

# The First Amendment: Broadening the Information Superhighway

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In Memory of My Brother  
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## I. INTRODUCTION

For the last one-hundred years, telephones have revolutionized the way in which people communicate. A new era began in the late 1950s when the advent of cable television allowed telephone companies to provide more than only two-way telephone service. However, since that time, Congress and the Federal Communications Commission (“FCC”) have severely limited telephone companies’ activity in the cable industry through pole access laws forcing telephone companies to share their telephone poles with cable operators<sup>1</sup> and laws preventing telephone companies’ cross-ownership of phone and cable services.<sup>2</sup> These cross-ownership rules were largely responsible for the rapid growth of the modern cable television

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<sup>1</sup> Since telephone companies owned all the poles along which telephone communications were sent, Congress enacted pole access laws to prevent telephone companies from denying telephone pole access to cable operators.

<sup>2</sup> In 1970, the Federal Communications Commission imposed restrictions that prohibited telephone companies from owning and operating both a telephone service and a cable service in the same local service area so that they could not develop a local communications monopoly.

industry. In fact, the original laws prohibiting cross-ownership between local telephone companies and local cable operators are still in effect today. This Comment attempts to show that on both practical and constitutional grounds, the justifications for these rules no longer exist. In recent years, telephone companies have helped develop a technology that enables them to transmit video signals through telephone lines. This new technology provides a video dialtone that enables telephone companies to transmit one-way video programming and interactive video communication to consumers. Additionally, the video transmission is served to consumers through a hybrid of fiber optic telephone lines and coaxial cable. Furthermore, unlike a traditional telephone server, a video dialtone server has the capability to control the content of the programming sent over its communication lines.

The advent of video transmission through telephone lines has brought with it challenges to existing communications regulations on First Amendment grounds. One regulation that has been challenged is Section 533(b) of the 1992 Cable Act which permits, with some exceptions, telephone companies to supply video programming to the consumer provided that such service is not conducted in the telephone company's local telephone service area by either the telephone company itself or by any of its affiliates.<sup>3</sup> The FCC's rationale behind Section 533(b) was to ensure that telephone companies could not cross-subsidize their video transmission service with their telephone service. In doing so, they would artificially shift costs from one service to another in an attempt to lower video transmission service fees to the consumer and compete unfairly with other

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<sup>3</sup> See 47 U.S.C. § 533(b) (1995); *see also* The 1992 Video Dialtone Order, 7 F.C.C.R. 5781 (1992).

video transmission service companies.<sup>4</sup>

The purpose of this Comment is to explore the constitutionality and subsequent applicability of Section 533(b) of the 1992 Cable Act, which bans, with certain exceptions, local cross-ownership between telephone companies and video programmers.<sup>5</sup>

The government asserts that the cross-ownership restriction imposed by Section 533(b) promotes the public

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<sup>4</sup> See, e.g., *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 930 n.31 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995).

Local telephone companies have substantial opportunity to engage in cross-subsidization when . . . both the competitive video transmission service and the monopoly service are provided on common facilities with common costs. . . . Common costs mean that cross-subsidization is virtually impossible to detect and eliminate. It is the existence of significant common costs which differentiates telephone companies [from other potentially anti-competitive actors]. . . . One of the most difficult aspects of telephone regulation is the assignment of costs to their causes. Cable and telephone systems share a certain amount of capital equipment; allocating shared costs between these capital accounts on the basis of actual cost causation will be difficult or impossible.

*But see id.* at 930 n.32 ("It is difficult to conceive that there could be any substantial costs common to the transmission of video and other transmission signals, on the one side, and the creation and packaging of video programming on the other.")

<sup>5</sup> 47 U.S.C. § 533(b) provides in pertinent part:

(1) 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.

(2) It shall be unlawful for any common carrier . . . to provide channels of communication or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

interest because it prevents unfair competition and encourages a diversity of ownership of communications outlets.<sup>6</sup> This Comment will argue that Section 533(b) of the 1992 Cable Act should be repealed because the circumstances that justified its original enactment no longer exist, and because it violates the First Amendment of the United States Constitution. Section 533(b) is not narrowly tailored to achieve a significant governmental interest. Rather, it limits a certain type of speech when other less restrictive and more effective means are available to achieve the governmental interest of precluding anti-competitive behavior by the telephone companies. Several circuit and district court decisions, Senate and House subcommittee reports, as well as recommendations by the FCC, the Antitrust Division of the Department of Justice, and a branch of the United States Department of Commerce, support the proposition that Section 533(b) of the Cable Act should be repealed.

## II. THE HISTORY OF THE BAN ON TELEPHONE COMPANY PROVISION OF VIDEO PROGRAMMING

### A. *The 1970 FCC Rule and its Progeny*

Section 533(b) of the Cable Act was enacted in 1984. However, telephone companies have been prohibited, with certain exceptions, from providing cable television service as early as 1970.<sup>7</sup> When those restrictions were imposed, the

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<sup>6</sup> H.R. REP. NO. 934, 98th Cong., 2d Sess. 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4692.

<sup>7</sup> *See* Application of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Final Report and Order) 21 F.C.C.2d 307 (1970) [hereinafter "*1970 Order*"], *reconstructed in part*, 22 F.C.C.2d 746 (1970); *see* General Tel. Co. of the Southwest

cable television industry was in its infancy and was referred to as Community Antenna Television service ("CATV"). At that time, CATV providers used large antennas in rural areas and other places unable to receive clear television signals to deliver television service to over-the-air customers who would have otherwise been without television reception. The actual process involved stringing cables, often on electric utility or telephone poles, from the central antenna to the CATV customers.

In 1968, the FCC ruled that "telephone companies must obtain certification pursuant to section 214 of the Communications Act, prior to constructing, acquiring, or operating facilities to provide 'channel service' to cable television companies."<sup>8</sup> The FCC adopted this rule because "the monopoly position of the telephone company in the community [results in] effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems. Hence, the telephone company is in an effective position to preempt the market for this service. . . ."<sup>9</sup> The resulting section 214 applications revealed an ownership structure that consisted of affiliations between telephone companies and television operators. As a result, the FCC adopted a rule that precluded telephone companies and their affiliates, absent an express exemption, from providing cable

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v. United States, 449 F.2d 846 (5th Cir. 1971); see *Chesapeake and Potomac*, 830 F. Supp. at 911.

<sup>8</sup> *Id.* at 912; see *General Tel. Co. of California*, 13 F.C.C.2d 448 (1968); *General Tel. Co. of California v. FCC*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969); see also 47 U.S.C. § 214 (stating in pertinent part, "[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation, of such additional or extended line. . . .").

<sup>9</sup> *Chesapeake and Potomac*, 830 F. Supp. at 912.

television service within their local telephone service areas.<sup>10</sup> This ruling was based on the concern that telephone companies would be in a position to favor their own affiliates over independent CATV providers and thus create a communications monopoly in their respective communities.<sup>11</sup>

In 1978, Congress addressed rate regulation of the telephone companies in relation to cable operators when it passed the Pole Attachment Act. The ensuing legislation authorized the FCC to “regulate the rates, terms, and conditions for pole attachments.”<sup>12</sup> The Pole Attachment Act did not mandate access to the poles owned by the phone company.<sup>13</sup> Thus the Pole Attachment Act “only partially allayed the Commission’s concerns regarding cable operators’ access to telephone poles and conduit space.”<sup>14</sup>

In 1981 the FCC issued a report that considered alternatives to its policy regarding telephone company and cable company local cross-ownership. However, the FCC concluded that the previous restrictions must be retained because of the threat of telephone company cross-subsidization and pole access

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<sup>10</sup> See 1970 Order at 307; see *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

<sup>11</sup> See 1970 Order, 21 F.C.C.2d at 324.

<sup>12</sup> 47 U.S.C. § 224(b)(1) provides in relevant part:

[T]he Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

<sup>13</sup> See *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987).

<sup>14</sup> *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 913 (E.D. Va. 1993), cert. granted, 115 S. Ct. 2608 (1995).

discrimination.<sup>15</sup> Therefore, the FCC's justification for the retention of the original local telephone company and cable company cross-ownership rules was economic.<sup>16</sup>

### B. *The 1984 Enactment of the Cable Act*

By the 1980s the cable industry was experiencing substantial growth and Congress adopted the Cable Act in 1984. Section 533(b) of the 1984 Cable Act, the subject of this Comment, was adapted directly from the earlier regulations established by the FCC's 1970 Order, with the exception that where the FCC had prohibited telephone company provision of "CATV service," the new law prohibited telephone provision of "video programming."<sup>17</sup> The Code defines video programming as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."<sup>18</sup> This seemingly stringent rule provided for exemptions, which included a rural exemption and a waiver authority by the FCC.<sup>19</sup> That the FCC was given the power to

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 158, which states:

If telephone companies are able to cross-subsidize, the result could very well lead to higher telephone rates and supra-competitive profits for them. These profits could easily be used to under price competing cable television operators, forcing them out of business, thereby enabling the telephone companies to leverage their regulated local exchange monopoly into an additional monopoly of video transmitted services.

The fear of telephone company cross-subsidization is the main reason that 47 U.S.C. §533(b) still prevails. As will be discussed below, the FCC, Department of Justice, as well as Senate and House subcommittees, have recommended that § 533(b) be repealed because the FCC now believes that it can control the cross-subsidization threat through rate regulations and channel allotments.

<sup>17</sup> *Chesapeake and Potomac*, 830 F. Supp. at 913.

<sup>18</sup> 47 U.S.C. § 522(16).

<sup>19</sup> *See* 47 U.S.C. § 533(b)(3)-(4).

grant a waiver seems to suggest that Congress trusted it to decide competently when cross-ownership will benefit the public.<sup>20</sup>

No legislative findings of fact accompanied the enactment of Section 533(b). However, it is not hard to ascertain the congressional intent behind Section 533(b)'s enactment because the House Committee Report, which accompanied the legislation, indicated that the provision's intent was "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers . . . ."<sup>21</sup> Section 533, as a whole, was intended to "prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets."<sup>22</sup> Congress must now decide whether Section 533(b) still works to further these goals.<sup>23</sup>

### C. *The Recommendations for Repeal of 47 U.S.C. § 533(b)*

Since the enactment of the 1984 Cable Act, there have been several recommendations for repeal of 47 U.S.C. § 533(b).

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<sup>20</sup> See, e.g., *Chesapeake and Potomac*, 830 F. Supp. at 913. The waiver provision of § 533 suggests that the FCC is competent to regulate any video programming transmitted by telephone companies to prevent any anti-competitive behavior on behalf of the telephone companies. The FCC's ability to regulate a cross-ownership case is one of the main reasons that the FCC itself has recommended repeal of § 533(b).

<sup>21</sup> See *id.* at 913 (quoting H.R. REP. NO. 934, 98th Cong., 2d Sess. 56 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4693).

<sup>22</sup> H.R. REP. NO. 934, 98th Cong., 2d Sess. 55 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4692.

<sup>23</sup> The FCC has stated that "any remaining risk of anti competitive conduct by the local telephone companies is outweighed by the potential public interest benefits their entry would bring." Video Dialtone Order, 7 F.C.C.R. 5781, 5849 ¶ 137 (1992). Also, any concern of anti-competitive behavior by the local telephone companies has been attenuated by the enormous growth of the cable television industry. *Id.* at 5848 ¶ 136.

Several House and Senate committees have considered bills that would repeal Section 533(b). In fact, both the House and the Senate have drafted communications legislation this year that eliminates the local cross-ownership ban provided by Section 533(b).<sup>24</sup> However, this proposed legislation will not eliminate Section 533(b) until both the House and Senate agree on communications legislation.<sup>25</sup>

1. The FCC's Recommendations of Repeal and the Resultant 1992 "Video Dialtone Order"

In 1986, the FCC directed its Common Carrier Bureau to prepare a notice of inquiry "on the question of the restriction on cable ownership placed on local exchange telephone companies."<sup>26</sup> In *In re Telephone Company--Cable Television Cross Ownership Rules (Notice of Inquiry)*,<sup>27</sup> as well as *In re Telephone Company--Cable Television Cross Ownership Rules (Further Notice of Inquiry and Notice of Proposed Rule Making)*,<sup>28</sup> the FCC tentatively concluded that it should recommend to Congress that 47 U.S.C. § 533(b) be repealed. The FCC finally acted on these conclusions in August of 1992, when it recommended that Congress

[a]mend the Cable Act to permit the local telephone companies to provide video

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<sup>24</sup> See S. 652, 104th Cong., 1st Sess. 203 (1995); see also H.R. REP. NO. 1555, 104th Cong., Reg. Sess. (1995). The new communications legislation is significant because in 1992 Congress adopted a new version of the Cable Act in which Section 533(b) remained intact. Until recently, it seemed unlikely that Congress would act to repeal the cross-ownership ban that has existed since the early 1970s.

<sup>25</sup> This assumes President Clinton will not veto the Telecommunications Act of 1995.

<sup>26</sup> *Id.* at 914 (quoting 1 F.C.C.R. 864, 897 (1986)).

<sup>27</sup> 2 F.C.C.R. 5092 (1987).

<sup>28</sup> 3 F.C.C.R. 5849 (1988).

programming directly to subscribers in their telephone service areas, subject to appropriate safeguards. We find that such an amendment would further promote our overarching goals . . . by increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services made available to the public . . . .<sup>29</sup> The FCC noted that when it adopted the cross-ownership ban in 1970 the Commission intended to prevent local telephone companies from using their poles and conduits to disadvantage independent cable operator competitors. Therefore, by precluding telephone companies from providing video programming directly to subscribers, the ban gave cable television operators an opportunity to firmly establish themselves as viable competitors.<sup>30</sup>

After at least five years of research, the FCC concluded in 1992 that the cable industry's enormous growth had attenuated the risks of anti-competitive conduct by the local telephone companies in connection with the direct provision of video programming.<sup>31</sup>

The tremendous growth of the modern-day cable industry has all but eliminated the rationales that supported the 1970 Cross-Ownership Rule and its progeny. The FCC supported the

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<sup>29</sup> US West, Inc. v. FCC, 855 F. Supp. 1184, 1187 (W.D. Wash. 1994) (quoting *In re Telephone Company--Cable Television Cross Ownership Rules*, 7 F.C.C.R. 5781, 5847 ¶ 135 (1992) [hereinafter *Video Dialtone Order*](second report and order, recommendation to Congress, and second further notice of proposed rulemaking, "the Video Dialtone Order").

<sup>30</sup> *Id.* (quoting 7 F.C.C.R. at 5848 ¶ 136 (footnote omitted)).

<sup>31</sup> *Id.* (quoting 7 F.C.C.R. 5781, 5848 ¶ 137).

above assertion in its 1992 Video Dialtone Order when it stated that,

[w]hen the cross-ownership rules were adopted, cable television (then called CATV) reached approximately 9% of all homes and largely consisted of small, limited capacity systems in remote communities. Today, cable offers over 90 percent of American homes multichannel service and is now a \$20 billion industry. Rather than a fledgling industry unable to compete, the cable industry holds a leading position in the delivery and provision of video programming to the American public. In this sense, the cross-ownership ban has fulfilled its purpose of ensuring that the cable industry is able to thrive. Given this widely changed *competitive* situation, we find it reasonable to conclude that, with appropriate safeguards on their entry, there is little threat that the local telephone companies could preemptively eliminate competition and monopolize the market for video programming services.<sup>32</sup>

Despite congressional attempts to promote competition in the cable television provider market, Section 533(b) has helped cable television operators grow into virtual monopolies in several communities. In fact, cable operators have faced competition from other cable operators in less than 1% of the communities served by cable.<sup>33</sup> In other words, it is not cost-

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<sup>32</sup> *Id.* at 1188 (emphasis added) (quoting 7 F.C.C.R. at 5848-49 ¶ 137 (footnotes omitted)).

<sup>33</sup> *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 915 (E.D. Va. 1993) (“Companies operating cable television systems have grown rapidly, commensurate with growth in the industry. . . . Despite Congressional efforts to

effective for two cable operators to compete in the same local service area.

If local telephone companies are allowed to enter the video programming market, the FCC should be able to regulate their entry in a way that will allow companies other than telephone companies to enter the local video service market and become competitive.<sup>34</sup> The Department of Justice asserts that as long as telephone companies monopolize the phone service, their incentive and ability to cross-subsidize and discriminate will continue. However, the anti-competitive risks are nonetheless outweighed by the pro-competitive benefits of allowing telephone companies to provide video programming.<sup>35</sup>

Nevertheless, it has been argued that there are no pro-competitive benefits for the consumer if telephone companies are allowed to provide video programming in their local service area. In support of this assertion, Bradley Stillman, legislative counsel for the Washington-based Consumer Federation of America, stated that “[t]he FCC has failed to establish rules for the road to protect consumers . . . while granting the telephone companies the authority to build. . . . Using the most conservative numbers we are talking about an additional \$16 per month on the phone bill of every American household for the next twenty years to pay for video dialtone.”<sup>36</sup> Additionally, he noted the difficulty the FCC’s staff of 26 auditors will face trying to determine how much of a new network’s cost should be attributed to the video carrying capability and how much to

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promote competition in the cable industry, the provision of cable television has remained a monopoly service in virtually every community. In 1991 cable system operators faced competition from another operator in less than 1% of the localities served by cable.”).

<sup>34</sup> See *Ameritech Corp. v. United States*, 867 F. Supp. 721, 727 (N.D. Ill. 1994).

<sup>35</sup> *Id.*

<sup>36</sup> Jube Shiver Jr., *Phone Systems Get Permission To Compete With Cable*, L.A. TIMES, Oct. 21, 1994, at D1, D2.

the more traditional function of handling phone calls.<sup>37</sup> If Stillman is correct, it is possible that telephone companies will be able to cross-subsidize and unfairly compete, which could lead to a telephone company monopoly in video programming through the video dialtone. However, since local cable programmers already have a natural monopoly over cable service, both local telephone company video providers and cable providers should be allowed to compete because one form of monopoly should not be preferred over another.

Section 533(b) is outdated. It was originally enacted to enhance the growth of cable television providers. Telephone companies were precluded from competing with cable operators because they were perceived to be monopolistic in nature and predisposed to anti-competitive behavior. Because the majority of local cable television operators are operating in a natural monopoly, it is time to allow local telephone companies to compete for the same business. Additionally, the most appealing aspect of allowing telephone companies to provide video programming is that it may create more choices for consumers (absent a natural monopoly like the present cable system) as well as completely upgrade the United States' telecommunications infrastructure. The threshold question seems to be whether the FCC will be able to prevent cross-subsidization to avoid a telephone company monopoly over video programming, and if so, whether the pro-competitive benefits from allowing telephone companies to provide video programming outweigh any residual anti-competitive risks involved.

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<sup>37</sup> *Id.* at D2.

2. Department of Justice, Antitrust Division's Recommendation to Repeal 47 U.S.C. § 533(b).

The Communications and Finance Section of the Antitrust Division of the United States Department of Justice ("DOJ") recommended that telephone companies, referred to as local exchange carriers, be permitted to own and directly provide video programming.<sup>38</sup> This was in response to a proposed rulemaking by the FCC, which led to the Video Dialtone Order. The DOJ has stated that it believes that the pro-competitive benefits of allowing local exchange carriers to provide video programming outweigh any anti-competitive risks involved.<sup>39</sup> The DOJ enumerates those pro-competitive benefits by stating that "it will allow another competitor to enter the video programming market, . . . entry will increase the [local exchange carriers'] willingness to take the financial risk of developing broadband integrated networks[, and] . . . vertical integration will allow them to achieve efficiencies."<sup>40</sup> Additionally, with regard to vertical integration, the DOJ finds it unlikely that allowing telephone companies to vertically integrate will have anti-competitive result because the cable industry is already vertically integrated.<sup>41</sup> Instead, the DOJ believes it will create more effective competitors and will provide an alternative player with whom third parties may bargain to carry their programming.<sup>42</sup> The DOJ's findings assume that cable programmers will be able to keep up with

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<sup>38</sup> See *US West, Inc. v. United States*, 855 F. Supp. 1184, 1188 (W.D. Wash. 1994) (quoting *In re Telephone Company--Cable Television Cross Ownership Rules*, "DOJ Cross-Ownership Rules Reply," CC Docket No. 87-266, 44-45 (Mar. 13, 1992)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 45.

telephone companies. This is a suspect assumption merely because telephone companies are much bigger than cable programmers and can conceivably cross-subsidize their video programming service with their telephone service and effectively price out cable companies.

The DOJ has shown a remarkable willingness to evolve its standards as competitive environments evolve. For example, in the above-cited DOJ reply on cross-ownership rules, the DOJ stated that its current position is consistent with its prior position regarding the necessity of the cross-ownership restrictions because the cable market has changed and the prior restrictions should be modified or removed to permit the market place to function freely.<sup>43</sup> In contrast to the DOJ's willingness to repeal 47 U.S.C. § 533(b), Congress has consistently fought the telephone companies' attempts to become video programmers in their local telephone service areas.<sup>44</sup> Consequently, there exists a tension because the administrative branches of government are advocating one position and then are compelled by Congress to enforce another.

This tension may indicate that significant change in the existing law is pending. The DOJ and Congress both recognize that, on the one hand, telephone company participation in video programming will help spur competition and may benefit the consumer, while on the other hand, that the telephone companies' history is deeply rooted in monopolistic behavior.<sup>45</sup> While government administrative agencies are almost

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<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g.,* Chesapeake and Potomac Tel. Co v. United States, 830 F. Supp. 909 (E.D. Va. 1993); *see* GTE California, Inc. v. FCC, 39 F.3d 940 (9th Cir. 1994); *see* Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994).

<sup>45</sup> The DOJ's apparent waffling may very well be the manifestation of the government's suspicions that the telephone companies are predatory by nature and therefore once they get established in the video programming business they will make it next to impossible for cable programmers to compete.

universally calling for Section 533(b)'s repeal, Congress has hesitated to act because there may not be other existing means of regulating this emerging industry effectively.<sup>46</sup> The DOJ's arguments for the repeal of Section 533(b) will become more persuasive when the FCC has a regulatory scheme in place that will prevent a telephone company monopoly in the local video programming business. At present, the FCC has decided to regulate telephone company entry into the local video programming market on a case by case basis in an attempt to eliminate the possibility of cross-subsidization and resultant monopolistic behavior.<sup>47</sup>

### 3. Recommendation to Repeal 47 U.S.C. § 533(b) by the United States Department of Commerce

Like the FCC and the DOJ, the National Telecommunications and Information Administration ("NTIA"), a branch of the Department of Commerce, recommended in 1991 that 47 U.S.C. § 533(b) be repealed. However, the NTIA recommended that Section 533(b) be repealed only if proper safeguards are put in its place to eliminate the possibility of anti-competitive behavior by telephone companies.<sup>48</sup> However, the NTIA's report seems to go a step further than the FCC and DOJ proposals to repeal 47 U.S.C. § 533(b) by suggesting ways to control the threat of cross-subsidization and discrimination.<sup>49</sup> The NTIA suggests that the FCC already possesses the means

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<sup>46</sup> Because both the House and Senate have proposed legislation in which Section 533(b) will be repealed, it is assumed that a satisfactory regulatory scheme exists.

<sup>47</sup> See *In re the Application of New Jersey Bell Tel. Co.*, 9 F.C.C.R. 3677 (1994).

<sup>48</sup> *US West, Inc., v. United States*, 855 F. Supp. 1184, 1189 (W.D. Wash. 1994); see also National Telecommunications and Information Administration's Infrastructure Report at 233 (October 1991).

<sup>49</sup> *US West*, 855 F. Supp. at 1189.

to control telephone company cross-subsidization in their accounting and cost allocation rules. The FCC's existing accounting and cost allocation rules have proven to effectively control communication companies that try to cross-subsidize and compete unfairly.<sup>50</sup> Regarding discrimination, the NTIA concluded that the FCC should again look inward at existing regulatory schemes and adapt them to this new technology.<sup>51</sup> For example, the NTIA has suggested that the earlier pole access concerns "should be less serious than in the past, since nearly 90 percent of U.S. homes have access to cable television today."<sup>52</sup> The NTIA additionally noted that the "antidiscrimination and pro-efficiency requirements of [current FCC rules concerning the] provision of enhanced services would be an effective way to satisfy" anti-discrimination goals.<sup>53</sup>

The NTIA has come up with a seemingly simple answer. The FCC does not tend to embrace hard and fast rules that try to deal with the problems associated with telephone company cross-ownership of video dialtone and programming services. The FCC has recommended that it decide each cross-ownership case on an individual basis. By considering the merits of each case, the FCC can achieve the government's overarching goals of increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services made available to the public.<sup>54</sup> A standard that takes into account the likelihood of cross-subsidization and predatory pricing by the telephone companies and then attempts to minimize that threat will likely achieve the government's overarching goals of promoting competition and encouraging diversity of ownership in the video

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See Video Dialtone Order, 7 F.C.C.R. 5781, 5847 (1992).

programming industry.<sup>55</sup>

#### 4. House and Senate Subcommittee Reports

Throughout the last five years, House and Senate subcommittees have considered several bills that would repeal 47 U.S.C. § 533(b)<sup>56</sup> and until recently, no such bill has passed through either house.<sup>57</sup> As mentioned earlier, both the Senate

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<sup>55</sup> This proposed standard would also try to minimize, as much as possible, the threat of cross-subsidization by telephone companies from their phone service to their video programming service so that they will be forced to fairly compete with rival cable television programmers.

<sup>56</sup> See, e.g., H.R. 1504, 103d Cong., 1st Sess. (1993); S. 1200, 102d Cong., 1st Sess. (1991); H.R. 2546, 102d Cong., 1st Sess. (1991); S. 2800, 101st Cong., 2d Sess. (1990); S. 1068, 101st Cong., 1st Sess. (1989); H.R. 2437, 101st Cong., 1st Sess. (1989).

<sup>57</sup> See S. 652, 104th Cong., 1st Sess. § 203 (1995); see also H.B. 1555, 104th Cong., Reg. Sess. (1995). On several separate occasions the issue of whether or not to repeal 47 U.S.C. § 533(b) has been considered in Congressional hearings. See, e.g., *Cable - Instructional TV and S. 1200 Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong., 2d Sess. (1992); *Cable TV Consumer Protection Act of 1991: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong., 1st Sess. (1991); *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. (1991); *Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. (1990); *Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. (1990); *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990); *Oversight of Cable TV: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (1989); *Competitive Issues in the Cable Television Industry: Hearings Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988).

and the House have approved communications bills that would repeal the telephone company and cable company cross-ownership ban. However, Section 533(b) is still the prevailing law until Congress agrees on a final form, notwithstanding a Presidential veto.

Until 1995, both the House and the Senate have refused to repeal Section 533(b). Congress' previous refusal to repeal or modify Section 533(b) is thought-provoking in light of the fact that it passed the Cable Television Consumer Protection and Competition Act of 1992, which comprehensively revised the previous regulations contained in the 1984 Cable Act.<sup>58</sup> It is interesting to point out that Congress has been advised by its own subcommittees as well as other governmental agencies that Section 533(b) should be repealed so that competition between telephone companies and cable operators will be enhanced and diversity of ownership will be achieved. In support of these recommendations, "Congress specifically found that 'most cable television subscribers have no opportunity to select between competing cable systems,' resulting in 'undue market power for the cable operator as compared to that of consumers and video programmers.'"<sup>59</sup> Furthermore, Congress discovered that the "cable industry has become highly concentrated" and that the potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers."<sup>60</sup> Additionally, in 1992, the five largest cable system operators served over forty percent of

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<sup>58</sup> The Senate Committee on Commerce, Science, and Transportation's Report accompanying the 1992 Cable Act expressly affirmed the viewpoint that repealing 47 U.S.C. § 533(b) would enhance competition. See S. REP. NO. 92, 102d Cong., 1st Sess. 18 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1150.

<sup>59</sup> *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994) (citing Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460, 1460 (1992)).

<sup>60</sup> *Id.*, citing Pub. L. No. 102-385, 106 Stat. 1460 § 2(a)(4) (1992)).

America's cable subscribers.<sup>61</sup> Still after all of this information, Congress has refused to repeal or modify Section 533(b).

A substantial governmental and First Amendment interest exists in promoting a diversity of views through various types of media. "The 1992 Cable Act attempted to address these concerns by prohibiting exclusive local franchises, regulating or limiting the rates cable providers may charge consumers and unaffiliated programmers, and prohibiting cable providers from owning wireless cable systems."<sup>62</sup> Curiously, the 1992 Cable Act did not repeal Section 533(b) or otherwise open the cable market to telephone companies. Does this represent the notion that cable television operators as a whole may have a monopoly as long as they compete among themselves, or that telephone companies are so large that they will be able to somehow price out cable operators and create their own monopolies?<sup>63</sup> It is clear that Congress needs to act swiftly so that these questions may be resolved and a regulatory scheme may be put into action to monitor the growth of this new emerging technology. There is a very serious problem in government when the law espouses one policy through an outdated statute and those regulatory agencies appointed to enforce the law see its defects and publicly comment on them. The government should be trusted to augment the laws as needed to further the interest of the people.

In November 1994, an historic national election took place in which the balance of power in both the House and

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<sup>61</sup> *Id.*; see also *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 915 (E.D. Va. 1993).

<sup>62</sup> *Ameritech Corp. v. United States*, 867 F. Supp. 721, 726 (N.D. Ill. 1994).

<sup>63</sup> See, e.g., *Chesapeake and Potomac*, 830 F. Supp. at 915; see *GTE California, Inc. v. FCC*, 39 F.3d 940, 950 (9th Cir. 1994) (Nunan, J., dissenting).

Senate shifted to the right.<sup>64</sup> Both legislative bodies have currently proposed communications legislation which, if enacted, would repeal Section 533(b).<sup>65</sup> If the 104th Congress moves forward in the communications area it will help spur the investment necessary to upgrade the United States' telecommunications infrastructure, ultimately benefitting consumers. However, if the 104th Congress drags its feet, as did its predecessor, Section 533(b)'s overturn by the courts as violating the First Amendment seems imminent.<sup>66</sup> The implications of a judicial solution are not yet apparent, but an invalidation of Section 533(b) by the courts could result in the telephone companies being allowed to compete in the video programming industry with fewer restraints than if Congress had enacted a regulatory scheme to comport with its overarching goals of increasing competition and promoting diversity of ownership.<sup>67</sup>

### III. DOES 47 U.S.C. § 533(B) VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION?

Because Congress has been slow to adapt telecommunications law to rapidly changing technological and economic circumstances, several telephone companies have

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<sup>64</sup> Victories in the 1994 midterm elections resulted in Republican control of both the House and the Senate.

<sup>65</sup> Given 47 U.S.C. § 533(b)'s history, it seems likely that Congress will have to strike a delicate balance between the pro-competitive benefits of allowing telephone companies to compete with local exchange carriers in video programming with the very real threat of monopolistic behavior by those companies.

<sup>66</sup> The First Amendment concerns surrounding 47 U.S.C. § 533(b) will be discussed *infra* part III.

<sup>67</sup> The United States Supreme Court will decide whether or not to reinstate § 533(b) sometime within the next six months. *See Chesapeake and Potomac Tel. Co.*, 830 F. Supp. at 909, *cert. granted*, 115 S. Ct. 2608 (1995).

challenged 47 U.S.C. § 533(b) as violative of the First Amendment.<sup>68</sup> The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ."<sup>69</sup> The Supreme Court has held that cable operators and programmers "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."<sup>70</sup> Courts have applied three levels of scrutiny to statutes or other restrictions that burden speech protected by the First Amendment.<sup>71</sup> These levels are strict scrutiny,<sup>72</sup> intermediate level or "heightened" scrutiny,<sup>73</sup> and rational basis scrutiny.<sup>74</sup> The next section of

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<sup>68</sup> See *GTE California, Inc. v. FCC*, 39 F.3d 940 (9th Cir. 1994); see *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994); see *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. at 909.

<sup>69</sup> U.S. CONST. amend. I.

<sup>70</sup> *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); see also *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (holding that, where a municipality had refused to lease utility pole space to respondent cable company, "the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests").

<sup>71</sup> *Ameritech Corp. v. United States*, 867 F. Supp. 721, 729 (N.D. Ill. 1994).

<sup>72</sup> A restriction that burdens speech according to its content, or that affects so small a group of speakers as to be directed at the content of their speech, is presumptively invalid and will be upheld *only if it is "necessary to serve a compelling state interest."* *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2554 (1992) (White, J., concurring).

<sup>73</sup> Intermediate scrutiny is applied to regulations or restrictions on speech-related conduct or on the time, place, or manner of speech. See *Ameritech*, 867 F. Supp. at 729. The relevant standard is set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which held that when a governmental regulation of conduct has an incidental effect on speech the regulation will be upheld (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the burden on speech is no greater than is essential to the furtherance of the governmental interest. *Id.* Governmental restrictions on time, place, and manner of speech are valid so long as (1) they are content-neutral; (2) they are narrowly tailored to serve a significant governmental interest; and (3) they leave open ample alternative channels for communication of the information. *Id.* (citing

this Comment will discuss the strict scrutiny and rational basis standards of review first because, in the view of the D.C. Circuit, several district courts, and the author, those standards do not apply to the regulation in question. Finally, this Comment explores the intermediate level of scrutiny and its relation to 47 U.S.C. § 533(b).

### A. *Strict Scrutiny Analysis*

A restriction that burdens speech based on its content is presumptively invalid and will be upheld only if it is “necessary to serve a compelling state interest.”<sup>75</sup> In other words, the strict scrutiny standard applies to content-based regulations. This is the First Amendment’s most stringent standard and “generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.”<sup>76</sup> As a result, content-based restrictions are presumptively invalid and can only survive if they are necessary to serve a compelling state interest.<sup>77</sup>

Parties that have taken the position that 47 U.S.C. § 533(b) is content-based and targets a special class of speaker have argued that the statute is a presumptively invalid restriction

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Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Graff v. City of Chicago, 9 F.3d 1309, 1319 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1837 (1994). “The O’Brien Test is ‘little, if any, different,’ from the Ward test.” *Ward*, 491 U.S. at 798.

<sup>74</sup> “In an analysis akin to rational basis scrutiny, courts uphold regulations affecting broadcast television if the regulations are a ‘reasonable means’ of promoting a ‘permissible’ public interest, such as the interest [of] diversified mass communications.” *Id.* (citing *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796, 892 (1978)).

<sup>75</sup> *R.A.V.*, 112 S. Ct. at 2542.

<sup>76</sup> *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 917 (E.D. Va. 1993) (citations omitted).

<sup>77</sup> *Id.*

on free speech.<sup>78</sup> While this argument has not been accepted by several district and circuit courts, those same courts have decided that Section 533(b) violates the First Amendment under an intermediate scrutiny standard of review.<sup>79</sup> The various district and circuit courts that have held that 47 U.S.C. § 533(b) violates the First Amendment agree that the statute is content-neutral and fails to trigger strict scrutiny. However, these courts differ in their reasons for finding Section 533(b) to be content-neutral.

### 1. Is 47 U.S.C § 533(b) Content-Based?

It has been argued that Section 533(b) is content-based because of the definition of video programming found in the 1992 Cable Act.<sup>80</sup> "Video programming" is defined at 47 U.S.C. § 522(19) as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."<sup>81</sup> The FCC has interpreted this definition to require reference to what constituted broadcast television programming in 1984.<sup>82</sup> Several courts have agreed that the content of the video programming offered by telephone companies is implicated by this forced comparison.<sup>83</sup> It necessarily follows that, because Section 533(b) regulates telephone company provision of video programming in their

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<sup>78</sup> *Id.*; *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994); *GTE California, Inc. v. FCC*, 39 F.3d 940 (9th Cir. 1994) (Nunan, J., dissenting); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994).

<sup>79</sup> *See Chesapeake and Potomac*, 830 F. Supp. at 909; *see US West*, 855 F. Supp. at 1184; *see Ameritech Corp.*, 867 F. Supp. at 721.

<sup>80</sup> "Video Programming" as stated in § 533(b) and defined in § 522(19) of the Cable Act means "programming comparable to that provided by broadcast television stations in 1984." Video Dialtone Order, 7 F.C.C.R. at 5280.

<sup>81</sup> Video Dialtone Order, 7 F.C.C.R. 5781 ¶ 74.

<sup>82</sup> *See id.*

<sup>83</sup> *Id.*

local service areas by referencing television programming as it existed in 1984, the statute is not content-neutral. However, the fact that Section 533(b) regulates video programming by reference to its content does not mean that Section 533(b) must be constitutionally reviewed under a strict scrutiny standard.

Government regulation of expressive conduct is not always subject to strict scrutiny as long as it is justified without reference to the content of the regulated speech.<sup>84</sup> In fact, the government's justification for enacting a speech restrictive regulation is the controlling consideration when deciding whether or not strict scrutiny is triggered.<sup>85</sup> Therefore, a government regulation that is not content-neutral may still survive strict scrutiny so long as the government's justification for curtailing free speech is unrelated to the suppression of free expression.<sup>86</sup>

For example, in 1986, the Supreme Court in *Renton v. Playtime Theaters* decided that a municipal ordinance imposing zoning limitations on the location of adult theaters did not violate the First Amendment under a strict scrutiny test because the ordinance was unrelated to the suppression of free expression.<sup>87</sup> Although the ordinance clearly focused on the content of the films being shown at local theaters, it passed strict scrutiny because the purpose of the ordinance was to help prevent the harmful *secondary effects* associated with adult theaters.<sup>88</sup> The government and several cable operators have adopted the *Renton* Court's reasoning in trying to establish that Section 533(b) does not violate the First Amendment. To date,

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<sup>84</sup> Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

<sup>85</sup> *Id.*

<sup>86</sup> Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 475 (noting that the ordinance has been justified as a means of preventing various "secondary effects" of adult theaters such as crime, devaluation of adjacent properties, and alienation of retail establishments).

only one court has accepted this argument.<sup>89</sup>

Recently, the district court in *Chesapeake and Potomac Tel. Co. v. United States* relied on the Supreme Court's reasoning in *Renton* in deciding that Section 533(b) survived strict scrutiny even though it targeted a certain type of speech.<sup>90</sup> The government, in *Chesapeake and Potomac*, asserted two justifications for Section 533(b)'s ban on cross-ownership; namely, (1) to protect the "diversity of ownership of communications outlets," and (2) to promote "competition in the video programming market."<sup>91</sup> The district court recognized that the government's two justifications for Section 533(b)'s ban on cross-ownership were "unrelated to the suppression of free expression . . . on the ground that the prevention of these secondary effects will be advanced by the restriction."<sup>92</sup> While the district court in *Chesapeake and Potomac* used *Renton* to allow Section 533(b) to escape strict scrutiny, the court has suggested that *Renton* is an isolated decision and should only be referenced in the context of sexually explicit speech.<sup>93</sup>

a. *Is Renton v. Playtime Theaters a Proper Standard to Use in the Evaluation of Section 533(b)?*

*Renton* remains the only case to date in which a majority of the Supreme Court has found that the government's asserted content-neutral justification for a statute can overcome the fact that the statute, on its face, draws a content-based distinction. The *Renton* decision represents the notion that a legislative act curtailing First Amendment rights is to be evaluated on its

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<sup>89</sup> *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993).

<sup>90</sup> *Id.* at 924-25.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505 (1993).

justification rather than its operation.<sup>94</sup> In essence, the *Renton* decision seems to give legislatures an open door to restrict disfavored speech as long as it can justify the limitation on free speech, without reference to the speech.<sup>95</sup> The Supreme Court showed that it was aware of this problem in *Boos v. Barry* when Justice Brennan stated in his concurring opinion that “the best protection against governmental attempts to squelch opposition has never lain in [the Supreme Court’s] ability to assess the purity of legislative motive but rather in the requirement that the government act through content-neutral means that restrict expression that government favors as well as expression it disfavors.”<sup>96</sup> Therefore, “any speech restriction, the application of which depends on the message’s content, has traditionally, and appropriately, been treated with suspicion by the courts as a potential vehicle for the conscious or unconscious prejudices of the legislature.”<sup>97</sup> The *Renton* standard will be satisfied as long as the government can justify its reasons for restricting speech independent of the content of that speech.

It has been argued that the *Renton* secondary effects doctrine hinders the judiciary’s ability to strike down content-based regulations and places too much faith in the motives of lawmakers.<sup>98</sup> For example, if legislators passed a law limiting a certain type of speech that was disliked by the

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<sup>94</sup> *Chesapeake and Potomac*, 830 F. Supp. at 924.

<sup>95</sup> See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

<sup>96</sup> *Boos v. Barry*, 485 U.S. 312, 336-37 (1988) (Brennan, J., concurring).

<sup>97</sup> *Chesapeake and Potomac*, 830 F. Supp. at 925.

<sup>98</sup> See, e.g., *id.* (noting that the *Renton* “secondary effects” doctrine abandons the “healthy mistrust” of the judiciary’s ability to detect content-based regulations’ distorting effects in favor of “a misplaced confidence that either: (a) legislatures will always acknowledge any viewpoint distortion likely to result from a regulation or (b) courts will consistently be able to predict which content-based regulations will be devoid of distorting effects”).

majority of the population and then justified that restriction without reference to the speech, the law would pass constitutional muster. It is unlikely this approach will adequately protect First Amendment values because speech-restrictive laws will be undetected and, therefore, go unchallenged.<sup>99</sup> The Supreme Court understands this problem and can be expected to act with great caution when posed with a *Renton* type of case.

In 1993, the Supreme Court had an opportunity to limit the *Renton* decision to the context of sexually explicit speech but declined to do so.<sup>100</sup> This means that the *Renton* analysis can be used to justify content-based restriction on speech. However, the Supreme Court seems to exercise discretion when given the opportunity to use *Renton* to uphold a speech-restrictive law. In *Discovery Network*, the Supreme Court utilized the *Renton* analysis when it decided that a municipal ordinance that banned newsracks purveying commercial publications from being placed on public property violated the First Amendment.<sup>101</sup> *Discovery Network* is similar to *Renton* and to Section 533(b) cases because the applicability of the statute in question turned on a content-based distinction.<sup>102</sup> However, the Supreme Court struck down the statute in *Discovery Network* and distinguished it from *Renton* by stating, “[i]n contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent publishers’

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<sup>99</sup> *Id.*; see also *Boos*, 485 U.S. at 336 (Brennan, J., concurring) (“[T]he inherently ill-defined nature of the *Renton* analysis certainly exacerbates the risk that many laws designed to suppress disfavored speech will go undetected.”).

<sup>100</sup> *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505 (1993).

<sup>101</sup> *Id.*

<sup>102</sup> See *Chesapeake and Potomac*, 830 F. Supp. at 925 (“In *Discovery Network*, as in *Renton* and the present case, the applicability of the relevant ordinance turned on a content-based distinction--in that case, between commercial and non-commercial publications. Cincinnati attempted to rationalize its ordinance, as in *Renton* and the present case, with content-neutral justifications--in that case, safety and aesthetics.”).

newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks."<sup>103</sup> In essence, the secondary effects the City of Cincinnati asserted to justify squelching free speech were not adequate. *Discovery Network* represents the notions that *Renton* is not limited to cases involving sexually explicit speech and that the government's justification for limiting free speech must be compelling for the Court to restrict free speech. It is also important to note that since *Renton*, the Supreme Court has not validated a speech-restrictive statute under the secondary effects doctrine.

A plurality of Supreme Court justices have indicated a willingness to apply the *Renton* secondary effects doctrine to political speech.<sup>104</sup> The district court in *Chesapeake and Potomac* read that willingness to mean that *Renton* should generally apply to Section 533(b) cases.<sup>105</sup> Therefore, if *Renton* is applied to Section 533(b) cases, the two interests advanced by the government in support of Section 533(b), diversity in the ownership of communications outlets and competition in the video programming market, are justifications which are made "without reference to the content of the regulated speech."<sup>106</sup> Thus, even if Section 533(b) is found to be content-based, any Section 533(b) case that is analyzed under a "*Renton*-like" secondary effects test will, more likely than not, pass constitutional muster.<sup>107</sup>

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<sup>103</sup> *Discovery Network*, 113 S. Ct. at 1517.

<sup>104</sup> *Boos*, 485 U.S. at 312.

<sup>105</sup> *Chesapeake and Potomac*, 830 F. Supp. at 926 ("This apparent general applicability of *Renton* compels the holding here that § 533(b) is a content-neutral restriction, despite the fact that the determination of whether the statute applies to any particular message may only be accomplished by reference to the content of that message.").

<sup>106</sup> *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 782 (1989)).

<sup>107</sup> *See, e.g., Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181, 195 (4th Cir. 1994):

We determine whether a speech regulation partial to certain

## 2. Is 47 U.S.C § 533(b) Content-Neutral?

Section 533(b) will only be subject to strict scrutiny if it regulates speech based on its content. The Fourth and Ninth Circuits looked to the Supreme Court's recent decision in *Turner Broadcasting v. FCC* to determine whether or not Section 533(b) is content-neutral.<sup>108</sup> The Court noted in *Turner* that the principal inquiry in determining content-neutrality "is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."<sup>109</sup> To determine content-neutrality, the *Turner* Court provided a two-pronged test which provided that one first consider the suspect statute's design, then look to its operation.<sup>110</sup>

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speakers is content-based mindful of the "physical characteristics" and "economic incentives" inherent to the particular type of speech regulated. Here . . . the FCC and Congress have regulated the telephone companies' provision of cable service in light of the physical "bottleneck," peculiar to cable communications, and the perception that the telephone companies, absent regulation, would have the incentive and ability to dominate that bottleneck and establish themselves as sole "gatekeeper[s]" . . . thereof. *Because Section 533(b)'s speaker distinction is thus justifiable entirely on the basis of the peculiar economic and physical venue inherent to cable communications, we conclude that it is not an improper content-based distinction.*

(citations omitted) (emphasis added).

<sup>108</sup> *Id.* at 192; *US West, Inc. v. United States*, 48 F.3d 1092, 1097 (9th Cir. 1995).

<sup>109</sup> *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994) (quoting *Ward*, 491 U.S. at 791).

<sup>110</sup> *Chesapeake and Potomac*, 42 F.3d at 193 (citing *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2459-61) (The court in *Chesapeake and Potomac* read *Turner Broadcasting Sys., Inc.* to instruct that it must first "examine the plain terms of the regulation to see whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates," and second, "[i]f the regulation's plain language does not, itself, mandate a finding of content discrimination, [they] then must determine whether, nevertheless there are indications

Section 533(b) prohibits telephone companies from directly providing video programming to customers in their local telephone service areas.<sup>111</sup> As discussed earlier, the FCC has defined video programming as broadcast television programming as it existed in 1984.<sup>112</sup> Based on the definition of video programming, the district court in *Chesapeake and Potomac* decided that "Section 533(b) regulated speech differently according to its content because the determination of whether 'video programming' is being provided requires reference to the content of the programming."<sup>113</sup> However, the circuit court in *Chesapeake and Potomac* and the district court in *Ameritech Corp. v. United States* disagreed with the *Turner* court and decided that Section 533(b) is content-neutral because it regulates the manner in which speech may be delivered rather than the content of the speech.<sup>114</sup>

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that the regulation's 'manifest purpose is to regulate speech because of the message it conveys.'"); see also *US West*, 48 F.3d at 1099.

<sup>111</sup> See 47 U.S.C. § 533(b).

<sup>112</sup> See 47 U.S.C. § 522(19).

<sup>113</sup> *Chesapeake and Potomac*, 42 F.3d at 193; see also *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 923 (E.D. Va. 1993) (The district court based its decision on the notion "that the cognitive process necessary to apply the video programming definition cannot be accomplished without comparing the content of the image being tested with the content of 1984 broadcast television programming. . . . [T]here is simply no way that § 533(b), incorporating as it does the § 522(19) definition, can be applied without reference to the content of the message being conveyed.").

<sup>114</sup> See *Chesapeake and Potomac*, 42 F.3d at 193 ("While a content-based distinction necessarily involves consideration of the nature of the message sought to be conveyed, the converse is not true in all cases, i.e., that a regulation requires some examination of the speech upon which it has impact does not make the regulation content-based. In particular, the government may validly examine the mode of delivery of speech to determine whether it is delivered in conformity with a 'manner' restriction, provided that the restriction does not discriminate based upon the content of speech."); see also *Ameritech Corp. v. United States*, 867 F. Supp. 721, 732 (N.D. Ill. 1994).

a. *Section 533(b) Regulates the Manner in Which Speech May be Conveyed and Not the Speech Itself*

In *Regan v. Time, Inc.*, the Supreme Court upheld the validity of a statute that regulated the size and color of permissible copying of United States currency.<sup>115</sup> The Court concluded that the size and color restrictions did not discriminate based on speech content. Time's compliance with the size and color requirements did not in any way prevent them "from expressing any view on any subject or from using illustrations of currency in expressing those views. More importantly, the Government does not need to evaluate the nature of the message being imparted in order to enforce the color and size limitations."<sup>116</sup> The limitations imposed by the relevant statute in *Regan* only restrict the manner by which the illustrations may be presented and not the content of the message being conveyed. The court upheld the color and size restrictions, analogizing them to valid noise level restrictions that can be placed on announcements in residential areas and size and height limitations that can be placed on outdoor signs.<sup>117</sup>

The circuit court in *Chesapeake and Potomac* referenced the Supreme Court's decision in *Regan* to establish Section 533(b) as content-neutral.<sup>118</sup> The Fourth Circuit came to that conclusion because they determined that Section 533(b) does not regulate speech differently based upon its content, but rather distinguishes speech solely based on whether the speech is in the form of video programming, that is, based on the speech's mode

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<sup>115</sup> *Regan v. Time, Inc.*, 468 U.S. 641 (1984), *superseded by statute as stated in Boggs v. Bowron*, 842 F. Supp. 542 (D.D.C. 1993).

<sup>116</sup> *Regan*, 468 U.S. at 655-56.

<sup>117</sup> *Chesapeake and Potomac*, 42 F.3d at 194 (citing *Regan*, 468 U.S. at 656).

<sup>118</sup> *Id.*

of delivery.<sup>119</sup> In other words, Section 533(b) is content-neutral because the government need not “evaluate the nature of the message being imparted” to determine whether “video programming is being transmitted.”<sup>120</sup>

In a second case, rather than justifying the suppression of free speech, the court in *Ameritech Corp v. United States* decided that Section 533(b) was content-neutral by the FCC’s own distinction between one-way video programming and interactive programming.<sup>121</sup> In determining content-neutrality, the *Ameritech* court looked to the Supreme Court’s decision in *Ward v. Rock Against Racism* for guidance.<sup>122</sup> In *Ward*, the Supreme Court stated that “[t]he principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>123</sup>

The court in *Ameritech* recognized that a key characteristic of broadcast television as it existed in 1984 was that it was a one-way transmission.<sup>124</sup> In 1984, the television

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<sup>119</sup> *Id.*; see also *Ameritech Corp. v. United States*, 867 F. Supp. 721, 732 (N.D. Ill. 1994) (“There can be no doubt that interactive programming is a form of communication or mode of expression of ideas, but as such it differs from noninteractive video only in the form or manner of speech, rather than in substance.”).

<sup>120</sup> *Chesapeake and Potomac*, 42 F.3d. at 194-95 (citing *Regan*, 468 U.S. at 656); see *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2460 (1994) (finding that the “must-carry” rules are not content-based because they “distinguish between speakers in the television programming market . . . based only upon the manner in which speakers transmit their messages, and not upon the messages they carry” (emphasis added)); cf. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993) (holding that a sweeping ban on newsracks’ use to distribute commercial handbills, but not newspapers, is content-based).

<sup>121</sup> *Ameritech*, 867 F. Supp. at 732.

<sup>122</sup> *Id.*

<sup>123</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>124</sup> *Ameritech*, 867 F. Supp. at 731 (citing *Video Dialtone Order*, 7 F.C.C.R. 5781, 5821 (1992)).

viewer could not manipulate or interact with the video image.<sup>125</sup> In its Video Dialtone Order, the FCC deemed interactive programming to be something other than video programming, because it was not comparable to the one-way programming broadcast television stations provided in 1984.<sup>126</sup> The FCC went on to explain that “two-way” or “interactive programming” allows the viewer to “tailor the video images to his or her specific requests.”<sup>127</sup> Based on this information, the *Ameritech* court, unlike the district court in *Chesapeake and Potomac*, decided that it did not need to look to video programming as it existed in 1984 to determine whether Section 533(b) is content-based.<sup>128</sup> Instead, the *Ameritech* court decided that it must determine whether the FCC’s distinction between interactive and non-interactive video programming is content-based.<sup>129</sup>

According to the *Ameritech* court, the proper means to determine if the above distinction is content-based is whether the distinction favors some speech over another based on the ideas or views expressed.<sup>130</sup> Therefore, the *Ameritech* court decided that the distinction is content-neutral because non-interactive and interactive video differ only in form and not

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<sup>125</sup> *Ameritech*, 867 F. Supp. at 732.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* But see *Video Dialtone Order*, 7 F.C.C.R. at 5821. The FCC added the caveat that some elements of “interactive programming” might be deemed video programming if those elements could be separated from the interactive package and provided independently as programming comparable to television programming in 1984.

<sup>128</sup> *Ameritech*, 867 F. Supp. at 732-33.

<sup>129</sup> *Id.* at 732.

<sup>130</sup> *Id.* (citing *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct 2445, 2459 (1994)); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The principal inquiry in determining content-neutrality, in speech cases generally, and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”).

substance.<sup>131</sup> The court stated that its decision would have been different if Section 533(b) allowed only certain types of video programming to be broadcast by local telephone companies.<sup>132</sup> Therefore, a statute such as Section 533(b) that prohibits telephone companies from directly providing any video programming is a blanket prohibition on the method by which speech may be transmitted and not on the ideas or views expressed by that transmission.<sup>133</sup> Accordingly, under both the circuit court's decision in *Chesapeake and Potomac* and the district court's decision in *Ameritech*, Section 533(b) is content-neutral and, therefore, not subject to strict scrutiny.

### 3. 47 U.S.C. § 533(b) Distinguishes Between Speakers

It has been argued that because Section 533(b) affects a small number of speakers by targeting telephone companies, it should be subject to strict scrutiny.<sup>134</sup> The Supreme Court's recent decisions only support the above assertion if a distinction

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<sup>131</sup> *Ameritech*, 867 F. Supp. at 732, which states:

There can be no doubt that interactive programming is a form of communication or mode of expression of ideas, but as such it differs from noninteractive video only in the form or manner of speech, rather than in substance. For example, if a local government told people they could not shout messages through a bullhorn in residential neighborhoods but could broadcast them on the radio or television, this rule would not be a content-based restriction, even though it distinguishes among modes of communication. But if our hypothetical local government told people they could not read John Steinbeck or Nelson Algren novels aloud over the megaphone, but could convey any other message, this would be a content-based distinction subject to strict scrutiny.

<sup>132</sup> *Id.* at 733.

<sup>133</sup> *See, e.g., Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181, 193 (4th Cir. 1994) ("Because Section 533(b) prohibits telephone company provision of video programming [in local service areas] regardless of the message it conveys, the burden it imposes on common carriers is not content-based.").

<sup>134</sup> *Ameritech*, 867 F. Supp. at 733.

between speakers “is directed at, or presents the danger of suppressing particular ideas.”<sup>135</sup> Thus, in *Leathers v. Medlock*, the Supreme Court rejected a First Amendment challenge to a state tax on cable operators, where the tax was content-neutral and did not suggest an attempt to censor the cable operators or stifle the free exchange of ideas.<sup>136</sup> Furthermore, in *Turner Broadcasting*, the Supreme Court noted that the 1992 Cable Act’s “must carry” provisions favored broadcasters over cable operators but did so “based only upon the manner in which the speakers transmit their messages to viewers, and not upon the messages they carry. . . . So long as [the provisions] are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.”<sup>137</sup> Section 533(b) favors cable operators by prohibiting telephone companies from directly providing video programming to their telephone customers in their local service area.<sup>138</sup> However, the Supreme Court’s decision in *Turner Broadcasting* suggests that Section 533(b) would survive strict scrutiny because it only strives to regulate the manner in which speech is transmitted, not the content.<sup>139</sup> Consequently, the fact that Section 533(b) targets telephone companies, alone, is immaterial, and therefore insufficient to trigger strict scrutiny.

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<sup>135</sup> See *Leathers v. Medlock*, 499 U.S. 439, 452-53 (1991); see also *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994).

<sup>136</sup> *Leathers*, 499 U.S. at 453.

<sup>137</sup> *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2460-61.

<sup>138</sup> *Ameritech*, 867 F. Supp. at 733.

<sup>139</sup> *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2460-61.

4. Does it Matter Whether 47 U.S.C § 533(b) is Content-Based or Content-Neutral?

If Section 533(b) is determined to be content-based, it will still pass muster. *Renton's* secondary effects doctrine will shield Section 533(b) from a strict scrutiny level of review.<sup>140</sup> Alternatively, since Section 533(b) will likely be found content-neutral,<sup>141</sup> a review of Section 533(b)'s constitutionality should focus on either the rational basis test or the intermediate or heightened scrutiny level of review.<sup>142</sup>

B. *Rational Basis Analysis*

Courts have been reluctant to apply the least stringent standard of scrutiny, rational basis, when dealing with a 47 U.S.C. § 533(b) challenge.<sup>143</sup> The Supreme Court has employed a rational basis test in cases involving the regulation of over-the-air broadcasting;<sup>144</sup> however, the Court recently ruled that "broadcast cases"<sup>145</sup> are not applicable to the

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<sup>140</sup> See *supra* part III.A.1.

<sup>141</sup> See *supra* part III.A.2.

<sup>142</sup> See *infra* part III.C.

<sup>143</sup> *Ameritech Corp. v. United States*, 867 F. Supp. 721, 729 (N.D. Ill. 1994).

<sup>144</sup> *Id.*, citing *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 798-802 (1977):

In *NCCB*, the Court rejected a First Amendment challenge to an FCC rule barring newspapers from owning broadcast stations in the same community, reasoning that the rule was content-neutral and served a reasonable means of promoting a "permissible" governmental interest--the diversification of ownership in the mass communications media as a whole.

<sup>145</sup> See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984); see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969); see *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

regulation of cable television.<sup>146</sup> The distinction between cable regulations and over-the-air regulations rests on the idea of scarcity. With over-the-air broadcasting, there are a limited number of broadcast stations, and the government should be given more leeway to regulate broadcast communications to ensure that a few speakers do not gain a disproportionate hold over the medium as a whole.<sup>147</sup> The technology behind cable television has brought with it the notion that there “is no practical limitation on the number of speakers who may use the cable medium.”<sup>148</sup> Therefore, the scarcity argument that triggers rational basis scrutiny in the broadcast cases is inapplicable in cable programming regulation cases.

It has been suggested, however, that the scarcity rationale is analogous to the theory behind 47 U.S.C. § 533(b).<sup>149</sup> The goal of 47 U.S.C. § 533(b) is to promote competition and to diversify ownership in the cable television industry by preventing the telephone companies from monopolizing it.<sup>150</sup> Even if the cable television industry is free from the same physical limitations of broadcasting, cable television may still be susceptible to market forces, such as monopolization, that can lead to similar undesirable results.<sup>151</sup> However, the Supreme Court has made it clear that market dysfunction was not at the

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<sup>146</sup> See *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456-57 (1994) (employing intermediate level scrutiny when refusing to apply *NCCB* and other cases involving over-the-air broadcasting to a situation involving cable television).

<sup>147</sup> See *Ameritech Corp. v. United States*, 867 F. Supp. 721, 730 (N.D. Ill. 1994) (“In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized. . . . Being forced to ‘choose among applicants for the same facilities,’ the Commission has chosen on a ‘sensible basis,’ one designed to further, rather than contravene, the ‘system of freedom of expression.’” (quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 779, 802).

<sup>148</sup> *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2457.

<sup>149</sup> See *Ameritech*, 867 F. Supp. at 731.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

root of broadcast regulation cases and as such, the Court has specifically refused to extend the broadcast cases to cable television.<sup>152</sup> This refusal comes despite the Court's acknowledgment that the cable market is plagued by a disfunction similiar to the one prevalent in the over-the-air broadcast market.<sup>153</sup> "[T]he mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to non-broadcast media."<sup>154</sup> Therefore, regulations on speech such as 47 U.S.C. § 533(b) cannot be justified under a rational basis standard and must be analyzed under heightened scrutiny.

### C. *Intermediate Level Scrutiny Analysis*

In its decision in *Turner Broadcasting*, the Supreme Court stated that where a law imposes "special obligations" or "special burdens" upon cable programmers, a "heightened" measure of First Amendment scrutiny is required.<sup>155</sup> Accordingly, because the 1992 Cable Act's "must carry" provisions placed a special burden on cable programmers, it necessarily follows that 47 U.S.C. § 533(b) places a special burden on telephone companies because it prohibits them from directly providing video programming to their local telephone customers.<sup>156</sup> Therefore, Section 533(b) will be subject to intermediate scrutiny and pass constitutional muster if "[ (1) ] it furthers an important or substantial governmental interest; [ (2) ]

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<sup>152</sup> See *id.*; see also *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2457-58.

<sup>153</sup> *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2458.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Ameritech*, 867 F. Supp. at 731; see, e.g., *US West, Inc., v. United States*, 855 F. Supp. 1184, 1190 (W.D. Wash. 1994); see *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 918-22 (E.D. Va. 1993).

the governmental interest is unrelated to the suppression of free expression [content-neutral]; and [(3)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>157</sup> The second prong is satisfied because Section 533(b) is content-neutral; it regulates how telephone companies may or may not participate in video programming.<sup>158</sup> This section will concentrate on the first and third prongs of the *O’Brien* standard, and will discuss whether 47 U.S.C § 533(b) furthers a substantial governmental interest and if so, whether the statute places no more restrictions on telephone companies than necessary in furtherance of the substantial governmental interest.

### 1. Substantial Governmental Interest

The rationale supporting Section 533(b) has diminished over time.<sup>159</sup> Section 533(b) is in place to prevent the telephone companies from engaging in monopolistic practices against the cable industry and to maintain ownership diversity in communications outlets. However, the same rationale that was the impetus for Section 533(b) could very well support the contention that it should be repealed. That contention is that Section 533(b) promotes anti-competitive behavior on the part of the cable television programmers by discouraging and, in

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<sup>157</sup> *Turner Broadcasting Sys., Inc.*, 114 S. Ct at 2469 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>158</sup> See *supra* section III.A.1.

<sup>159</sup> See, e.g., *supra* part II. The history of § 533(b) illustrates how the regulation was once very much needed and that as the cable television industry has evolved into a virtual monopoly, how its original mandates may promote anti-competitive results by sustaining the cable television industry’s monopoly while prohibiting telephone companies from competing in the video programming market.

most cases, prohibiting competition in local service areas.<sup>160</sup> To decide whether there is a significant governmental interest, a court “must look to the face of the [subject] regulation and the identifiable interests advanced to justify the regulation.”<sup>161</sup> In addition, the government, “when trenching on First Amendment interests, . . . must be able to adduce either empirical support or at least sound reasoning on behalf of its measures.”<sup>162</sup> On its

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<sup>160</sup> It has been shown in Section II of this Comment that the cable television industry is present in most U.S. cities. It has also been shown that approximately 99% of all cable operators are in business in a single market with no competition. This is probably the case because it would not be cost-effective to have two cable companies compete in the same market and carry duplicative programming. In fact, it is quite possible that if two cable companies compete in the same market, they could cut each other's business by half, but incur the same amount of overhead. This would inevitably lead to higher cable television rates for consumers, which by no means would benefit the cable operator or the consumer.

<sup>161</sup> 11126 Baltimore Blvd. v. Prince George's County, MD., 886 F.2d 1415, 1426 (4th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990); *see also* Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 829 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980). *But see, e.g., Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2471 (citations omitted), which states:

[C]ourts must accord substantial deference to the predictive judgments of Congress. Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. . . . [However,] [t]hat Congress' predictive judgments are entitled to substantial deference does not mean . . . that they are insulated from meaningful judicial review altogether. [The Supreme Court has] stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose [their] independent judgment of the facts bearing on an issue of constitutional law.' . . . [W]hen First Amendment rights are implicated[, the Supreme Courts' obligation to exercise independent judgment] is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [its] own. . . . [I]t is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.

<sup>162</sup> *See 11126 Baltimore Blvd.*, 886 F.2d at 1426 (quoting *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)).

face, 47 U.S.C. § 533(b) was enacted to achieve substantial governmental interests -- to promote competition in the video programming market and to preserve diversity of ownership in the communications media.<sup>163</sup>

“When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator *bottleneck, or gatekeeper, control* over most, (if not all) of the television programming that is channeled into the subscriber’s home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.”<sup>164</sup> The telephone companies’ common carrier networks are the primary electronic means of access to American homes and businesses other than existing coaxial cable wiring networks used by cable operators.<sup>165</sup> As discussed previously, the possibility of transmitting cable programming over these common carrier networks is now a reality. Thus, the peculiar positioning of the local telephone companies makes them natural competitors of the cable operators.

In light of the telephone companies’ predatory past, Congress’ past decision to ban telephone companies from participating in video programming was a reasonable assumption at the time 47 U.S.C. § 533(b) was originally enacted. Presumably, Congress believed that this was still a valid interest because it did not repeal Section 533(b) in 1992. Therefore, it has been established that 47 U.S.C. § 533(b) comports to

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<sup>163</sup> See *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 927 (E.D. Va. 1993) (The government is trying to prevent single ownership control of all electronic communication devices entering and exiting a home.).

<sup>164</sup> *Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181, 189 (4th Cir. 1994) (citing *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2466).

<sup>165</sup> *Id.* at 189-90.

achieve a substantial governmental interest.<sup>166</sup> The next issue is whether the statute places no more restrictions on telephone companies than necessary in furtherance of a substantial governmental interest.<sup>167</sup>

2. Is 47 U.S.C. § 533(b) More Restrictive Than Necessary to Achieve the Government's Stated Substantial Interest?

Section 533(b) need not be the "least restrictive or least-intrusive means" of achieving Congress' goal of eliminating anti-competitive behavior and promoting diversity of ownership in the area of video programming.<sup>168</sup> The requirement of narrow tailoring is satisfied if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."<sup>169</sup> The Supreme Court explained that the regulation need not be the least severe that will achieve the desired end. However, the presence of numerous and obvious less-burdensome alternatives to the restriction is a relevant consideration in assessing the reasonableness of the "fit" between the means and end.<sup>170</sup> Therefore, "if there exists a range of regulatory strategies that would effectively eliminate the threat of anti-competitive behavior by the telephone companies in the cable television industry, then § 533(b) would 'burden substantially more speech than is necessary to further the government's legitimate

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<sup>166</sup> See *Turner Broadcasting Sys., Inc.*, 114 S. Ct. at 2470 (citations omitted) ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.").

<sup>167</sup> See *City of Cincinnati v. Discovery Network*, 113 S. Ct. 1505, 1510 (1993).

<sup>168</sup> *Chesapeake and Potomac*, 830 F. Supp. at 928 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796-99 (1989)).

<sup>169</sup> *Id.* (citations omitted).

<sup>170</sup> *Discovery Network*, 113 S. Ct. at 1510 n.13 (citations omitted) (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989)).

interests,' and would therefore violate the First Amendment."<sup>171</sup>

Any findings of fact Congress makes regarding the potential effectiveness of the FCC's regulation of the pole access and cross-subsidization problems are entitled to considerable deference from the courts.<sup>172</sup> The legislative record reflects that Section 533(b) "encourages a diversity of ownership of communications outlets"<sup>173</sup> and "enhances competition."<sup>174</sup> Section 533(b) almost certainly would have passed constitutional muster when it was enacted in 1984. At that time, the cable television industry as we know it today was in its infancy. However, within the last ten years, the business of cable television and video programming has changed both technologically and economically.<sup>175</sup> Therefore, if ten years

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<sup>171</sup> *Chesapeake and Potomac*, 830 F. Supp. at 928.

<sup>172</sup> *Id.* at 929 (citing *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) (revealing, curiously, that there is no indication in any legislative materials "that Congress reached a conclusion which discussed the effectiveness of less restrictive regulatory measures to combat the potential for anti-competitive practices by the telephone companies in the cable television market").

<sup>173</sup> *Id.* (quoting H.R. REP. NO. 934, 98th Cong., 2d Sess. 56 (1984), *reprinted in* 1994 U.S.C.C.A.N. 4693).

<sup>174</sup> *Id.* (quoting S. REP. NO. 92, 102d Cong., 1st Sess. 18 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1150).

<sup>175</sup> *See, e.g., id.* at 915 (citations omitted), which states:

Companies operating cable television systems have grown rapidly, commensurate with the growth of the industry. According to the Census Bureau, annual cable operator revenues were \$345 million in 1970. By 1992, annual revenues of the industry topped \$21 billion. Many cable systems serving individual communities are owned by large, national or regional chains known as multiple system operators ("MSOs"). The five largest MSOs combined to serve over 40% of all cable subscribers. The largest MSO, Tele-Communications, Inc., served 9.6 million cable subscribers in 1991 and had revenues of \$3.8 billion. The second largest, Time Warner, had 6.8 million subscribers and total revenue from all sources of \$12 billion.

Despite Congressional efforts to promote competition in

later there are less speech intrusive means available to achieve these stated goals, they must be examined.<sup>176</sup> It then logically follows that Section 533(b) should be analyzed with reference to conditions as they exist today.<sup>177</sup>

As discussed earlier, several government agencies such as the FCC, the Department of Justice's Anti-trust Division, the Department of Commerce, as well as several House and Senate subcommittees, have formally recommended the repeal of Section 533(b).<sup>178</sup> These agencies have suggested that Section 533(b) does not promote competition and ownership diversity in cable television, and in fact, may actually hinder achievement of those objectives.<sup>179</sup> Congress was apprised of all the aforementioned recommendations, and nonetheless decided neither to amend nor to repeal Section 533(b) from the 1992 Cable Act.

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the cable industry, the provision of cable television has remained a monopoly service in virtually every community. In 1991, cable system operators faced competition from another operator in less than 1% of the localities served by cable.

<sup>176</sup> See *supra* part II.C; see also *Chesapeake and Potomac Tel. Co.*, 830 F. Supp. at 929 ("It cannot be law that, whenever Congress passes a statute infringing on the right to free expression, it will be inferred by reviewing courts that Congress considered and rejected the effectiveness of all less restrictive alternatives."); see, e.g., *Ameritech Corp. v. United States*, 867 F. Supp. 721, 734 (N.D. Ill. 1994) (When a statute's constitutionality is predicated on a particular state of facts, that constitutionality "may be challenged by showing to the court that those facts have ceased to exist." (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (citations omitted))).

<sup>177</sup> See, e.g., *Ameritech*, 867 F. Supp. at 734 ("[T]he district court should determine whether removal of the information-services restriction [in the AT&T consent decree] as applied to the generation of information would be anti-competitive under present market conditions." (citing *United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990))); see also *id.* ("If, under present market conditions, the statute places a greater burden on speech than is necessary to promote the goals of competitiveness and diversity of ownership in the business of cable television or video programming, the statute is not 'narrowly tailored' to promote those goals.").

<sup>178</sup> See *supra* part II.C.

<sup>179</sup> *Ameritech*, 867 F. Supp. at 736.

Those that believe that Section 533(b) is narrowly tailored argue that when Congress failed to repeal or amend it, they implicitly validated the statute's original concerns that telephone companies will act anti-competitively if given the chance. The Ninth Circuit "observed that because enhanced competitiveness in the information service markets into which the telephone companies wished to enter 'does nothing' to decrease their monopoly power in the local telephone market, 'we fail to see how it can diminish the [telephone companies'] ability to shift costs to their regulated services without detection in ratemaking proceedings."<sup>180</sup> This argument is substantiated by the initial case of *United States v. Western Electric Co.*<sup>181</sup> Based on the finding that the federal regulatory scheme would not prevent cross-subsidization and network discrimination, the court initially refused to lift the portion of the AT&T consent decree concerning the ban on telephone company provision of information services.<sup>182</sup> However, that decision was remanded on the question of whether lifting the ban would be anti-competitive under existing market conditions.<sup>183</sup> With considerable reluctance, the ban was ultimately lifted in deference to the DOJ's view that doing so would not be anti-competitive.<sup>184</sup> The above progression represents the fact that anti-competitive conduct by the telephone companies is a real concern. However, a statute purporting to eliminate a certain type of speech in order to prevent anti-competitive behavior and promote ownership diversity, must do so in a way that does not place a greater burden than necessary on protected speech.<sup>185</sup>

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<sup>180</sup> *Id.* at 735 (citing *California v. FCC*, 905 F.2d 1217, 1234 (9th Cir. 1990)).  
<sup>181</sup> 673 F. Supp. 525 (D.D.C. 1987).

<sup>182</sup> *Id.* at 567-79.

<sup>183</sup> *United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990).

<sup>184</sup> *United States v. Western Elec. Co.*, 767 F. Supp. 308, 327 (D.D.C. 1991),  
*aff'd*, 993 F.2d 1572 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993).

<sup>185</sup> *Ameritech*, 867 F. Supp. at 736.

To sustain Section 533(b), the proponent must show that less restrictive measures would be ineffective in restraining the telephone companies' monopolistic tendencies.<sup>186</sup> The government's biggest concern behind enacting Section 533(b) was that telephone companies would cross-subsidize between their common carrier telephone service and their video programming service, thereby artificially lowering cable programming prices and eventually creating a local cable service monopoly.<sup>187</sup> Section 533(b)'s flat ban on video programming by telephone companies in their local service area was designed to prevent this anti-competitive behavior. Is there a reasonable fit between Section 533(b) and its stated goals, and if so, is it narrowly tailored to achieve those goals?

*Chesapeake & Potomac* suggests "the potential for telephone companies to act anti-competitively in the video programming market can be reduced to a level significantly below the level of risk currently tolerated in relation to cable operators."<sup>188</sup> For example, the FCC's current

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<sup>186</sup> *Id.*

<sup>187</sup> *See, e.g., Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 930 n.31 (E.D. Va. 1993), stating that:

Local telephone companies have a substantial opportunity to engage in cross-subsidization when . . . both the competitive video transmission service and the monopoly service are provided on common facilities with common costs. . . . Common costs mean that cross-subsidization is virtually impossible to detect and eliminate. It is the existence of significant common costs which differentiates telephone companies from [other potentially anti-competitive actors]. . . . One of the most difficult aspects of telephone regulation is the assignment of costs to their causes. Cable and telephone systems share a certain amount of capital equipment; allocating shared costs between these capital accounts on the basis of actual cost causation will be difficult or impossible.

*But see id.* at 930 n.32 ("It is difficult to conceive that there could be any substantial costs common to the transmission of video and other telephone signals, on the one side, and the creation and packaging of video programming on the other.")

<sup>188</sup> *Id.* at 930.

recommendation to Congress for Section 533(b)'s repeal requires a limit on telephone companies' direct provision of video programming to a specified percentage of the channel capacity made available by the companies' video transport facilities. The channel capacity balance would be leased on a common carrier basis and the system would have to possess the capability to accommodate multiple video programmers.<sup>189</sup> The FCC and DOJ have suggested that if telephone companies are allowed to compete in the local cable programming markets, the existing FCC accounting and cost allocation rules can help to curb the threat of cross-subsidization by the telephone companies.<sup>190</sup> Accordingly, the required "fit" between Section 533(b)'s restrictions and its purported purpose of preventing cross-subsidization is absent. The above stated scenarios seem less restrictive than a prophylactic ban on telephone company entry into the local video programming market.<sup>191</sup>

Section 533(b) is content-neutral and was originally enacted to serve an important or substantial governmental interest. Although it is only an incidental restriction on speech, Section 533(b) violates of the First Amendment because its restriction on protected speech is greater than is essential to achieve the government's significant interest.

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<sup>189</sup> *Id.* at 930-31 (citing Video Dialtone Order, 7 F.C.C.R. 5781, 5850 (1992)). This regulatory scheme would take care of the diversity of programming and ownership prong of the government's substantial interest.

<sup>190</sup> *See supra* note 13; *see also supra* part II.C.; *see also, e.g.*, Video Dialtone Order, 7 F.C.C.R. at 5828-29 (stating that "our existing safeguards with respect to non regulated [telephone company] services are sufficient at this time to protect against cross-subsidization concerns . . . . [W]e continue to believe that they constitute an effective means of preventing cross-subsidization between regulated and non regulated services").

<sup>191</sup> This conclusion assumes the suggested regulatory scheme can substantially curtail the problem of cross-subsidization.

## IV. CONCLUSION

An analysis of the evolution of Section 533(b) of the 1992 Cable Act leads one to believe that it should be repealed or at least amended to facilitate those goals that inspired its original adoption. The very agencies responsible for its enforcement have suggested less restrictive ways to deal with the problems of anti-competitive conduct and diversity of ownership in the video programming industry. However, until recently, Congress has been unwilling to repeal or amend the statute.<sup>192</sup> In 1995, during the 104th Congress, both the House and Senate passed communications legislation that eliminates Section 533(b). The communications legislation has not yet been consolidated, but one bill is expected to be voted on by Congress in November 1995.

The Supreme Court has granted certiorari on the issue of whether Section 533(b) violates the First Amendment and will likely hear oral arguments on the issue in December 1995. If Congress fails to repeal or amend Section 533(b), the Supreme Court will likely strike it down as violating the First Amendment under a heightened scrutiny test, following the mandates of *Turner Broadcasting*.<sup>193</sup> In November of 1994, the Fourth Circuit in *Chesapeake and Potomac Telephone Company of Virginia v. United States*, analyzed Section 533(b) under an intermediate level of scrutiny and found it violated the

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<sup>192</sup> Congress may have chosen not to repeal or amend § 533(b) because it was concerned about the telephone companies' ability to cross-subsidize and eventually use their financial strength to create another monopoly. However, Congress may have been lobbied by the Cable Industry to keep § 533(b) in the Cable Act. We simply do not know what Congress' motivations for deciding not to heed the recommendations of the FCC, the Department of Justice, and their own subcommittee reports and repeal or amend § 533(b).

<sup>193</sup> *Turner Broadcasting Sys., Inc., v. FCC*, 114 S. Ct. 2445 (1994).

First Amendment.<sup>194</sup> These developments should alert both the President and Congress of the necessity to pass a telecommunications bill discarding 47 U.S.C. § 533(b) and establishing reasonable safeguards in its place that prevent telephone companies from unfairly competing via cross-subsidization between local telephone and video programming service. Otherwise, if the Supreme Court declares 47 U.S.C. § 533(b) unconstitutional, the regulatory safeguards necessary to prevent cross-subsidization and to promote ownership diversity among video programmers may not be provided.

The cable industry has argued that Section 533(b) is narrowly tailored to facilitate the government's substantial interest in a content-neutral manner that does not prevent telephone companies from providing video programming outright. Section 533(b) allows telephone companies to conduct a minimal percentage of video programming to areas other than those they serve with local telephone service, or in their own locality through an unaffiliated media outlet. The court in *Ameritech Corporation v. FCC* rejected this argument stating, "that [the above] reasoning is akin to telling the *Chicago Tribune* that it may distribute a newspaper everywhere but in Chicago, or that its ability to communicate is not significantly curtailed by its having to publish its news stories in other publications."<sup>195</sup> Therefore, it is likely that Section 533(b) is not a valid time, place, or manner restriction on speech.

Finally, it is interesting to note that the cable industry has arguably developed into several local monopolies. In an attempt

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<sup>194</sup> *Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994).

<sup>195</sup> *Ameritech Corp. v. United States*, 867 F. Supp. 721, 737 (N.D. Ill. 1994) (citing *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1975) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)))).

to preserve the cable industry's monopolistic posture in modern-day cable broadcasting, Turner Broadcasting challenged the constitutionality of the "must carry" provision of the 1992 Cable Act, arguing that the provision was not narrowly tailored to achieve a substantial or important governmental interest. The Supreme Court only ruled that the "must carry" provision be analyzed under the *O'Brien* intermediate scrutiny standard. The cable industry is now using the same First Amendment arguments television broadcasters were utilizing against them in an attempt to uphold Section 533(b) of the Cable Act.

If appearances hold true, the cable television industry has grown fond of its virtual monopoly over local video programming and is reluctant to give it up. It argues that it should not be compelled to carry local network television broadcasters because that violates its First Amendment rights, but then advocate violation of telephone companies' First Amendment rights because those companies would have an unfair advantage in competition. The FCC has stated that it believes it can prevent cross-subsidization and promote diversity of ownership among video programmers if telephone companies are allowed to compete.<sup>196</sup> Furthermore, there is no valid reason to prefer one form of monopoly over the other. If Congress' true goals are to promote competition and encourage ownership diversity, it should repeal Section 533(b) before the Supreme Court does to ensure that these goals are met.

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<sup>196</sup> See *Video Dialtone Order*, 7 F.C.C.R. 5781, 5847 (1992).

