AT&T DIVESTITURE: THE QUESTION OF MONOPOLY OR FREEDOM OF SPEECH

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DEDICATION

This work is dedicated to the two most important relationships in my life. First, I would be most remiss were I not to give all credit to the one who has given me the knowledge and ability to pursue this educational endeavor. Anything good that has or will happen in my life comes as a direct result of knowing Jesus Christ.

My second debt of gratitude goes to my husband Gary who willingly became both father and mother to our three children Jonathan, Blayke and Cassie and helped them understand why mama needed to spend those many evenings studying in order to obtain this very important goal in our family's life. From the beginning, he has shared my goals and my dreams. For this encouragement and prodding, I am most grateful.

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ABSTRACT

This study looked at the information services ban placed on the Regional Bell Operating Companies in U.S. v. AT&T (1982). This case, while overturned in 1991, was viewed as either a case based on antitrust or First Amendment freedom of speech principles.

This study reviewed court cases stated as relevant and impacting on the decision reached in the 1982 case. It also studied cases presented in opposition to the ban based on the U.S. Constitution's guarantee of freedom of speech. These cases--from both sides--are studied for their content, statement, and relevance to the issues presented.

TABLE OF CONTENTS

CHAPTER 1

Introduction

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . (United States Constitution, 1778). This guarantee, while sometimes taken for granted, is viewed as one of the most basic of all rights promised to the citizens of the United States, a country most known for its love of freedom. While these words are used thousands of times, they take on special significance when one views them in light of occurrences that appear to conflict with this most hallowed of all freedoms.

With no intent to tarnish those words, one must question just how far the writers of the Constitution meant to carry the guarantees for those freedoms. It was impossible for them to have understood the specifics of a different age and an unknown lifestyle or culture as it exists today. Yet, it was the pursuit of this freedom written by those who well remembered the struggles for it that held the heaviest weight.

It comes as no surprise that along with the joys of living with those freedoms also comes the responsibility of preventing some from taking freedom away from others. This need to safeguard our freedoms provides the foundation for American anti-trust laws. Along the same lines of embracing and protecting freedom come the words of the Senator for whom the Sherman Act was named:

> If the concentrated powers of a combination are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government and should be subject to the strong resistance of the State and National authorities. If anything is wrong, this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessities of life. (<u>Congressional Record</u> 1890, p. 45)

According to Blake and Jones (1965), America's political system is designed so that the power of one group may be checked by the power of another. The antitrust laws require this same approach in the economic sphere. Those laws seek to diffuse economic power in order to promote the proper functioning of both economic and political systems.

The significance of these two basic freedom concepts is accentuated by the context in which the United States District Court of the District of Columbia was called upon to decide in <u>U.S v. AT&T</u> (1982). It was in this classic antitrust lawsuit that the Bell System, synonymous with American Telephone and Telegraph (AT&T), was divested of its local companies as they were found to be in violation of the Sherman Antitrust Act. Those companies became the providers of local telephone service but were excluded from participating in the field of information services. As defined by the court for this case, the term information service means:

> The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. (U.S. v. AT&T, 1982, p.8)

To the consumer, however, the term information services has come to mean the providing of access to different information gateways via computer or the telephone. One proposal is for the local telephone company to provide their customers with inexpensive, user-friendly terminals designed to plug into a regular telephone jack. By calling one number, consumers could reach services such as electronic telephone pages or classifieds; make reservations; do home banking and shopping; and have education links that provide even poorer schools with equal access. Another area of interest to the public would be in the medical field with the provision of health links between patient and physician. These links could also allow a specialist to give second opinions to patients located many hours away. These represent a few of the proposed areas of impact to the general public (Coll, 1986).

It is the idea of any total ban preventing a willing and capable player to participate in the marketplace of ideas that sends up warning signs as a conflict with those aforementioned guarantees in the First Amendment. As in any legal case, both sides must be heard in order to obtain a full understanding and an equitable resolution.

In his address to the annual American Bar Association on August 9, 1988, the case's presiding judge, Harold H. Greene, made a distinction between the AT&T divestiture as it related to any other industry that had been de-regulated. In this presentation he stated that this difference was "the product of two very different forces--technology and the antitrust laws" (Greene, Aug. 1988, p. 9).

This paper will consider those forces mentioned by Judge Greene. The intent of this study, however, is to consider whether those restrictions on creation, implementation, and use of information services under the Sherman Act violate the First Amendment of the United States Constitution.

The following listing is provided for the purpose of maintaining a cohesive understanding of definition and terms used within this study. These definitions and terms are as they appeared in U.S. v. AT&T (1982).

Definition of Terms

AT&T. American Telephone & Telegraph

OPERATING COMPANIES. The part of the Bell System that handled the local switches. Also referred to as Local Operating Companies prior to divestiture.

RBOCs. Regional Bell Operating Companies. After divestiture, they hold the local franchise market.

<u>DIVESTITURE</u>. Refers to the breaking away of the local companies from AT&T as detailed by the 1982 consent decree. In antitrust law, it is the act of selling off one or more of its parts, such as a subsidiary, a plant, or certain assets that create productive capacity.

<u>U.S. v. AT&T</u>. Originally appeared as <u>United States of America v. Western Electric Company, Incorporated, and American Telephone and Telegraph Company</u>. After the 1982 decree, Western Electric was no longer actively involved. Their name, however, remained on the following cases as was initially entered.

<u>CARRIER</u>. Any person deemed a carrier under the Communications Act of 1934 or amendments thereto, or, with respect to intrastate telecommunications, under the laws of any state.

<u>INTRASTATE</u>. Service within the state.

<u>INTERSTATE</u>. Service among different states. Also refers to service outside of a particular local calling area.

<u>EXCHANGE AREA or EXCHANGE.</u> A geographic area established by an RBOC in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;
2. every point served by an RBOC within a state shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated states) shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated states), unless the Court shall otherwise allow, and

4. except with approval of the Court, no exchange area located in one state shall include any point located within another state.

INFORMATION. Knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

INFORMATION ACCESS. The provision of specialized exchange telecommunications services by an RBOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding, or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.

BELL SYSTEM. Consisted of the Local Operating Systems--most of which were owned by AT&T, Western Electric and Bell Laboratories.

INFORMATION SERVICE. The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

TELECOMMUNICATIONS EQUIPMENT. Equipment, other than the customer's telephone set, used by a carrier to provide telecommunications services.

TELECOMMUNICATIONS. The transmission, between or among points specified by the user, of information as sent and received, by means of electromagnetic transmission, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

TELECOMMUNICATIONS SERVICE. The offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

CHAPTER 2

History of AT&T

The Bell System played the distinguished yet precarious role of being a regulated monopoly that provided telephone service to the American people. The only exceptions to this were in those areas that were owned by an independent--or non-Bell company--where the Bells held no franchise. This role was distinguished in that AT&T was without question the largest company in the world when measured by its assets. AT&T also had employees in every state and every congressional district and could muster substantial political power. In the eyes of its leaders, it was a benevolent giant carrying out the dreams of Theodore Vail, president of AT&T from 1885 and into 1919. His dream was for AT&T to provide universal service to their customers. Simply stated, universal service was the term used to describe having a telephone in every home that is connected to every other telephone in the country. His dream became the Bell System's primary goal (Temin, 1987).

In Temin's eyes (1987), the less glorious and most difficult side of AT&T's role-playing venue resulted from the fact that they were the largest regulated monopoly. They came to understand how quickly opinions could change or be misread. The ambiguity of government policies made not only for precarious role-playing but mandated an accurate reading of public opinion, which in turn, affected government policy.

The Bell System became accustomed to close public scrutiny during peacetime. The Kingsbury Commitment, as an example, was an agreement between the U.S. Attorney General's office and AT&T prior to World I stating that AT&T would cease predatory action on smaller companies in exchange for their placement as the nation's telephone monopoly. The harsher terms of this agreement were forgotten with the onset of the war since the nation enjoyed the privileges an efficient communications network provided. During the early months of 1933, Congress once again began questioning the power of the Bell System. It was at this time they decided to establish a regulating body to watch carefully AT&T practices (Temin, 1987).

The task of regulating this monopoly was given to the Federal Communications Commission (FCC) which had been established by the Communications Act of 1934. The first draft of that act met with strong opposition by AT&T in that it gave the FCC total control of all AT&T's internal contracts. Congress intervened and replaced that stringent mandate with a request for a thorough FCC study on the matter. That study, completed in 1939, was tabled when the United States entered World War II. Following this war, another complaint filed in 1949 was peacefully settled in 1956 that once again established the Bell System as the nation's telephone service provider. Through ups and downs such as these, the Bell System, with the FCC as an overseer, saw the task of providing both universal service and non-discriminatory rates as the two main pillars supporting their industry (Temin, 1987).

The goals of the Bell System as described by those two pillars remained for the most part, unchallenged. Only on occasion would the FCC slap the hand of the Bell Companies for infringement on other telephone companies or for participating in anti-competitive practices. In response, the Bells would change the questioned practice or move on to other areas of interest (Temin, 1987).

No matter the public policy or governmental tendency of the time, there is an event that when it occurs will find history smiling on the telephone industry. This event is wartime. During and immediately following World War II, AT&T found its hands full in just trying to furnish communications services to the two million unfilled orders for new telephones (Bell System Statistical Manual 1920-1964, April 1965). During this time of economic growth, AT&T had grown exceedingly large while in the process of attaining their goals of universal and very dependable telephone service. In the words of Walter Gifford, a past AT&T Chief Executive Officer, "The Bell System's very size imposed an unusual obligation on the company to provide adequate, dependable service: The only sound policy . . . is to continue to furnish the best possible telephone service at the lowest cost consistent with financial safety" (1965, p. 23). In the eyes of some, AT&T exemplified the well-behaved public utility.

It was at this point in AT&T's life that the first effect of new forces was felt on the industry. Shortly after World War II, it became clear that telephone conversations no longer had to depend on miles and miles of cable and wooden poles and expensive land rights of way. Conversations could be transmitted from one city to another just as effectively by microwaves capable of beaming telephone signals through the air. The economics and quality of the latter system superseded that of the former. One of the most significant changes this technology brought was that, for the first time, other companies entered into the market in competition for a share in this new long distance arena (Temin, 1987).

Unaccustomed to this new competition, the Bell System faced the fact that they could no longer be guaranteed the lion's share in any area except one. This knowledge hinged upon the technological factor that although microwaves and satellites could transmit telephone calls over thousands of miles, they were rendered essentially useless in a dense city environment where buildings blocked the signals. AT&T discovered that the answer to how a long distance carrier could reach any of its actual or potential customers would lie in the hands of those who controlled the local switches. It was through the local switches and lines that the final leg of transmission must pass. At this time, AT&T controlled the local switch (Temin, 1987).

Considerable evidence mounted against AT&T that pointed to a practice where AT&T exercised their monopoly power in the area of local transmission for the purpose of placing at a disadvantage new entries into the marketplace. According to complaints, AT&T was preventing the independents (non-Bell affiliates) from attaching their wires and other equipment to the AT&T local switches. This made it impossible for the independents to reach their local business and residence customers without delay or extra cost, or sometimes they could not reach them at all. Evidence was also submitted pointing to AT&T's subsidizing its own competitive operations with revenues generated by its regulated competitive-free local markets (U.S. v. AT&T, 1982).

Suit was brought against AT&T in 1974 under the Sherman Act. According to presiding Judge Harold H. Greene, a principal issue evidenced first during the trial and continuing on through the signing of the consent decree which ended the suit issue was the antitrust laws' essential facilities or Bottleneck doctrine. This doctrine holds that, where a company controls an essential facility that cannot be feasibly duplicated, it is a violation of the antitrust laws to keep competitors from using that facility, thus shutting them out of the market (U.S. V. AT&T, 1982).

Failure to heed repeated warnings by the FCC resulted in the filing of the antitrust suit by the United States Department of Justice. The complaint charged that AT&T employed it local and long distance service monopoly to close out competitors and guarantee a market for Western Electric, and the Bell Operating Companies were employed to foreclose long distance companies attempting to compete with AT&T's long lines division (long-distance). The government further asserted that AT&T monopolized the intercity and telecommunications market (Temin, 1987).

In seeking relief from the monopolizing practices, the complaint sought the divestiture from AT&T of the Bell Operating Companies (hereinafter generally referred to as Regional Bell Operating Companies or RBOCs) as well as the divestiture and dissolution of Western Electric on grounds that they had been in violation of the Sherman Act (<u>U.S. v. AT&T</u>, 1982).

As a means of preventing the law suit, AT&T entered into a settlement with the United States Department of Justice. This 14 page settlement, signed by Judge Harold Greene, on August 23, 1983, stipulated that AT&T would indeed divest itself of the 22 RBOCs. As mandated on page three of that agreement, these companies reorganized themselves into seven regional holding companies: Ameritech, Bell Atlantic, BellSouth, Nynex, Pacific Telesis, Southwestern Bell and U.S. West. According to the agreement, AT&T would concentrate its business on providing long haul (long distance) services and on the manufacturing of equipment. The RBOCs, restricted to providing local services, were barred from not only the offering of long haul or information services, but also from the manufacturing of equipment. To the RBOCs, who represented nearly two-thirds of the telecommunication assets in the U.S., this agreement known as the Modification of Final Judgment (MFJ) meant that they were barred from participation in the information services (Temin, 1987).

From an antitrust perspective, according to past FCC chief economist Alan Pierce, the settlement was as remarkable a resolution to a major competitive controversy as any that the antitrust laws have produced in generations. "Only the 1911 Standard Oil decision and subsequent reorganization of the petroleum industry comes close to its far-reaching impact" (Tribe, 1988, p. 182). Pierce's allusion to this 1911 decision which broke the monopoly Standard Oil Company held over 90% of the country's oil refining industry clearly illustrates the magnitude he attributed to the case. Like Standard Oil, once considered untouchable by any authority, AT&T had been broken into what was considered more manageable portions. Judge Greene (Dec. 1988) acknowledged and defended the gravity of his court's decision by stating in a CommunicationsWeek symposium that the restrictions were necessary to prevent the RBOCs from using guaranteed profits from these regulated phone businesses to subsidize their entry into the new markets which were without guaranteed profits.

In that CommunicationsWeek address, Greene (Dec. 1988) also alluded to the fear that AT&T could use those same local monopolies to squeeze out competing information services providers. Not alone in his views, he was supported by industry groups including newspaper publishers, cable television operators, and manufactures of equipment, and AT&T (Henck, 1988).

For the RBOCs, the harshest area of the consent decree lay in the ban preventing their entry into the information services markets. According to the court, in U.S. v. AT&T (1982), the placing of these restrictions was based upon the kinds of anticompetitive activities in which the local companies had engaged while they were still a part of AT&T. These restrictions took further steps to hinder any future anticompetitive behavior in which the RBOCs were likely to engage for a time until, in the words of the Modification of Final Judgment, "the RBOCs could prove they no longer were capable of using their bottlenecks for anticompetitive purposes" (U.S. v. AT&T, 1982, p. 12).

Abiding by the designs specified on page 13 of that consent decree, a triennial review was conducted in 1987 to re-examine those important issues and test them for their relevance three years following the signing of the decree. The Department of Justice in a shocking reversal from its original role as initiator of the antitrust suit contended that the goal of transforming the telecommunications market had been accomplished. They recommended that the RBOCs equipment and information services ban be lifted. The argument was denied by Judge Greene's District Court, but was upheld by the D.C. Circuit Court of Appeals in April of 1990. After a series of appeals, the April 1990 decision to lift the ban was upheld by the United States Supreme Court in U.S. v. AT&T (1991) where the court recognized the RBOCs' substantial right to provide information services. In this case, it was decided that the FCC would once again serve as an overseer to prevent any possible Bell anticompetitive activity.

Following a series of appeals, on October 30, 1991, the U.S. Supreme Court in a vote of 8-0 upheld the Court of Appeals decision to lift the RBOC ban on information services. This began a new chapter in the annals of the telecommunications industry. The case of U.S. v. AT&T (1991) made it clear that under existing law, the RBOCs have a substantial right to provide information service content to their customers.

From that October 1991 decision to the present, the information services ban on the RBOCs, while lifted, yet remains in question. The American Newspaper Publishers Association (ANPA), a leader in the fight to restrict the Regional companies' participation in information services, continues to hold as first and foremost, the principle that it is a competition free from monopoly power that best serves the public. The RBOCs argue that the lifting of the ban only recognized their rights to freely express and participate in the marketplace (Samuelson, 1991).

It is in this area that one questions whether the Sherman Act while attempting to provide protection from monopolies is not instead violating the First Amendment guarantees of freedom to speak. Which area holds and carries the greatest weight in a free society?

This study's intent was to determine how solid are those guarantees of the First Amendment in general? For this study, however, research was confined to court cases and the different First Amendment issues they addressed to consider whether those restrictions on creation, implementation and use of information services under the Sherman Antitrust Act violated the First Amendment of the United States Constitution.

CHAPTER 3

First Amendment as Protector of Public Interest

It requires little reading of Judge Harold Greene's writings or speeches concerning U.S. v. AT&T (1982) to become aware of an issue he saw as pivotal to the case. He viewed AT&T as a giant monopoly wreaking havoc on competition. As such, AT&T threatened competition and, therefore, it must be prosecuted by laws strong enough to protect the right to compete and participate in a marketplace that enjoys variety. In his opinion, the Sherman Act was the tool used to convict AT&T of their violations of the antitrust laws of the United States. What resulted from this conflict between competition and the Antitrust Laws was the signing of a consent decree which, among other things, banned the Regional Bell Operating Companies' from participating in the information services arena.

In considering whether this information services restriction placed on the RBOCs under the Sherman Act violates the First Amendment freedom of speech, one must turn to the courts in which those decisions were made. This search will also cite other cases with congruent rulings on First Amendment and antitrust issues, as these are the two main areas with which this work is concerned.

In his address to the state regulators, Judge Harold Greene (1987) stated that the issue most prominent in his decision for divestiture was the principle of "competition that is free from arbitrary restraints of monopoly power" (p. 3). He further stated that this had been the secret of the American economy for the past century and was the only environment in which the public could best be served.

In studying antitrust laws, an obvious element not to be overlooked is that without the presence of a monopoly, there would be no need for the antitrust laws. U.S. v. AT&T (1982) existed, first and foremost, because AT&T had become a monopoly. For this research, monopoly as prohibited by Section 2 of the Sherman Antitrust Act, has two elements: possession of monopoly power in relevant markets and willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" (U.S. v. Grinnell Corp. ,1966, p. 779). A monopoly condemned by the Sherman Act is the "power to fix prices or exclude competition, coupled with policies designed to use or preserve that power" (U.S. v. Otter Tail Power Co. ,1986, p. 361). The government asserted that AT&T had effectively deterred competition by its manipulating prices for access to the Operating Company networks (U.S. v. AT&T ,1982).

The Justice Department's position in 1982 was that AT&T's control over the local Operating Companies was central to the anti-competitive behavior that resulted in the ban on information services and the divestiture which formed the RBOCs. The evidence rendered during that case also indicated that the Bell System had never been effectively regulated. During the trial of 1982, the FCC officials acknowledged their inadequacy to cope with a company the size of AT&T. This was the first time AT&T had been subjected to true competition (Temin, 1987).

The overriding factor leading to divestiture in the 1982 case was that the principal means by which AT&T had maintained monopoly power--which is "the power to control prices or exclude competition" (U.S. v. Grinnell Corp., 1966, p. 778)--was through its control of the Operating Companies with their strategic bottleneck position where the local service was impacted. Later, this bottleneck position became the rationale for banning the RBOCs from the information services.

In U.S. v. AT&T (1982), the basic rationale for keeping the information services restrictions in tact was that the RBOCs retained their monopoly control of the local telephone switches and wires. Basically, any prospective competitor must pass through them before reaching their customer. This situation would give the RBOCs opportunity to set prices or discourage competition. Any occurrences of these situations could constitute a violation of the Sherman Antitrust Act.

According to Black's Law Dictionary (Black, Nolan, & Nolan-Haley, 1990), the Sherman Act is defined as "any act that prohibits any unreasonable interference by contract or combination, or conspiracy with the ordinary, usual and freely-competitive pricing or distribution system of the open market in interstate trade" (p. 1433). Under antitrust law, serious competitive concerns are raised even when relatively small market shares are involved. By applying that previous standard to the complaints of AT&T's alleged monopolization, Judge Greene found the largest corporation in the world to be in violation of the Sherman Antitrust Act.

In light of the numerous complaints of AT&T's monopolization of the telecommunications market and in consideration that AT&T considerably dominated that market, the Court's decision was to seek a way to end the great aggregation and the grievances it caused. Considering the size of this industry, seeking a way to end the grievances would be no small task. Whatever the decision, its effects would be far reaching (Henck, 1988).

Justice William O. Douglas provided more insight on the use of the Sherman Act when he wrote his dissenting opinion in U.S. v. Columbia Steel Co. (1948). He noted that the power that controls the economy should not be in the hands of an industrial giant, but rather it should be in the hands of those elected to represent the people. This power should be scattered into many hands so that the people's fortunes would not be dependent upon individual whims, political prejudices, or the stability of a few appointed people. In that case, as in U.S. v. AT&T (1982), the fact that those men are not vicious but respectable and social-minded is irrelevant.

This is the philosophy and principle of the Sherman Act. It was founded on the theory that there is danger whenever power is concentrated anywhere other than under the control of government and its people. Should any industrial power attempt to challenge this principle, they should be met with hostility (U.S. v. Grinnell Corp., 1966).

Under the Sherman Act, before this hostility can be imposed upon the violator, two areas must be considered. The first area deals with the issue of public interest. The essence of competition and effects of competition which are at the heart of the antitrust laws should be deemed matters of paramount concern when determining whether the proposed action would be in the best interest of the public. The second part of this consideration addresses the proposed remedy for the violation. The remedy should be inflicted with as little injury as possible, in reference to the public and relevant private interests. When choosing between effective remedies, the court should also impose the relief that impinges least upon other public policies (Clayton Act, 1914, Sect. 16 e 1).

Statutes are explicit as to judicial obligation when determining public interest. They are not so explicit in providing an overall definition, but choose rather to offer criteria which a court may consider in making its decision. Other references seem to indicate that an actual listing of factors or definitions could limit, rather than aid, the court in its search (Supreme Court Reporter, 1974, No 93). In essence, the antitrust statutes left room for individual consideration and provided only the basic guidelines from which to operate in determining what would be considered the public interest for the particular case in question.

The court is clear, however, on many other factors that must be taken into account in considering the issue of public interest. To define public interest, this study will use the one provided by Black's Law Dictionary (Black, et al, 1990). "Public interest is something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected" (p. 1393).

The Supreme Court has repeatedly held that when enacting the Sherman Act, Congress sought as a rule of trade to preserve competition and keep it free from the threat of monopolization (Northern Pacific Railway Co. v. U.S., 1958). In this case, the Northern Pacific Railway was found to be in violation of the Sherman Act. Before leasing land (Railway ownership of this land was by a Congressional grant.), the Pacific Railway would grant preferential routing clauses to those who agreed to ship their produce on that railway's lines. In writing the court's opinion, Justice Hugo Black stated that the railway was using these clauses as a leverage to obtain substantial economic power. The court also ruled that these preferential clauses provided no benefit to the lessees. The railway was not working for the good of the public. According to the principles of the Sherman Act, the court would be acting in the public interest to intervene.

Likewise, the court ruled that intervention would best serve the public in National Society of Professional Engineers v. U.S. (1978). In this case, an association of professional engineers was found in violation of Section 1 of the Sherman Antitrust Act. This section makes any contract or agreement restraining trade or commerce illegal. The members of their association refused to submit competitive bids on grounds that if they did so, the competition might produce inferior work which would endanger the public for whom they worked. The U.S. Supreme Court found this association was illegal since it operated as a total ban on competitive bidding and deprived the customers the ability to compare prices.

The U.S. Supreme Court took antitrust action against a group of movie theater owners who combined to fix prices, obtained special rights of showing motion pictures, and attempted to squelch any competition. In U.S. v. Crescent Amusement Co. (1944) these owners were prohibited from using their combined purchasing power to make franchise agreements. The Supreme Court stated in that case, that "competition rather than combination should be the rule of trade" (p. 2360).

Another U.S. Supreme Court case cited in U.S. v. AT&T (1982) as setting precedent for antitrust violation of Section 2 of the Sherman Antitrust Act was U.S. v. United Shoe

Machinery Corp. (1968). Hanover Shoe, Inc. was a shoe manufacturer and a customer of United Shoe Machinery Corporation. It manufactured and distributed shoe machinery--some of which was vital to the operation of businesses such as Hanover Shoe, Inc. United's policy was to offer their equipment only on a lease basis. Their refusal to sell meant that customers of United Shoe were overcharged and were at the mercy of the seller who could charge whatever price it deemed appropriate. It was decided to be in the best interest of the public to make United not only sell equipment but also pay back any overcharging that occurred.

By precedent, the courts do not view the protection of competition lightly. The need to safeguard free competition comes from a basic premise within our society that takes the view that "an unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions" (Northern Pacific Railway v. U.S., 1958, p. 517). Refer also to the previously stated case of National Society of Professional Engineers v. U.S. (1978) for a similar stance.

CHAPTER 4

First Amendment as Protector of Free Trade

Before an action can become an antitrust case, it must meet two qualifications. The first test deals with the determining of fault or liability. In other words, before a court would issue a lawsuit on grounds of antitrust violation, it must first determine whether or not a violation has taken place (Tribe, 1988). This was accomplished in U.S. v. AT&T (1982) by citing both specific instances of infraction and by researching to determine how other courts have ruled on similar issues.

After the liability has been determined, the second test or phase the action must pass is to find a suitable relief from the violation just determined. The remedy in antitrust actions is measured not only on how well it stops the violation, but also on how it minimizes the likelihood that the same violation would occur in the future (Tribe, 1988).

The second phase through which an action must pass before it can be classified as an antitrust suit is that the court must select a relief that would stop the violation. In writing the Court's opinion in U.S. v. AT&T (1982) Judge Greene wrote that he was most concerned with finding remedies to end AT&T's violations.

The task of antitrust remedy, according to the U.S. Supreme Court, is that it must, in effect, pry open a market that has been closed by illegal restraints

(International Salt Company v. U.S., 1947). The case involving International Salt Company dealt with an owner of patents on machines that used salt. He refused to lease his equipment to any customer without first obtaining an agreement that all future salt purchases would be from his company. This act was found to be in violation of antitrust laws. The fact that the owner was bound by that lease to provide salt at a reduced price held no bearing on the case. It met the standard that allowed it to be identified as an antitrust case in violation of the Sherman Act on the grounds that this agreement lessened competition and restrained trade.

In this case, the Supreme Court held that the remedy for the violation does not have to stop with only the present, but could also block future paths the violator may wish to travel. An important decision in this case is that it would become the responsibility of the transgressors to provide proof they were no longer a threat to competition should they re-enter that market. According to Judge Greene (U.S. v. AT&T, 1982), similar reasoning was used to block the RBOCs from information services until they could prove they would be no threat to competition, nor would they be able to use their monopoly as local service providers to discourage other possible entrants into the market. The case was resolved by working out terms where International Salt Company gave their customers the freedom to purchase their salt from wherever they chose.

Citings from International Salt Company v. U.S. were used in U.S. v. AT&T (1982) to provide a guideline for handling the antitrust case. An interesting statement, made in that case which did not receive equal citing, was found in the writings of Justice Felix Frankfurter, who wrote the opinion of the court for the case. He wrote that once an antitrust act had occurred, the court had the duty to design a decree to stop the condemned action. "But the law also respects the wisdom of not burning even part of a house in order to roast a pig" (International Salt Co. v. U.S. ,1947, p. 401).

While the issue of using remedies in order to maintain competition is at the heart of antitrust laws, judging from other court cases, it also becomes clear that the remedies must also pass a certain test. In United States v. American Tobacco Co. (1911), the Supreme Court set the standard that the remedy should be administered "with as little injury as possible to the interest of the general public and to relevant interests" (p. 31). In this case, the Supreme Court stated that when choosing an effective remedy, a court should choose the relief that impinges least upon the public and other public policies.

During the trial of U.S. v. AT&T (1982), Judge Greene's court heard testimonies attesting to AT&T's flagrant antitrust violations in the long distance trade, and of their use of the Operating Companies to monopolize and thwart competition in the local market. In writing the court's opinion, Greene used another Supreme Court definition to describe AT&T's strength. He defined it as market power. Left alone, AT&T had the power to control prices or exclude competition. The case providing his definition was U.S. v. Grinnell Corporation (1966).

That case defined what the offense of a monopoly under Section 2 of the Sherman Antitrust Act meant. This act makes it an offense to monopolize any part of the trade or commerce among several states. Before it can be called such, it must be composed of two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development resulting from a superior product, business knowledge, or historic accident. In U.S. v. AT&T (1982), Judge Greene had evidence against AT&T on both issues. Yet another impressive component from that same case is found in Sections 78 and 79. In these two sections, the court upheld a provision requiring a parent company to divest itself of its holdings in its affiliated companies. This action was deemed justifiable where the companies had more than 87% controlling interest and had been shown to have monopolized the market. In this area, AT&T again stood convicted.

In his search for the appropriate remedy that would fit in with guidelines already established in prior antitrust cases, Judge Greene sought comments coming from both the antitrust and First Amendment viewpoints to aid him in making the ruling that would best serve the public interest. His resulting decision called for the divestiture from AT&T of the local companies as an attempt to prevent further threats to competition. Those local companies were to be banned from entering the information services market based on the pattern of abuse exhibited by AT&T. As an attempt to prevent litigation, AT&T signed a consent decree stating that they would abide by the conditions proposed by Judge Greene as defined by the Modification of Final Judgment.

In his 1988 address to the National Governors Association, Judge Greene stated that this consent decree had two basic features: The first was accomplished in January 1984 when the RBOCs were separated from AT&T. The second feature dealt with the types of businesses in which these newly independent companies could participate. They still had control over the local lines and, therefore, were not to be guardians to the gateways of information services. He ended the decree with a stipulation similar to those antitrust cases previously cited. When there was no substantial possibility that an RBOC could use its monopoly power to impede competition in the market it sought to enter, the restrictions would be extinguished. The burden of the proof, however, would lie on the shoulders of the RBOCs.

This burden of proof issue was overturned in U.S. v. AT&T (1991) when the Supreme Court ruled that if Judge Greene was unable to conclude evidence of RBOC violation from the information submitted, he should remove the information services ban. In this appeal case, it was noted that unless the RBOCs had the ability to raise prices or restrict output in the information services market, there would be no substantial possibility of its using its monopoly power to impede competition. Professor Franklin Fisher (1991), in his testimony during this trial stated that before the RBOCs could achieve market power, they must accomplish four things: (1) They must have the ability to raise not only their own prices, but also the costs of their competitors, (2) This ability would then have to give them power over the price of information services; (3) Regulators would be unable to defeat any of these measures; and (4) Efficiency losses due to anticompetitive RBOC conduct must outweigh the benefits to the public" (U.S. v. AT&T ,1991, p. 10).

In U.S. v. AT&T (1991), Judge Greene argued that with 99% of local traffic still passing through RBOC hands, their market power was still present. He expressed fears of that power being used to drown out competition and, in essence, returning to a situation much the same as in the previous case of U.S. v. AT&T (1982).

In writing the Court's opinion, Judge Greene turned to previous decisions for support and guidelines. He quoted from Associated Press v. U.S. (1945) in stating that the goal of the First Amendment is to achieve the "widest possible dissemination of information from diverse and antagonistic sources" (p. 65). He further supported this view by citing

FCC v. National Citizens Committee For Broadcasting (1978). Here, the Supreme Court ruled that an FCC ban on prospective cross-ownership of newspaper and broadcast combinations within the same community was in agreement with the First Amendment's goal of achieving the widest possible dissemination of information.

In this case, the court reporter concluded that the FCC does have the authority of rule enforcement in areas of diversity as a whole, since those rules are based on public interest. The reporter added that sometimes, in the pursuit of diversity, one could easily become entangled with elusive concepts almost impossible to measure without making quality judgments that would be objectionable on both policy and First Amendment grounds. The regulations, therefore, should remain under the FCC authority as long as they represented a means for seeking to achieve its goals as defined by public interest. It was in the case of U.S. v. Storer Broadcasting Company (1956) that the FCC's authority in this area was tested and upheld.

Judge Greene's writings alluded to other Supreme Court cases where the interest in diversity was recognized. He observed in U.S. v. AT&T (1982) that "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market" (Red Lion Broadcasting v. FCC ,1969, p. 23).

In U.S. v. AT&T (1991), the information services ban restriction on the RBOCs was lifted, thereby, enabling them to enter the field of creation, implementation and use of the new market. When writing for this court's opinion, Judge Greene stated that since it was impossible to either prove or disprove any RBOC discrimination in a market that gives no opportunity for such test, the information services ban was lifted.

As previously stated, Judge Greene viewed U.S. v. AT&T (1982) as an antitrust case. This study will now present cases cited by those who viewed the decision to place an RBOC ban on information services as a flagrant violation of the First Amendment. From this viewpoint, the services offered by the Regional Bell Operating Companies were seen as protected speech under the First Amendment.

CHAPTER 5

First Amendment as Protector of Commercial Speech

Some may interpret the First Amendment phrase "Congress shall make no law. . ." (United States Constitution, First Amendment, 1778) as forbidding any branch of the federal government from interfering with speech rights of individuals. The courts, however, do tend to rule that it is not to be taken so literally. Obscenity, for example, has been held not to qualify for First Amendment protection (Samuelson, 1991).

Sometimes speech is protected dependent upon the nature of its content. Courts regard political speech, for example, as having the greatest of protection against government interference. Commercial speech, while still protected by the First Amendment, can be regulated by the government to a greater extent than would be acceptable for other kinds of speech (Samuelson, 1991).

A second important factor for consideration is that the First Amendment deals with the nature of the medium. Newspapers are given the highest level of freedom from government intervention. By contrast, television broadcasters have generally been said to enjoy a narrower scope of First Amendment protection than newspapers (Riley v. National Federation of the Blind, 1988).

A third factor of importance in the study of the First Amendment lies in determining whether the government is trying to restrain speech before it is uttered, or merely hold the speaker responsible later for unlawful speech activities. It is extremely rare for the courts to uphold prior restraints on speech. Court sensitivity to this issue can be traced to instances before the American Revolution and the adoption of the First Amendment as part of the Constitution. Courts may seem more reluctant to prevent a newspaper from running a story, yet would not be quite as hesitant to allow collection for damages after the article has shown up in print. The courts have made many distinctions in areas concerning the nature, the medium, and prior restraint. This could explain why those courts have adopted different standards for reviewing the First Amendment (Samuelson, 1991).

The RBOCs have argued that Judge Greene's order in U.S. v. AT&T (1982) prohibiting them from offering information services to their customers constituted prior restraint on speech, and therefore, was unconstitutional under the First Amendment. Their idea was that it singled out one class of speakers and forbade them to speak in a forum in which they would have chosen to speak had they been permitted to do so. According to the RBOCs, that latter argument was two-fold. Not only was their right to speak at stake, but also the right of the audiences themselves. In their view, the audiences were denied their First Amendment rights to hear the RBOCs speech (Tribe, 1988).

A basic principle of the First Amendment is that the speech of individuals and corporations has inherent value and is entitled to protection. In First National Bank of Boston v. Bellotti (1978), the Supreme Court ruled that "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity or its sources" (p. 935). A state statute prohibiting certain expenditures by banks and other businesses for the purpose of influencing the vote on a referendum was challenged and upheld by the Court. The bank as a corporation holds the same rights as an individual. Writing the Court's opinion, Justice Warren Burger expressed the view that the First Amendment did not belong to any definable category of persons, but belonged to all who exercised its freedoms.

The First Amendment makes no distinction between the speech of corporations and the speech of a government regulated monopoly (Consolidated Edison v. Public Service Commission, 1980). In this case, the U.S. Supreme Court reaffirmed the rights of a utility to express their views on controversial issues via inserts placed in their customers' monthly bills. This decision overrode a state public service commission prohibition against this on grounds that a utility was not entitled to the same freedoms of speech as are corporations. Section 934 of that case further stipulated that under the First Amendment, a restriction that regulates only the time, place, or manner of speech may be imposed as long as it is reasonable; but when a regulation is based on the content of the speech, governmental action must be examined closely to ensure that communication is not being hindered just because public officials may disapprove of the stated viewpoints. Pacific Gas and Electric Company v. Public Utilities Commission of California (1986) holds the same premise.

The Court of Appeals for the District of Columbia's decision in Quincy Cable TV v. FCC (1985) struck down the notion that information services should receive different First Amendment treatment since they involve a different medium--that of computerized, telecommunications--based messaging. In this case, the court stated: "The core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed" (p. 935). The Supreme Court held that not even in public television may broadcasters be denied an opportunity to create, edit, and broadcast their own ideas and information (Federal Communications Commission v. League of Women Voters, 1984).

In Riley v. National Federation of the Blind (1988) the U.S. Supreme Court established that to receive money for one's speech would in no way reduce the protection of commercial speech. This case concerned the First Amendment rights of speech given to professional fundraisers. Section 934 establishes that by regulating how a speaker may speak does directly impact the speech.

In addressing the area of applying regulation or remedies in the information services field, the court viewed it as unconstitutional unless it is narrowly tailored to the targeted evil. The court stated this in Ward v. Rock Against Racism (1989), when it affirmed that the restriction may not "burden substantially more speech than is necessary to further the government's legitimate interests" (p. 930). This case deals with a city which, as a means of controlling noise levels at concerts in its city park, passed an ordinance demanding that all performances must use city appointed equipment and sound technicians. When a concert that had been previously scheduled violated the sound and equipment ordinance, a law suit resulted.

This case affirmed previous First Amendment positions by saying that the government may impose the place where the speech can be delivered, the time of when the speech can be delivered, and the manner in which it may be delivered. Even in a public forum those restrictions are justifiable until they make reference to the content of the speech. Unless restrictions are narrowly tailored to serve a significant governmental interest, and leave open alternative channels for communication, they endanger the rights of the speaker. The case of Frisby v. Schultz (1988) was concerned with a city's picketing ordinance. Section 930 provides a clear test for the validity of a statute. It states that it is possible to narrowly tailor a ban to address only the targeted evil, but if that ban targets and eliminates more than the exact source of evil, it should not be used.

Not only does court precedent lean toward the narrowly tailored remedy, it also frowns upon government-imposed delays in speech, as is reflected, for example in the prior restraint doctrine. In the case of Carroll v. Princess Anne (1968), the town of Princess Anne, Maryland, issued a restraining order banning a white supremacist group from holding a rally in their town. This restraining order was obtained without making any effort to contact the group. The group was banned from holding meetings or rallies in that county for ten days. At the end of the ten-day period, the group was informed of a ten-month injunction. When this case reached the U.S. Supreme Court, the justices decided that the act of issuing the ten-day order without notice constituted a First Amendment violation. Section 928 of that case states that the elimination of prior restraints of speech was a primary factor in the adoption of the First Amendment. They concluded that prior restraint upon speech suppresses the precise freedom the First Amendment sought to protect. There is also agreement in Section 925 of this case that the relief must be couched in the narrowest of terms in order for it constitutionally to pinpoint its objective.

The case of Freedman v. Maryland (1965) is another example of judicial ruling in the area of prior restraint. In this case the justices stated that when any form of prior restraint is presented before their court, it "bears a heavy presumption against its constitutionality" (p. 1289). This case examined the constitutionality of a Maryland motion picture censorship statute which made it unlawful to show a motion picture without a license. A constitutional guarantee of freedom of expression was, in the court's opinion, violated in the first step of the licensing process. This first step involved the requirement that all prospective licensees must submit their film for approval or disapproval by a censor. Then, with the censor's disapproval of the film, the prospective licensee must assume the burden of instituting proceedings or attempt to persuade the court of the merits of the motion picture. Freedman v. Maryland (1965) also stated that "where the transcendent value of speech is involved, due process requires that the State bear the burden of proof" (p. 840).

An issue that came to the forefront in U.S. v. AT&T (1982) was the question of whether it was fair to allow a corporation to operate in an area where it has such advantage. A possible answer to that questions lies in the case of Buckley v. Valeo (1976), which presents the argument that the First Amendment's doctrine forbids the government from eliminating the natural advantages some speakers seem to enjoy. First National Bank of Boston v. Bellotti (1978) takes the same stance.

A review of court cases dealing with First Amendment rights and utilities shows no reasoning why the RBOCs should remain out of the field of information services in exchange for their local franchise right. On the contrary, First National Bank of Boston v. Bellotti (1978) states that "where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intruding upon privacy unless the captive audience cannot avoid hearing the speech offered" (p. 935). In Pacific Gas and Electric Company v. Public Utilities Commission (1986), the U.S. Supreme Court ruled that First Amendment rights protected utilities against burdening their speech in order to enhance the speech of another.

The U.S. Supreme Court standard set in Sable Communications v. FCC (1989) stated that even when government is legitimately concerned with possible dangers and abuses that might be posed by the exercise of speech, it must focus on regulating the harmful portion rather than simply banning the speech. This case involved indecent messages dealing with sexual interests. The Court ruled that Congress could not ban these messages from the phone lines even in order to ensure that children would be protected from those messages. It was determined that interested adults had the right to receive these messages if they desired to do so.

The concept of punishing a corporation for a pattern of violations, while contradictory to previous rulings, was offered as grounds for placing the RBOC ban on information services in U.S. v. AT&T (1982). The notion of a pattern or practice in this situation tends to be vague. What is required (apart from an actual witnessing of the occurrence) to prove that a crime or violation was committed? In H.J. Inc. v. Northwestern Bell Telephone Co. (1989), four Supreme Court Justices joined in a statement that the term pattern is so vague as to offend due process and that providing a definition of the word reached a difficulty level that surpassed that court.

There is an argument that the information service ban placed on the RBOCs was really no different from other cross-ownership restrictions in the media industry that have been approved by courts in the past. The case of FCC v. National Citizens Committee for Broadcasting (1978) upheld the FCC ban on joint ownership of radio and television stations and daily newspapers in the same town. Such restrictions, however, have been upheld on the grounds that the scarcity of broadcast frequencies is unique to the electromagnetic spectrum. Red Lion Broadcasting Co. v. FCC (1969) gives government special powers to place restrictions on broadcast licenses that it does not possess in any other context.

Antitrust laws do not automatically disappear whenever the words First Amendment are heard, but as the court shows in NAACP v. Claiborne Hardware Co. (1982), neither do antitrust laws hold an edge over the First Amendment. In this case, the

First Amendment prevented a state from applying its tort rules to penalize nonviolent aspects of a civil rights boycott organized by NAACP against white merchants. Again, in the case of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. (1965), the court ruled that the Sherman Act should not be construed to forbid joint efforts by businesses seeking legislation that would disadvantage their customers.

Applications of the antitrust laws to the publishing industry must also comply with traditional First Amendment analysis. If laws applying to publishers--as laws applying to anyone engaged in protected expression--are not triggered by expressive activity and have only an incidental effect on speech, then no First Amendment scrutiny is necessary. In Arcara v. Cloud Books, Inc. (1986), the court upheld a ban on the selling of books in a bookstore. While normally this is a First Amendment protected area, the court determined that it would not receive that normal protection if the books sold in an establishment were used for purposes not protected by the First Amendment. In this case, the act of selling books in an establishment used for prostitution made the general ban (as opposed to a specific ban that is narrowly targeted) of closing the bookstore acceptable under the First Amendment. The issue here is that in the case of the RBOCs, if the laws do regulate speech--as a direct prohibition on the provision of information services--such laws must be narrowly tailored to a significant or compelling governmental interest. The case of U.S. v. O'Brien (1968) points to the same premise.

This requirement might be met when the expressive activity involved is itself the specific evil at issue. For example, in Lorain Journal Co. v. U.S. (1951), the court upheld a judicial order that enjoined a newspaper's practice of refusing to accept local advertising from parties that also placed ads with the newspaper's competitor, a local radio station. In City Council of Los Angeles v. Taxpayers for Vincent (1984), the court concluded that an ordinance prohibiting the posting of signs on public property could be applied to individuals seeking to attach political campaign signs to public utility poles, on the ground that the ordinance was narrowly tailored to the city's interest in preventing the eyesore that the signs themselves made.

The U.S. Supreme Court, by their rulings, do not suggest that efforts to find the appropriate answers to regulatory problems are, by the facts themselves, punitive in nature. In fact, the court has been careful not to limit the notion of punishment to the classic sentences of death, imprisonment, banishment, and punitive fines and confiscation of property. Indeed, the court has noted that the attainer ban, while historically has called for the punishments previously mentioned, extends to legislative bans to participation by individuals or groups in specific employments or professions (Selective Service System v. Minnesota PIRG, 1984). A similar case is U.S. v. Brown (1965), where Communist Party members were barred from offices in the labor unions.

The speculation that evolved from this study was that those restrictions on creation, implementation, and use of information services placed upon the Regional Bell Operating Companies under the Sherman Antitrust Act violated the First Amendment of the United States Constitution.

CHAPTER 6

Conclusions and Recommendations

While citings from the previous court cases do not explicitly state that the First Amendment rights of the RBOCs were violated by the total ban placed upon them under the Sherman Antitrust Act, one can glean from them that, as with other cases, different options should have been explored. Examples from these referenced court cases give evidence to the fact that a case is not won by merely crying foul play while hiding behind some perceived First Amendment protection. Neither do these cases in any way lessen the power or necessity for antitrust laws.

There is enough evidence provided from decisions in these cases on similar issues considered pivotal in the U.S. v. AT&T (1982) decision to corroborate with this study's argument that those restrictions on creation, implementation, and use of information services under the Sherman Act did violate the First Amendment of the U.S. Constitution. When Judge Greene's court (U. S. v. AT&T, 1982) decided to place a total ban on the RBOCs without a specification of time, he was not narrowly targeting the evil or complying with the time, manner, and place criteria. This decision of the court conflicts with those of Justice Harry A. Blackmun, who included in his written concurrence in Central Hudson Gas v. P.S.C. of N.Y. (1980) that it should not lie in the court's hands alone "to decide if a rule is unwise" (p. 2364). This case was similar to U.S. v. AT&T (1982) in that it dealt with a public utility that also held a monopoly status due to the nature of the service they provided. Continuing along those same lines is Justice Felix Frankfurter's concurring statement in Police Department of Chicago v. Mosley (1972) when he wrote that the court should not be allowed to decide the worthiness of a case. In his statement he concluded that "If the marketplace of ideas is to remain free and open, governments must not be allowed to choose which ideas are worth discussing or debating" (p. 2286).

The Modification of Final Judgment that settled U.S. v. AT&T (1982) is an example of how Judge Greene allowed the court to decide the worthiness of a case. In the words of Justice Department's Ron Carr, "There are two ways to explain what he (Judge Greene) did: (1) he wanted to be a miniature FCC, or (2) he wanted to make sure his decision could not be overturned. . .while protecting his turf from Congress, . . . he created a kingdom for himself" (Coll, 1986, p. 357). As is clearly established by the United States Constitution, creating personal kingdoms is not a role which the courts were designed to play.

Writing for the court in Central Hudson Gas & Electric Corp. v. P.S.C. (1980), Justice Lewis Franklin Powell Jr. emphasized that the First Amendment protects commercial speech from unwarranted governmental regulation. He also continued to state that while the Constitution accords a lesser degree of protection to commercial speech than to other constitutionally protected forms of expression, the protection does exist. He stipulated that "the government may ban forms of commercial communication that are more likely to deceive the public than to inform it or are related to illegal activity" (p. 2344).

In this stance taken toward another utility company, Justice Powell took issue that if the government sought to restrict commercial communications that do not fall into those two categories, then the method of regulation meted out must be proportionate to the public interest served by that regulation. In turn, this restriction must be weighed by the amount of legislation placed on the expression in question. On this issue concerning the amount of restriction, the First Amendment is quite clear. Section 14 mandates not only that the restrictions be narrowly drawn, but it makes it equally clear that the regulations were not completely to suppress information when narrower restrictions on expression and participation would suffice (United States Constitution, Amendment 1, 14). Even in monopoly markets, extreme suppression serves only to reduce available information or selection to the public. This also conflicts with the purposes of the First Amendment.

President Reagan, newly elected during the early days of U.S. v. AT&T (1982), found the antitrust case silly and without grounds (Coll, 1986). He felt there was a greater need to take measures less harsh where areas of attempting to curtail AT&T's monopolistic activities were concerned. The two men heading Reagan's Justice Department--William French Smith and Edward Schmults--agreed with the President that total suppression would not only violate the First Amendment but would also be too drastic when weighed against the question of what would best serve the American government and its people.

Defense Secretary Caspar Weinberger also pled for lesser restrictions since military intelligence and other national and social services could be compromised. He argued that the cost and risk would far outweigh any competitive benefits (Coll, 1986). The Secretary of Commerce issued similar pleadings in the case, calling for the court to view the importance of maintaining America's lead in the telecommunications industry. The court in 1982 would have done well to have given heed to these leaders' call for the court to find a restriction that would effectively end AT&T's monopoly and encourage industry competition, but would not totally eliminate RBOC participation in the telecommunications market. Their suggestions, ranging from a call for tighter FCC control as RBOC overseer to the establishment of a watchdog committee for the FCC fell on unresponsive ears.

There is also sufficient evidence to establish that while the rights of commercial speech are not as highly regarded as political speech in areas of enjoying First Amendment protection, it does hold a protected status. Some cases such as First National Bank of Boston v. Bellotti (1978) went far enough to state that it matters not in the least if the speech is commercial or private. Both are protected. Justice Powell wrote his concurring decision in Carey v. Population Services International (1977) that there are "no differences between commercial speech and other protected speech when it is used to influence public conduct through manipulation of the availability of information" (p. 701). The RBOCs' exclusion from the information services mandated by the Modification of Final Judgment totally prevented a corporation from participating in the public arena, thereby lessening the choice of services available to the consumer.

With the same idea in mind, Justice William Joseph Brennan Jr. wrote his concurrence with the judgment in Central Hudson Gas v. Public Service Commission of New York (1980) stating that "there is no difference between commercial speech and other protected speech to justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information" (p. 2357). Judging from this statement, U.S.v. AT&T (1982) flagrantly disregarded a precedent set only two years prior when Judge Greene's court became guilty of manipulation when they chose what companies could be considered by the consumer as providers of information services.

Also coming from Central Hudson Gas v. Public Service Commission of New York (1980), the Court recognized that permissible restraints on commercial speech had been limited to measures designed for the protection of the consumer against fraudulent, misleading, or coercive sales techniques. The Court felt those measures should not be used as a means of depriving the public of the information needed to make a free choice. In this case, the U. S. Supreme Court recognized commercial speech's permissible restraints, but also invalidated any measures that were designed to keep information about legally offered products or services out of the consumers' reach. This researcher views the previous statement as a summary of occurrences brought about by the decisions of U.S. v. AT&T (1982).

The case of Central Hudson Gas v. Public Service Commission of New York (1980) reflected the view that the government was attempting to manipulate the choices of individuals by depriving them of the information necessary to make free choices. The same thing occurred in U.S. v. AT&T (1982) when the total ban was placed on the RBOCs, thereby prohibiting their participation within the information services marketplace.

From its effective date of January 1, 1984, until its repeal in 1991, the ban on information services placed on the RBOCs by the Modification of Final Judgment ground American telecommunications wheels of progress to a halt. During that time, other countries such as France, Great Britain, and Japan took leading roles in an industry that welcomed their enterprises (Local telephone, Dec. 1993). These countries, or any other local American telephone company, enjoyed a freedom of competition within the United States--a freedom which the RBOCs were forbidden by the courts to enjoy.

It was during those seven years between the two U.S. v. AT&T (1982) and (1991) cases that the French government, in a joint effort with their national telephone company, subsidized the placement of more than 4 million computer terminals into the homes of families at a cost of 25 dollars a month. These terminals connected through telephone lines, offered over 10,000 different information services (Information services, Feb. 1992). Those information services offered then are much like the services the American public is just now beginning to take advantage of in their own country.

During that same time period, the United Kingdom established a videotex system connected to over 200,000 business and residential subscribers through telephone lines. This service, still in use today, offers a variety of educational methods for instruction of students in remote areas. One of the most effective services offered by this system allows communication among children with speech or communication disorders (Information services, Feb. 1992).

While the telecommunications market was booming in these areas, quite the opposite was true for the United States. By

1987, the United States Department of Commerce stated that over 46 per cent of all patents approved in the United States were issued to foreign interests. Of those foreign patents, almost 90 thousand were awarded to Japan (Information services, Feb. 1992). When judging the merit of the RBOC information services ban, one must weigh that 1982 court decision against those previous figures along with the current concern that the United States no longer remains unchallenged in these markets. In light of these considerations, the overall best interest of the public was not served.

The Modification of Final Judgment not only deprived consumers as individuals but also as a nation by silencing a leading force in the telecommunications industry that had begun to branch out into the information services field. The court would have been wise to have given more thought to the public interest issue and the ramifications of closing the doors to an American industry while opening those same doors to foreign competitors. The years from 1982 to 1988 saw America fall from a trade surplus in telecommunications of nearly 1 billion dollars to a deficit of more than $2.5 billion dollars. Had U.S. v. AT&T (1991) not come about, the United States Commerce Department projected that by 1995, the deficit would have reached 7 billion dollars (Information services, Feb. 1992).

Information services choices and offerings were kept out of the consumers' realm of choice from fear of a possible monopolization of the business. Citings from previous cases such as <u>H.J. Inc. v. Northwestern Bell Telephone Co.</u> (1989) warn against decisions based upon perceived wrongdoings or the possibilities that they may occur. This also conflicts with the First Amendment's stand against prior restraint. In 1982, the Modification of Final Judgment was agreed upon by the Department of Justice and AT&T without any attempt to consider any of the lesser forms of RBOC restrictions that had been offered. Again, all action taken was to the exclusion of the regional companies which would be most affected by the Court's decision.

At no time during the court proceedings in <u>U.S. v. AT&T</u> (1982) was the monopoly holder of the communications industry seen as being an immediate or viable threat to either the national security or the federal government itself. As stated earlier in this Chapter, quite the contrary was true. The cause for alarm was that the threat to security could come from the removal of a competent telecommunications leader from the market, though this company had served the government and its people well. In reality, given the situation of the day, there was a great possibility of foreign companies being allowed to provide the nation with vital information service links. This would seem to have posed the greater threat to security. Also missing from the list of AT&T charges were accusations of fraudulent, coercive, or misleading sales practices aimed toward the detriment of the consumer. It is evident that the RBOCs carried no guilt in these areas since they were not in existence prior to the divestiture.

In the case of U.S. v. AT&T (1982), the Court was correct to call for an end to AT&T's abuse of power and monopolization of the telecommunications market brought on by a laissez-faire attitude developed between the U.S. government, the FCC, and AT&T over generations when telecommunications played a more vital role in American involvements such as wars and matters of security and dependability. Another obligation of the Court was to seek out a solution with capabilities to address both present and future inequities. Divesting the local companies from AT&T fell within this realm of finding a suitable remedy to the monopoly problem. It was when this remedy called for the total silencing of a willing participant within the information services market that serious First Amendment questions were raised.

The issues for consideration were not limited only to that of serving the government's interests in meting out justice nor of granting the RBOC's requests for participation within the information services arena, but also finding what would best serve the overall public interest. To this researcher, it seems feasible that during times of indecision, there is a need for more speech rather than less speech in order to aid in proper selection of available choices.

If the First Amendment guarantee means anything at all, this researcher feels its foundations were violated based upon other court decisions dealing with similarly regulated monopolies. Judge Greene's decision disagreed with the statement advocated by Justice Brandeis in the opinion he wrote in Whitney v. California (1927): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom" (p. 641).

As Justice Felix Frankfurter stated concerning the Court's responsibility to design a remedy for the condemned action, "the law also respects the wisdom of not burning even part of a house in order to roast a pig" International Salt Co. v. U.S. (1945, p. 401). This researcher feels that the U.S. v. AT&T (1982) decision would have produced different results had the Court recognized this position. There is little doubt that the Court would still have forced AT&T to divest itself from the local arm of the telecommunications industry as an attempt to end their monopoly. This falls within the realm of appropriate court accountability. What this study points to, however, is that had Judge Greene chosen to abide by some of this study's referenced cases, his remedy would have been narrowly targeted to attack the monopoly rather than the esteemed privilege of speech. Had Judge Greene opted to call for tighter FCC control over the newly formed RBOCs or even allowed an overseer for the FCC as had been suggested, the infractions could have been curbed and no First Amendment violation would have occurred. The American public would have been spared the inconvenience U.S. v. AT&T (1982) caused.

As in any situation, history can be kind or cruel in its remembrance of an event. Blessed is the group or individual who can quickly acknowledge and move to amend a bad decision. Even if the problem is corrected in an expeditious fashion, one must yet hope that the decision is devoid of any far reaching ill effects. Such was not the case where U.S. v. AT&T (1982) is concerned. Granted, the error of the RBOC information services ban was recognized and lifted in 1991; however, the effects of those seven years are left for the government and the telecommunications industry to deal with today. Also left unresolved are questions of ethics and First Amendment violations that still give rise to studies such as this. The major concern was not resolved with U.S. v. AT&T (1991) which served only as a means to stop the wrong incurred by the information services ban. Greater than the wrong itself is the question of how to prevent any future First Amendment violations on this scale that are so far reaching both in terms of financial and human interests.

Had Judge Greene applied First Amendment principles by heeding Justice Frankfurter's statement, the Modification of Final Judgment would not have been the result of U.S. v. AT&T (1982). Had it been followed, the rationale stated by

Frankfurter in his recognition that "the law also respects the wisdom of not burning even part of a house in order to roast a pig" (International Salt Co. v. U.S., 1947, p. 401) would have been evidenced by action that would have ended AT&T's monopoly, and closely observed the actions of the newly formed RBOCs. This action, while addressing the evil, would not penalize the public. Neither would this action have denied the RBOCs of their First Amendment guaranteed rights of speech and participation within a marketplace that welcomed their technology. In late 1989, a survey of 24,000 registered voters nationwide revealed that Americans favored, by a margin of three to one, the lifting of the information services ban as outlined by the Modification of Final Judgment (MFJ relief, Nov. 1989). Two years later, U.S. v. AT&T (1991) brought about relief from the information services ban placed on the RBOCs, allowing them to participate in the field from which they had been barred for seven years

I feel that U.S. v. AT&T (1991) only started the wheels turning in the right direction. Currently, there are new issues facing the telecommunications industry and those who will be called upon to make decisions. There must be safeguards put in place to prevent future bannings of such magnitude as was U.S. v. AT&T (1982). First Amendment freedoms must never again be sacrificed upon the alter of new technology simply out of fear that something may possibly get out of hand. In dealing with issues of public interest, there must be a time of review to see if what was deemed best for the public in the past remains so today. In retrospect, not only do the court cases cited in this study call for a change but so does our current administration. In his speech to the National Press Club in Washington, D.C., this past January (1994), Vice President Al Gore announced the Clinton administration supports removal of judicial and legislative restrictions on all telecommunications companies. Included within those categories that could expect relief were cable, telephone, utilities, television, and satellite companies (Gore: drop, Jan. 5, 1994). Gore went on to define the government's role by stating: "Our goal is not to design the market of the future. It is to provide the principles that shape that market. . . and to provide the rules governing this difficult transition to an open market for information" (Gore: drop, Jan. 5, 1994, p. 1).

Had these principles been embraced in 1982, the open market for information would have already been ushered in and vital information links would have long been established. Since this study calls for an awareness as an attempt to prevent further massive First Amendment infringements, further study is recommended in areas that are now in their infancy as were the information services in the late 70's and early 80's. New technology such as fiber optic cable which allows telephone, computer, and video transmission and access from a residential telephone is an area that could bring about the same questions today as did U.S. v. AT&T (1982). This single example, while a definite benefit to the public will most certainly create a need for redefining outdated boundaries set up between telecommunications companies. Learning from our past mistakes is wonderful but a repeat of those same mistakes in this new computer age would be unforgivable.

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