branch's view of the public in-
terest, the sole question presented in a federal court is whether
Congress may restrict telephone-cable cross-ownership without
running afoul of the First Amendment. And the answer to that
question is yes.

This is so for a number of reasons. The first, the Supreme
Court's decision in FCC v. National Citizens Committee for Broad-
casting ("NCCB")—the case that was alluded to in panels this
morning—involved FCC regulations similar to § 533(b) which
prohibited a daily newspaper from owning broadcast outlets in the
same community. Newspaper owners challenged the FCC's
newspaper-broadcast cross-ownership rules as an unconstitutional
burden on their First Amendment right to publish newspapers.
The Supreme Court, in 1978, unanimously disagreed. Rather, the
Court endorsed such rules as promoting diversity of ownership in
the mass media, which in turn serves First Amendment values by
promoting diversity of viewpoints in the media. The Supreme
Court time and again has described media diversity as essential to
the public welfare.

Section 533(b) serves the same purpose and operates in the
same fashion as cross-ownership restrictions sustained in the NCCB
case. It does so by the simple device of prohibiting common

45. See, e.g., Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909,
46. 436 U.S. 775 (1978) [hereinafter NCCB].
47. See id. at 779; Rules Relating to Multiple Ownership of Standard, FM, and
Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046 (1975), as
amended upon reconsideration, 53 F.C.C.2d 589 (1975) (codified at 47 C.F.R. §§ 73.35,
73.240, 73.636 (1976)) [hereinafter Newspaper-Broadcast Cross-Ownership Report and
Order].
48. NCCB, 436 U.S. at 793, 800.
49. Id. at 802.
50. Id. at 780-81, 794-96.
51. See, e.g., Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-67 (1990); United
States v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972); Associated Press v.
United States, 326 U.S. 1, 20 (1945).
ownership by telephone companies of both video transmission facilities and the programming carried on those facilities. The statute does not, as Mr. Hansen implied, prevent telephone companies from constructing the facilities that could bring America 500 channels of video programming. As the FCC made clear in its video dialtone order of 1992, telephone companies are free to build such common carriage facilities and make them available to all unaffiliated programmers who wish to use them.\textsuperscript{52}

I would also like to address counsel’s arguments that, rather than promoting diversity and competition, the statute has actually inhibited diversity. Counsel’s evidence on that point is the existence, per se, of what everyone—except perhaps the cable industry—acknowledges to be monopoly conditions in the cable market. That is a \textit{post hoc ergo propter hoc} argument, and it is not valid.

In 1992, Congress made detailed findings regarding the root causes of cable monopolies,\textsuperscript{53} and Congress found that local franchising practices and the enormous capital costs of constructing duplicate cable systems were to blame.\textsuperscript{54} In fact, after four years of hearings on the matter, Congress explicitly found in the Senate report to the 1992 Cable Act that cross-ownership rules such as § 533(b) actually enhance competition.\textsuperscript{55}

For these reasons the statute should be sustained, like the newspaper broadcaster rules in \textit{NCCB}, as promoting, and not offending, First Amendment values.

Congress may also bar telephone companies from local cable markets to prevent the recurrence of the kind of anticompetitive practices that forced the government to break up the AT&T monopoly a decade ago.\textsuperscript{56} As Mr. Hansen noted, one of these practic-

\begin{itemize}
\item \textsuperscript{52} See Video Dialtone Order, supra note 7, at 5787-88, 5812-18.
\item \textsuperscript{55} S. REP. No. 92, supra note 53, at 47, reprinted in 1992 U.S.C.C.A.N. at 1180.
\end{itemize}
es—just one of them—is cross-subsidization, where a telephone company improperly reclassifies its cost of providing service in a competitive market as the cost of providing monopoly phone service. In this fashion, absent an effective regulatory mechanism, a telephone company could embark on a strategy of predatory pricing by charging artificially low prices for cable service, at the expense of captive telephone rate payers and to the detriment of cable competitors.

Mr. Hansen argues that this could not possibly happen because there are no common costs between creating video programming and providing telephone services. But he misses the point. The concern is not that a telephone company will cross-subsidize the creation of its video programming, but that it will cross-subsidize the cost of transmitting it to consumers. The telephone companies envision a future in which all communication services—voice, data (so-called information services) and video—are carried on a single, probably fiber-optic, wire. The construction of such a system would involve literally thousands of common costs, and there are attendant difficulties in determining which costs are properly attributed to which service.

Because of such difficulties, even under the “heightened” or “mid-level” scrutiny of O’Brien, Congress may restrict telephone company participation in cable markets to prevent such unfair practices. This is initially so because § 533(b) is content-neutral.57

The statutory definition of video programming is not, as some argue, shorthand for the programs listed in the 1984 TV Guide. The definition simply identifies the market that telephone companies may not enter by drawing a simple distinction between what is and is not a television show. For example, while telephone companies could not offer their own television program about the weather, they could offer some sort of video-text service over their

57. United States v. O’Brien, 391 U.S. 367, 377 (1968) (stating that the regulation in question must be “unrelated to the suppression of free expression”); see also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others”).
network, with current information about the weather. There's also talk of providing interactive video games over your telephone wire. A telephone company may offer its "Indy 500" race car video game. But if a telephone company were to purchase rights to coverage of the Indianapolis 500, they would not be able to offer that television program over their telephone wire.

In short, "video programming," as used in § 533(b), defines a medium of expression, not the content of the expression, and it is therefore content-neutral.

O'Brien next requires that the statute serve an important government interest. There has been little serious dispute that, given a real danger of anticompetitive conduct by telephone companies in video markets, preventing such monopolistic practices meets this test. Judge Ellis, who decided the C & P case in Alexandria, essentially held as much.

Therefore, the constitutionality of § 533(b) turns, as in C & P, on whether or not the statute is narrowly tailored to achieve its governmental purposes. Section 533(b)'s constitutional opponents say no because the FCC and the Department of Justice have concluded that newly developed regulatory alternatives can reduce the danger of cross-subsidies and other practices. These agencies have concluded that, on balance, the public could enjoy the competitive benefits of so-called Telco TV without undue exposure to the anticompetitive risks.

Arguments based on these conclusions are misguided for several reasons. The Supreme Court explained in Ward v. Rock Against Racism that a regulation will meet the test of narrow tailoring if the government's purpose would be served less effectively without the regulation than with it. Often this inquiry calls for predictive economic judgments that courts are ill-equipped to make, and so the Supreme Court has made it clear that the legislature must not

58. 391 U.S. at 377.
60. 491 U.S. 781 (1989).
61. Id. at 799 (citing United States v. Albertini, 472 U.S. 675, 689 (1985)).
be second-guessed, so long as it reasonably could conclude that its interests would be served less effectively without the regulation in question. Under this standard, the telephone cable cross-ownership ban is patently constitutional.

Neither the FCC nor the Department of Justice has ever concluded that alternative regulations can eliminate the problem of cross-subsidization. They have concluded only that regulation can sufficiently reduce the risk to the point that, in their judgment, the costs of the cross-ownership rule outweigh its benefits. Congress is not constitutionally bound by that judgment. In fact, Congress has specifically declined to adopt that view.

From 1988 through 1992, both houses of Congress conducted hearings to examine the problem of monopoly conditions in the cable market. Time and again they considered repeal of the

62. See, e.g., Ward, 491 U.S. at 800 (it is error not to defer to Government’s "reasonable determination" that its interest are best served by the regulation at issue); Board of Trustees v. Fox, 492 U.S. 469, 478 (1989) (courts are "loath to second-guess the Government’s judgment" as to the necessity of regulations); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 539 (1987) (upholding legislation on the grounds that it was "not broader than Congress reasonably could have determined to be necessary").

cross-ownership ban as the solution to that problem. The 1992 Cable Act represents a conscious decision by Congress to reject that approach. The Senate report to the 1992 Act concluded that the cross-ownership rule should not be modified because telephone companies might use their market power over telephone service to cross-subsidize an affiliated cable operator and to discriminate against unaffiliated cable operators. This conclusion is more than reasonable.

The effectiveness of the FCC's alternative safeguards has been called into question by a number of court decisions, including decisions in the information services litigation to which Mr. Post alluded earlier. There have also been two separate inquiries by the U.S. General Accounting Office which call into question the FCC's ability to enforce rules against cross-subsidization. The effectiveness of alternative safeguards was also disputed in the four years of hearings that considered whether or not to repeal the statute. This public record provides an ample basis for Congress to conclude that safeguards would be less effective than § 533(b) when it comes to preventing the anticompetitive practices and, under applicable precedents, that reasonable judgment is not subject to second-guessing by the federal courts. The statute is therefore constitutional.

Now, as Mr. Hansen pointed out, the district court in the C & P case thought otherwise. Its reasoning here is telling. The court

---

67. See generally Congressional Hearings on Cross-Ownership, supra note 63.
did not conclude that regulatory alternatives would be as effective as the statute when it came to preventing anticompetitive conduct. Instead, the court held that there was no reasonable relationship between the statute’s means and its ends.68

What both Mr. Hansen and the district court failed to appreciate, however, is that the statute eliminates the financial incentive a telephone company would have as a cable programmer to resort to such practices as cross-subsidization. For this very reason, the FCC concluded—at the very time that it recommended that the statute be repealed—that it “surely reduces” the likelihood that such practices would occur.69 This conclusion regarding the statute’s effectiveness was buttressed by expert testimony that was provided to the court in C & P.70 Thus, whatever the statute’s merits from a policy perspective, the court in C & P is the only body in 25 years to conclude that the telco-cable cross-ownership ban is irrelevant to its intended purposes.71

Even if there were arguable merit to this analysis, the court erred in attempting to decide for itself whether or not the statute bears a reasonable relation to its goal. Given the expert opinion on this question, and the FCC’s conclusions—again, at the time the FCC recommended the statute be repealed—there is ample basis upon which Congress could have reasonably concluded that § 533(b) promotes its legislative purpose, and on that basis if no other, it should be sustained as constitutional.

PROFESSOR GOODALE: Does the cable association wish to present its position at this point?

MR. THORNE: Yes, your Honor, we do. May it please the court, I am John Thorne appearing for Fordham Cable, Inc., commonly known as FCI. I want the court to understand that the gov-

71. The telephone-cable cross-ownership rule was first promulgated by the FCC in 1970. Id. at 912-14.
ernment litigators in this case are not alone in wanting to see this statute upheld. Even though the clients for the government litigators—the FCC and parts of the Justice Department itself—have largely abandoned the statute, the cable industry is here to see this statute stay.

I'd like to just put some context around what we're talking about. This is a cable industry that grew up in the Wild West, some 30 years ago, when things were much more rugged than they are today. We were a tiny industry, and it's been a long road. We've created a lot of value, a lot of wonderful entertainment and channels for this country.

It's true that we're not a tiny industry today the way we once were when this cross-ownership ban was enacted, but we're still delicate compared to the behemoth Baby Bell telephone companies.

Now, it is true that some of the cable companies that are members of the NCTA have associated with the Baby Bells: Bell Atlantic and TCI; Viacom and NYNEX; Jones Intercable—which was the local cable company fearing competition in the C & P case—and Bell Canada; Southwestern Bell and Cox Enterprises; Time Warner with U.S. West; and BellSouth with Prime Cable. It's true that one telco affiliate doesn't have any advantage over another, but most cable companies are not affiliated with telcos and are still very delicate.

It's also true that we've been found to have increased our prices during the period of deregulation by about three times the consumer price index. But we've delivered a lot of value for those price increases. Besides, we're now stringently regulated by the 1992 Cable Act, and with regulation that mimics a competitive outcome, competition itself is unnecessary.

It's true that we cable companies have not crossed the boundaries from one franchise area to another. We haven't competed with one another, but that's because it's a natural economic phenomenon not to compete, at least that's the way we've resolved it in

---

our minds. It is true that there are a few competitive systems—fifty or so—out there, and it’s true that where we have competition, prices are about 30 percent lower per channel and the systems tend to have more channels. But those are not major systems, and we’re not sure that out of eleven thousand franchises, fifty is a statistically significant model of what competition might do.

What it comes down to is that we’ve got some serious concerns about telephone companies coming in and competing with us. The concerns are really in two or three categories. One is attachments to poles. Now telephone companies have a lot of poles; electric companies have more, but we’ve sort of settled things with them. Telephone companies have a lot of poles and if they were in this business competing with us, we might be forced off their poles. And then where would we be?

It’s true that in 1978, our association, the NCTA, went to Congress and got legislation that required telephone companies to charge reasonable rates, but that legislation is insufficient. It’s insufficient because it doesn’t guarantee access. It just says that once you have access, as we do in 98 percent of the country, the rates have to be reasonable. We’re seriously worried that despite long-term contracts with the telephone companies that don’t expire for a decade or so, they might throw us off the poles and we’d be naked without legislation to protect us.

An even more serious concern, as counsel for the government argued, is cross-subsidization. Now cross-subsidization is where a telephone company takes the cost of doing a video . . .

PROFESSOR GOODALE: That’s the more serious argument, isn’t it, counselor?

MR. THORNE: Well, your Honor, that’s a very good point. Bell Atlantic has got $13 billion in revenues. The whole cable industry has $20 billion. We’re a whole industry barely bigger than one Baby Bell. Now TCI, under the proposed merger with Bell Atlantic, would have the same advantage in that situation, and

Jones Intercable has the same advantage with its affiliation with Bell Canada, and Viacom has the same advantage with its affiliation with NYNEX. Putting all those aside, there are a lot of small cable companies that don’t have the advantage of those telco bucks.

Now it’s true that we already compete against a number of municipalities, and municipalities have the power to tax, which is the power to destroy. In fact, we brought a case against a municipality. The City of Niceville had the temerity to go into competition with, I think, a Time Warner system. We sued the municipality, claiming that we, Time Warner, had a First Amendment right to be free of government competition. It’s true we lost that case.

Now you get down to the legal theory of this case and it is true that in the Supreme Court we said that giving up 30 percent of our channels under the “must carry” rules was an absolutely abhorrent violation of our First Amendment rights. But that’s completely distinguishable from a telephone company giving up 100 percent of its speech, because of these pole attachment and cross-subsidization concerns.

So I hope I’ve helped in defending this ban.

MR. GILLIGAN: Can the Journal transcribe sarcasm? I was just wondering.

PROFESSOR GOODALE: The government is going to have additional help, because the local government here in New York City is going to enter a brief amicus appearance orally.

MR. BRONSTON: Thank you, your Honor. My remarks are a little less formal, but when I hear the cable companies and the phone companies talking at these seminars, I’m reminded of a

75. 911 F.2d at 636.
76. Id. at 640.
story. A woman goes to the zoo and visits the lion cage. Inside the lion cage she sees a lamb lying down with the lion. The woman gets so excited, she turns to the zoo keeper and says, "Isn't this wonderful? This fulfills the Biblical prophecy that the lamb shall lie down with the lion!" The zoo keeper turns to her and says, "Lady, I don't know what you're talking about. I've got to put a new lamb in there every day."

While I'm not a First Amendment attorney, as a government attorney, I'm more in the role of the zoo keeper. The First Amendment applies to me directly, so let me try to put a local spin on the debate that's going on here.

Our position at the outset, in summary, is that we support telco entry into the video programming market and a lifting of the cross-ownership ban, essentially to increase competition. But we expect the telcos to enter on a parity with cable companies and be subject to the same local regulations and franchise requirements. If Judge Ellis is right in the C & P case, the government can erect safeguards, short of a draconian total ban, to further the significant government interests in diversity. The cross-ownership ban can then be lifted, making the phone companies equal to cable and subjecting them to the safeguard of requiring them to obtain a local franchise.

Taking a cue from Judge Ellis and commentators, this may become moot. The train is leaving the station in Congress. As Mr. Post mentioned, there are several bills being introduced in both the Senate and the House. Senator Hollings just came out with a bill—you've heard of H.R. 3636 several times today. They aim to open telephone and cable markets to competition and to encourage the rapid development of the nation's information infrastructure. New York City has been a leader in opening telecommunications to competition—NYNEX will affirm that—and we support open market entry and uniform rules for all participants. Legislation advancing these goals of competition and diversity, as men-

78. See, e.g., S. 1086, supra note 9; H.R. 3636, supra note 9; H.R. 3626, supra note 9.
79. H.R. 3636, supra note 9.
tioned in the C & P case, is desirable, but we feel they must include provisions to protect local needs.

Let me outline some of these requirements. First, as mentioned, is a franchise requirement, or some local authorization for all users of the public rights of way, to assure that the city is compensated for the commercial use of its property. New York City receives over $40 million a year currently, and that is only increasing as the telecommunications market opens up. With a franchise requirement, we can also require that new providers not discriminate against, for instance, low-income neighborhoods—a sort of "informational red-lining," if you will. Bell Atlantic, I believe, is on record in the C & P case and in Judge Ellis' decision, as having requested a franchise in Alexandria and expressed a willingness to be franchised.81 I would also point out that the franchising process, as much as it's maligned by the industry, has worked pretty well. It successfully launched, as was indicated, a cable industry that takes in $20 billion a year in revenues.

As mega-mergers create telecommunications giants, I think it's self-evident that they should pay a portion of their enormous revenues to the city for the use of the public's property. The city is the trustee of that property, and like any landlord, we're entitled to a fair return on our asset. In the Erie Telecommunications case,82 a franchise fee was upheld and the court determined that there were no First Amendment implications involved. We feel it's not fair to give us the intractable problems, like welfare and Medicaid, but take away these revenue-positive, economic development issues.

A second requirement is the ability to negotiate into these franchise agreements a guarantee of local, public, educational, and governmental channels or capacity. This leverage allows us to get capacity to improve local government services and become technologically state-of-the-art. For example, in New York we have five

80. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, 928 (E.D. Va. 1993) (stating that "[w]ithout question, the preservation of diversity of ownership of communications outlets is a significant governmental interest").

81. Id. at 911.

Crosswalks Channels which provide adult education, basic literacy, English as a second language, and a local version of C-SPAN, if you will, which we got by negotiation with the local carrier. We can also do distance learning and video arraignment. It's quite a positive attribute.

If we were going to be wiring schools, hospitals, and libraries, who's going to decide which ones go first? Who's going to negotiate with local Board of Education administrators—whichever ones are left after the Mayor gets through with them—and is that going to be someone on M Street in Washington?

Some First Amendment issues do get implicated here, but these franchise requirements have passed muster under the O'Brien test of being content-neutral and furthering significant governmental interests of diversity and localism. In fact, I'd argue that franchise requirements are more in the spirit of the First Amendment, as they create more public fora, than these ducts and wires really are.

Finally, we also need the ability to draft, administer, and enforce local customer service standards to avoid the beltway method of handling consumer complaints. If you were to call someone at the FCC with a cable consumer complaint and say “I'm on the Grand Concourse in the Bronx,” they would probably say “Grand Concourse? What's the Grand Concourse?” So again, I think you have to have a local authority, a local authorization, and again there's no First Amendment implication there.

We, the government, have to get our acts together. The current situation is a hodge-podge, with segmentations of responsibility that no longer make sense in this era of convergence. There should be a clear division of regulatory functions and clearly assigned duties with no redundancies. If we don’t, there will be higher costs to the companies which will then be passed on to the consumer.

Let me just come back quickly to the constitutional issue of franchising, and our view of C & P. Franchising of cable and telecommunications is constitutional, given the governmental and public interests involved. You've heard the comparison to the print media. Well, the government, cable and telcos are so closely intertwined that it's different from a newspaper. Printing presses are
not permanently affixed to the public property as these cables and wires are, and I think that’s an important distinction that hasn’t been made yet. Regulation and franchising is primarily economic, not content-based, and furthers substantial governmental interests, as I mentioned before, promoting localism and allocating physically scarce rights of way as productively as possible. So if I were to use an analogy, I would not use the news rack, as some in the cable and telecommunications fields do. Instead, I would compare the franchising process, as Professor Price does in his treatise,\(^3\) to a newsstand in a government building. In the lease, we don’t tell the lessee what material he can or cannot carry. If he wants to specialize in sci-fi, that’s fine. If he wants to put monster magazines, that’s fine. But we can require him, perhaps, to carry some government bulletins on his newsstand. We can ask him to pay a percentage of his revenues, and again, it’s strictly content-neutral, and I think it’s the same with the phone company or cable company on our streets.

Let me close by invoking—and I’m glad I haven’t heard it so many times today—the over-used analogy to a superhighway. I think the analogy to the federal highway system shows why the local role in this public policy debate is so important. Let’s compare the interstate highway system. What were some of its less laudatory effects? It battered, if not destroyed, local transportation. It increased white flight to the suburbs, damaging inner cities. And if you lived in a rural community that was bypassed by the interstate, the potential was to become a ghost town as a result. So let’s keep one eye on the hype and one eye on the policy ramifications of the decisions being made.

PROFESSOR GOODALE: Thank you, participants. Now since this judge has been aging, he’s been drifting off, and it’s in the afternoon and he may need some clarification of some of the positions. Mr. Bronston, is the bottom line that you’ll support the C & P decision if you get a piece of the action?

MR. BRONSTON: If the proper safeguards are in

---

place—again, cross-subsidization is a concern—and if there is a franchising authorization, we would support the lifting of the cross-ownership ban.

PROFESSOR GOODALE: So this will be a pretty good source of revenue for the city.

MR. BRONSTON: Absolutely.

PROFESSOR GOODALE: All right. Let's go back into the constitutional basis for the arguments a little more seriously, and let me go to the government first. Could you just clarify again for me what level of scrutiny you think is appropriate for this regulation? Because it seems to me that, in a way, you've referred, en passant, to each of the three possible ones that seem available to this court; namely, the rational test, the O'Brien test, and strict scrutiny. Could you answer that question?

MR. GILLIGAN: Clearly strict scrutiny does not apply because the statute is content-neutral. Therefore, the question comes down to whether or not some sort of mid-level scrutiny under O'Brien is required, or whether something more like a rational basis test is called for.

We have argued that the appropriate test is the level of scrutiny applied in the NCCB case. Now that Court did not say explicitly that they were using the rational basis test . . .

PROFESSOR GOODALE: Can I just stop you? I'm giving a little warning on this dialogue. I happen to have the quote from where the Court is saying how it reached its decision. I just want to read it out loud for everybody. The cross-ownership regulations for newspapers and broadcasting, the Court said, and this is Justice Marshall, "are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." 84

Now I would argue from that language in, what do we call this case, NCCB?

---

84. NCCB, 436 U.S. 775, 802 (1978).
MR. GILLIGAN: *NCCB*, yes.

PROFESSOR GOODALE: *NCCB* held that the rational test was appropriate for the regulations which were being decided then, which was in 1978. If I look at this case, should I then conclude that, since it supports your argument, I'm supposed to apply the rational test as a court?

MR. GILLIGAN: Yes. I think if you find that the cross-ownership ban is a reasonable means for promoting diversified mass communications, then it should be upheld. The Supreme Court said in *NCCB* and in cases such as *Associated Press v. United States*, a case exclusively involving the print medium, that promoting diversity in the mass media is essential to the public welfare. Cross-ownership rules have been determined to promote diversity because, by separating ownership of different mass media, they tend to provide you a greater diversity of viewpoints in the media.

Also bound up in this is the notion that you're preventing an inappropriate concentration of economic power within the mass media. Many have expressed concern about the further concentration of economic power that comes along with the so-called convergence of the mass media that we are witnessing. So we rely on, yes, the *NCCB* case, which not only says it is appropriate to promote diversity, but also notes that the cross-ownership provisions there scrutinized were, in form, quite similar to the antitrust laws, whose applicability to newspapers is both consistent with and promotes the underlying values of the First Amendment. If that is true in the print medium, which traditionally is accorded the greatest level of First Amendment protection, then it certainly must be so when telephone companies—common carriers—seek to enter the cable medium.

PROFESSOR GOODALE: Okay, now here's a historical question that really doesn't follow on the usual court-to-lawyer dia-

---

85. 326 U.S. 1 (1945).
87. *NCCB*, 436 U.S. at 801 n.18.
logue. I take it that that was your principal argument in the district court, is that correct? I'm trying to give you some flexibility here in telling me and the rest of the audience when you had the appeal, did you then come in and say that the O'Brien test was met, or did you still argue the rationality test?

MR. GILLIGAN: Well certainly the C & P court opted for the O'Brien test, and as we argued in the Fourth Circuit, § 533(b) is completely sustainable even under that test. But yes, in the Fourth Circuit, we did argue that the case is controlled by NCCB.

PROFESSOR GOODALE: So basically the government's position with respect to this type of regulation is that the rational test should apply. Now, counsel for the cable companies . . .

MR. THORNE: I'll be counsel for Bell Atlantic for a minute.

PROFESSOR GOODALE: I've got a question you won't be able to answer, since you've just become counsel for Bell Atlantic. But do you remember what position the NCTA took in the comparable case involving Indiana Telephone?

MR. THORNE: I argued opposite Bartow Farr in that case, and the NCTA's claim was that the court didn't need to reach the First Amendment issue because there had been a prior appeal when the telephone company, unaided by intervenors, my clients, hadn't raised the issue and it was just too late.

PROFESSOR GOODALE: Let me ask, what's the cable company's position in this case? Is it the rational basis test?

MR. THORNE: Rational basis. NCCB. Although at oral argument before the Fourth Circuit, Farr stood up and said they had no disagreement with the O'Brien test.

PROFESSOR GOODALE: And what did Farr argue in the "must carry" case?

MR. THORNE: Strict scrutiny.

89. Northwestern Indiana Tel. Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987).
PROFESSOR GOODALE: So the NCTA is a very flexible organization. It can argue all tests at all times. Is there any one you wish to rest your case on?

MR. THORNE: I think the NCTA and Bell Atlantic would agree that each thinks it wins under any level of scrutiny and the level of scrutiny is not nearly as important as the correct statement of the interests on both sides.

PROFESSOR GOODALE: Okay, counsel for the telephone companies, two questions. First, tell us again the standard you’re relying on, and second, can you adjust the standard being used by the two gentlemen on your left?

MR. HANSEN: Certainly. The standard we rely on most heavily is strict scrutiny, because this isn’t a cross-ownership restriction. That’s a diversion. This is a gag on our speech of a certain form. It only applies to us, and it only applies to a very certain limited type of speech—television the way it was in 1984. As to the government’s reliance on the NCCB case, the judge was kind enough to ask me a question in writing—I won’t claim it as my own thought—but subsequent cases after NCCB—including FCC v. League of Women Voters—make it clear that this kind of restriction on speech can’t be judged by any standard less than the O’Brien standard. The government can’t go around muzzling speakers and just have a rational basis for it. It needs to have an important interest, narrowly tailored. Even the NCTA in the Fourth Circuit agreed with that. I think that’s the only possible lesser standard than strict scrutiny that can apply. The argument is really whether the standard should be strict scrutiny or O’Brien. You can have an argument about that. You can’t really have much of an argument about rational basis.

MR. THORNE: If I could just follow up.

PROFESSOR GOODALE: Sure, let everyone pitch in here.

MR. THORNE: I could mention another case that Jim Gilligan mentioned, which is the Associated Press case. I think it’s a good case for the telephone companies. It’s a case that found an anti-
trust violation by requiring the AP Association to make available its news feed to non-affiliated publishers. The opinion affirming this decree had some structural access rules in it, and the Court said this thing does not bar any publisher from publishing exactly how he pleases. That's the kind of result that you would expect if there really were, say, a cross-subsidization problem. You'd see a remedy that was tailored, an accounting remedy or a separation remedy, like the FCC has been applying for similar situations, not a ban on speech.

MR. GILLIGAN: If I may jump in here.

PROFESSOR GOODALE: Yeah, everyone jump in.

MR. GILLIGAN: As Justice Black, a very staunch defender of the First Amendment, said in Associated Press, in response to the newspaper's arguments there, the right of free speech does not confer a right to suppress the speech of others, and that is the fear underlying the cross-subsidization issue. If a telephone company can use the power to cross-subsidize to engage in predatory pricing and drive other speakers out of the cable market, then that is exactly what the telephone company has done. It has suppressed the speech of others, and the Associated Press case makes clear that the government is not disenabled by the First Amendment to prevent that sort of thing from happening.

MR. HANSEN: See, this is one of the fun things of having a sequence of panels. The government counsel on the prior panel said that cable, as it currently exists, is controlling about 60 percent of what America sees on television. They've got an absolute monopoly power in every market they're in, and your argument is, we're worried that the telephone companies will challenge the cable companies and become the new monopolists and, as a result, we can't risk the competition.

MR. GILLIGAN: You can point to the fact that cable has annual revenues of about $21 billion a year and refer to it as an

---

93. Id. at 20 n.18.
94. Id. at 20.
800 pound gorilla. The telcos ask “How are we going to slay an 800 pound gorilla?” But the annual revenues of the telephone industry just from the local exchange—never mind their many other activities—is, as I recall, around $84 billion a year, so that would make you folks the 3,000 pound gorilla. So it cannot be said that the concern over cross-subsidies is beyond the realm of plausibility.

Also, let’s . . .

MR. HANSEN: Beyond the realm of plausibility is not the standard. At the very least, under constitutional scrutiny, the government is going to have to make a fact-based showing that this is a real interest that’s served by the statute, as opposed to trotting out this abstract horror that, in fact, doesn’t make any sense.

Here’s another reason why it can’t make any sense. The argument is that the telephone consumer will have a bill jacked up because the telephone company smuggles into the phone bill the cost of some moviemaking or something like that. That doesn’t make sense where the prices for telephone service are not based on the costs to the telephone company. Most telephone regulation now is “price cap” rather than “rate of return.” In other words, the telephone company gets a rate adjusted not for cost factors, but, rather, only for some inflation factor. If you smuggle more costs into the telephone rate base, when you have price cap regulation, all you do is decrease your profit margin.

MR. THORNE: I have to jump in and say that the NCTA, before Judge Ellis, said that if there were pure price caps there would not be a cross-subsidization problem. The NCTA’s point is that price caps aren’t pure. If costs get really out of whack then the telephone company can make an appeal for a little more, but they admit that with pure price caps there wouldn’t be a cross-subsidization problem.

MR. POST: We seem to be losing sight of the fact that the issue is not whether there’s a legitimate concern about cross-subsidization. Even if you conceded that, there’s still the question of whether a blanket cross-ownership ban is narrowly tailored to meet that interest, or whether the more focused remedies that the FCC
has developed to specifically address cross-subsidization are the way to go in this area.

MR. THORNE: You have to look at the sincerity of this, too. For example, most electric utilities are not subject to price caps. They’ve got a rate base, they have more poles than telephone companies, and they provide an essential monopoly service; you’ve got to get your electricity to heat your home. They’re in the video programming business; nobody has banned them. Likewise, municipalities presented a neat case, City of Niceville.\(^{95}\) The court in Niceville held that the municipality can tax consumers to fund the construction of a cable system.\(^{96}\) That’s more than a cross-subsidy; that’s a tax to fund this thing, yet municipalities are not barred from video programming.

MR. GILLIGAN: Mr. Post, you’ve focused on the critical point. The FCC and the Department of Justice both agree that accounting mechanisms developed by the Commission are sufficiently effective to address the cross-subsidy problem. But whether that is in fact so has been a matter of public debate now for a number of years. You also alluded to the debate in connection with the 1992 legislation\(^{97}\) that would have reimposed some of the consent decree limitations from the AT&T case. That case goes to show that the government is not just dreaming up these concerns. They happen. We had to go through ten years of litigation to put an end to AT&T’s monopoly practices.

MR. POST: Well keep in mind that the Court of Appeals for the D.C. Circuit found, in connection with that information services ban, that it was thrown into the consent decree without any real record being developed at the time of divestiture that there was a risk of anticompetitive practices in the information services industry.\(^{98}\)

\(^{95}\) Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634 (11th Cir. 1990), cert. denied, 111 S. Ct. 2839 (1991).
\(^{96}\) 911 F.2d at 640.
\(^{97}\) H.R. 5096, supra note 13.
MR. GILLIGAN: But in connection with having the ban lifted, there was an enormous record put before Judge Greene, and the court of appeals in its most recent decision observed that “distinguished economists” submitted affidavits on both sides of the issue, and that the expert opinion opposing removal of the information services restriction, because of concerns about cross-subsidization, may well have been right. But what the court of appeals held there—which the government certainly believes is true—is that it was reasonable for the Department of Justice and the FCC to conclude that their regulatory alternatives would be sufficient to meet the problem. But there’s plenty of authority and evidence on the other side, and when we’re talking about an act of Congress, we have to acknowledge that Congress is the policymaking branch under our constitutional form of government, and they are not bound by the policy judgments of the Executive Branch.

PROFESSOR GOODALE: I want everyone to join in, but I just want to start asking some dumb questions, because no one understands enough about this. Is the argument that you just made essentially a rational basis argument?

MR. GILLIGAN: That’s an argument under the O'Brien standard.

PROFESSOR GOODALE: That’s an O'Brien. So then what is the substantial interest under O'Brien?

MR. GILLIGAN: Well, the substantial interest under O'Brien is in protecting local cable markets from the potential for anticompetitive conduct by telephone companies. It’s sometimes been described as preventing the telephone companies from just wiping out the cable industry completely, and my friend, John Thorne, will tell you, my goodness, they’re a $21 billion monopo-

101. 993 F.2d at 1578, 1582.
102. Id. at 1581.
MR. THORNE: TCI is going to get wiped out?

MR. GILLIGAN: There are a lot of smaller cable companies, though, within this monopoly. So long as the telephone company is successful in eliminating some—rather than all—of its competition, then in terms of diversity and competition in video markets, we lose ground, we are not advanced.

PROFESSOR GOODALE: So this will promote diversity, right?

MR. GILLIGAN: Congress can reasonably conclude that.

PROFESSOR GOODALE: Why is the promotion of diversity an interest cognizable under the *O'Brien* test?

MR. POST: Can I address that? I don’t think it is, frankly. I think as a matter of law, the Supreme Court’s holdings in *Buckley v. Valeo* and in *Miami Herald Publishing Co. v. Tornillo* rule out diversity as a permissible justification for First Amendment restrictions. Looking at it more as a policy matter than as a legal matter, I think there’s a very frightening, almost Orwellian irony in saying that we’re going to protect speech by suppressing speakers. One can’t imagine the government saying we’re going to put the *New York Times* out of business to let the *Village Voice* have a louder voice in the New York information market. Yet that’s exactly the sort of argument we’re hearing here.

PROFESSOR GOODALE: Anyone else who can’t resist or feels any other way, please speak.

MS. HEINS: If you remember, in the *Bakke* case, the first affirmative action case to reach the Supreme Court, the Court struck down the University of California’s affirmative action plan, but Justice Powell’s opinion recognized that achieving diversity on

---

105. Marjorie Heins, Esq., Director and Staff Counsel, American Civil Liberties Union Foundation Arts Censorship Project, New York, NY; Cornell University, B.A. 1967 (with distinction); Harvard University, J.D. 1978 (magna cum laude).
a university campus was a means of promoting academic freedom, and therefore was a compelling interest.

PROFESSOR GOODALE: That's a First Amendment case?

MS. HEINS: An equal protection case.

PROFESSOR GOODALE: An equal protection case.

MS. HEINS: How do you rationalize that case with *Pacific Gas*?

PROFESSOR GOODALE: Well do you remember what the *Pacific Gas* case held? The holding in *Pacific Gas* was that diversity was not a compelling state interest that could be recognized in a situation involving a monopoly and access by a public interest group to the envelope that the Pacific Gas company was sending to its customers. The argument was that diversity, the viewpoint of the speaker, the public interest group, should be recognized and therefore, its message should be put in the envelope that was sent out to the customers of Pacific Gas along with the bill.

MS. HEINS: The distinction there is analogous to the distinction between public access requirements, which I would say are constitutional, and "must carry" requirements, which I would say are much more questionable, because in the context of public access and in the context of *Bakke*, there's a general promotion of diversity without any content discrimination, without any particular message being favored by the government. Whereas in the context of the *Pacific Gas* case, as one could argue in the context of "must carry," the government is forcing speech, it is forcing a private speaker to favor a particular message that the government likes.

PROFESSOR GOODALE: So you think that's just a forced speech case and not a diversity case? It's usually cited for diversity by those who want to make that . . .

MS. HEINS: I think it should be decided as a forced speech case. I think that's one distinction that could be argued. It may be that there's language in *Pacific Gas* that's inconsistent with lan-

---

108. *Id.* at 20.
109. *Id.*
guage of *Bakke*—that’s not unknown.

MR. THORNE: We took a similar position in the *Turner* case,\(^{110}\) and this is different from the NCTA’s view that even common carrier rules would be unconstitutional as applied to cable. We said that common carrier rules are constitutional. You can’t bar individual speakers who want to use those common carrier facilities—that was the difference. We cited the *Pruneyard* case\(^ {111}\) for the authority that, as long as you’re not hurting the mall owner’s own speech, it’s constitutional to allow his visitors to speak on his premises.

MS. HEINS: I think there’s certainly a good argument that diversity in the context of free speech is a compelling interest, but I acknowledge that when you give the government the power to decide how to accomplish diversity, you have to be very careful to make sure the government is not just protecting itself by favoring certain viewpoints and suppressing others.

PROFESSOR GOODALE: Since you put yourself in this position of being part of the panel, thankfully, I’m going to ask another question. What’s your view with respect to whether diversity is a cognizable interest under the *O'Brien* test?

MS. HEINS: Well, if it’s a compelling interest, then a fortiori it’s a substantial interest.

PROFESSOR GOODALE: But no, it isn’t under *O'Brien*. Under *O'Brien*, all you have to show is substantiality.

MS. HEINS: I’m saying that if it’s a compelling interest, then surely it’s a substantial interest.

MR. THORNE: But it’s not unrelated to speech, I think was his point. Is that what you’re getting at?

PROFESSOR GOODALE: That would be the next point, yes.

MS. HEINS: It certainly is related to speech.

PROFESSOR GOODALE: Excuse me?

MS. HEINS: It’s related to speech, but it’s not related to a


particular viewpoint, if it's done right.

PROFESSOR GOODALE: Thank you very much. Anyone else who wishes to speak.

MR. GILLIGAN: I agree substantially.

PROFESSOR GOODALE: To coin a phrase.

MR. GILLIGAN: First, let me observe, NCCB was decided three years after Buckley, if my memory serves correctly. The trouble in Buckley was not with the goal of diversity; the Supreme Court expressed its view that removing corruption, and the appearance of corruption, from our electoral process is certainly a substantial, if not an almost compelling, interest. The Supreme Court's trouble with the provisions struck down in Buckley was that the means chosen—which basically suppressed any kind of political expression that exceeded $100 in cost—were simply overbroad. Similarly, in Tornillo, the Supreme Court expressed sympathy for the press access rules at issue there, but the problem was that they amounted to content-based regulation of the press. That's not what is at issue with content-neutral cross-ownership rules such as those at issue in NCCB and the statute we're talking about here.

MR. HANSEN: But it's not content-neutral because it requires a government bureaucrat to look at content and distinguish. Moreover, there's an unexamined premise that even if you accept diversity as a goal, and there's certainly a valid question about that, whether silencing a particular class of speakers is narrowly tailored to achieve that goal. I think there's a better argument that says that permitting entry by the telephone companies—the most natural competitors in this business—will expand cable capacity and actually create more diversity of voices. This is more likely to be the case than their coming in to squelch the voices of cable companies. The squelch argument again goes right back to that old shibboleth:

113. See id. at 48.
115. Id. at 256-57.
116. See NCCB, 436 U.S. 775, 779 (1978); Newspaper-Broadcast Cross-Ownership Report and Order, supra note 47.
cross-subsidization. Unless the telephone companies can somehow do this mythic thing, there’s no chance of diversity being squelched. That depends on them being able to transfer costs from unrelated business under the noses of state and federal regulators, and against their own interests. It makes no sense. But it’s a complicated argument and it’s easy to get lost in.

MR. BRONSTON: Would the phone companies be willing to abide by the 1984 Cable Act’s requirements for public access and governmental access channels?118

AUDIENCE MEMBER: Mr. Bronston, I have a more specific question. Do the telcos have not just a general willingness to abide by fair access requirements, but also a willingness to abide by the very specific powers that the city and other municipalities would like to get over them? Maybe a bit of background is appropriate here. The FCC said that when a telephone company only provides transport services under a regime called video dialtone—it’s like making a phone call except it’s a video call—and somebody else is the programmer, in that circumstance, the FCC said phone companies don’t have to apply to municipalities for franchises. This is something that’s on appeal in the D.C. Circuit, and I’m not sure how that’s going . . .

MR. THORNE: We’re one of the intervenors in that case.

PROFESSOR GOODALE: Go through that argument again. They don’t have to apply for franchises, why?

AUDIENCE MEMBER: They don’t have to apply for a franchise in order to upgrade their telephone system to carry video.

PROFESSOR GOODALE: This is for a video dialtone?

AUDIENCE MEMBER: A video dialtone for programmers who choose to use that telephone system.

MR. THORNE: As I understand the city’s dilemma, you’ve got cable companies which pay up to a 5 percent tax on their revenues to the cities. They’ve got public access channels and other things that the cities like. You’ve got the potential for telephone

company video dialtone systems and their programmer customers not being subject to these taxes and requirements. You've got, of course, Direct Broadcast Satellite ("DBS") which is in the air; it's beyond the reach of the municipal arms. The cities are facing a problem of rationalizing these franchise requirements that apply to some but not all of the players.

PROFESSOR GOODALE: What happens in the ordinary non-video dialtone situation? I want to be a cable carrier, but I'm a telephone company. What happens then?

MR. BRONSTON: It's channel service and you're a programmer. If the programmer comes to a phone company and says, "I want you to transport my video" or "I want to lease your lines," someone has to get a franchise, and it's the programmer in that instance. The video dialtone test is premised on a common carriage basis and it's totally non-discriminatory, but we have yet to see it in effect.

PROFESSOR GOODALE: Let me try the question again. I understand that answer, but I don't understand the answer to the question that I'm not articulating very well. Suppose Bell Atlantic just wants to be any old cable company—as indeed it's trying to be—and it wins the C & P case, and it starts putting fiber under the street of, I don't know, Raleigh, Virginia. Is it the phone company's position that it can do so without getting a franchise?

MR. THORNE: If a phone company's service doesn't fall within the parameters of what the FCC has outlined as video dialtone, I think we probably would be required to get a franchise.

PROFESSOR GOODALE: So it would be just like anyone else, like me.

MR. THORNE: In Alexandria, we voluntarily said we will get a franchise.

I'd like to make one point, not as a Bell Atlantic or NCTA representative, but as a private observer of the proceeding. We used to have scarcity of airwaves. Maybe that notion itself is economically corrupt from the outset, but there's an argument that there was some scarcity of airwaves that required a heavy-handed government to allocate broadcast frequencies and require some
diversity within them. Now you've got cable systems strung past as many homes as have television sets, so there is no longer any scarcity there. With the possibility of telephone and DBS coming into the video business also, the only scarcity left are those rights of way under the streets that the cities control. You have manufactured scarcity where there really doesn't need to be any, and the entire basis for franchises is bogus.

PROFESSOR GOODALE: Why don't we go around the table with any comments and any other questions from the audience.

AUDIENCE MEMBER: I have two questions. First, I was wondering about the scarcity issue, whether you think the switching facilities that the telephone companies possess could play into that. The second question I have is a more broad question, about the development of the law, about whether the proper First Amendment standard to apply to cable and telephone companies depends on the interplay of First Amendment and antitrust law. Is this interplay influenced by the fact that the premise underlying the First Amendment and antitrust law have diverged since Associated Press? Specifically, the First Amendment still prefers a diversity of speakers, but antitrust law increasingly tolerates vertical integration and concentration of economic power in the hands of a few. Therefore, could this case become a modern refinement on Associated Press and become the vehicle for re-evaluating the antitrust laws in their application to media conglomerates?

MR. THORNE: I heard the word conglomerate at the end there. I see the antitrust laws and the First Amendment as perfectly consistent. In antitrust, when you have more output and lower price, that's a good thing; that's not an antitrust problem. You have an antitrust problem when output is artificially suppressed. I think in the C & P case, you've got a First Amendment problem because the output of speech is artificially suppressed by the Cable Act's ban. There would not be an antitrust cause of action to keep C & P from competing with Jones Intercable/Bell Canada in Alexandria. I think those things are perfectly consistent.

Now the point about conglomerates is not quite what it appears on the surface. When a telephone company allies with an out-of-region cable company, you have to ask, why would they do that?
They could have done this ten years ago. The reason they're doing that is to attack other out-of-region telephone companies by supplying the telephone know-how to that cable company and also, to the extent they're allowed to provide cable or video service in their home region, to get that video know-how from the cable company. One of the problems in the C & P case that Mr. Gilligan raised was that C & P doesn't know beans about programming. How are they going to program? Mr. Gilligan said we lacked standing to bring the case because, among other things, we didn't know enough about programming. You get programming and the know-how to market programming if you ally with a cable company that knows how to do it. TCI is going to get telephone expertise to attack other telephone companies outside the Bell Atlantic region from Bell Atlantic. The same kind of combination has worked in the United Kingdom with some of the same players—U.S. West and TCI have put together a cable telephony system that is taking market share from British Telecom and rates are going down there. It's maybe the only place in the world where you've got head-to-head local telephone competition from cable companies on a big scale.

AUDIENCE MEMBER: On the issue of competition, I understand that allowing the telephone companies to compete with cable will initially improve the competitive atmosphere. However, that might just lead to an oligopolistic situation, rather than allowing more small players into the market.

MR. THORNE: The question you've got to ask yourself is, is two better than one?

AUDIENCE MEMBER: In ten years are two large corporations better than ten small ones?

MR. GILLIGAN: Can I address that? Mr. Thorne says a cable-telco duopoly has got to be better than a cable monopoly. There are two responses. One, of course, is if perchance the FCC and the Department of Justice are wrong, and the FCC doesn't have the wherewithal to prevent predatory pricing through cross-subsidization, we may just wind up with a telephone monopoly over cable as well. Second of all, in 1992, Congress took a number of steps to open up what room there can be for competition in
local cable markets. It outlawed exclusive franchising practices in certain local jurisdictions.119 Through imposition of a sort of cable-DBS cross-ownership rule, it sought to encourage the growth of alternative cable services such as direct broadcast satellite and multichannel, multipoint distribution service ("MMDS").120 The question is, if you want an atomistic market, which is the goal of the Clayton Act121 as I understand it—I’m not an antitrust lawyer—do you want to let the telephone companies rush in and take up all the slack that you’re trying to create for these emerging technologies? Congress found in connection with the 1992 Cable Act that there is a strong public interest in allowing these new technologies to emerge.122

Your question about the interplay of the antitrust laws in the First Amendment frequently seems to come up in these cases. It came up during the "must carry" panel earlier on, when it was suggested that the antitrust laws would address all the problems behind "must carry." Sort of as a ringer I threw out a question suggesting that they are not, because we’re trying to preserve a free medium of mass communication for those who are less fortunate in our society.

It was noted by Justice Marshall in the NCCB case that the antitrust laws were not a solution to the problem being addressed by the cross-ownership rules.123 There, in fact, the FCC explicitly disavowed any reliance on concerns about anticompetitive practices by co-owners of newspapers and broadcast outlets.124 It said that the interest in promoting diversity transcends the concerns addressed by the antitrust laws, and I think the same is true here.

MR. HANSEN: It would be foreign to the antitrust law to say that the antitrust laws could apply to protect an entrenched monop-
alist from competition by another company on the theory that the other company might come in and become a monopolist. That would not be legitimate under the antitrust laws. You have to step back from your antitrust analysis and recognize that we’re not talking about pure economic antitrust analysis here; we’re talking about the First Amendment. If you start applying content-based restrictions to the phone companies to try and achieve antitrust ends, you’re not going to like it a whole lot the next time that restriction is applied to somebody else whose speech you do like. That’s the very reason why the government shouldn’t get into the speech regulating business.

PROFESSOR GOODALE: You know, historically, all of the events that are going forward now are very interesting when you look back at the *NBC* case, which is the key broadcasting case. That case regulated speech; there’s no question about it. I think it regulates speech, frankly, as far as what we’re talking about today. The government—just to shore up its ammunition, so to speak—brought a companion antitrust case, because when you looked at the restrictions at issue in the *NBC* case, which dealt with an effort by the government to cut down the power of the networks through restrictions entered into between the networks and the stations, they were basically antitrust-driven regulations which survived attacks under the First Amendment because that Court didn’t give them much attention. But the fact that the government in the *NBC* case at the same time brought antitrust actions has a familiar ring to what the government—it seems to me in my humble view—could be doing in these types of cases, which is to regulate them under antitrust laws that apply to everybody rather than looking at speech-specific types of regulations. Does anyone want to attack me on that one?

MR. GILLIGAN: Sure, what you’re talking about is the *AT&T* case. Practices such as cross-subsidization and discrimination against competitors seeking access to your supposedly common

carrier, equal access network were at the heart of the government’s case in *AT&T*. At the time, the FCC had been trying for decades, through regulation, to bring a stop to it. We resorted to the always-applicable antitrust laws, and we wound up in litigation for ten years trying to get to the heart of the matter. Ultimately, we arrived at the consent decree which, as was pointed out earlier, imposed line-of-business restrictions on the regional Bell operating companies—the Baby Bells—similar to the restriction in § 533(b).\(^{127}\) I think the *AT&T* case goes to show that we shouldn’t write a rule of constitutional law that says that Congress necessarily has to allow vertical integration in certain telecommunications industries and try and deal with the harmful consequences later. The lore is that, because of *AT&T*’s monopolistic practices, we were denied the benefits of competition in long-distance markets for years and years before the government was finally forced to step in.

PROFESSOR GOODALE: I could say, I suppose, if the government acted a little quicker it might have come out better, but go ahead.

MR. THORNE: Just a debater’s point. It’s ironic and maybe even not perfectly ingenuous, Mr. Gilligan, for the government to say that the *AT&T* case is a predicate for the kind of ban on speech that we’re talking about. The *AT&T* case didn’t involve any information services. The Bell System was providing some information services, some minor things—time of day, weather services. Judge Greene found there wasn’t any problem with those, even though he banned all information services because the parties asked him to. But it was the government that urged the lifting of the information services restriction a couple of years ago, and it was lifted at the government’s urging.\(^{128}\) One of the most astonishing moments in the briefing of the *C & P* case was the government submitting the evidence of its opponents in the *AT&T* case, which it had defeated, as a rationale for retaining a ban on speech. You couldn’t believe that this was the same government in the two cases.


MR. GILLIGAN: Mr. Thorne, I’ll tell you what I’m prepared to tell any judge that asks me in oral argument, “Who’s right? Congress or the FCC?”

MR. THORNE: Congress or the Justice Department?

MR. GILLIGAN: Congress or the Justice Department, my employer. The answer is, I don’t know. I’m not qualified to answer the question. The question is, does Congress have a reasonable basis for making its decisions, because to put it very bluntly, Congress, when it comes to policymaking, is the top dog, is superior to both the FCC and the Department of Justice.

MR. THORNE: In a First Amendment case, the burden of proof is on the government.

MR. GILLIGAN: In C & P, you did not cite a single case that said that.

PROFESSOR GOODALE: But that’s why the First Amendment lawyers have always hated the rationality test, because all they have to show is that Congress is rational in passing a law and if that law impacts speech, I mean you have to be pretty dumb to be irrational.

MR. GILLIGAN: It was said earlier this morning, I believe by Mr. Devlin, that the court should not use the First Amendment to revive Lochner-type jurisprudence . . .

MR. THORNE: Perhaps we should use a gag too . . .

MR. GILLIGAN: Come on, let me finish.

PROFESSOR GOODALE: We’re ganging up something terrible on the guy. We’ve got to give him his First Amendment rights.

MR. GILLIGAN: The point is, we should not let courts use the First Amendment essentially to substitute their view of sound economic policy for that of Congress. Because frankly, lawyers, which most judges are, who don’t have Ph.D.’s in regulatory economics, are not institutionally . . .

MR. THORNE: What about the authors of the bills we're talking about . . .

MR. GILLIGAN: Congress held hearings on this issue for years. Congress is in a much better institutional position to come up with a sound judgment than the courts are, and the Supreme Court has said that the courts discharge their responsibility under the First Amendment when they scrutinize what Congress has done and determine whether or not Congress has a reasonable basis for arriving at the conclusion it did, without substituting their own judgment as to what is the better policy.\(^\text{130}\) Now you can argue that that does not accord enough First Amendment protection to Bell Atlantic Corporation, but that is a quarrel you'll have to take up with the Supreme Court. That is the law as it stands now.

MR. HANSEN: Mr. Gilligan says, defer to Congress, Congress made these judgments. Let me read what the Supreme Court said in *Sable Communications, Inc. v. FCC*.\(^\text{131}\) The court said that it may not simply defer to Congress and presume Congress made the necessary findings, but must exercise its independent judgment on First Amendment review.\(^\text{132}\)

MR. GILLIGAN: There was absolutely no record to support what Congress did in *Sable*. That was the problem. *Sable* also involved content-based regulations of indecent, not obscene, speech. That's a different case entirely.

MR. HANSEN: But the Court is saying, Judge, your job is to keep Congress from running afoul of the First Amendment, it's not your job to say, Congress made this judgment and I must defer.

MR. GILLIGAN: When strict scrutiny applies, I think you may be right. *Sable* was a strict scrutiny case.

MR. THORNE: *Sable* has another similarity to this case. In that case, the FCC said it had some regulations it wanted to try, yet Congress had banned speech first and not let the FCC regulations go into effect. The FCC has got regulations here that it would like

---

132. Id. at 129.
to try.

MR. GILLIGAN: There was no track record in Sable. There was no . . .

MR. THORNE: But the Court required Congress to let the FCC try the regulations first without a track record.

MR. GILLIGAN: Correct, because there was a content-based regulation, and because, as Justice Scalia pointed out in concur- rence, there was nothing anywhere, there was no legislative history, there were no findings in the statute, there was nothing in the known universe to explain why Congress had reached for this ban at issue in Sable. When it comes to § 533(b), there is an immense public record, there is an historical record going back to the AT&T days which provides a reasonable basis for Congress to decide that we are actually going to promote competition by making it less likely that telephone companies will be able to engage in anticompetitive practices.

PROFESSOR GOODALE: Are there any other questions from the audience?

AUDIENCE MEMBER: I'd like to come back to the issue of the competition for the local phone market and see how that rationalizes with the argument for cross-subsidization, with the death of the monopoly in the local telephone market. Doesn't the argument become moot that the phone companies would be able to cross-subsidize because they're going to have to compete effectively to keep the core businesses? We see the cable companies gearing up to compete in that business, and the phone companies are going to have to fight fiercely just to keep business in that market.

MR. THORNE: In fact, some of the telephone companies like Bell Atlantic are gearing up the cable companies for that battle. You know, the way a cross-subsidizer would behave if the theory were true—he would be padding costs, adding costs to the telephone rate base. Instead, you see telephone companies cutting costs, firing or laying off tens of thousands of employees, getting

133. Id. at 131 (Scalia, J., concurring).
134. Id. at 131-32 (Scalia, J., concurring).
ready for competition, not behaving like a cross-subsidizer.

AUDIENCE MEMBER: How could the phone company pad costs going forward if they’re going to have to be cost-competitive going forward?

MR. THORNE: They’re cutting costs, they’re not padding costs. Exactly right.

MR. GILLIGAN: All I can say is at this time I truly wish there were genuine competition in the local exchange. That way I could drop C & P as my telephone company.

MR. THORNE: And use C & P for your cable service.

MR. GILLIGAN: The point is, we’re not there yet. Judge Ellis so found in August of 1993, and I believe the D.C. Circuit again so noted that in the most recent information services decision, which came out sometime in the spring of 1993. We’re getting into territory where my expertise, flimsy as it is, gets even thinner, but even assuming there could be genuine competition in the local exchange—where phone service could be priced essentially by market forces rather than through regulation that has “rate of return”-type features—as long as we’re not in that world, there’s a cross-subsidy concern that every court that I am familiar with acknowledges to be genuine. Whether the world changes when we have genuine competition in the local exchange, I’m just not qualified to address that.

PROFESSOR GOODALE: It seems to me the government creates these monopolies in the case of cable television, granting exclusive franchises. That was the history, either in fact or for all practical purposes. I’m not that familiar with telephone regulation, but it seems to me just as a general observer, that effectively the same process has taken place in the telephone business, and then when it comes time to deal with the First Amendment questions, we can’t do it because they are monopolies. But who created the

monopolies? The government created the monopolies. Now the
government wants us to opt out speech. I mean it's a First Amend-
ment Catch-22 from my perspective. Since we've talked so long,
I think maybe I'll just finish up since I've got the mike.

I think it's been a great panel in an area that is not easy to
parse and articulate. I ran a session this morning in which I won-
dered whether what the panelists were really talking about was
some form of broadcast regulation again in the new era of the
information revolution, and it seems to me that technically one
could make the same characterization of some of the legal argu-
ments this afternoon.

I don't think the NCCB case is good law. It adopts the rational
test for broadcast regulation. I think League of Women Voters\textsuperscript{137}
overruled that case effectively because it adopted a test for broad-
cast regulation of requiring a substantial governmental interest to
be shown in the speech to be regulated and a narrow-tailoring stan-
dard to go along with it.\textsuperscript{138} In short, it adopted a test whereby you
could regulate the content of speech, and it seems to me if you
think about some of the arguments that were made back and forth,
particularly on the issue of diversity, the arguments were essentially
that the substantial interest to be found under the O'Brien test was
a diversity interest, which is a broadcast-type analysis. Basically
what we ended up with on this panel is, it seems to me, that to the
extent that there's been clustering around the O'Brien test, there
has been, in effect, the application of the broadcast test to telcos.

I do not agree with my friend from the ACLU that it is a good
idea, under the O'Brien test, to treat it like a broadcast test. I think
that's the major fault in all the analysis of all the courts that have
looked at this particular test, the O'Brien test. What they have
done, I would submit, is apply the broadcast test.

I want to leave that as a stimulating thought, perhaps, and thank
the panelists and the audience.

---

\textsuperscript{137} 468 U.S. 364 (1983).

\textsuperscript{138} Id. at 380 ("these restrictions have been upheld only when we were satisfied
that the restriction is narrowly tailored to further a substantial governmental interest").