OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION:	UNITED STATES, FEDERAL COMMUNICATIONS COMMISSION, AND JANET RENO, ATTORNEY GENERAL, Petitioners v. CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA VIRGINIA, ET AL.; and NATIONAL CABLE TELEVISION ASSOCIATION, INCORPORATED, Petitioner v. BELL ATLANTIC CORPORATION, ET AL.
CASE NO:	No. 94-1893, No. 94-1900
PLACE:	Washington, D.C.
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PAGES:	1-60

CORRECTED VERSION

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, FEDERAL :
COMMUNICATIONS COMMISSION, AND :
JANET RENO, ATTORNEY GENERAL, :
Petitioners :
v. : No. 94-1893
CHESAPEAKE AND POTOMAC :
TELEPHONE COMPANY OF VIRGINIA, :
ET AL.; :
and :
NATIONAL CABLE TELEVISION :
ASSOCIATION, INCORPORATED, :
Petitioner :
v. : No. 94-1900
BELL ATLANTIC CORPORATION, :
ET AL. :

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Washington, D.C.

Wednesday, December 6, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10::07 a.m.

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APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

LAURENCE H. TRIBE, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 94-1893, United States, the Federal Communications Commission v. Chesapeake & Potomac Telephone Company, and National Cable Television v. Bell Atlantic Corporation.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE PETITIONERS

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

The provision of the 1984 cable act that the court of appeals invalidated in this case, section 533(b) of title 47, addresses the special capacity for anticompetitive conduct by local telephone companies in providing cable television programming services.

That capacity stems from the telephone companies' established situation as regulated monopolies, and it is important to an understanding of the premises on which the commission and Congress have acted over the past 25 years not to elide too quickly over what it has meant for these companies to be regulated monopolies.

They have in the first place been given exclusive franchises. The Virginia statutory provision

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involved in this case is set forth in footnote 17 of the district court's opinion on page 77a of our appendix to the petition, which protected them against competition in providing the telephone services regulated on the basis of recovery of costs and return of capital type of rate regulation still the predominant and historically the only form of rate regulation to which they've been subject in providing telephone service.

They've been granted rights of way sometimes with the exercise of the power of eminent domain to construct poles and conduits and their expenses in doing so have been included as part of their rate base, so at the advent of modern cable television, when it was replacing the old community antenna systems, they had not only the capacity to provide wire service throughout the communities they served, they had the wires in place to virtually every residence and a capacity through their Government-sponsored regulated monopolies to stifle the development of any other competition in the provision of cable television services.

I don't mean to suggest that any of this was in any way improper. Obviously, this served an important public interest on the part of the local governments in assuring that telephone service would be available throughout their communities at a reasonable cost.

But the situation with which the commission and Congress have been concerned is that not just through their legitimate use of the advantage that they had were they in a position to stifle the development of others in providing these services, but they also would have the capacity incentive to use unfair competitive methods.

QUESTION: Mr. Wallace --

MR. WALLACE: Yes, sir.

QUESTION: All that is well and good, but to date has that changed, and are cable companies competitive with each other, or are they equally in the monopoly position, and are we just talking about monopolists versus monopolists?

MR. WALLACE: Well, there have been franchises granted to the cable companies. We're talking about an historical evolution of a provision --

QUESTION: I know it, but the evolution has taken place. The -- as I understand it, the cable industry is no longer at its infancy state, it is a developed industry with over 90 percent saturation, right?

MR. WALLACE: Well, I not only do not deny it, I'm not in a position to deny it, because it's part of the basis of the commission's Third Report and Order, which has been issued --

QUESTION: Well, doesn't the Third Report, the

basis of the Third Report conflict with much of what you've just said, as to the development ability of the cable industry?

MR. WALLACE: What I have said is more of a historical nature in showing the development of regulation in this field, and why the 1984 act with its provision for good cause waivers, that was intended to have flexibility so that the commission could adapt it to changing situations in the industry and changing technologies, was a legitimate response to the congressional concerns, which were to try to nurture a multiplicity of voices in the provision of these services and to prevent unfair --

QUESTION: Mr. Wallace, if we're going to get into history, wasn't it proposed to Congress and rejected early in the history of cable to prevent cable from becoming a monopoly by making the cable owners common carriers only and preventing them from programming, which would have made cable much more open to any kind of programming not within the control of a single monopolist? That was rejected, right?

MR. WALLACE: That was a --

QUESTION: So you have cable monopolies in 99 percent of localities now, is that right?

MR. WALLACE: The commission is undertaking --

QUESTION: Yes.

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MR. WALLACE: -- right now to try to do something constructive about this --

QUESTION: And the Government is concerned about monopoly power, having created this thing.

MR. WALLACE: Well, we were -- the concern at the outset with the 1970 commission study and regulations that were then adopted by Congress was that the telephone companies were in a position to preempt the entry of any other players into this at all. They were allowed to enter into this business but not in their own service areas where they had these artificial advantages as monopolists.

The whole idea was to bring other players in, with the telephone companies among those standing in the wings as potential competitors. We're talking about a longer view than -- the idea was, the motivating animation of this was that otherwise no one else would ever get into it, or there was a great danger of that.

QUESTION: Mr. Wallace, if the Government was worried that telephone companies would engage in unfair practices, why is it that the statute they passed just prohibited video programming instead of video transmission?

I mean, it just -- it's just so illogical to me.

MR. WALLACE: Well --

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QUESTION: Why did they select the most speech-restrictive approach, instead of saying we won't let phone companies transmit these messages?

MR. WALLACE: Well, we like to think of that as a form of more narrowly tailoring the restraint to the --

QUESTION: You mean, it's more narrowly tailored to just prohibit speech?

MR. WALLACE: To prohibit the conduct where there would be the greatest incentive as an economic matter for the telephone companies to engage in unfair competitive practices, including discriminatory self preference in the use of the essential facilities of the poles and the conduits as well as the cross-subsidization that is so very --

QUESTION: How does that --

MR. WALLACE: -- difficult to detect and monitor.

QUESTION: How does that work? That is, the thing I couldn't -- the -- in trying to understand this, the point that you seem to be making now, which was the point that I thought was the strongest for your side, was contained in Professor Owen's reply affidavit, where I think he agreed with Professor Kahn that really this problem of cross-subsidy, which seems to me your only

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rationale, doesn't really exist in respect to cross-subsidizing programming.

I.e., the programming, you can't easily hide the cost of programming in the cost of your telephone service. I mean, it's not very likely a regulator would think, right, the cost of producing Cecil B. DeMille's The Ten Commandments was part of the cost of picking up the phone. They're pretty easily separable. It's the communication part.

Then he says, but they wouldn't have the incentive to do it, to do this cross-subsidy on communication, unless they're allowed to go into programming, and then he stops, and that's the part I didn't understand. That is, why? Why? What do you mean, the incentive?

Why is there -- if you could make extra money by doing the cross-subsidizing of the two kinds of communication, why wouldn't you do it, irrespective of whether you're in programming? What does programming add to the incentive?

MR. WALLACE: They're not prohibited from being in programming in the sense of making a movie or a series undertaking through investment or activities in places where these things are made to make them for marketing to others. What --

QUESTION: Well, let's call it program editing.

MR. WALLACE: It's marketing programs the way a cable television company does that is the prohibition, putting together a package of programs mostly prepared by others, and marketing them directly to their -- the customers in their own service area that is the prohibition, and that is where the big profit is to be made in comparison with what they would get from enabling others to use their wires to transport and market their packages of programming.

QUESTION: How can that be cross-subsidized? Can you tell me that, Mr. Wallace? Give me an example of the cross-subsidy that might occur.

MR. WALLACE: Well, there --

QUESTION: What -- you know, what costs would be shifted over to the monopoly thing very readily --

MR. WALLACE: There would be many --

QUESTION: -- and that the regulator wouldn't be able to spot?

MR. WALLACE: There would be many common costs and cost allocation methods, as this Court recognized --

QUESTION: I know. You've said that. Give me an example, a real life -- you know, this.

MR. WALLACE: They would share capital equipment. They would share the fiber optic cable itself,

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costs of research and development, costs of administration of their telephone network, including the programming service, personnel costs, costs of raising capital --

QUESTION: Mr. Wallace, but I think you --

MR. WALLACE: All of this would have to be allocated.

QUESTION: And this doesn't happen with the cable companies, who are also rate-regulated?

MR. WALLACE: Well, but they are rate-regulated under Federal law now, but they don't have the problem of extending a regulated monopoly into an area that is less regulated --

QUESTION: Into programming?

MR. WALLACE: -- and having to allocate --

QUESTION: Into programming? Hasn't the Government not only not prohibited them from originating programming, but required them to originate programming? Is there no risk of cross-subsidy there, and was the Government totally unconcerned with that?

MR. WALLACE: Well, there may be some risk of cross-subsidization there, but the Government doesn't have to address every risk throughout the spectrum of society in order to be able to move one step at a time against risks --

QUESTION: It seems to me it's been very

unconcerned with all sorts of risks in this whole area, and suddenly it's picked out this one.

QUESTION: I'm just telling you I don't understand the argument. I don't understand how it's supposed to work. The telephone company charges me or you let's say $50, just like district cable, okay? Now, if it can in fact really charge an additional $5 on my telephone bill because it's somehow hidden, the regulator doesn't understand that this optic fiber which is necessary for the cablevision part isn't really necessary for the telephone part, but you fool them, so they could get $50 from me for the cable,and they push $5 on my telephone bill.

My question is, if they're so smart and can do that and fool everybody, why don't they do it, and if, in fact, they do do it, what is being in the programming editing part got to do with it?

Professor Owen says that, well, if they go into the programming editing part they'll have greater incentive to do it.

MR. WALLACE: Well --

QUESTION: Why? $5 is $5. If they can fool me now, they'll fool me then. What has the editing part got to do with this?

MR. WALLACE: If they undertake additional

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expenses of a substantial nature, they have more opportunity to shift the cost.

QUESTION: You mean, they're going to hide Cecil B. DeMille's Ten Commandments, which is their editing thing, and the regulators are so stupid that they're going to think that that programming business which has no common cost is really part of your telephone service? That would be pretty stupid regulating.

MR. WALLACE: Well, I'm not talking about producing the Cecil B. DeMille film.

QUESTION: The editing. The --

MR. WALLACE: I'm talking about marketing something to their same customers over their telephone wires the way the cable television market did to their customers, and what I'm saying is --

QUESTION: So it's a common cost.

MR. WALLACE: -- why they don't do it without having undertaken that, why they don't hide the same $5, as you put it, of expenses is because they don't have the expenses to hide.

QUESTION: So then you're making a common cost argument, and the problem with your common cost argument is all the affidavits in this, I think, even Professor Owen I think in the reply, concedes that Kahn is right that there aren't common costs.

MR. WALLACE: Well, I've mentioned a number of categories of common costs that would be difficult to allocate, and our case doesn't rest entirely on cross-subsidization. There is also the problem of discriminatory self preference in handling the facilities being used for their own benefit as well as for the benefit of others who are competing with them.

QUESTION: So that's an argument that basically says we, Congress, would prefer to have a monopolist, the cable company, exist today because then maybe, if the telephone company runs another line into your house, it will let three or four people use that line, but if, in fact, we don't have this statute, what it will do is only one person so will use the line, namely the phone company itself.

MR. WALLACE: Well --

QUESTION: Yes.

MR. WALLACE: -- this was taking a long-term view.

QUESTION: Is that the argument? Yes.

MR. WALLACE: You first had to establish somebody else --

QUESTION: Yes -- right.

MR. WALLACE: -- who could be in this industry with the phone company there. Then you evolved into the

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two-wire situation where there were actually two providers of wires to most of the residents.

QUESTION: I didn't find anywhere in the record anybody making this argument. I could understand this argument, but I didn't under -- I didn't see it anywhere.

MR. WALLACE: Well, it's developed through the history of commission regulation.

QUESTION: Where -- is there somewhere in the record where they're making it?

MR. WALLACE: I can't point to anything in the record in this case, but we have a long record of commission consideration of these matters, and the commission has, once the cable companies began to get established, they began to look to their wires as the best potential competitors to provide competing local telephone service.

QUESTION: Mr. Wallace, it would help me if you would clarify what the Government is defending now as consistent with the First Amendment. You set out the history very effectively, but I take it that the Government is no longer defending as consistent with the First Amendment a total prohibition, which is the principle thing that the statute did, or are you defending that?

MR. WALLACE: We're defending the statute, which

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in our view has always had just a presumptive bar in it with a provision for good cause waiver as situations changed and as the commission would find the waiver to be consistent with the procompetitive purposes of the statute, and --

QUESTION: Good cause including the fact that the statute is no longer needed, right?

MR. WALLACE: Well, it's not that the statute --

QUESTION: Is that a good cause, essentially? Isn't that part of your analysis? You know, things have changed so much that this statute really is not necessary any more.

MR. WALLACE: The commission --

QUESTION: Therefore we give you a good cause exception to the statute.

MR. WALLACE: The commission's Third Report and Order, recently adopted, does not leave the presumptive bar without bite?

QUESTION: You call it a --

QUESTION: Why? Why?

QUESTION: -- presumptive bar, but this waiver provision refers to, justified by the particular circumstances demonstrated by the petitioner. That doesn't read to me like a basis for the commission to have a general waiver. We waive for everybody provided they

meet these regulations.

MR. WALLACE: The commission has interpreted this, and we think very defensibly in its recent report and order, to say that they can define what circumstances will warrant a waiver and still require the particular applicant to show that that applicant meets those circumstances.

QUESTION: Do you have another instance where a waiver provision in a statute is interpreted to mean, going in you have a waiver if you meet these requirements, instead of, here's my particular situation, I would like a waiver because of something peculiar to my situation?

MR. WALLACE: Well, I can't say that one occurs to me off-hand, but it doesn't seem to me to be unique in administrative practice to define in advance what showing will entitle people to a waiver under a public interest standard of a provision that otherwise would apply, and those who do not meet those circumstance will not get a waiver. They --

QUESTION: It seems to me, Mr. Wallace, that in the First Amendment area, where I think this case is taking us, a standard list, or very amorphous waiver scheme, is quite inconsistent with our precedents.

I'm thinking of the police commissioner that has this open-ended discretion to allow you to parade or not,

and it seems to me that in a sense your waiver argument almost makes your case weaker from a First Amendment standpoint.

MR. WALLACE: I recognize there is First Amendment jurisprudence which says that those seeking to engage in expressive activity should not be subjected to standardless waivers.

In this case, the waiver is to be based on the taking account of the purposes of the presumptive bar itself, and those purposes were stated quite clearly in the original House report as to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets.

Those are legitimate purposes adverted to and -- with approval in this Court's opinion in the Turner Broadcasting case, not purposes that are in any way meant to suppress speech.

QUESTION: And that is the thrust and the purport of the Third Report and Order? Does it specifically contain that rationale?

MR. WALLACE: Yes, that because of both technological changes and changes in the nature of the industry, where the cable companies have developed from a fledgling industry to one well-established, competition can now be made a reality in this industry by -- and the

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new video dial tone system which in trial runs has been running 200 channels and can easily be doubled that and more provides opportunities to introduce several competitors.

And part -- while there was reluctance in the initial work of the commission on dial tone to permit the telephone companies to go beyond being carriers for programming for others, they've recognized in this report and order that both in order to preserve the constitutionality of the statute and to give the companies an incentive to make the heavy investment that you need to make dial tone, video dial tone a reality, that they should be allowed to participate, but not to the exclusion of other participants.

QUESTION: Well, does it boil down to this, Mr. Wallace, that in areas in nonrural areas where there is present cable competition, we can assume, you're suggesting to us, that the commission in fact will allow the phone companies into the business. Where there is no competition, we can assume, I take it, that they won't allow them into the business. Is that what it boils down to?

MR. WALLACE: Yes, except there --

QUESTION: So that the bite of the statute is, where there's no competition, the statute will continue to

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be applied, and where there is, it probably won't be.

MR. WALLACE: Well, that's not the only bite, or even the most important bite of the statute, because cable is well-established in most --

QUESTION: What's the important bite?

MR. WALLACE: -- in most parts of the country. The important bites are that they cannot acquire an existing cable company. They're only allowed to participate through video dial tone as a competitor, and --

QUESTION: But if the bite is going to be the justification, you're going to have a statute extraordinarily broader than anything necessary to accomplish that particular justification.

MR. WALLACE: Well, that's only -- and the rest of the bite is that they have to comply with the regulations that the commission is to adopt to safeguard against cross-subsidization and discriminatory self-preference and use of the video dial tone system itself.

QUESTION: And those regulations could be promulgated by the commission whether the statute stands or not, is that correct?

MR. WALLACE: Well, if the regulations --

QUESTION: Can't the commission issue regs addressed to the cross-subsidization problem whether the

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statute stands or not?

MR. WALLACE: It could -- it could prohibit these practices, yes, but it could not do it with the bite that the prohibition would have if someone's authority to engage in this lucrative business depended on agreeing to abide by the --

QUESTION: The bite is kind of an interrorum bite. In other words, if you don't agree to this, under the statute we can make it even more restrictive for you.

MR. WALLACE: Any of these conditions are subject to judicial review in themselves. Any conditions, any requirements that the commission will adopt can be reviewed in the courts. It isn't as if the commission has unreviewable sway over these companies, and there's also an agreement to share this capacity with other providers of service, that there is a common carrier aspect to this.

QUESTION: May I ask you a question, Mr. Wallace? Is it your view that appropriate regulations can avoid the cross-subsidization problem that allegedly motivated the enactment of the statute?

MR. WALLACE: Did you say can or can't avoid it?

QUESTION: Can.

MR. WALLACE: Not avoid it entirely. There's -- it's very difficult --

QUESTION: You're sort of in a dilemma, I

suppose. If you say it can avoid it, then we don't need the statute. If you say it can't avoid it, then the regulation -- you have all sorts of problems with the waiver.

MR. WALLACE: Well, we --

QUESTION: So your position is it can almost avoid it, I guess.

(Laughter.)

MR. WALLACE: The waiver allowing entry is a judgment made. It's a trade-off judgment often made by regulators and/or by Congress, or the commission acting pursuant to congressional authority, of how much risk is to be accepted in order to accomplish offsetting public benefits.

Obviously, there would be less risk of cross-subsidization, virtually no risk if they weren't allowed to participate, or a much lessened risk at the very least, but a judgment has to be made by someone as an industry evolves of when it is that the risk that remains is going to be outweighed by offsetting public benefits. That traditionally has not been the role of the courts in our system to make that calibration and decide when a change in the regulatory regime is ripe and should be made.

QUESTION: May I ask you another question that kind of runs through my mind? Let's assume for the moment

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that the statute was perfectly constitutional and was enacted. If that premise is accepted, do you think the situation could change in such a way that it would thereafter become unconstitutional?

MR. WALLACE: Yes. It could happen, and perhaps we were approaching that, and under the stimulus of the litigation that has been brought, the commission has now taken initiatives that make the waiver policy as applied more responsive to the changes that have occurred, but this was always something that they had authority to do.

QUESTION: That's an interesting concept. Does the opposite work? Can a statute that's unconstitutional at the outset be rendered constitutional over time? I mean --

MR. WALLACE: Well, I'm talking -- I don't mean on its face, and we're dealing here with a facial challenge.

I would say only in application, a statute -- and perhaps it would be unconstitutional only as applied under those circumstances, when the statute was constitutionally valid.

QUESTION: Are you saying that the regulation makes the case moot? If their case was valid when it was brought before the Fourth Circuit, aren't we entitled to hear it based on the assumptions that the Fourth Circuit

entertained?

MR. WALLACE: Well, it -- we suggested that the case be remanded to the Fourth Circuit to readdress it based on what the commission has now done.

QUESTION: And we declined that invitation.

MR. WALLACE: Yes. Yes, the Court did, but that still does not erase the fact that the legal landscape has been changed, and that under the Third Report and Order, it seemed to us that the respondents could have declared victory, although they're loath to do so.

QUESTION: Is there any authority justifying this agency and this sort of moving target theory of litigation?

MR. WALLACE: Well, we don't think of it as a moving target.

We think of it as admirably trying to respond to the admonition that when fairly possible statutes can be -- should be construed and, I think, applied to avoid serious constitutional questions.

QUESTION: -- law?

MR. WALLACE: If I may, I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Wallace.

Mr. Tribe, we'll hear from you.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE RESPONDENTS

MR. TRIBE: Thank you, Mr. Chief Justice, and may it please the Court:

I think I might begin, as Justice Thomas did, by pointing out that the Third Report and Order in 1995 fairly negated virtually everything that Mr. Wallace has suggested about why perhaps at one early time when there was only one wire into every home something like this might have made sense.

QUESTION: Mr. Tribe, is this a facial challenge?

MR. TRIBE: Yes, it is, Justice O'Connor.

QUESTION: And do we have to look at it for its validity as of the time it was enacted?

MR. TRIBE: Well, I think as in Baker v. Carr there are a few things that with changes can suddenly become wholly irrational, as this one did, but I think even if you try to turn the clock back to 1984, this law would have completely failed to fit the alleged objective, so I don't think you need to reach the moving target question, because it seems to me this law has always been facially invalid, and facially invalid for reasons that I think were implicit in one of your questions to Mr. Wallace.

QUESTION: Well then, would it be appropriate

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for us to examine the constitutionality as of the date of enactment, and then just ignore all this subsequent history?

MR. TRIBE: No. I think that would be inappropriate, Justice Stevens, because the test established in this Court's decisions in Coors, Edenfield, and Turner and Ibanez basically asks does the law, as we have it, materially advance, even under intermediate scrutiny, the alleged goal? Is there a real harm, does this really solve it, and the fact that at one time there might have been a problem that it might have solved would be interesting history.

QUESTION: Well, but things change. I mean, if it's a facial challenge, as I understand it, there has to be no situation to which it can be applied.

MR. TRIBE: That's right, and there is none.

QUESTION: Well, we can say there could be a situation if, you know, everything went back to the way it was, that would be a situation that --

MR. TRIBE: A meteorite hit --

QUESTION: Whatever. I don't --

MR. TRIBE: I mean, my --

QUESTION: That's why there's a stock market. Things go up and things go down.

MR. TRIBE: Yes, but it is our position, Justice

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Scalia, that because of the way this law is written and because of what it means, there really are no circumstances in which it could be constitutional.

QUESTION: All right. Well, I'm willing --

MR. TRIBE: And that relieves the --

QUESTION: Even when it was initially enacted. Isn't that --

MR. TRIBE: That's right.

QUESTION: And you're willing to defend that position.

MR. TRIBE: And I'm willing to defend that position.

QUESTION: Let me just --

MR. TRIBE: It makes no sense.

QUESTION: -- modify the question to this extent. Suppose the justices were persuaded that, given the fact situation in 1984, or back to 1970, whatever dates you use, and given the precedent on you can't have cross-ownership of TV stations and newspapers and things like that, that looking at it at that time it should have been upheld if there had been immediate challenge, would that require that justices reach the same conclusion today?

MR. TRIBE: No, I don't think so, Justice Stevens.

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QUESTION: So you think there can be a moving target.

MR. TRIBE: I think that the Constitution is fixed. I think that the question whether a given law is justifiable necessarily depends on the circumstances, and the circumstances can change so substantially that the law on its face might never, in current circumstances, have any permissible application.

QUESTION: That's interesting. So things change, and it becomes facially invalid. What if they change again, does it become facially valid again, or does it --

MR. TRIBE: Well, since, Justice Scalia --

QUESTION: Congress has to repeal it, or it's sort of a -- I don't know, a time bomb there. You wait for circumstances to reawaken it, sort of like a --

MR. TRIBE: No -- like a sleeping giant.

QUESTION: -- a Snow White statute.

(Laughter.)

MR. TRIBE: Like the Night of the Walking Dead, you try to kill the statute and it won't rise.

QUESTION: No, it's a spring in use. It's a spring in --

MR. TRIBE: A spring in use.

(Laughter.)

QUESTION: Yes.

MR. TRIBE: Well, let me -- I think to get away from the question whether we can hypothesize any world in which the statute could have a constitutional application, it would be useful to focus on what the statute actually does, because some of what Mr. Wallace described about the statute when he said that it's sort of about ownership and so forth I think really has nothing to do with this statute.

And let me just focus on the fact that, as Justice O'Connor suggested, the statue as designed rather perversely targets one thing and one thing only, and that is speech. It is not a law against cross-subsidization. It is not a law that says, for example, when there is no competition, then we will let them in, because (b)(3) itself is an exception for that. That is, this law deals directly with the editing function.

It's true the prohibition was included in a part of the statute called ownership restrictions, but there's no dispute that this statute allows a telephone company to own video programs, to invest in companies that generate or require them, like Time-Warner, to own physical cable facilities such as Bell Atlantic does in Washington, D.C.

The one function this law prohibits any telephone company from participating in is the editorial

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function of deciding which video programming channels to carry -- is it going to be Disney, the Learning Channel, Discovery, Playboy? -- how the programs are going to be arranged, which to provide in preset time slots, which to provide on demand.

That's the way it's been interpreted. That's the way it's been enforced.

QUESTION: You say editing, Mr. Tribe. You don't mean the actual making of an individual show, but the choice between ones that have already been made.

MR. TRIBE: That's right, although it would certainly prohibit -- I mean, if we wanted, for example, not only to choose the shows, but wanted in addition to engage in a more active editorial function, that would also be prohibited if this was going to be provided directly to our customers.

Now, that --

QUESTION: Is that very likely that --

MR. TRIBE: Not likely, no.

QUESTION: -- Bell wants to go out to Hollywood and make some programs?

MR. TRIBE: Well, I would never predict, but that's not likely, I think.

The point, however, is that as this Court has repeatedly held in the Preferred opinion recently, in --

and Hurley and Turner, the function of deciding what to show and when is a core First Amendment function, and in saying that that is what telephone companies cannot provide to their subscribers, they can provide video transport, they can't provide the editorial function, the law is a complete misfire in terms of any objective it could ever have achieved even in 1970.

QUESTION: But what if the Congress might think editing is a very important function in the future, and the more editors the better, and at the moment we have one, because you only can have one where you have one integrated cable and editor. There's just one, the cable network, and you say, let's have two, why are we not having two.

MR. TRIBE: Sounds good to me.

QUESTION: Why couldn't Congress think, look, if they go into the business, AT&T, of putting that line in, we've got another line here. If we say they can be editors, there'll only be two. If we say they can't be editors, maybe there will be three, four --

MR. TRIBE: You've done something --

QUESTION: -- five, because they'll have no interest in not turning that line over to as many editors as want to come in.

MR. TRIBE: Well, the interest in somehow

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preventing any -- a particular set of --

QUESTION: It's the bird in the bush is worth giving up the bird in the hand. That would be the --

MR. TRIBE: Well, the point I guess is, first of all, in response to your earlier question, is there anything in the record suggesting that Congress theorized along these lines, there isn't. But secondly, the notion that by keeping a competitor like the telephone companies out you might somehow achieve something in the very long run is really quite irrational.

That is, the second -- their whole theory is that because there can be cross-subsidy of video transport, and because here you've got a captive market, the ratepayers, and we can pad the bills here and engage in predatory pricing, that this is a particularly dangerous editor, somehow, to let in.

But in response to your question, it's always puzzled me as well. How exactly does it work? Why does editing somehow change it? Money is money. If they can monopolize the video transport they'd be doing it today.

NCTA in its briefs points out that they have unique incentives to do that now because they think the telephone companies are afraid of the cable companies, so this law has nothing to do with the problem of taking a particularly powerful speaker and gagging him in order to

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prevent him from engaging in predatory abuses that will in the long run stifle diversity, because it doesn't eliminate the one thing that speaker could do, provide video transport that provides the alleged source of danger.

They in their briefs at various points say that it serves that function because the video transport market is regulated in price, but the video -- but the cable market isn't, and so you want to go into an unregulated market, but of course that's problematic, because it's false.

QUESTION: Can I ask you one other question?

MR. TRIBE: Sure.

QUESTION: And I may be the only one who's -- don't spend a lot of time answering it, but I'm nervous -- I don't fully understand the standard of review.

That is to say, what we have here really is classical economic regulation, and it happens to be economic regulation in an area where people are providing, like newspapers and other things, they are providing communication services which does involve -- but is suddenly this whole big economic area to be turned over to courts?

Because we're going to retreat from giving Congress quite a lot of discretion when it tries to deal

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with the structure of industries, and we're going to use the First Amendment -- other people in history have used other amendments to sort of go into economic regulation in great depth.

MR. TRIBE: I would --

QUESTION: You know what I'm thinking of.

MR. TRIBE: I think I do, Justice Breyer.

QUESTION: Yes.

MR. TRIBE: Certainly the -- if there were a rule of general applicability like the one in Lorain Journal or the one in Associated Press v. United States, and it incidentally, somebody argued, restricted expressive opportunity, we would not be arguing here for some version of strict scrutiny, although even under the O'Brien test there's intermediate scrutiny.

Rules about the structure of an industry, about who may own what, are really quite different. The NCCB case deals with that in the case of broadcasters and newspapers. This isn't even a rule about who may own what. It's a rule about who may edit.

It's not even, as in Turner, a must-carry rule. It's a may-not-edit rule.

QUESTION: What's the provision? Remembering the history of the court, and the use, say, of freedom of contract as a method of --

MR. TRIBE: Sure.

QUESTION: -- going in. All right, what is the rule when you're dealing with economic regulation in the communications area as to when you depart from the normal rational basis, lots of deference to Congress? When do you do it, and when don't you?

MR. TRIBE: Well, first of all, I think the most important thing, Justice Breyer, is to ask whether something is simply economic regulation, an argument that the Government made below but has abandoned, or whether this really has a significant enough impact on speech that it is a First Amendment problem in a genuine sense.

In this case we're way beyond that. We're way beyond that along at least two dimensions, because this law I think shouldn't be categorized with a merely economic regulation that just happens to touch this industry. It directly takes aim at a core speech function deciding what the mix of information shall be and what's available over important medium.

It doesn't do that as the incidental result of a general law of applicability, a law about camping like the law in CCNV, or a law about using or destroying Government property, like the laws in Albertini.

QUESTION: Mr. Tribe --

QUESTION: This response to a concern that I had

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as well, and I suppose you just about answered it. As we become more and more a speech-intensive, speech-creative, speech-obsessed society, it seems to me we're going to have more and more cases where you tell us that a software manufacturer, or the manufacturer of a video screen, is engaged in speech, and I have to say that although you're right, this is directed at a very much of a what we now know as to be a core speech activity, the Government's interest here primarily, it seems to me, is an economic one.

MR. TRIBE: In terms of its original motive.

QUESTION: Yes.

MR. TRIBE: Certainly. I think, Justice Kennedy, that as issues of speech, intellectual property and telecommunications in cases this Court will hear -- Lotus v. Borland -- in cases the Court has already heard, Turner, and in this case, come crashing upon the judiciary, it will be important, in addition to worrying about where we're all headed, to keep our eyes gazed on rather fixed stars of this constitutional constellation.

One of them, surely -- and this Court, I guess your concurring opinion in Simon & Schuster made it clear, has helped establish it -- is that you apply strict scrutiny when a law directly and demonstrably aims at speech and only speech and demonstrably reduces its

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quantity, even if it's not content-based.

Buckley v. Valeo was like that. FCC v, NCCB was like that, Meyer v. Grant --

QUESTION: Mr. Tribe, this raises a question that has been troubling me. Supposes that Congress recognized the problem you describe but they still thought the concerns that motivated the statute are still valid, which they may or may not be, and they enacted a statute based on a parallel to the banking regulation, and they said, we don't want the telephone companies to take undue risks with their capital and so forth, and so they basically said telephone companies cannot engage in any business except what they do now, period.

MR. TRIBE: Right. I think the State, as part of its franchising authority, might have the power to say you, a corporation, are a creature of the State, this is a condition.

But even though Mr. Wallace spoke about the telephone companies as though somehow they're all franchised, and he almost made it sound as though they're all franchised by the national Government so it could impose this condition, it's important --

QUESTION: Well, suppose the national Government decided to franchise all these phone companies, they could do -- I mean, theoretically, it could happen.

MR. TRIBE: I suppose given the reach -- I don't know how far Lopez will end up going, but this sounds like commerce, and it does seem to me that if the Government says as a precondition of going into a particular business, you've got to agree to stick to business, you can't go out and become a speaker or an editor --

QUESTION: It would have precisely the same effect on the First Amendment interests in this case.

MR. TRIBE: I don't really think so. I don't think so, Justice Stevens, because I think political incentives would be very different. It's very much easier for Congress to pass a law that does not really make a general structural proposition but says there's a certain function, namely editing speech, that some speakers cannot perform.

If you look at this law, not only does it take aim at speech and nothing but speech, and in that sense misfire completely, it doesn't hit its target, but it is in fact content-based. It seems --

QUESTION: Mr. Tribe, when we talk about statutes of general applicability like Associated Press --

MR. TRIBE: Yes.

QUESTION: And then you get to a case like NCCB, that certainly was not a statute of general applicability.

MR. TRIBE: That's -- you're certainly right.

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QUESTION: That was strictly media ownership.

MR. TRIBE: Yes, Chief Justice Rehnquist.

QUESTION: I don't think that the Court there applied the strict scrutiny.

MR. TRIBE: No, and it -- as it explained in Turner, the reason it didn't is because the electromagnetic spectrum is a unique and scarce resource, and problems of physical interference allow the national Government to license it, and the Court has said consistently from NCCB through Turner that the standards applicable to rules that say who may and who may not hold a broadcast license, and if you hold a broadcast license what else may you own, do not apply to the cable industry or to anybody else.

QUESTION: So you say NCCB was just kind of a red Lion extension.

MR. TRIBE: Exactly. Exactly, Your Honor.

Let me get back to the point about this law being content-based, because I'm --

QUESTION: Mr. Tribe, may I just ask one question?

MR. TRIBE: Sure.

QUESTION: If we had a regime where the FCC said, fine, you can do all this, but we want you to disclose -- we're going to have good accounting rules, and

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we want you to disclose fully, and could the answer be, well, the disclosure is related to our speech, so we're not subject to --

MR. TRIBE: Oh, I doubt that, Justice Ginsburg. I mean, I think disclosure requirements have been upheld in the campaign area, which is a core speech area, and in the Riley case, even though I think -- Riley v. National Federation of the Blind, even though I think maybe Justice Scalia had a problem with some of the disclosure rules, those were upheld.

All kinds of rules designed to protect the public from abuses, trying to shift costs to fool regulators, not aimed at speech, and they're content-neutral, and they don't demonstrably restrict the amount of speech, and therefore they're not subject to special speech scrutiny.

QUESTION: There's a lot of economic regulation that can affect the press.

MR. TRIBE: Incidentally and indirectly, yes, but if it affects the press indirectly only, it's subject to intermediate O'Brien scrutiny, and if it's part of a law of general applicability, as opposed to a restriction on the manner of speech, then I think, as Justice Scalia pointed out in Barnes, this Court really has not used O'Brien to strike down a law of general applicability that

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doesn't take aim at an expressive activity.

QUESTION: Well, but the problem is, when we're talking about where the First Amendment ends and economic regulation begins, it seems to me that the Congress at some point could say, we're interested in what's happening in the broadcast cable industry. That's what we're interested in. We're not interested in cement companies.

MR. TRIBE: And we think of this as --

QUESTION: And so we're passing an economic regulation to protect consumers --

MR. TRIBE: Right.

QUESTION: -- from prices, or whatever.

MR. TRIBE: Well, I think as you said in the Turner opinion, Justice Kennedy, the fact that the industry definition happens to focus on an aspect of the media doesn't in itself trigger strict scrutiny, and we've not made that argument.

What does trigger strict scrutiny here, and I do want to underscore that this law failed any level of scrutiny, including intermediate, and I hope to get back to it, but since you're talking about the future of the First Amendment, I think an important principle to establish would be that just calling a law economic regulation doesn't allow you to fail to look at what it actually says.

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That is, this law says telephone companies may not directly provide, in the sense of edit, video programming, and it defines video programming as programming generally considered comparable to that provided by a television broadcast station.

The Government in its brief says, oh, this is just a matter of mechanical definition. It's a matter of defining the mode, the method by which a message is disseminated. That is not true.

That is true of the way the cable act that this Court reviewed in Turner defines things like cable service. That's not true of this definition.

Indeed, the FCC itself in its video dial tone order made very clear that the line that this law draws between the video -- the video impulses that may be provided by the telephone companies and those that may not within the universe of cable service is a line that, for example, does not distinguish between one-way and two-way transmissions, interactive television shows, two-way, they can't provide them --

QUESTION: Mr. Tribe, would your argument be different if Congress had made findings at the time it passed this statute and the findings said, in substance, this.

We are passing the statute for purposes -- for

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an economic regulatory purpose. Our principal concern is, in fact, with cross-subsidization. We find that it can occur -- we find that the greatest danger of its occurrence will be in those situations in which the cable companies are engaging in the editorial function as you have designed it.

We find that that danger will exist primarily only in those instances in which cable -- the companies are engaging -- the telephone companies, rather, are engaging in the editorial function with respect to the same kind of programming that is going on over cable generally, what you have referred to as the video program, and therefore we're going to adopt this reference to video simply as an effective way of getting to the heart of our economic objective.

Would your argument for a level of scrutiny be different if we had that on the record?

MR. TRIBE: No, Justice Souter. My principal argument would be that, as this Court has often recognized, it is dangerous to make the level of scrutiny depend, except when you absolutely have to, on an inquiry into why Congress acted. The face of the law should be the primary test.

QUESTION: Then in any case in which you can make this kind of facial argument, you in effect are

saying, we are precluded from the consideration that sort of animated Justice Kennedy's question of trying to, in effect, divide the universe between what may be legitimate economic regulation with an incidental effect and the rest of the speech regulatory universe.

QUESTION: Justice Souter, I think it would be salutary in terms of the First Amendment purposes to put -- to remind the legislative branch that it may not abridge speech. It may not use speech categories, content categories, as shorthand for other things.

Even if the only level of scrutiny were intermediate, as in Turner, the mere existence of elaborate findings, which certainly the 1992 act contained and this act does not, didn't suddenly mean that the fire power of the First Amendment receded.

This Court looked closely at, and instructed the lower court on remand to look closely, at whether, for example, the finding that the broadcast industry was in terrible danger and would be driven out unless this must-carry obligation was imposed, was in fact justifiable.

QUESTION: So the nub of your argument is you can't use speech as a surrogate for other regulatory objectives just as they were saying yesterday you can't use race as a surrogate for other --

MR. TRIBE: Certainly you can't use the content

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of speech, that speech, like race, like religion, is a matter of special sensitivity, and that content-based rules do not have to be merely a mask for some illicit objective on the part of Congress before they trigger a strict scrutiny.

QUESTION: But if --

QUESTION: This would be okay, or at least it would be a lot closer to okay if the ban were just absolutely on telephone companies carrying video material.

MR. TRIBE: Carrying any video signal of any kind.

QUESTION: Any video signal.

MR. TRIBE: It would certainly be less invidious in terms of a content line if it said they can't carry or transport signals of a certain megahertz frequency, just defined it in a technical way.

I think it would at that point not be subject to strict scrutiny, although if one could show, as I think is plain here, that they are foreclosing an important medium of communication -- maybe not the same one as in Ladue, putting stuff on your house, but the most important medium today to a large set of speakers -- it would certainly not be appropriate to subject it to the reduced level of scrutiny that some merely economic regulations get.

QUESTION: No, but what about --

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QUESTION: That seems to me to suggest it's just the way the statute's drafted. In other words, if, instead of saying provide video program, they'd said to transmit video program, it would be --

MR. TRIBE: Well, we might have a -- we certainly would have a different case, but the way the statute is -- you say just the way the statute is drafted. A lot turns on a word here or there, the word not, the word speech.

This statute is written in a way that guarantees it will misfire. Look at Coors, for example. One could have said, well, there's a general problem with people drinking it up too much, and if they had not had those puzzling exceptions the statute might have been okay, and certainly alcohol is a matter of social concern.

But no, this Court looked closely, said that these exceptions don't make sense, the law doesn't fit, it subjected it to intermediate scrutiny, and struck it down because of just the way it was written.

QUESTION: The prohibition against transmission would really be broader than the one they have now. Wouldn't that be --

MR. TRIBE: Well, it's sometimes the case that by broadening the law, by eliminating what makes it content-based, it solves the problem.

QUESTION: It would accomplish the same economic objective here, I think.

MR. TRIBE: It might -- no, well, there's a difference, Justice Stevens.

If, as Justice O'Connor suggested, they actually prohibited video transport, there would at least be a prayer that they would achieve something. This law has no such hope.

It's a lot like Justice Frankfurter said in Butler v. Michigan, when he was dealing with a very broad law designed to keep adults from reading material -- children from reading material, and then they said the adults can't see it, either.

He said, this isn't just a case of -- I guess it was burning the house to roast the pig. It's a case where the pig lives somewhere else altogether.

(Laughter.)

MR. TRIBE: That's what's going on here. It's not just that they are overshooting by a mile, they're shooting at the wrong target, and they're choosing speech and they're defining it by its content, and I couldn't imagine a --

QUESTION: Mr. Tribe, why do you say it's not content-neutral? I think there's some room for debate on that point.

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MR. TRIBE: Well, I suppose, Justice O'Connor, it depends on what one means by content-neutral. That is, one could have said that the line in Discovery Network between newspapers and commercial pamphlets is not an ideological line, and so it's content-neutral, but the Court said no, you have to examine the content to tell whether the law applies. So that's one test.

I think when you suggested in Ladue how important it is to have a bright line test for what is and what isn't content-neutral, I think one bright line test I could suggest is, if you can't tell whether the speech is prohibited without subjectively evaluating its content, then it's not content-neutral.

QUESTION: Let me just interrupt for a second. You mean you have to subjectively evaluate a transmission to determine whether it's video programming?

MR. TRIBE: Absolutely. The FCC has said we have to look at the mix of textual and nontextual material. The mere inclusion of video text, even though that makes it a little different from what was around in 1984, doesn't prevent it from being video programming.

They said that interactive two-way television, though it wasn't available in 1984, that's video programming.

They said that a lot of one-way stuff like

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stock quote transmission, and news services, even with pictures, they're not video programming. They don't look like I Love Lucy.

It seems to me that nothing could be more manifestly content-based.

QUESTION: Why -- why --

QUESTION: But you're saying that if you did define it by using the number of megacycles or megahertz, or whatever you do, to define the kind of picture that you normally associated with a television program, that would be all right.

MR. TRIBE: Well, it would depend on what law it was part of, and -- but that would not -- that would certainly prevent it from being content-based.

This law, I think, fairly speaking, is content-based, but in any event it is a direct ban on speech.

QUESTION: Isn't the purpose of the content-based requirement, or a higher hurdle, that we don't want the Government to be imposing its biases against certain contents, against certain subject matters, upon the citizenry, but where the content-based nature is really based upon reference to a third party, like the Government says you can't produce any programming that he produces, the Government doesn't care what he produces. The Government is not imposing its view of subject matter

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desirability. It's just saying, you can't compete with him.

MR. TRIBE: But if it said you can't --

QUESTION: Now, is that subject-based, in your view?

MR. TRIBE: If it said you can't put paintings up if they are comparable to those by Monet --

QUESTION: Yes, okay.

MR. TRIBE: I think that would be content-based. I think the reason is that --

QUESTION: Well, -- no, no. If you mentioned Monet, yes, but anything -- Monet's still alive, or it's Picasso and he's still in one of his earlier periods, so you don't know what he's going to turn out to be like. You just say, you can't paint anything that competes with Picasso.

MR. TRIBE: Well, that's why we have --

QUESTION: Is that content-based?

MR. TRIBE: We have -- I think the real answer probably is intellectual property and copyright. That is, there is in that context a competing constitutional provision.

There are circumstances in which people can be given property-like interests whose contour does depend on content, but I don't think the fact that that's true with

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respect to intellectual property means that the Government should generally be able to target content.

QUESTION: The Government isn't determining the content, and it seems to me here the Government is essentially saying in a lot of words, don't compete with cable.

MR. TRIBE: Well --

QUESTION: That's what they're saying.

MR. TRIBE: I would --

QUESTION: They don't care. If cable chooses to produce nothing but cartoons, then presumably the only thing AT&T would be kept out of would be cartoons.

MR. TRIBE: Well, since nothing in the result we seek depends on the theory one adopts for what's content-based, or even strict scrutiny, I hope --

QUESTION: Well, strict -- what is your -- I -- they have to write something on this standard, so --

MR. TRIBE: Well --

(Laughter.)

MR. TRIBE: One way --

QUESTION: The one question on the standard is --

MR. TRIBE: Yes.

QUESTION: -- you're saying strict scrutiny, but if you applied strict scrutiny to this thing, then

wouldn't you have had to say, ab initio -- you know, Congress made a bet initially, we may have monopolists here, and it may turn into AT&T Western Electric, and we don't know there will be independent cable companies, and Western Electric and AT&T is a legitimate concern, just substitute the editor of cable for the words Western Electric.

And why couldn't Congress pass a statute like that without being 100 percent certain, just 80 or 60 percent concerned that such a thing would happen?

MR. TRIBE: I think in the cable act, Justice Breyer, Congress did very much that. It said, look, we've got this monopolist. It then defined cable service in a neutral way, and it imposed certain obligations that didn't reduce the amount of speech.

Here, instead, whether or not you think the definition is content-based -- and I don't know that you need to write an opinion about that because it so obviously flunks intermediate scrutiny. That is, even if you assume for a moment that you could come up with some answer to your question about how it is that they have more incentive to cross-subsidize as a result of this law, the on-balance judgment made by all of the expert agencies in the Government from 1987 to 1992 and then embodied in the video dial tone order, is that this is massively

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counterproductive in terms of the competitive objective.

I mean, the conclusion, I think, that was in your 1987 article tentatively, they adopted it and went full fire with it.

They said that it's virtually hallucinatory to think that the telephone companies could enter this market with massive cable incumbents, win market power through this scheme of predatory pricing, and knock out those huge companies, and that on balance the law, even if you grant that regulators are so stupid that they would miss everything, that on balance the law is responsible for this massive monopoly we now have, as Justice Scalia suggested, that the law, in fact, costs consumers billions of dollars in competitive benefits.

Now, if you wanted to look at the big picture, one thing you surely want to say is that the Government is not entitled to say that, because speech is important and speech-related industries are important, we are entitled to have a law sustained that on the undisputed record in this case eliminates something like 99 percent of the speech that telephone companies could provide in video programming form, allowed to have it sustained on the basis of wild speculations, where all of the evidence, unlike Florida Bar where there was this --

QUESTION: It's hard to explain why Congress

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doesn't repeal it, then.

MR. TRIBE: Well, they did, not in a bill that the President has yet signed, but if you're going to look at post enactment history this past summer, by huge majorities, both the House and the Senate said, of course this is counterproductive. That wasn't even one of the serious debates.

QUESTION: Some --

QUESTION: But it hasn't passed.

QUESTION: Yes.

QUESTION: It hasn't passed.

QUESTION: There's been no legislation passed.

MR. TRIBE: No, no, I understand that, Justice --

QUESTION: There are those who also assert that the cable industry has extensive lobbying power.

MR. TRIBE: I wouldn't imagine how that could be, Justice Scalia.

(Laughter.)

QUESTION: Mr. Tribe, I did have one question --

MR. TRIBE: Yes.

QUESTION: -- about this standard, and it's a concern to me that you are arguing vigorously for the top standard, the strictest scrutiny, this is content-based.

Suppose the Government said, we're going to let

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you video, get into the game, anything you want to do except you may not have -- you may not video anything about family planning. Now --

MR. TRIBE: That, of course --

QUESTION: -- wouldn't you want to reserve something higher?

MR. TRIBE: Something higher.

QUESTION: So then would we have to have super strict --

MR. TRIBE: Per se invalidity I would want to reserve for that. I would want to say that there are some bans on speech that no justification could sustain, but it's only an accident of the half-hour I think that a lot of time we spent on content-based.

Remember the fundamental point, this law doesn't fit at all. It's not only not narrowly tailored, it's completely untailored to any legitimate governmental objective.

If the Court ruled, as it did in Edenfield and Ibanez, and Turner, and Coors, this law is a lot worse than any of those. It is positively counterproductive, and this Third Report and Order, which is sort of like Gertrude Stein's Oakland -- I mean, you look at it and there's no there there -- it doesn't promise anything. It just says, you know, now that we have this case, we want

to be speech friendly. Maybe we'll do something if you give us a chance.

But as Justice Kennedy suggested, what they promised to do, you know, makes me worry a little bit, because it's to exercise a blank check authority over speech, and that's --

QUESTION: Thank you, Mr. Tribe.

MR. TRIBE: Thank you, Mr. Chief Justice.

QUESTION: Mr. Wallace, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE PETITIONERS

MR. WALLACE: Thank you, Mr. Chief Justice.

The time, place, and manner cases in this Court, the model intermediate scrutiny cases often have involved direct restraints on speech, as such Heffron v. Krishna Consciousness, Ward v. Rock Against Racism, Taxpayers for Vincent are all examples of that, and as long as there were other opportunities, as we have shown here, content-neutral regulation for a nonspeech purpose, they met intermediate scrutiny.

Now, we're not talking about the remote future when we're talking about video dial tone with the capacity to carry three, four, or five providers and not just the telephone company.

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We have already had in place in DeKalb County, Georgia, in Fairfax and Arlington Counties, Virginia, model trial runs of it in which there have been about 200 channels and the phone company was restricted to 50 percent or less as the provider of programming, the others having to be leased out, and a more permanent one is to begin soon in Dover, New Jersey, a small community, where all of the programming will be provided by others than the telephone company because the regulations are not yet in place that will permit the telephone company to participate.

What is really at stake in many of the contentions being made here is the contention that the phone company should have autonomy over all its lines to be the sole user or to control who can use it, a form of asking for what Solicitor General Fried used to call Lochnerizing the First Amendment --

QUESTION: I don't think he's saying that. You know, I was worried about that, too, but I asked the question whether you could keep the phone company out of the business of video programming, and he said that's a totally different question.

That's not what you've done here if you say you have to be a common carrier, and if you're a common carrier you cannot do any video programming, any -- you

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know, you can't do what cable does. If it was structural like that, he says that's a different case.

MR. WALLACE: Well, the Third Report and Order gives them the right to participate on video dial tone, precisely what it was that the Fourth Circuit posited at the urging of respondents as the less restrictive alternative that could have been adopted to accomplish the Government's purposes, and yet they're resisting the fact that this has been achieved now through administrative interpretation and application of the waiver provision --

QUESTION: Well, but what can --

MR. WALLACE: -- because they say they're entitled to more.

QUESTION: But counsel, what can be granted can be taken away. We're dealing with an absolute ban as opposed to an administrative potential for waiver.

MR. WALLACE: We're dealing --

QUESTION: Isn't that right?

MR. WALLACE: What can be taken away subject to judicial challenge, and we're dealing with a facial attack where they have to show that there are no constitutionally permissible applications, and we have a constitutionally permissible application in the Third Report and Order.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wallace.

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The case is submitted.

(Whereupon, at 11:17 a.m., the case in the above-entitled matter was submitted.)

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UNITED STATES, FEDERAL COMMUNICATIONS COMMISSION, AND JANET RENO, ATTORNEY GENERAL, Petitioners v. CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA VIRGINIA, ET AL.; and NATIONAL CABLE TELEVISION ASSOCIATION, INCORPORATED, Petitioner v. BELL ATLANTIC CORPORATION, ET AL.

CASE NO: 94-1893, 94-1900

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Fe Leiro

(REPORTER)