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Will the Telephone Companies Join the Scramble for Multi-Communications Services - An Analysis of Chesapeake and Potomac Telephone Company v. United States

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WILL THE TELEPHONE COMPANIES JOIN THE SCRAMBLE FOR MULTI-COMMUNICATIONS SERVICES? 
An Analysis of Chesapeake and Potomac Telephone Company v. United States

The original Star Trek series introduced children growing up in the 1960's to some never-before-seen, fantastic technological wonders. For years, that generation has been waiting for those wonders to become accessible to the average person. Although technology has not yet advanced to the point where the phrase "Beam me up, Scottie"\(^1\) will result in instantaneous transportation to a specified destination, today's society may have reached the era of a multi-communications system comparable to that used by Lieutenant Uhura\(^2\) on board the Starship Enterprise\(^3\) (although, of course, not an intergalactic communications system).

Through such a system, users can access "[e]lectronic games, first-run movies, newspapers, home shopping, reference libraries, medical diagnostic services, [and] video mail."\(^4\) They can also "buy books, pay bills, play poker against people in other parts of town and book airline reservations. A small camera atop the TV even enables them to make video phone calls to a similarly equipped family."\(^5\)

This multi-communications package—a combination telephone, television, and computer system—has been referred to as teleputers.\(^6\)

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2. Uhura was the communications officer on the Starship Enterprise. John C. Kuehner, *Star Trek to Mentor Art Gallery; Actress Who Played Uhura Promotes Prints*, PLAIN DEALER (Clev.), Dec. 11, 1993, at 1B.
3. The television series, Star Trek, featured the Starship Enterprise and was aired from 1966 to 1969. *Id.* In addition, there were also six movies based on the same concept. *Id.* NBC originally ran the 79 episodes of the series. Isabel Forgang, *Captain's Log Hits Bookshelves; William Shatner Records 'Star Trek' History*, ARIZONA REPUBLIC, Nov. 3, 1993, at E1. The reruns of the series are currently showing on BBC. Harrington, supra note 1.
4. Joshua Quittner, *Online to A Revolution; The Amazing—and Some Say Ominous—New World of TV, Telephone and Computer Is Heading Your Way*, NEWSDAY, July 18, 1993, at 4. Quittner speculates that such a method of communication, which he refers to as teleputers, may occur before the end of this century or may be delayed until the next century. *Id.*
5. *Id.*
6. *Id.*
personal communication services ("PCS"),\textsuperscript{7} or interactive and video data services ("IVDS").\textsuperscript{8} As recently as July of 1993, the reality of such a system finally appeared to be in the immediate future.\textsuperscript{9} Even President Clinton, referring to this multi-communications system when discussing the "Information Highways," the system that would transport such data, seemed to believe that it would be developed very soon.\textsuperscript{10}

During the summer of 1993, computer companies were already developing the necessary hardware to send and receive such data.\textsuperscript{11} The question, though, was how to transmit the information to the average consumer.\textsuperscript{12} Traditionally, information was disseminated via airwaves and via cables. However, no provisions had been made for the airwave transmission of this multi-communications type of data, and Section 533(b) of the Cable Communications Act of 1984 (the "Act")\textsuperscript{13} prohibited local telephone companies from directly transmitting "video programming" (through cross-ownership) in their service areas. Therefore, there seemed to be a stalemate on the development of this multi-communications package.

In mid-1993, though, the Federal Communications Commission ("FCC") announced that certain airwaves would be available through wireless systems (such as cellular telephones) for PCS\textsuperscript{14} and IVDS.\textsuperscript{15} At approximately the same time, in 	extit{Chesapeake and Potomac Tel. Co. v. United States}\textsuperscript{16} ("Chesapeake and Potomac"), a Virginia district court

\begin{itemize}
\item \textsuperscript{8} John Eckhouse, \textit{FCC Awarding Interactive TV Rights by Lot}, \textit{S.F. Chron.}, Sept. 15, 1993, at D1.
\item \textsuperscript{9} Quittner, \textit{supra} note 4.
\item \textsuperscript{10} \textit{See Information Highway May Get Crowded, Hill Finds}, 3 \textit{Predicasts} No. 14 (1993). Even though these systems seem inevitable, some skeptics were more cautious than the President about how quickly it would be instigated due to a lack of public policy, affordability, and accessibility for most households. Quittner, \textit{supra} note 4.
\item \textsuperscript{11} Quittner, \textit{supra} note 4.
\item \textsuperscript{12} Quittner, \textit{supra} note 4.
\item \textsuperscript{13} 47 U.S.C. § 533(b) (1988). It also prohibits the telephone companies’ affiliates from using their "channels of communications" for the transmission of "video programming." \textit{Id.} § 533(b)(2). The FCC may allow a waiver to this prohibition if such video programming is for an FCC-defined rural area or if the video programming would not be otherwise accessible to the telephone company’s subscribers. \textit{Id.} § 533(b)(3)-(4).
\item \textsuperscript{14} Lazzaresci, \textit{supra} note 7.
\item \textsuperscript{15} Eckhouse, \textit{supra} note 8.
\item \textsuperscript{16} 830 F. Supp. 909 (E.D. Va. 1993).
\end{itemize}
judge held that Section 533(b), prohibiting cross-ownership, was unconstitutional.\(^\text{17}\)

The *Chesapeake and Potomac* case is vital to the average consumer since most households in the U.S. have telephone systems and/or cable television hookups.\(^\text{18}\) This multi-communications system could be directly transmitted into the home through the cables of one of these existing lines. The district court's holding, however, is vulnerable to reversal through appellate review. In fact, due to its significance for both the telephone and cable television industries, the Chesapeake and Potomac Telephone Company ("C & P"), expects this case to be appealed, probably all the way to the U.S. Supreme Court.\(^\text{19}\)

This Note will first discuss the background of Section 533(b) and of *Chesapeake and Potomac*.\(^\text{20}\) Next, this Note will address the legal issues of standing,\(^\text{21}\) C & P's First Amendment rights,\(^\text{22}\) and the resulting level of scrutiny.\(^\text{23}\) Last, this Note will analyze several weaknesses of the district court's holding.\(^\text{24}\)

I. BACKGROUND

A. Section 533(b) of the Cable Communications Act of 1984

Section 533(b) of the Act formalized the 1970 FCC regulation prohibiting cross-ownership of telephone and community antenna television services ("CATV," the term for cable television in those early days).\(^\text{25}\)

\(^{17}\) 47 U.S.C. § 533(b).

\(^{18}\) *Chesapeake and Potomac*, 830 F. Supp. at 932.


\(^{20}\) Telephone interview with Wiley R. Wright, Attorney, Hazel & Thomas, P.C. (Sept. 9, 1993). The significance of the case to both industries is shown by the fact that the National Cable Television Association, Inc. was a party to the case as an intervenor-defendant and that 33 amici curiae, many of whom were associated with one of the two industries, submitted briefs to the court. *Chesapeake and Potomac*, 830 F. Supp. at 911-12.

\(^{21}\) See infra part I.

\(^{22}\) See infra part II.A.

\(^{23}\) See infra part II.B.

\(^{24}\) See infra part II.B.2.

\(^{25}\) See infra part III.

\(^{26}\) The Communications Act of 1934, 47 U.S.C.A. § 214, allowed the FCC to require licensure for all new telephone companies. The FCC decided after conducting studies that it would prohibit cross-ownership through the granting of such certificates. Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to
The FCC's major concern was to encourage competition in the then infant CATV market\(^ {27} \) and to protect emerging CATV companies from the unfair advantages the telephone companies would have as legally protected monopolies.\(^ {28} \)

When Congress passed the Act, the House Committee Report stated that the intent of the Act was "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers."\(^ {29} \) Therefore, with the exception of substituting the term "video programming" for CATV, the FCC regulations became codified law.

From 1986 to 1988, the FCC conducted a study that examined whether the cross-ownership restriction was still necessary.\(^ {30} \) It decided that the restriction had served its purpose of preventing the telephone companies from establishing monopolies in cable television programming.\(^ {31} \) A continued restriction, however, would inhibit the growth of other services, such as those offered through a PCS system, that could be provided by either the telephone or cable television companies.\(^ {32} \) Since the FCC held that "nonstructural alternatives to the prohibition . . . appear likely to control telephone companies' potential anticompetitive conduct,"\(^ {33} \) it implied that Section 533(b) should be eliminated. Instead, non-legislative, administrative regulations promulgated by the FCC could control the unfair advantage the telephone companies might have through their status as legally protected monopolies.

At this time, the FCC did not recommend to Congress that Section 533(b) be repealed. As the only "nonstructural alternatives" actually specified by the FCC were "accounting safeguards,"\(^ {34} \) its main concern appeared to be that the telephone companies would gain a competitive edge in the PCS marketplace by subsidizing their video programming with income from their monopolistic activities. For example, the telephone companies could use their telephone technicians, paid through their


\(^{28}\) Id.

\(^{29}\) Id. at 5857.

\(^{30}\) Id. at 5866.

\(^{31}\) Id.
monopolistic telephone services, to provide services for their cable television services. As a result, the telephone companies' overhead for their cable television services would be lower. They could then pass those savings on to their customers through reduced prices, thus undercutting their competition.

In 1992, after further study, the FCC specifically recommended "to Congress that it amend the Cable [Communications] Act [of 1984] to permit the local telephone companies to provide video programming directly to subscribers in their telephone service areas."\textsuperscript{35} However, as the FCC was still concerned that the telephone companies would take advantage of their status as monopolies to subsidize their video programming services, it strongly recommended that the FCC be given discretionary power to utilize any "nonstructural safeguards" necessary to prohibit such "anticompetitive abuses."\textsuperscript{36}

Since the publication of the 1988 study, Congress has considered the recommended changes in eight hearings and in six bills without taking any conclusive action.\textsuperscript{37} Therefore, when C & P filed its case against the federal government, it was still subject to the provisions of Section 533(b).

B. Chesapeake and Potomac Telephone Co. v. United States

C & P, a subsidiary of Bell Atlantic Corporation, is the local telephone company for Alexandria, Virginia.\textsuperscript{38} C & P obtained written verification from both Alexandria's mayor and city attorney that, absent Section 533(b)(1)-(2) which prohibits video programming by local telephone companies and their affiliates in the service areas of those telephone companies, C & P would be eligible to apply for a cable television franchise from the city.\textsuperscript{39} It then filed this lawsuit challenging Section 553(b)(1)-(2) as violative of its First Amendment rights.\textsuperscript{40}

C & P claimed that, prior to 1991, the effect of Section 533(b) on its right to provide video programming was minimal since the consent decree from AT&T's divestiture had already prevented the Baby Bells from

\textsuperscript{35} Video Dialtone Order, 7 F.C.C. Rec. 5781, 5847 (1992).
\textsuperscript{36} Id. at 5850-51.
\textsuperscript{37} See Chesapeake and Potomac, 830 F. Supp. at 914-15 nn.9-10.
\textsuperscript{38} Id. at 911.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 910-11.
providing such services. After the consent decree’s prohibition was lifted in 1991, Section 533(b) became the only bar to C & P’s entering the cable television market in Alexandria.

Alexandria had only one cable television supplier which provided cable services/access to over ninety percent of Alexandria’s households. Both parties also stipulated that this supplier was the “eighth largest multiple-system operator in the country, and the world’s largest cable TV management company.” Besides having a virtual monopoly on the cable television services in Alexandria, the supplier had also recently been granted FCC licenses to test radio-based telephone services in Alexandria. As a result, Section 533(b) effectively protected the supplier from competition with C & P in cable television services but did not prohibit the supplier from entering into competition with C & P in telephone services.

II. LEGAL ISSUES IN CHESAPEAKE AND POTOMAC

A. Standing

The government defendants (the “Government”) first challenged C & P’s standing to bring a suit in federal court. Claiming that C & P’s suit failed both the causation and the redressability aspects of standing, the Government requested that C & P’s claims be dismissed without further discussion of the merits.

The Government described the causation and redressability requirements for standing as follows:

[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly trace[able] to the challenged action of the defendant, and not

41. Plaintiffs’ Memorandum in Support of Their Motion for Summary Judgment at 17; Chesapeake and Potomac, 830 F. Supp. 909 (E.D. Va. 1993) [hereinafter Plaintiffs’ Memorandum]. In the 1980’s, to settle an antitrust lawsuit filed by the Justice Department, AT&T agreed to the breakup of its local telephone services. Show: Morning Edition, National Public Radio, Jan. 8, 1992, available in NEXIS Library, Omni File. The resulting local telephone companies are commonly referred to as the Baby Bells. Id.

42. Plaintiffs’ Memorandum at 18.

43. Id.

44. Id.

45. Id. at 19.


47. Id. at 28.
... the independent action of some third party not before the court. Also, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.

The Government claimed C & P's alleged injury was "the inability to provide cable television service to subscribers in Alexandria." In order to provide such services, C & P had to obtain the requisite franchise from Alexandria. Therefore, the Government argued that the injury was "traceable" to the "lack of a franchise" and not to Section 533(b) and that the ability to obtain such a franchise was dependent on the approval of the Virginia State Corporation Commission. As C & P was considered a "public service company," the Government claimed that Virginia's laws would not have allowed C & P to provide cable television services even in the absence of Section 533(b). The Government cited General Tel. Co. of the Southwest v. United States as federal authority which held that "it cannot be said that the furnishing of [cable television] services is incidental to the function of providing local telephone service." Since C & P could not gain the approval of the Virginia State Corporation Commission to provide cable television services, the Government claimed that C & P's injury was not due to Section 533(b) but rather to the inability of the state commission to grant the franchise.

To show that the injury would not be redressed even if Section 533(b) were found unconstitutional, the Government compared this case to Warth v. Seldin. In Warth, low-income plaintiffs challenged local

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49. Defendants' Memorandum at 28.
50. Id. at 28, 32.
51. Id. at 28-29.
52. Id. at 28-31 & n.24. Public service companies were, under state law, only allowed to provide their public services and any services "incidental to" those public services. The government discusses the relationship between Virginia Code § 56-77, § 56-232, and § 56-76 to conclude that C & P was a "public service company." Id. at n.24.
53. 449 F.2d 846 (5th Cir. 1971). As federal authority, General Tel. is non-binding on Virginia's state courts in deciding which services are "incidental," but it is persuasive evidence requiring rebuttal by C & P. See Defendants' Memorandum at 31.
55. Defendants' Memorandum at 28, 32.
56. 422 U.S. 490 (1975). See also Defendants' Memorandum at 27.
zoning regulations which allegedly caused prohibitively high housing costs. The Supreme Court held that, absent the zoning laws, the "economics of the area housing market" would continue to result in expensive housing costs. Consequently, the plaintiffs would still be unable to afford housing unless low-income residential structures were built. As the plaintiffs had not shown that any third parties were interested in building such housing, there was not a substantial probability that their injury would be redressed by striking down the zoning ordinances involved.

In Chesapeake and Potomac, the Government claimed that, even if Section 533(b) were eliminated as an obstacle, C & P still had not proven that there was a substantial probability that it would receive a franchise from Alexandria. C & P had not shown that the city had any intention of granting it a franchise; it merely had shown that Alexandria would consider its application for one. To prove its injury was redressable, C & P should have submitted its application for a franchise to Alexandria, which the Government claimed would not violate Section 533(b). Thus, only after C & P received the franchise would the redressability aspect of standing be satisfied.

The district court rejected the Government's arguments regarding C & P's lack of standing. Referring to Arlington Heights v. Metropolitan Housing Development Corp., the district court held that the challenged statute did not have to be the sole obstacle but must be an absolute barrier for C & P to satisfy the causation issue. Even if C & P obtained the

57. Id. at 502-05.
58. Id. at 506.
59. Id. at 504-08.
60. Defendants' Memorandum at 32-33.
61. Id. at 32.
63. Defendants' Memorandum at 32.
64. Id. at 34 n.33. The Government stated that in January 1992, a local telephone company had been granted a franchise, and the telephone company subsequently sought a waiver for § 533(b)(1) pursuant to § 533(b)(4). Id.
66. Chesapeake and Potomac, 830 F. Supp. at 916 (In footnote 11, the district court supports its findings: Arlington Heights, 429 U.S. 252, 261 . . . (standing exists where challenged statute was 'absolute barrier' to plaintiff's goal, despite the fact that invalidation of statute would not 'guarantee' achievement of that goal); see also Nyquist v. Mauclet, 432 U.S. 1, 6 n.7 . . . (1977), (unnecessary for plaintiff to apply for and be denied a loan in order to establish his standing to challenge the statute making him ineligible for the loan, 'in light of the certainty of [the loan's] denial' under
requisite approval of the Virginia Corporation Commission, Section 533(b) would absolutely bar it from receiving a franchise. In addition, the district court referred to *Regents of University of Cal. v. Bakke* to support C & P's satisfaction of the redressability aspect since "standing exists for [a] plaintiff unconstitutionally deprived of [the] opportunity to compete for a benefit, without proof that, in the absence of the challenged program, [the] plaintiff necessarily would have received the benefit." Therefore, the district court held that C & P had standing.

The district court further held that to require the plaintiffs to pursue a franchise "in the face of a federal statute that expressly forbids them from engaging in the activity in question" would be "formalistic and wasteful of governmental and societal resources." Citing *Lujan v. Defenders of Wildlife*, the district court stated that causation and redressability are essentially rhetorical issues once it has been established that the plaintiff is affected by the action:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

**B. First Amendment Rights of the Chesapeake and Potomac Telephone Company**

The second and most important legal issue of *Chesapeake and Potomac* involved C & P's First Amendment rights. C & P contended that its First Amendment rights to free speech were directly inhibited by this statute since it could not express itself through video programming:

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the statutory scheme).

*Id.*


69. *Id.* at *23.


therefore, Section 533(b) was subject to a strict scrutiny level of review\(^\text{72}\) or at least an intermediate level of review.\(^\text{73}\) However, both the Government and the intervenor-defendant, National Cable Television Association, Inc. ("NCTA"), argued that this statute was an economic regulation with only an incidental effect upon C & P's First Amendment rights to free speech, thereby subjecting the statute to only a rational basis level of scrutiny.\(^\text{74}\)

The Government and NCTA also argued that the government could regulate certain businesses if the purpose of such regulation was to promote competition, resulting in a greater dissemination of information (one of the purposes behind the First Amendment free speech clause).\(^\text{75}\) In such a case, those businesses could not use the First Amendment to prohibit the government from regulating them.\(^\text{76}\) To support this argument, both the Government and NCTA relied heavily on Associated Press v. United States.\(^\text{77}\)

In Associated Press, the government, under the authority of federal antitrust laws, regulated the plaintiff's distribution and membership practices because those practices gave members a "competitive advantage over their rivals."\(^\text{78}\) The Court deferred to the government's interests and its means for attaining those goals since "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."\(^\text{79}\)

In determining that heightened scrutiny was required in Chesapeake and Potomac, the district court did not address this specific argument. Instead, it emphasized that "'[c]able television . . . is engaged in "speech"
form of the telephone companies' speech or (2) an economic regulation directed at non-speech conduct, but inflicting a substantial, and disproportionate, incidental effect on the telephone companies' right to engage in expressive activity.85 However, the telephone companies were only restricted from transmitting video programming rather than prohibited from transmitting any visual image. Since this restriction required an examination of what was being transmitted, it was a content-based regulation and the traditional categories did not apply.86 Prior to 1986, the district court probably would have determined that Section 533(b) was content-based and thus subject to a strict level of scrutiny. In 1986, though, the U.S. Supreme Court in City of Renton v. Playtime Theatres, Inc.87 determined that a regulation having "secondary effects" or legislative goals, justified by reasons "unrelated to the suppression of free expression,"88 was content-neutral and thereby only subject to an intermediate level of scrutiny, not strict scrutiny.89

Although the district court in Chesapeake and Potomac expressed reservations about allowing "a legislative act curtailing First Amendment rights . . . to be evaluated based on its justification rather than on its operation,"90 it could find no U.S. Supreme Court case limiting the rule from Renton.91 Instead, it determined that the U.S. Supreme Court in Discovery Network92 had refused to do so.93 Therefore, the district court felt compelled to follow the Renton rule.94

In examining the legislative reasons for enacting Section 533(b), the district court determined that the two advanced by the Government—"(1) protecting diversity of ownership of communications outlets and (2) promoting competition in the video programming market"—were not related to the speech being denied C & P.95 The district court decided, then, that Section 533(b) fell under the Renton rule and was subject to an intermediate level of scrutiny as a regulation that was "'justified' on

85. Chesapeake and Potomac, 830 F. Supp. at 922 (footnotes omitted).
86. Id. at 922-23.
88. Id. at 48.
89. Id. at 47-49, 51-52.
90. Chesapeake and Potomac, 830 F. Supp. at 925.
91. Id.
92. 113 S. Ct. at 1517.
94. Id.
95. Id. at 924, 926.
under the First Amendment." As a result, C & P's First Amendment freedom to communicate through this medium was abridged by Section 533(b). Therefore, the district court held that a rational basis level of scrutiny was not sufficient since even economic regulations were subject to a higher level of scrutiny if they "disproportionately impact[ed] entities engaged in speech protected by the First Amendment." To determine whether Section 533(b) should be subject to an intermediate or a strict level of scrutiny, the court examined whether the section was content-neutral or content-based.

1. Section 533(b)—"Content-Neutral" or "Content-Based"

A law is content-neutral when the determination as to what speech is being regulated does not require an examination of the contents of that speech whereas a content-based regulation is one that requires an examination of the contents of the speech to determine whether that speech may be regulated under the law. For example, in City of Cincinnati v. Discovery Network, Inc., the U.S. Supreme Court determined that a local law banning newsracks with commercial publications from public property was content-based since the contents of the newsrack (whether it contained commercial publications or not) had to be examined in order to determine whether the newsrack was banned. If the ordinance had banned all newsracks, then the regulation of those newsracks would not have been dependent upon what type of speech they contained (here commercial speech), and the regulation would have been considered content-neutral. In Chesapeake and Potomac, the district court determined that:

[A] statute restricting telephone companies from providing video programming to customers within their service areas would fall within one of the two content-neutral categories either as: (1) a time, place, and manner restriction on the

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83. 113 S. Ct. 1505 (1993).
84. Id. at 1517.
grounds unrelated to the suppression of the speech." Therefore, the district court used the intermediate level of scrutiny test of United States v. O'Brien.97

2. The O'Brien Test

In O'Brien, the U.S. Supreme Court held that a law was constitutional:

[I]f it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.98

In subsequent cases, the Court has upheld the O'Brien test.99 In Chesapeake and Potomac, the district court applied the O'Brien test: the law is constitutional if its "provisions 'are justified without reference to the content of the regulated speech, ... they are narrowly tailored to serve a significant governmental interest, and ... they leave open ample alternative channels for communication of the information.'"100 The court found that, since Section 533(b) fell under the Renton rule,101 the first prong of the O'Brien test was automatically satisfied.

In its arguments, C & P addressed the two governmental interests that the district court had accepted. The district court found that the federal government had two interests when it passed the Act which were unrelated to the suppressed speech: "protecting diversity of ownership of communications outlets" and "promoting competition in the video programming market."102 C & P argued that these interests were not constitutionally

96. Id. at 926 (citation omitted).
98. Id. at 377.
100. Chesapeake and Potomac, 830 F. Supp. at 917 (quoting Ward, 109 S. Ct. at 2753) (citation omitted).
101. See supra notes 84-86 and accompanying text.
protected since the House of Representatives relied on a U.S. Supreme Court case\textsuperscript{103} that allowed Congress to regulate broadcast television cross-ownership due to the scarcity of airwaves.\textsuperscript{104} C & P implied that cable television was significantly different from broadcast television because its transmissions were sent through cables which could be laid anywhere in seemingly limitless numbers. Since scarcity was not an issue for cable television, Congress was not empowered to regulate this industry.\textsuperscript{105} Although the district court did discuss the scarcity rationale when addressing the level of scrutiny to be utilized,\textsuperscript{106} it did not discuss whether the federal government’s interests were constitutionally protected. The district court assumed that these government interests were protected.\textsuperscript{107}

The district court then separated the second prong, “narrowly tailored to serve a significant government interest,”\textsuperscript{108} into two parts: “a significant government interest” and “narrowly tailored” to serve that government interest.\textsuperscript{109}

The district court held that the second governmental interest of promoting competition was not legitimate since cable companies were already miniature monopolies and Section 533(b) actually inhibited competition by prohibiting a potential competitor—the telephone companies—from entering into the market.\textsuperscript{110} However, the district court found that the first governmental interest of diversity of ownership was “significant” based on \textit{FCC v. National Citizens Commission for Broadcasting}.\textsuperscript{111}

To determine if the regulation was “narrowly tailored” to implement this governmental interest, the district court had to decide if the “restriction on alleged First Amendment freedoms [was] no greater than is essential to the furtherance of that interest”\textsuperscript{112} but did not “burden substantially more speech than [was] necessary.”\textsuperscript{113}

\textsuperscript{104} H.R. Rep. No. 934 at 32-33.
\textsuperscript{105} See Plaintiffs’ Memorandum at 51-53.
\textsuperscript{106} Chesapeake and Potomac, 830 F. Supp. at 918-19.
\textsuperscript{107} See supra notes 84-86 and accompanying text.
\textsuperscript{108} Chesapeake and Potomac, 830 F. Supp. at 926.
\textsuperscript{109} Id. at 927-28.
\textsuperscript{110} Id. at 927.
\textsuperscript{111} Id. at 927-28. \textit{See also} FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 801-802 (1978) (the regulation of broadcast media was held to be in the public’s interest).
C & P argued that Section 533(b) restricted its First Amendment speech more than necessary by not satisfying the aim of diversity since diversity was not actually promoted.\textsuperscript{114} C & P contended that since cable television companies were already monopolies and Section 533(b) prevented the telephone companies from entering the market in competition with them, the actual effect of the restriction was "precisely the opposite of 'diversity.'"\textsuperscript{115} Thus, C & P argued that Section 533(b) did not further the governmental interest at all; therefore, the regulation was not narrowly tailored to serve the governmental interest. In support of its contention, C & P cited reports from the FCC,\textsuperscript{116} the Department of Justice,\textsuperscript{117} and the National Telecommunications and Information Administration ("NTIA") of the Department of Commerce,\textsuperscript{118} all of which concluded that removing Section 533(b)'s prohibition would further the goal of diversification.\textsuperscript{119}

The district court, in \textit{Chesapeake and Potomac}, focused on the multiplicity of alternatives available to Congress instead of addressing C & P’s argument regarding diversity.\textsuperscript{120} It acknowledged that a law was constitutional even after a court decides that the government’s interest could be adequately served by some less-restrictive alternative.\textsuperscript{121} In contrast, "the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’"\textsuperscript{122} Despite its acknowledgment of these U.S. Supreme Court holdings, the court concluded Section 533(b) failed the second prong since:

\[\text{[E]ffective alternatives exist that would allow telephone companies to enter the cable television market, yet prevent the evils allegedly targeted by @ [sic] 533(b), the Court finds that @ [sic] 533(b) is not "narrowly tailored to serve a significant}\]

\textsuperscript{114} Plaintiffs’ Memorandum at 55-57.
\textsuperscript{115} Id. at 55.
\textsuperscript{116} Video Dialtone Order, 7 F.C.C. Red. 5781, 5850 (1992) ("we conclude that the ability of local telephone companies to have significant ownership interests in [cable television] . . . will further increase competition in the video market.").
\textsuperscript{117} Reply Comments of the United States Department of Justice, Telephone Company-Cable Television Cross-Ownership Rules, CC Dkt 87-266 at 44 (Mar. 13, 1992) (the Department of Justice recommended that § 533(b) should be changed “to allow another competitor to enter the video programming market.” Plaintiffs’ Memorandum at 55-56).
\textsuperscript{118} NTIA, Telecommunications in the Age of Information, REPORT at 234 (1991).
\textsuperscript{119} Plaintiffs’ Memorandum at 55-56.
\textsuperscript{120} Chesapeake and Potomac, 830 F. Supp. at 928-32.
\textsuperscript{121} Id. at 928.
\textsuperscript{122} Ward v. Rock Against Racism, 491 U.S. 781, 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).
governmental interest,” but instead, that the statute “burdens substantially more speech than is necessary to further the government’s legitimate interests.”

In its analysis, the district court discussed three alternatives. First, Section 533(b) did not prohibit video transmission (only video programming) by the telephone companies in their service areas. Second, telephone companies, therefore, could cross-subsidize such video transmissions. Last, regulatory oversight by the FCC could prevent anticompetitive activity even in the absence of Section 533(b). Of these three, only the third really showed how the “government interest . . . would be achieved less effectively absent the restriction.”

The district court easily determined that the third prong of the O'Brien test was also satisfied. It stated: [P]laintiffs remain unfettered in their ability to communicate by any means other than video programming. Moreover, plaintiffs may directly provide video programming to anyone residing outside their area of service. Finally, plaintiffs may communicate with subscribers inside their service area through video programming by producing such programming and marketing it to broadcasters and cable operators. Plaintiffs are by no means “silenced” by the operation of @ [sic]-533(b).

According to the district court, Section 533(b) was unconstitutional since it was not “narrowly tailored” to the legitimate legislative interest.

123. Chesapeake and Potomac, 830 F. Supp. at 932 (citations omitted in original).
124. In other words, the telephone companies could send video images through their wires in their service areas, but they could not be the originators of such images (for example, a cable company could pay a telephone company to send its programming over the telephone company’s wires, but the telephone company could not buy or create programming and transmit it over its own wires in its service areas). Id. at 926.
125. Although a telephone company could not transmit its own programming over its wires in its service areas, it could fund programming in the service areas of other telephone companies. In addition, telephone companies could create programming and sell it to cable television companies. Id.
126. Id. at 929-31.
129. Id. at 926.
130. Id.
III. ANALYSIS OF THE DISTRICT COURT HOLDING

Taking into account the several thousands of pages the district court considered before rendering an opinion, its decision is a fairly straightforward analysis. Despite its relative simplicity, however, the district court’s rationale for its holding may be overturned by the appellate court based on one of the following: (1) Section 533(b) is economic legislation with only an incidental effect on C & P’s First Amendment rights and thus subject to a rational basis test instead of the O’Brien intermediate scrutiny test; (2) Congress has the right to legislate activity that would suppress speech; (3) the second prong of the O’Brien test, as elucidated in Ward, was applied incorrectly, thereby making Section 533(b) constitutional; (4) Section 533(b) would fail Ward’s requirement that the legislation “promote[] a substantial government interest that would be achieved less effectively absent the regulation”; or (5) the governmental interest—to encourage diversity—was either unconstitutional or not effectively promoted through Section 533(b).

A. Section 533(b) is Economic Legislation Subject to a Rational Basis Test

The U.S. Supreme Court usually defers to Congress in its review of the government’s interests, and the means used to attain those interests, for economic legislation which only incidentally affects free speech. Although this argument is valid under a rational basis standard of review, the U.S. Supreme Court usually requires some support for the legitimacy of the governmental interests and the efficacy of the means under a higher standard of review. Therefore, the issue is whether the appellate court will view Section 533(b) as economic legislation subject only to a rational basis standard of review or whether it will impose a higher standard of review.

An examination of U.S. Supreme Court cases would not offer the appellate court a solution to its dilemma. For example, in Minneapolis Star, the U.S. Supreme Court held that the “Federal Government can subject newspapers to generally applicable regulations without creating

131. Id. at 912.
133. Chesapeake and Potomac, 830 F. Supp. at 932.
constitutional problems.” In Arcara v. Cloud Books, Inc., however, the Court stated, in deciding Minneapolis Star, “[w]e imposed a greater burden of justification [than that of rational basis] on the State even though the [restriction] was imposed upon a nonexpressive activity, since the burden . . . fell disproportionately . . . upon the shoulders of newspapers exercising the constitutionally protected freedom of the press.”

When reviewing the FCC’s rule on newspaper-television station cross-ownership in FCC v. National Citizens Commission for Broadcasting (“NCCB”), though, the Court did not use any heightened level of scrutiny in unanimously rejecting the plaintiff’s First Amendment claim.

Since there are not any U.S. Supreme Court cases concerning telephone-cable television cross-ownership regulations, the appellate court will have to determine if this type of First Amendment restriction on telephone companies is similar to Minneapolis Star or NCCB. In Minneapolis Star, the economic legislation imposed a disproportionate burden whereas in NCCB the economic regulation did not result in heightened scrutiny. Although the district court held that Section 533(b) was economic legislation imposing a disproportionate burden on C & P’s First Amendment rights, the appellate court may arrive at a different conclusion since this is a case of first impression.

B. Congress’ Right to Legislate Activity that Suppresses Speech

The U.S. Supreme Court has consistently ruled against First Amendment claims when the regulation being challenged seeks to regulate activity that would inhibit freedom of speech. In Associated Press, the

137. Id. at 704.
139. Id. at 801-02.
140. In General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971), the Fifth Circuit Court of Appeals decided that a telephone-cable cross-ownership restriction was “reasonable” and “bears a rational relationship” to the governmental interest of diversity. Id. at 859-60. In General Tel., however, the plaintiff did not raise the First Amendment issue.
Court held that "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."\(^{143}\) Under such circumstances, the Court will defer to the government's interests and its means for attaining those interests.

In *NCCB*, the Court expanded this holding to other forms of mass media. It found the restriction on newspaper-television station cross-ownership a "reasonable means"\(^{144}\) of promoting diversification in mass communications and refused to utilize a heightened level of scrutiny.\(^{145}\)

When reviewing *Chesapeake and Potomac*, the appellate court may find that a restriction on telephone-cable cross-ownership restriction is just as "reasonable [a] means" of promoting diversification as a restriction on newspaper-television station cross-ownership. Also, since the government's goal of diversification "is not only consistent with, but is actually supportive of the values underlying the First Amendment,"\(^{146}\) it is not likely that the appellate court will impose a heightened level of scrutiny.

C. The Second Prong of the O'Brien Test Was Incorrectly Applied

As stated previously,\(^{147}\) the district court found Section 533(b) unconstitutional since it failed the second prong of the *O'Brien* test—the restriction must be "narrowly tailored to serve a significant governmental interest."\(^{148}\) Despite its detailed analysis, the district court did not correctly apply the second prong in this case. It found one alternative that would actually satisfy the governmental interest of ownership diversity without requiring a restriction of C & P's First Amendment rights. According to *Ward*, however, finding a less restrictive alternative does not make the restriction unconstitutional.\(^{149}\)

In fact, the U.S. Supreme Court in *Ward* seemed to defer to the legislature when it stated that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial governmental interest.'"\(^{150}\) If the appellate court follows the Supreme Court's lead, it too will defer to the government's interest in promoting diversity, thereby

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143. 326 U.S. at 20 (footnote omitted).
144. 436 U.S. at 802.
145. Id. at 780-802.
146. Id. at 800 n.18 (citing *Associated Press*, 326 U.S. at 20).
147. *See supra* notes 102-27 and accompanying text.
149. *Ward*, 491 U.S. at 800.
150. Id. at 799 (citing United States v. Albertini, 472 U.S. 675, 689 (1985)).
finding that Section 533(b) is constitutional and overturning the district court's decision.

D. The Governmental Interest Could Be Achieved as Effectively Absent the Regulation

As previously discussed, the trial court's application of the second prong of the O'Brien test was inaccurate since the U.S. Supreme Court held in Ward that a law is narrowly tailored if it promotes a substantial government interest. If the appellate court finishes its analysis at this point, it will uphold the constitutionality of Section 533(b), thus overturning the district court's decision.

By adding the phrase "that would be achieved less effectively absent the regulation," though, the Supreme Court has established one loophole for invalidating the restriction. Although the district court did not utilize this loophole, it did find that regulatory oversight by the FCC could prevent anti-competitive activity even in the absence of Section 533(b). This regulatory oversight would promote diversity as well or even better than Section 533(b) does. As a result, the appellate court might find that this alternative of regulatory oversight fits this loophole and affirm the lower court's decision for this reason rather than for the reasons stated by the district court.

E. The Governmental Interest Is Unconstitutional or Ineffectively Promoted Through Section 533(b)

The appellate court may also uphold the district court's finding despite its inappropriate application of the second prong. It might decide that one of C & P's two additional arguments about the governmental interest is valid: (1) that the governmental interest itself is invalid or (2) that the regulation does not "serve" the governmental interest of diversity of ownership at all since the effect of Section 533(b) is to eliminate diversity.

151. See supra part C.
152. See supra part C.
153. See supra part C.
154. See supra notes 110-16 and accompanying text.
155. See supra notes 91-97 and accompanying text.
156. See supra notes 104-09 and accompanying text.
Despite C & P’s persuasiveness, the appellate court will probably not be convinced by the latter argument. If Section 533(b) is eliminated, the worst case scenario will be that, instead of having cable companies controlling the video market and telephone companies controlling the telephonic market, the telephone companies will control both the telephonic and video markets. Thus, some diversity, limited as it is, is promoted by Section 533(b) and will be lost in the absence of the regulation.

However, it is possible that the appellate court might find C & P’s former argument more persuasive. The district court’s decision that the governmental interest was significant was based on a broadcast media case which found the congressional regulation of such media is constitutional based on the scarcity of available airwaves.\textsuperscript{157} Arguably, as the district court recognized, video programming transmitted through cables is not limited in the same manner as airwaves.\textsuperscript{158} The appellate court may then be convinced by C & P’s argument that Congress should not be able to regulate the cable industry in the same manner that it may broadcast media and may uphold the lower court’s holding.

IV. CONCLUSION

Recently, Bell Atlantic, the parent company of the plaintiffs, C & P,\textsuperscript{159} acted upon the district court’s decision by announcing its merger with TCI, one of the nation’s largest cable companies, on October 13, 1993.\textsuperscript{160} This $33 billion merger, touted as the “biggest in history,”\textsuperscript{161} is expected to “erase [the] boundaries between phone and cable services.”\textsuperscript{162} Although the details of the merger should be completed in

\begin{footnotesize}
159. See supra note 29 and accompanying text.
160. Kevin Maney, Tech Today, Tomorrow / Technology’s Hope: Is It Simply Hype?, USA Today, January 26, 1994, at 1B. Bell Atlantic believes it will be able to obtain the relevant antitrust waivers from the government to allow the completion of this merger. Julie Vorman, Bell Atlantic <BELN> Sees TV Box Standard in 5 Yrs, Reuters, Limited, January 26, 1994, at Financial Report, available in LEXIS, News Library, Curnws File. In addition, Bell Atlantic is confident that it will receive the requisite long-distance waiver, necessary due to the consent decree from AT&T’s divestiture which prohibits the Baby Bells from participating in the long-distance market. Telephone Interview with Paul Miller, Corporate Relations, Bell Atlantic, in Richmond, Va. (January 27, 1994).
162. Vorman, supra note 160.
\end{footnotesize}
approximately two weeks, the actual merger between the two corporations will probably not be completed until the beginning of next year.\textsuperscript{163}

Despite the potential reversal of the \textit{Chesapeake and Potomac} holding, Bell Atlantic plans to establish a test program this spring that will install "TV set-top software boxes" in approximately 2,000 homes\textsuperscript{164} in Alexandria.\textsuperscript{165} Seemingly anticipating success in Bell Atlantic's test program, TCI plans to manufacture about one million of the "set-top" boxes later this year.\textsuperscript{166}

Southwestern Bell has joined Bell Atlantic in anticipating that Section 533(b) will no longer be a barrier to the development of a multi-communications system.\textsuperscript{167} Aside from these telephone companies, other companies—notably Time Warner, US West, Pacific Telesis, Microsoft, Blockbuster, and Viacom—have also joined the scramble to enter the multi-communications market.\textsuperscript{168}

If the district court's holding in \textit{Chesapeake and Potomac} stands, a multi-communications package may be available through local telephone companies and cable television companies within the next two years.\textsuperscript{169} Public opinion and interest seem to be in favor of the changes that are occurring as a result of this case.\textsuperscript{170} However, the case could be reversed upon appeal due to one of the flaws in the district court's holding.

\begin{itemize}
  \item \textsuperscript{164} Vorman, \textit{supra} note 161. These boxes "will allow consumers to select movies and other programs for entertainment and news, as well as . . . for a host of services such as banking and shopping." Vorman, \textit{supra} note 160. An additional feature of these boxes is that consumers will be able to use VCR-like functions like fast forward, rewind, and stop on the programs they select. Vorman, \textit{supra} note 161.
  \item \textsuperscript{165} Maney, \textit{supra} note 160.
  \item \textsuperscript{166} Vorman, \textit{supra} note 160. The exact date when TCI will commence manufacturing is unknown since technical experts have yet to decide on the specifications for the type of "set-top" box that the entire industry will use. \textit{Id}.
  \item \textsuperscript{167} Maney, \textit{supra} note 160. Southwestern Bell anticipates a successful conclusion to its attempts to buy Hauser Communications and a portion of Cox Cable. \textit{Id}.
  \item \textsuperscript{168} \textit{Id}. Time Warner is establishing a test program in Orlando, FL; US West and Pacific Telesis are building fiber-optic networks; Microsoft is researching software; and Viacom and Blockbuster plan to merge this year and may be joined by Paramount Communications. \textit{Id}.
  \item \textsuperscript{169} Carla Lazzareschi, \textit{Ruling May Spur Phone-Cable Competition}, \textit{L.A. TIMES}, August 25, 1993, at A1. Despite the optimism expressed last year, Bell Atlantic does not expect an industry standard for their "set-top" boxes to emerge for at least five years. Vorman, \textit{supra} note 160. Microsoft does not anticipate any real progress towards a multi-communications system for five to ten years. Maney, \textit{supra} note 160.
  \item \textsuperscript{170} \textit{See supra} notes 1-15 and accompanying text.
\end{itemize}
Even if the district court decision is reversed upon appeal, a multi-communications system will still be available through airwave transmissions due to the FCC's decision to auction off or disperse by lottery airwaves for PCS and IVDS systems.\textsuperscript{171} It might even be available through local telephone and cable television companies if Congress repeals Section 533(b) as recommended by the FCC\textsuperscript{172}—the initiation of such services would simply be delayed until Congress acts.

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\footnotesize{171. Lazzareschi, \textit{supra} note 7; Eckhouse, \textit{supra} note 8.}
\footnotesize{172. Video Dialtone Order, 7 FCC Rcd. at 5847.}