CABLE TELEVISION

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After a hesitant start, America's courts appear ready to grapple with how the First Amendment should apply to the emerging "information age" technologies—cable television, satellites, electronic publishing, and telephone services. These fast-developing technologies increasingly provide information that Americans value as "speech"—and are even displacing newspapers in the types of speech that the First Amendment most protects. But they remain subject, as newspapers are not, to extensive and growing government regulation.

The Courts Enter the Fray

In January the Supreme Court will hear oral argument in *Turner Broadcasting System* v. *FCC*, a First Amendment challenge to the 1992 Cable Act's requirements that cable operators carry the signals of certain local public and commercial television stations.

Congressional proponents of these "must-carry" provisions of the act argued that cable systems must be prevented from using their market power to harm competitors, especially small broadcast stations, and that consumers often have to rely on cable systems to deliver stations' broadcast signals. Opponents argued that the must-carry provisions are restrictions on speech that would be intolerable if applied to newspapers. President Bush cited this concern when he vetoed the Cable Act (the only Bush veto Congress overrode), and Congress set up a special judicial review mechanism to resolve the constitutionality of the must-carry provisions. *Turner* is the result.

Even if the Supreme Court somehow ducks the larger issues in *Turner*, other cases wait in the wings. In August a federal trial court held that the First Amendment prevents enforcement of a federal statute that limits entry of local telephone companies into the cable television industry. Soon thereafter another federal judge upheld the rate regulation provisions of the 1992 Cable Act against constitutional attack while striking down others on First Amendment grounds.

These cases will turn largely on their particular facts, but the choice of general principles will more broadly affect these industries. That choice depends, in part, on how the new technologies implicate the First Amendment.

THE FIRST AMENDMENT

The First Amendment Interest

Courts have traditionally given newspapers and publishers of magazines and books the highest degree of First Amendment protection. Government may regulate publishers or restrict their "speech" only for the most compelling reasons, and then only in the most limited fashion (though publishers are subject to generally applicable restrictions such as income taxes or antitrust laws).

Radio and television broadcasters, in contrast, have less First Amendment protection. The government may not only determine who can operate a broadcasting station, but also impose certain restrictions on the content or balance of the broadcast information, even extending to broadcasters' role in elections. The courts have reasoned that because the electromagnetic spectrum allocated to broadcasters to transmit their signals is a limited resource, the government has considerable latitude in shaping the use of that spectrum.

Until the late 1970s the developing information technologies raised few First Amendment issues. Cable television initially functioned mostly to retransmit broadcast television signals to homes that could not receive them. Telephone companies largely confined themselves to carrying their customers' messages. Satellite broadcasting barely existed. The personal computer revolution had not yet moved beyond engineers' garages.

Even so, courts in the mid-1970s refined two First Amendment principles that would prove quite important to the developing technologies. In a case involving the *Miami Herald*, the Supreme Court invalidated a Florida statute that required newspapers to publish replies of political candidates to certain attacks or editorials by the newspaper. The Court reasoned that the statute punished a particular category of speech and also indicated that the First Amendment protects a newspaper's "editorial discretion" in choosing what to publish. In another case, the Court held that a New Hampshire citizen could not be forced to display the state motto—"Live Free or Die"—on his license plate because the First Amendment prohibits the government from compelling a citizen to publish or endorse a particular message.

These principles, along with traditional First Amendment protections, assumed growing importance as new technologies increasingly performed many of the functions of traditional media such as newspapers and broadcasters. By the early 1980s cable television systems had become in many communities a principal source of video programming—and carried both television station signals and other news, information, and arts channels. Owners of cable systems increasingly produced as well as transmitted programming. Satellite broadcasting, especially to the home dish market, also provided a range of information and entertainment. With increasing use of personal computers in businesses and homes, electronic publishing and distribution boomed. And after the break-up of the Bell System, telephone companies sought to provide complex services built around information transmission.

As these new technologies began to resemble and displace traditional media, their claims to First Amendment protection increased. A cable system operator, for example, acts in many respects like a newspaper publisher. That publisher has a variety of sources for filling the newspaper's pages: the newspaper's own staff, syndicates or news services such as The Associated Press, and advertisers.

Similarly, the cable operator can fill the increasing number of cable channels by producing programming, buying programming, or selling space on the cable system to advertisers or others. In this manner, cable operators have a strong claim to being part of the "press" protected by the First Amendment. In addition, the publisher and operator in determining the content of their respective information products exercise similar "editorial discretion."

Regulation of Cable Systems

Two types of regulation of cable systems have given rise to First Amendment claims. The first type involves "exclusive franchises" granted by cities to local cable television systems. Cable systems are franchised, or licensed, by local governments that control the access to city property necessary to build and operate a cable system. Many franchises were granted only to a single cable system. Would-be competitor cable companies claimed that the exclusive franchise is like a flat prohibition on additional speakers and that a local government has no more right to bar a second cable system than it does to bar a second city newspaper.

In 1986 the Supreme Court considered and then sidestepped these issues in a First Amendment case brought by a cable company against a city's exclusive franchising practice. The court noted that cable systems appeared to perform functions that gave them a First Amendment interest, but declined to decide whether that interest should be evaluated under the standards applicable to newspapers, those applicable to broadcasting, or some other set of standards. The case

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was returned to the trial court so that a greater factual record could be developed.

First Amendment questions also arise from requirements that cable systems set aside channels for particular types of programs or programmers. For example, federal law requires cable systems to devote certain channels to programming for educational and governmental purposes and to leave other channels to programmers not affiliated with the cable system. As noted, *Turner* involves one type of this requirement.

Cable operators, in their current court challenges, not only claim the status of newspapers, but also invoke the First Amendment principles developed by the courts in the 1970s. Like the New Hampshire driver, they want to be free from "compelled" speech in the form of having to carry channels or broadcasts not of their own choosing. And, like the *Miami Herald*, they claim that the government has impermissibly interfered with their "editorial discretion." Other information providers, such as satellite broadcasters and telephone companies, whether providing information that they select or carrying others' messages, have available to them similar claims in different contexts.

As the courts address these claims over the next several years, identifying a protected "speech interest" will be only half the problem. Equally important, and far less settled, is how to analyze the government's actions even if they do affect that speech interest.

Three broad strategies for analyzing this issue exist. The first is that traditionally applied to television and radio broadcasters; the second, that applied to economic regulation; and the third, that applied to newspapers and individual speakers. The approaches are not wholly exclusive, and courts could adopt nearly innumerable variations and combinations of them. But how the courts choose among them will have dramatic consequences for the range of permissible governmental regulation and for the types and sources of information available to the public.

The Broadcasting Strategy

One widely touted approach is to analogize the new information technologies to television and radio broadcasting and to invoke something akin to the "spectrum scarcity" of broadcasting to justify broad forms of government regulation.

For example, cable television is arguably a "bottleneck" monopoly because alternative forms of delivering video signals are rarely practicable, and thus a cable television system presents a limited range of available channel capacity in a manner similar to the limited broadcasting spectrum. The local telephone company's monopoly over wire service to the home may be analyzed similarly. And many new technologies, including satellite broadcasting and various "wireless" transmission technologies, in fact use the electromagnetic spectrum to deliver information.

This approach would allow widespread regulation of who may deliver information and even, in certain circumstances, of the content of the transmitted messages. It would support, for example, a revived "fairness doctrine"—a rule once imposed by the Federal Communications Commission, and now the subject of renewed congressional interest—that required broadcasters to present "balanced" coverage of important issues of the day. The rationale also underlay the Supreme Court's approval several years ago of minority broadcasting ownership preferences to support "diversity" of broadcast views.

The difficulties with this approach are twofold. First, the intellectual foundations of the "scarcity" rationale itself are weak. In economic terms, the spectrum is no more "scarce" than any other good. And consumers' ability to receive information from video tapes, cable programmers, satellite programmers, and personal electronic communications—not to mention traditional print sources—makes it difficult to maintain that the government must regulate television and radio to ensure that citizens receive a suitable mix of information.

Second, the scarcity rationale threatens to allow extensive regulation of nearly *all* information sources. If the government could control the provision and content of material transmitted over cable and telephone wires as well as through developing technologies employing the electromagnetic spectrum, there would be little that it could not regulate.

On the other hand, disavowing important elements of the scarcity rationale may prompt a revolution in the regulation of broadcast and radio. That would hardly be all bad. But it also portends enormous changes in the allocation of broadcast licenses and the oversight of broadcasters. The traditional ways of doing business may be swept aside in an important industry far sooner than is generally anticipated.

Economic Regulation

Another strategy is to distinguish between regulation designed to curb competitive abuses and regulation undertaken for other purposes. Under this approach, courts would uphold regulations proven to address the types of market power abuses currently remedied by the antitrust laws.

This approach would rely by analogy on several Supreme Court cases that have upheld particular applications of the antitrust laws to newspapers. In a variety of contexts, the Court has also indicated that the antitrust laws further First Amendment values by fostering competing sources of information.

This second strategy would allow the government considerable latitude to regulate certain competitive practices, but would bar regulation designed to affect the content of the transmitted message or to favor one class of speakers over another for reasons unrelated to competition. This approach would find favor with those who believe that the new information industries should have many of the protections of the print media, but not with those who believe that the public interest requires government oversight of the control and nature of information.

A definitional problem complicates this strategy. As experience in this area of regulation repeatedly indicates, many groups simply recast special pleading as

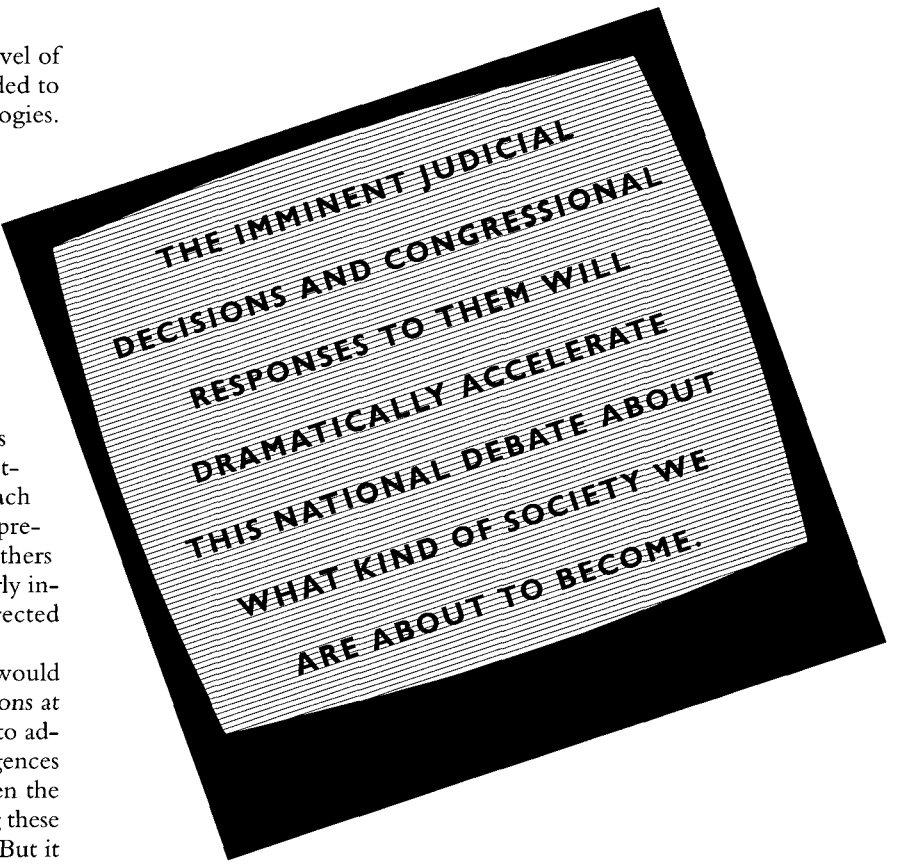
a demand to be free from "anticompetitive" practices. This strategy would require active judicial oversight to ensure that legislators did not invoke competitive rationales to justify preferences for favored groups or aggressively regulate groups whose messages were out of favor. Courts would also have to ensure that regulated entities were left with ample opportunities to communicate.

The Newspaper Analogy

The final approach would extend the highest level of First Amendment protection—that now accorded to newspapers—to the new information technologies. Such protection would permit government to regulate these industries only in limited circumstances and for the most compelling and clearly indicated reasons. Any regulation of the content of the information transmitted would be prohibited, as would many regulations that singled out particular industries.

The greatest uncertainty in applying traditional First Amendment principles in this manner would be in determining whether Congress could craft rules designed to prevent anticompetitive conduct. Some advocates of this approach would limit permissible regulation to enforcing preexisting and general antitrust laws, while others would allow greater leeway for regulations clearly independent of the messages conveyed and directed solely to preventing anticompetitive conduct.

The more extreme version of this strategy would bar government from a range of regulatory actions at precisely the time that regulators are struggling to address various mergers and technological convergences taking place in the information industries. Given the pervasiveness of government failure in regulating these industries, this result could have some benefits. But it could well overturn a range of rate and structural regulations—for example, even the various measures governing traditional telephone company activities—that are an integral and widely accepted element of government oversight.



Values

Years will pass before an accepted and general way of analyzing these First Amendment issues emerges. Although judges will determine many of these issues, in an important sense the issues are not distinctly legal.

The legal tradition provides support for each of the strategies outlined above, but in the end does little more than point us to relevant concerns. The rest is a matter of determining which values we as a society hold most dear and what vision of government we embrace. At a minimum, the First Amendment should remind us that if we are to err, we should do so by questioning the promise of government regulation and by allowing government fewer rather than greater powers. The imminent judicial decisions and congressional responses to them will dramatically accelerate this national debate about what kind of society we are about to become. ■

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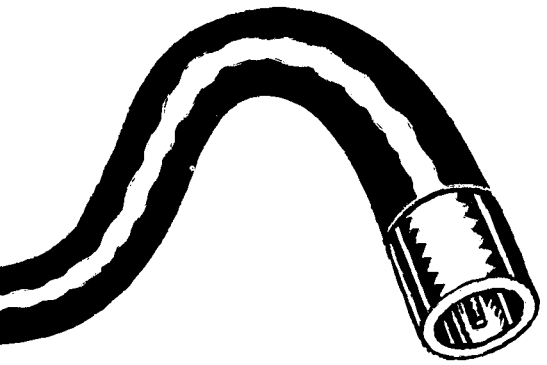
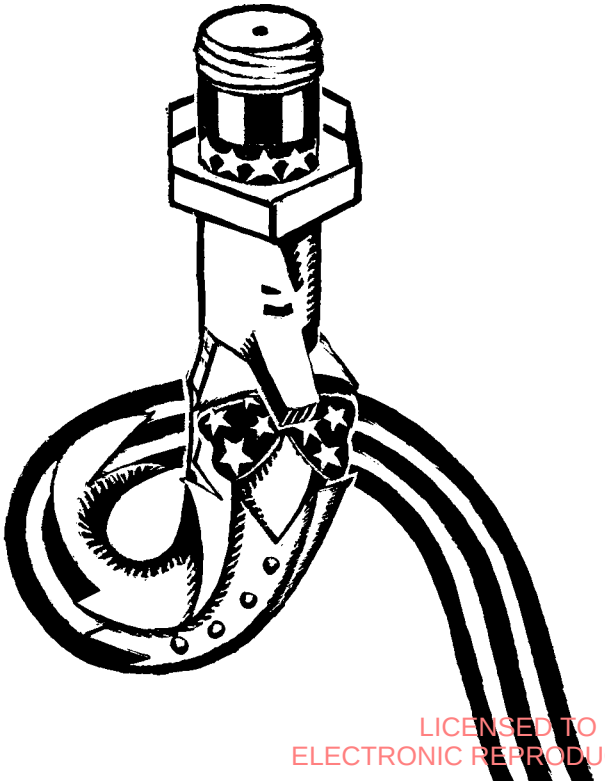


PROMOTING COMPETITION AND THE PUBLIC INTEREST



Over the past decade the telecommunications marketplace has experienced both explosive growth and intense industry pressure toward concentration. Through it all, Congress has tried to keep the market competitive to guarantee affordable and high-quality telecommunications for the American consumer.

Some observers of congressional efforts, whether to promote competition to AT&T in the long-distance market or, more recently, to promote competition in the cable industry, urge government to get out of the way of the largest companies so they can "compete" freely. This "let the marketplace decide" mentality, however, misses the point that the cable market has not and structurally cannot evolve into a competitive market without some regulatory structure to ensure that new competitors and entrants can compete freely.

The 1984 Cable Act

In 1984, when Congress deregulated the cable television industry and took the power to regulate rates out of the hands of local authorities, it expected that emerging competition in the video marketplace from wireless and satellite-based technologies would result in reasonable rates for cable service, improved customer services, and diversity in programming. The ensuing years were not to bear out that expectation.

With deregulation, the cable industry saw a period of unprecedented growth. Between 1984 and 1992 cable subscribership rose from 37 million to 57 million. The percentage of homes passed by a cable wire rose from 71 percent in 1984 to 97 percent in 1992. The number of programming services grew exponentially. Cable evolved from its roots as an antenna service to a video medium in its own right. Cable's arrival as a full-fledged competitor changed the entire face of the video market and, with its second stream of income from subscriber revenues, fundamentally altered the economics of video programming distribution.

The price consumers paid for this transformation, however, was steep. In a series of studies, the General Accounting Office (GAO) documented that in the years following cable deregulation, rates for cable service and equipment increased at more than three times the rate of inflation. A 1990 Consumers' Research study found that in areas where only one cable company existed, fewer channels were provided on average (33 as against 40) and the cost per channel was a third higher than in areas with competition.

The Wireless Cable Association reported that cable rates in 110 localities where microwave distribution systems existed were an average of 30 percent lower than in areas where the cable operator had an unchallenged monopoly. In 1990 a Department of Justice estimate confirmed what many consumers had long suspected, that up to half of basic rate increases since deregulation reflected monopoly power to charge above-competitive prices.

Cable industry customer service standards also failed to keep pace with the needs of a growing subscriber base. Growing customer service complaints underscored

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