

1-15-1996

The Fourth Estate and the Third Level: Turner Broadcasting System, Inc. v. Federal Communications Commission—Cable Television and Intermediate Scrutiny

R. Stuart Phillips

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Communications Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

R. Stuart Phillips *The Fourth Estate and the Third Level: Turner Broadcasting System, Inc. v. Federal Communications Commission—Cable Television and Intermediate Scrutiny*, 23 Pepp. L. Rev. Iss. 2 (1996)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol23/iss2/6>

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

**The Fourth Estate¹ and the Third Level:
*Turner Broadcasting System, Inc. v. Federal
Communications Commission—Cable Television
and Intermediate Scrutiny***

I. INTRODUCTION

On October 5, 1992, after lengthy debate,² presidential veto,³ and Congressional override,⁴ the Cable Television Consumer Protection and Competition Act of 1992 became law.⁵ The Cable Act of 1992, which reimposed federal controls on the cable industry after a brief eight-year period of deregulation was a "breathtakingly regulatory piece of legislation," reinstating the rate regulations which had been removed by the Cable Communications Policy Act of 1984.⁶ One section of the 1992

1. As to the oft-used term "the Fourth Estate," as well as its recognized importance, consider the following:

But does not, though the name Parliament subsists, the parliamentary debate go on now, everywhere and at all times, in a far more comprehensive way, *out* of Parliament altogether? Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact—very momentous to us in these times.

THOMAS CARLYLE, CARLYLE'S LECTURES ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY 149 (P. C. Perry ed., 1910).

2. See S. REP. NO. 92, 102d Cong., 2d Sess. 1 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133-1230; H.R. CONF. REP. NO. 102-862, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231-86; *see also* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 1992 U.S.C.C.A.N. (106 Stat.) 1460.

3. President's Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, 1992 PUB. PAPERS 1751-52 (Oct. 3, 1992) [hereinafter President's Message]; *see infra* note 60 and accompanying text.

4. *See infra* note 61 and accompanying text.

5. Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 521-558 (Supp. V 1993) [hereinafter Cable Act of 1992].

6. *See generally* Frank W. Lloyd, *The 1992 Cable Act: The Reregulation Pendulum Swings*, 2 COMM. LAW. 1 (1993) (discussing the Cable Act of 1992). The 1984 Act also gave the Federal Communications Commission (FCC), for the first time, direct legislatively-sanctioned authority to regulate cable, by amending the 1934 Act with a new Title VI. *See* S. REP. NO. 92, 102d Cong., 2d Sess. 1-2 (1992), *reprinted in* 1992

Act, the so-called “must-carry” provision, which requires that cable operators carry, free of charge, a certain number of local broadcast stations,⁷ would, eighteen months later, force the Supreme Court to confront an issue it had successfully dodged for almost two decades.⁸ In a decision characterized as “fragmented,” the High Court for the first time outlined the level of First Amendment scrutiny applicable to cable television operators—the mid-tier *O'Brien*⁹ approach.¹⁰ Yet, when called

U.S.C.C.A.N. 1133, 1134.

7. 47 U.S.C. § 534. The section reads, in pertinent part:

§ 534. Carriage of local commercial television signals

(a) Carriage obligations

Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section. Carriage of additional broadcast signals on such system shall be at the discretion of such operator, subject to section 325(b) of this title.

(b) Signals required

(1) In general

(A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

(B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.

Id.

8. *Greater Free Speech Protection For Cable*, N.Y.L.J., June 28, 1994, at 1, 1. The two previous cases involving must-carry provisions were decided at the district court level, with the Supreme Court denying certiorari in both. *See infra* notes 26-51 and accompanying text. This led at least one commentator to charge that the Court was “ducking the issue” on cable’s level of scrutiny. Claudia MacLachlan, *High Court Holds TV’s Future: Cable Mounts First Amendment Fight to Bar Broadcasters*, 7 NAT’L L.J., Jan. 10, 1994, at 1, 29.

9. *United States v. O’Brien*, 391 U.S. 367 (1968).

10. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994). In *O’Brien*, the government prosecuted David O’Brien for burning his selective service registration certificate in violation of federal law. 391 U.S. at 369. O’Brien appealed his conviction, contending that the statute was an unconstitutional burden on his speech. *Id.* at 370. The Court held that the statute was constitutional “both as enacted and as applied.” *Id.* at 372.

The Court determined that the statute imposed only an incidental burden on speech, as it was directed at nonspeech conduct. *Id.* at 376-77. In examining such burdens, the Court stated:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated

upon to answer the question of whether the current must-carry provisions are constitutional under that intermediate level of scrutiny, the Court responded with a resounding "maybe."¹¹

This Note examines the Court's decision in *Turner Broadcasting System, Inc. v. FCC*.¹² Part II discusses the history of cable regulation predating the 1992 Cable Act.¹³ Part III states the facts of the case,¹⁴ and Part IV analyzes the opinions of the divided Court.¹⁵ Part V outlines the impact of the case, both present and future.¹⁶ The Note concludes with Part VI.¹⁷

II. THE HISTORY OF CABLE REGULATION AND MUST-CARRY

A. Regulation—1949 to 1986

From its nascence in 1949,¹⁸ the role of cable in the communications

to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 317.

In its analysis, the Court stated that the power of Congress to require registration for the selective service was "beyond question." *Id.* (quoting *Lichter v. United States*, 334 U.S. 742, 756 (1948)). The Court also determined that the proper functioning of the selective service system was a substantial governmental interest. *Id.* at 381. Lastly, the Court determined that the law "specifically protect[ed] this substantial governmental interest." *Id.*

11. While the Court determined the applicable level of scrutiny, it did not definitively pronounce on the validity or invalidity of the must-carry provisions. *See Turner*, 114 S. Ct. at 2472. It is unfortunate that this controversy must drag on even longer. The constitutionality of the "must-carry" provisions is, in the words of Jack Goodman, special counsel to the National Association of Broadcasters, a "life-or-death question." MacLachlan, *supra* note 8, at 1. Andrew Schwartzman of the Media Access Project remarked that this case would "dramatically affect how cable and broadcast will interrelate," and that if the provisions are not upheld "[t]he future of free, over-the-air broadcast [will be] significantly harmed." *Id.* at 29.

12. 114 S. Ct. 2445 (1995); *see supra* note 10 and accompanying text.

13. *See infra* notes 18-61 and accompanying text.

14. *See infra* notes 62-71 and accompanying text.

15. *See infra* notes 72-257 and accompanying text.

16. *See infra* notes 258-70 and accompanying text.

17. *See infra* notes 271-72 and accompanying text.

18. The first non-commercial station was constructed in Astoria, Oregon, in 1949; the first commercial station was built in Lansford, Pennsylvania, in 1950. Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations,

regulatory scheme has defied definition.¹⁹ At that time, the statutory framework for interstate communications regulation was outlined in the Communications Act of 1934.²⁰ Although the Communications Act of 1934 gave the FCC authority to regulate “all interstate and foreign communication by wire or radio,”²¹ as late as 1959 the Commission declined to extend jurisdiction over cable, stating that it was within “neither of the principal regulatory categories created by the Communications Act.”²²

Beginning in 1960, however, the FCC “gradually asserted jurisdiction” over cable.²³ In the twenty years afterward, cable became one of the most heavily-regulated industries in America.

After years of tight regulation, in 1984, Congress, bowing to pressure from the more *laissez-faire* Reagan Administration, essentially deregulated cable rates with the Cable Communications Policy Act of 1984.²⁴

and TV “Repeaters” On the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 408 (1959).

19. As one author noted, “[l]ike other industries that eventually found themselves under pervasive regulatory schemes, cable television developed before a national policy was in place as to who should regulate it, and what that scheme should be.” Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329, 329 (1988).

20. Communication Act of 1934, 47 U.S.C. §§ 151-612 (1988 & Supp. 1992), as amended by the Cable Act of 1992, 47 U.S.C. §§ 521-558.

21. 47 U.S.C. § 152(a) (1988). The FCC has the sole power to allocate the broadcast spectrum, to establish standards for operation, and to license users. T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE, THE LAW OF MASS MEDIA* 633 (5th ed. 1991).

22. *Inquiry into the Impact of Community Antenna Sys.*, 26 F.C.C. at 429; see, e.g., *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251, 254 (1958) (holding that CATV is not a “common carrier” as identified in the Communication Act of 1934); see also *Inquiry Into the Economic Relationship Between TV Broadcasting and Cable TV*, 65 F.C.C.2d 9, 11 (1977) (noting the failure of the FCC to regulate cable at its inception).

23. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 165 (1968). This assertion of authority by the FCC in the absence of specific legislative mandate was eventually validated by the Supreme Court in *Southwestern Cable*. The Court held that the powers granted to the FCC under the Communications Act of 1934 were expansive, giving the FCC the ability to regulate new forms of communication. *Id.* at 168 n.8.

As part of its legislative powers, the FCC has the authority to issue cease-and-desist orders, to shorten a station’s renewal license period, to impose fines, to deny a license renewal, and even to revoke an existing license. FORD ROWAN, *BROADCAST FAIRNESS—DOCTRINE, PRACTICE, PROSPECTS: A REAPPRAISAL OF THE FAIRNESS DOCTRINE AND EQUAL TIME RULE* 41 (1984).

24. Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-639 (1988) (superceded by the Cable Act of 1992, 47 U.S.C. §§ 521-558 [hereinafter 1984 Act]). The 1984 Act was essentially a compromise between the interests of the National Cable Television Association (representing cable operators) and the National League of Cities (representing franchisors—the cities themselves). Brenner, *supra* note 19, at 351.

Despite rate deregulation, the FCC continued to enforce must-carry rules, requiring cable television operators to carry "upon request and without compensation" all broadcast stations "significantly viewed in the community."²⁵ In *Quincy Cable TV v. FCC*,²⁶ a three-judge panel composed of Judges Skelly Wright, Robert Bork, and Ruth Bader Ginsburg held that these must-carry rules were "fundamentally at odds with the First Amendment and, as currently drafted, can no longer be permitted to stand."²⁷

In a very detailed opinion by Judge Wright, the court examined the history of FCC regulation of both broadcast and cable, noting that "almost from the beginning, the must-carry rules were a centerpiece of the FCC's efforts to actively oversee the growth of cable television."²⁸ Judge Wright found that the FCC's goal was simple: "to assure that the advent of cable technology not undermine the financial viability of free, community-oriented television."²⁹

In a review of precedent, Judge Wright noted that while several approaches had been taken over the years, federal courts were increasingly examining these rules with a rather "rigorous constitutional analysis."³⁰ While not enumerating the level of scrutiny applicable to cable, the court examined the applicability of both the relaxed broadcast standard and the mid-tier *O'Brien* interest-balancing test.³¹

First examining the broadcast standard, Judge Wright summarily dismissed it, stating that "the 'scarcity rationale' has no place in evaluating government regulation of cable television."³²

For the cable operators, the 1984 Act deregulated all rates for new franchisees, while regulating only basic tier rates for pre-existing, grandfathered franchises. See Hogan & Hartson, *The New Cable Communications Act Policy*, in THE CABLE COMMUNICATIONS POLICY ACT OF 1984 7-9 (Jay E. Ricks & Richard E. Wilery, eds., 1985); see also 1984 Act 47 U.S.C. §§ 543, 623(c)(3), 623(f)(1) (superseded by the Cable Act of 1992). For the cities, the 1984 Act established guidelines for granting franchises. 47 U.S.C. § 542(b) (superseded by the Cable Act of 1992).

25. *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1437 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986) (quoting 47 C.F.R. §§ 76.57-76.61 (1984)).

26. 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

27. *Id.* at 1438.

28. *Id.* at 1440.

29. *Id.*

30. *Id.* at 1444.

31. *Id.* at 1448.

32. *Id.* at 1449. For a discussion of the scarcity rationale, see *infra* notes 95-103 and accompanying text. The scarcity rationale allows regulation of limited resources. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-99 (1969).

In examining the rules under the *O'Brien* approach, the court expressed doubt as to whether the must-carry rules are, indeed, an incidental burden on speech, stating flatly that “[t]he rules coerce speech.”³³ Additionally, requiring cable operators to carry certain channels interfered with the editorial function of cable operators.³⁴ Nevertheless, the court concluded that even if it assumed that the burden was incidental, the must-carry rules failed the analysis.³⁵

The first prong of the *O'Brien* test is that a substantial government interest must exist.³⁶ As the court noted, “a ‘regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.’”³⁷

Given that the stated rationale for must-carry was protection of local broadcasters, the fatal flaw in the Commission’s actions was that their dire predictions of the demise of the broadcast industry were based not on empirical data, but instead on “intuition” and “instinct.”³⁸ Indeed, in the twenty years since must-carry was first promulgated, the FCC had “never reconsidered or seriously questioned the elaborate and concededly speculative premises on which its economic defense of the rules rests.”³⁹ In questioning the need for protecting local broadcasters, the court relied heavily on the fact that:

[I]t [the Commission] has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television . . . and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.⁴⁰

Thus, the government had fallen “far short of the burden . . . to prove the substantiality of the interest served by the rules.”⁴¹ Therefore, the

33. *Quincy*, 768 F.2d at 1452.

34. *Id.* at 1452 n.39; *see also* *Miami Herald Publishing v. Tornillo*, 418 U.S. 241 (1974) (forcing newspaper to print candidate’s reply under a right of reply statute violated newspaper’s First Amendment rights); *infra* note 147. Nonetheless, the court did not find this dispositive, perhaps subconsciously preferring the active exercise of the editorial function of a newspaper editor to the passive exercise of the cable operator.

35. *Quincy*, 768 F.2d at 1454.

36. *Id.*; *see* *United States v. O’Brien*, 391 U.S. 367 (1968).

37. *Quincy*, 768 F.2d at 1455 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.) (per curiam) (quoting *City of Chicago v. Federal Power Comm’n*, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 434 U.S. 829 (1977)) (internal quotation marks omitted).

38. *Id.* at 1442, 1459 (quoting *Inquiry Into Economic Relationship Between TV Broadcasting and Cable TV*, 65 F.C.C.2d 9, 14 (1977)).

39. *Id.* at 1442.

40. *Id.* at 1457.

41. *Id.*

court voided the rules, stating that “[s]hould the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is, of course, free to do so.”⁴²

Some sixteen months after *Quincy*, the FCC did just that. These new rules were immediately challenged in *Century Communications Corp. v. FCC*,⁴³ in which the court held that again it had “no choice but to strike down this latest embodiment of must-carry.”⁴⁴

Relying heavily on *Quincy*, the court again rejected the application of the scarcity rationale used to justify lesser protection of broadcasters’ First Amendment rights and stated that it “offer[ed] no succor to those seeking to establish the constitutional validity of cable television regulations.”⁴⁵

While declining, as in *Quincy*, to determine the level of scrutiny applicable to cable, the court concluded that, even if the lower *O’Brien* standard were applicable, the regulations failed.⁴⁶ While admitting that the FCC had corrected some of the problems with the previous must-carry rules, the FCC still failed to make a showing of a substantial governmental interest.⁴⁷ The court noted that “the FCC’s judgment that [must-carry] rules are needed is predicated not upon substantial evidence but rather upon several highly dubious assertions” which provided “scant evidence” that such rules were, indeed, necessary.⁴⁸ Indeed, the court cited data which seemed to indicate that cable companies were not a threat to over-the-air television, stating that “during the 16 months that elapsed between *Quincy Cable TV* and the reimposition of the modified must-carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to *Quincy Cable TV*.”⁴⁹ The court further noted that, even if the threat to broadcasters were real, the must-carry provisions were not sufficiently narrowly tailored so as to pass the second prong of the *O’Brien* balancing test.⁵⁰ In concluding

42. *Id.* at 1463.

43. 835 F.2d 292 (D.C. Cir. 1987), order clarified by 837 F.2d 517 (D.C. Cir.), cert. denied, 486 U.S. 1032 (1988).

44. *Id.* at 305.

45. *Id.* at 295 (citation omitted).

46. *Id.*

47. *Id.* at 298. Improvements in the new must-carry rules included limiting the number of local stations that cable companies had to carry and eliminating the requirement that the companies carry duplicative programming. *Id.*

48. *Id.* at 300.

49. *Id.* at 303.

50. *Id.* at 303-04.

that the must-carry provisions were unconstitutional, the court maintained that "when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures."⁵¹ This effectively ended must-carry, albeit momentarily.

B. *The Cable Act of 1992*

In 1990, spurred by concerns of their constituents over recent rate hikes,⁵² Senators John Danforth and Daniel Inouye introduced a bill which eventually became the Cable Act of 1992.⁵³ The Senators' goal was simple—to spur competition in the cable industry, thereby producing lower rates for consumers.⁵⁴ While rate regulation⁵⁵ was the primary fo-

51. *Id.* at 304. It is apparent from the preceding line of cases that if Congress wished to craft must-carry rules that would withstand the court's scrutiny, empirical data to support the inference that off-the-air television is at risk would have to be presented. Congress obviously heeded this requirement in passing the Cable Act of 1992. Congress also obviously heeded the dictates of the courts, specifically redressing several problems noted in these two cases. For instance, in *Quincy*, the court noted that the rules were overly broad, as they required the carriage of all local broadcast stations. See S. REP. NO. 92, 102d Cong., 2d Sess. 1-2 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1172. The current Act addresses that in two sections: first, by limiting the number of local broadcast stations which must be carried to "up to one-third of the aggregate number of usable activated channels of such system," and, second, by not requiring the carriage of any station which "substantially duplicates" the programming of another local station carried on that system. 47 U.S.C. § 534(b)(1), (5) (Supp. V 1993).

52. The town of Eau Claire, Wisconsin, for example, saw an increase of some 206% with the advent of deregulation. 138 CONG. REC. H11477, H11479 (1992) (remarks of Rep. Gunderson).

Additionally, many consumers were outraged over the poor service which they received from their local operators. One Congressman noted that New York had to amend the charter of its local cable company to force them to answer the telephone, calling it "an example of public be damned." 138 Cong. Rec. H11485 (1992) (statement of Rep. Dingell).

53. Pub. L. No. 102-385, 106 Stat. 1460 (1992); see 47 U.S.C. §§ 521-558 (Supp. V 1993).

54. Congress stated that the purpose of the 1992 Act was "to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service." S. REP. NO. 92, 102d Cong., 2d Sess. 1, reprinted in 1992 U.S.C.C.A.N. 1133.

There is little doubt that cable television needs some form of regulation. After all, one commentator stated that "cable's significant technological and economic advantages will probably make it the dominant medium of the future." Eli M. Noam, *Local Distribution Monopolies in Cable Television and Television Service: The Scope For Competition*, in TELECOMMUNICATIONS REGULATION TODAY AND TOMORROW 351, 359 (Eli M. Noam ed., 1983). Indeed, Congress stated that "[c]able television has become our Nation's dominant video distribution medium." S. REP. NO. 92, 102d Cong., 2d Sess. 3, reprinted in 1992 U.S.C.C.A.N. 1133, 1135.

55. See, e.g., the FCC's mandate to ensure that rates set are "reasonable." 47

cus of the Act,⁵⁶ the must-carry provisions were also viewed as an important point by the bill's sponsors.⁵⁷

After passing both houses,⁵⁸ Congress sent the bill to President Bush, who had previously expressed his misgivings.⁵⁹ President Bush vetoed the bill, stating that, while "long on promises," the bill was simply a case

U.S.C. § 543(b)(1) (Supp. V 1993); *see also* 47 U.S.C. § 543(c) (Supp. V 1993) (permitting the regulation of unreasonable rates). Thus, rates for the basic service tier are regulated in almost every community in America. Charles D. Ferris, et al., *Cable Television Consumer Protection and Competition Act of 1992*, in *CABLE TELEVISION LAW: A VIDEO COMMUNICATIONS PRACTICE GUIDE 1* (Supp. 1992).

56. *See* MacLachlan, *supra* note 8, at 29.

57. *See* S. REP. NO. 92, 2, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1196-97.

In order to avoid a result similar to that of the previous two must-carry provisions, during deliberations on the 1992 Act Congress "deliberately constructed a thorough record to buttress its contention that must-carry rules were essential to the economic preservation of free over-the-air television and its free speech rights." MacLachlan, *supra* note 8, at 29.

Among the supporters of the Act were the AFL-CIO, the UAW, the National League of Cities, the National Association of State Attorneys-General, the U.S. Conference of Mayors, and, of course, local broadcasters. 138 CONG. REC. H11477, H11485 (1992).

58. *See supra* note 2 and accompanying text.

59. In his Letter to Congressional Leaders on Cable Television Legislation, President Bush wrote:

I am writing to express my strong opposition to the Conference Report to accompany S. 12 (Cable Television Consumer Protection and Competition Act of 1992), which the House and Senate will consider in the next several days.

This legislation will hurt Americans by imposing a wide array of costly, burdensome, and unnecessary requirements on the cable industry and the government agencies that regulate it. The heavy-handed provisions of the bill will drive up cable industry costs, resulting in higher consumer rates, not rate reductions as promised by the supporters of the bill.

The bill will also restrain continued innovation in the industry, cost the economy jobs, reduce consumer programming choices; and retard the deployment of growth-oriented investments critical to the future of our Nation's communications infrastructure.

My vision for the future of the communications industry is based on the principles of greater competition, entrepreneurship, and less economic regulation. This legislation fails each of these tests and is illustrative of the Congressional mandates and excessive regulations that drag our economy down. Congress would best serve consumer welfare by promoting vigorous competition, not massive re-regulation.

For these reasons I will veto S. 12 if it is presented to me, and I urge its rejection when the House and Senate consider the Conference Report.

1992-93 PUB. PAPERS 1588 (Sept. 17, 1992).

of "good intentions gone wrong."⁶⁰ The President's opposition notwithstanding, Congress voted to override his veto, with one Representative even calling the Cable Act of 1992 "the most important piece of consumer legislation in this Congress."⁶¹

60. President's Message, *supra* note 3, at 1751-52. The veto read, in its entirety:

To the Senate of the United States:

I am returning herewith without my approval S. 12, the "Cable Television Consumer Protection and Competition Act of 1992." This bill illustrates good intentions gone wrong, fallen prey to special interests.

Contrary to the claims made by its proponents, this legislation will not reduce the price Americans pay for cable television service. Rather, the simple truth is that under this legislation cable television rates will go up, not down. Competition will not increase, it will stagnate. In addition, this legislation will cost American jobs and discourage investment in telecommunications, one of our fastest growing industries.

S. 12 is clearly long on promises. Unfortunately, it is just as clearly short on relief to the American families who are quite rightly concerned about significant increases in their cable rates and poor cable service. Although the proponents of S. 12 describe the bill as procompetitive, it simply is not. Indeed, the only truly competitive provision, one that would have expanded the ability of telephone companies to compete with cable companies in rural areas, was dropped from the bill at the last minute.

S. 12 tries to address legitimate consumer concerns, but it does so by requiring cable companies to bear the costs of meeting major new federally imposed regulatory requirements and by adopting costly special interest provisions. For example, the bill requires cable companies for the first time to pay broadcasting companies, who have free access to the airwaves, to carry the broadcasters' programs. The undeniable result: higher rates for cable viewers.

Beyond increasing consumer costs, the bill takes certain key business decisions away from cable operators and puts them in the hands of the Federal Government. One provision, which is unconstitutional, requires cable companies to carry certain television stations regardless of whether the viewing public wants to see these stations. Another special interest provision would put the Federal Government in the position of dictating to cable companies to whom and at what price they could sell their programs. These types of federally mandated outcomes will discourage continued investment in new programs to the detriment of cable subscribers who have come to expect a wide variety of programming and new services.

I believe that the American people deserve cable television legislation that, unlike S. 12, will deliver what it promises: fair rates, good programming, and sound service.

Id.

61. 138 CONG. REC. H11353, H11483 (1992) (remarks of Rep. Cooper). President Bush's veto resparked the controversy in both houses of Congress, reflecting deep ideological differences in the effect and effectiveness of regulatory legislation. In the House of Representatives, opponents, mainly Republicans, argued against overriding the veto, warning that it could cost consumers up to three billion dollars. 138 Cong. Rec. H11480 (comments of Rep. Hughes). One of the most vocal opponents was Republican Rep. Newt Gingrich of Georgia, who called one portion of the bill "probably

III. FACTS OF THE CASE

*Turner Broadcasting System v. Federal Communications Commission*⁶² challenged the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992.⁶³ After Congress enacted the Cable Act of 1992,⁶⁴ numerous cable programmers and operators⁶⁵ challenged the must-carry provisions, arguing that they violate the First Amendment⁶⁶ because they interfere with

the greatest con job of recent times." 138 Cong. Rec. H11486.

In the Senate, opponents called the bill "flawed" and with "potentially harmful consequences." 138 Cong. Rec. S16656 (remarks of Sen. Chafee). In a strong attack on the effectiveness of the regulation, Senator Trent Lott of Mississippi stated "[i]n its wisdom, the Senate, in 1984, deregulated the cable industry, and what did we have? We had an explosion of development, innovation, opportunity; things really improved all across this country. It worked. Deregulation worked." 138 Cong. Rec. S16658. After stating that the current bill would actually drive up the price to consumers, Senator Lott noted that the must-carry provisions posed "serious constitutional questions." *Id.*

Despite these dire predictions, the Cable Act passed by a margin of 308 to 114 in the House and by a margin of 74 to 25 in the Senate. 138 Cong. Rec. H11487, S16676.

62. 114 S. Ct. 2445 (1994). Prior to this action, *Turner Broadcasting System (TBS)* had applied for injunctive relief. *Turner Broadcasting Sys. v. FCC*, 113 S. Ct. 1806, 1807-08 (1993) (Rehnquist, C.J.) (denying relief on the ground that it was not "indisputably clear" that TBS had a right to be free from regulation).

63. *See supra* note 7.

64. *See supra* notes 52-61 and accompanying text.

65. Those challenging the Act included cable programmers, such as TBS, the Arts & Entertainment Network, Black Entertainment Television, Discovery, E! Entertainment Television, Hearst/ABC-Viacom Entertainment Services, International Family Entertainment, National Cable Satellite Corporation, QVC Network, The Travel Channel, USA Networks, as well as cable operators, such as Daniel Cablevision, Time Warner, and National Cable Television. *Turner Broadcasting Sys. v. FCC*, 819 F. Supp. 32, 34 (D.D.C. Cir. 1993), *vacated*, 114 S. Ct. 2445 (1994).

Those defending the provisions included the United States, the FCC, the AFL-CIO, the Association of America's Public Television Stations, the Association of Independent Television Stations, Atlanta Interfaith Broadcasters, the Community Broadcasters Association, the Consumer Federation of America, the Corporation for Public Broadcasting, the International Association of Machinists and Aerospace Workers, Local Community Broadcasters, the National Association of Broadcasters, the National Association of State Cable Agencies, the National Council of Senior Citizens, the National Interfaith Cable Coalition, the National League of Cities, the National Rural Telecommunications Co-op, the Public Broadcasting Service, Trinity Christian Center, TV 14, Inc., the United Church of Christ, and Wireless Cable Association Intern., Inc. *Id.* at 34-35.

66. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

the cable operators' editorial control and place broadcasters in a preferred position.⁶⁷ Unpersuaded by these arguments, a three-judge panel⁶⁸ granted summary judgment for the Justice Department, stating that "[i]t is not the province of this Court to pass judgment upon the wisdom of the policies the national legislature has chosen to pursue in such endeavors."⁶⁹ The Supreme Court noted probable jurisdiction over the case on September 28, 1993,⁷⁰ to resolve the issue of whether the must-carry provisions of the Cable Act of 1992 are unconstitutional under the First Amendment.⁷¹

IV. ANALYSIS OF THE OPINION

A. Justice Kennedy's Majority Opinion

In Justice Kennedy's majority opinion⁷² the Court held that the "re-

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

67. *Turner*, 819 F. Supp. at 38.

"All art is at once surface and symbol." OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 10 (1931). Lawsuits—especially those grounded in the First Amendment—often show this dual nature; the concerns espoused in a brief bear little relation to those espoused in a boardroom. In the instant case, one need only scratch the surface to see the more pragmatic reasons motivating this litigation. The distant carriers, such as TBS, ESPN, et al., needed to persuade the Court to strike down the "must-carry" provisions in order to preserve their market share. Given the limited number of channels available to cable operators, if more channels must be set aside for local broadcast, there are fewer channels available for distant carriers.

The motivation of the cable operators is somewhat different. With distant programmers, the cable operator derives revenues from selling advertising inserted during the programs. With broadcasters, the signals usually come with advertising pre-sold by the broadcaster. The revenue produced from this pre-sold advertising is, of course, money in which the cable operator does not share.

68. This panel was created pursuant to § 23 of the 1992 Act. See 47 U.S.C. § 555(c) (Supp. V 1993) (codification of Pub. L. No. 102-385, § 23, 106 Stat. 1460, 1500).

69. *Turner*, 819 F. Supp. at 48. Judge Sporkin, in his concurrence, took TBS to task for being disingenuous in its suit, as he felt that it was more concerned with profits than with free speech. *Id.* at 54. He wrote, "to dress up their complaint in First Amendment garb demeans the principles for which the First Amendment stands and the protections it was designed to afford." *Id.* (Sporkin, J., concurring).

This economic paradigm was roundly criticized by New York Law School Professor Michael Botien, who called it "made up." MacLachlan, *supra* note 8, at 29.

70. *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 38 (1993), *vacated*, 114 S. Ct. 2445 (1994).

71. *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2451 (1994).

72. *Id.* Justice Kennedy was joined by the Chief Justice, Justices Souter, Blackmun, and Stevens. *Id.* at 2450-51. Justice Stevens, while concurring with much of Justice Kennedy's reasoning, noted that he would "part ways with him on the appropriate disposition of the case." *Id.* at 2473 (Stevens, J., concurring). Justice Stevens did,

laxed" First Amendment standard applied to broadcast industry regulation is inapplicable to the cable industry.⁷³ Instead, after finding that the must-carry provisions are content-neutral, the Court analyzed the provisions under the intermediate level of scrutiny set forth in *United States v. O'Brien*,⁷⁴ essentially weighing the First Amendment rights of the cable operators against the government's asserted interest in protecting the broadcast industry.⁷⁵ Seemingly satisfied that a legitimate government interest does exist in protecting local broadcast television,⁷⁶ the Court nonetheless remanded the case. Stating that the government had not satisfied the second prong of the *O'Brien* test, which requires that the government prove that the must-carry provisions are narrowly tailored to further the legitimate interest.⁷⁷

1. Historical Setting of the 1992 Cable Act

In Part One of the opinion, Justice Kennedy examined the role of cable television, stating that "the cable industry today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources."⁷⁸ Next, Justice Kennedy set the stage by briefly recounting the history of the 1992 Cable Act, along with the resulting legal challenges in the court below.⁷⁹

2. Level of Scrutiny

In Part Two of his opinion, Justice Kennedy stated that there is "no disagreement . . . [that] cable operators engage in and transmit speech."⁸⁰ Likewise, the Justice noted that there is no disagreement that

however, join in the remand in order to permit some disposition of the case. *Id.* (Stevens, J., concurring); see *infra* notes 202-19 and accompanying text for an analysis of Justice Stevens' opinion.

73. *Turner*, 114 S. Ct. at 2457; see *infra* notes 83-103 for a discussion of the broadcast standard.

74. 391 U.S. 367 (1968).

75. *Turner*, 114 S. Ct. at 2469-72.

76. Yet, these "local stations" are often simply affiliates of the major three networks. See 138 CONG. REC. H11479 (1992) (comments of Rep. Oxley).

77. *Turner*, 114 S. Ct. at 2472.

78. *Id.* at 2451.

79. *Id.* at 2453; see The Cable Television Consumer Protection and Competition Act, 47 U.S.C. § 534 (Supp. V 1993); see also *Turner Broadcasting Sys. v. FCC*, 819 F. Supp. 32 (D.C. Cir. 1993), *vacated*, 114 S. Ct. 2445 (1994).

80. *Turner*, 114 S. Ct. at 2456. Indeed, the cable operator engages in speech on at

the must-carry provisions do regulate speech, and stated that “[t]he rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining.”⁸¹ Given the existence of both speech and a burden thereupon, the Court had to first determine the level of scrutiny applicable to cable television before determining the constitutionality of the burden imposed by the must-carry provisions.⁸²

a. *The Red Lion standard*

The Government argued strongly for application of the standard applicable to broadcasters.⁸³ That standard was set forth in *Red Lion Broadcasting Co. v. FCC*,⁸⁴ where the Supreme Court, in its examination of the FCC’s Fairness Doctrine, upheld the constitutionality of the corollary “personal attack” doctrine, stating that the rules were “authorized by Congress and enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment.”⁸⁵ Additionally, the Court, for the first time, iterated the “scarcity rationale.”⁸⁶

The Fairness Doctrine required broadcasters to give coverage to each side on issues of public import.⁸⁷ The personal attack doctrine required broadcasters who aired a personal attack to forward a transcript to the person affected, and to provide them with cost-free time to respond.⁸⁸

least two levels: first, some cable operators actually produce original programming such as news, sports, or talk shows; second, the operator engages in speech by exercising editorial control over the selection of programs or services to be carried. Brenner, *supra* note 19, at 335-37. Several factors influence the selection of programming, including content (striving to provide a diversity of viewpoints), affiliation with the parent company, or, most frequently, market considerations. *Id.* at 337-38; *see also* *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (stating that cable operators are “press”); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (noting that cable operators are members of the press).

81. *Turner*, 114 S. Ct. at 2456.

82. *Id.*

83. *Id.*

84. 395 U.S. 367 (1969).

85. *Id.* at 375. *See generally* Charles D. Ferris & James A. Kirkland, *Fairness: The Broadcaster’s Hippocratic Oath*, 34 CATH. U. L. REV. 605 (1985) (discussing the Fairness Doctrine after *Red Lion*).

This personal attack doctrine has been criticized for failing to serve its underlying policies, for spawning terrible administrative complications, and for infringing on the First Amendment freedoms of the broadcaster. STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 87 (1978).

86. *Red Lion*, 395 U.S. at 388.

87. *Id.* at 369.

88. *Id.* at 371-72.

These doctrines were set forth in two forms: first, through a series of FCC rulings and case law; second, through the Communications Act of 1934,⁸⁹ which provided, with respect to candidates for public office, that “[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.”⁹⁰

Red Lion Broadcasting aired a program in which Fred Cook, an author, was maligned as a Communist fellow-traveler.⁹¹ Red Lion refused to provide Cook with airtime to respond to the attacks.⁹² After the FCC declared Red Lion in violation of the personal attack doctrine, the broadcaster took to the courts.⁹³

Reasoning that the personal attack doctrine was a logical corollary of the Fairness Doctrine, and noting that the Fairness Doctrine was later codified, the Court held that the FCC’s regulatory mandate was sufficiently broad to permit enforcement of both doctrines.⁹⁴

While conceding that broadcasters are entitled to First Amendment protection, the Court stated that broadcasters are not entitled to the same level of protection as the print media, reasoning that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”⁹⁵ Indeed, Justice White noted that the very nature of broadcasting led to regulation, stating that

[i]t was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.⁹⁶

This scarcity of frequencies led the Court to the inescapable conclusion that “it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”⁹⁷ Thus, while the aim of the First Amendment is to provide an

89. *Id.* at 369-70.

90. *Id.* at 370 n.1 (quoting 47 U.S.C. § 315 (1988)).

91. *Id.* at 371.

92. *Id.* at 372.

93. *Id.* at 372-73.

94. *Id.* at 379-86.

95. *Id.* at 386.

96. *Id.* at 388.

97. *Id.*

“uninhibited marketplace of ideas,” it does not preclude the regulation of broadcasting.⁹⁸

In fact, the Court, noting that because the public has an interest in the operation of the broadcast media consistent with the First Amendment, broadcasters are quasi-trustees of the people.⁹⁹ Calling the license to use radio frequencies a “privilege,” the Court found that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”¹⁰⁰

While agreeing that technology allows more efficient use of frequencies, Justice White noted that technology has also invented new ways of utilizing the frequencies, thereby perpetuating a scarcity.¹⁰¹ Finally, in defense of the scarcity rationale, Justice White reasoned that the airwaves are a vital resource of “growing importance.”¹⁰² Further, this resource must be regulated because it is scarce.¹⁰³

b. The Government's arguments for the Red Lion standard

The Government argued that cable operators should be subject to the same First Amendment standard as broadcasters, supporting its position with two arguments: first, a proper interpretation of *Red Lion* revealed that the true rationale for the lesser scrutiny for broadcast was not the scarcity of broadcast frequencies, but “market dysfunction;” and, second, the must-carry provisions were merely “industry-specific antitrust legislation,” and, as such, entitled to lessened scrutiny.¹⁰⁴

Justice Kennedy, in examining the first argument, stated quite bluntly that “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.”¹⁰⁵ Ana-

98. *Id.* at 389-90.

99. *Id.* at 390.

100. *Id.*

101. *Id.* at 397.

102. *Id.* at 399.

103. *Id.*

104. *Turner*, 114 S. Ct. at 2457-58.

105. *Id.* at 2456. There are, of course, fundamental technological differences between cable television and off-the-air broadcasting. Cable operators receive signals from broadcast stations, radio stations, and cable programmers. Brenner, *supra* note 19, at 332. While originally serving mainly to “boost” local stations with poor reception, they now serve primarily as importers of distant signals provided by cable programmers. Brenner, *supra* note 19, at 335; see *United States v. Southwestern Cable*, 392 U.S. 157, 163 (1968). These signals are then sent to subscribers by means of coaxial cables, which are either buried underground or strung along poles. Brenner, *supra* note 19, at 332-33. At the subscriber's home, the signal is fed into a converter box or into a cable-ready TV, which interprets the signals so that the television can

lyzing the rationale underlying the Court's broadcast exception, Justice Kennedy emphasized that the broadcast media requires a different standard because of its "unique physical limitations."¹⁰⁶ Thus, the Court expressly rejected the Government's proposed interpretation of *Red Lion*.

While noting that this scarcity rationale has been much maligned,¹⁰⁷ the Court nonetheless "declined to question its continuing validity."¹⁰⁸ Despite the validity of the scarcity rationale in the broadcast medium, Justice Kennedy stated that these same physical limitations are not found in the cable medium.¹⁰⁹ He therefore noted that nothing in this case would "require the alteration of settled principles of our First Amendment jurisprudence."¹¹⁰

The Court next addressed the government's argument that this is merely antitrust legislation, meriting rational basis scrutiny.¹¹¹ Although conceding that there may, indeed, be a dysfunction in the cable marketplace, the Court did not find such a dysfunction dispositive, stating that "laws

receive them. *Id.* at 333.

Broadcasters, on the other hand, send their signals as radiant energy on specified channels. CARTER ET AL., *supra* note 21, at 626. Television utilizes both VHF (from 30 to 300 MHz) and UHF (from 300 to 3,000 MHz), but relies primarily on transmission over VHF. *Id.* at 627, 636. These signals are then intercepted by an antenna, fed into the television, and translated into a viewable image. *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1438 (D.C. Cir. 1985).

106. *Turner*, 114 S. Ct. at 2458. Broadcasters are limited by physics—there is a finite number of broadcast frequencies available in the electromagnetic spectrum. Initially, 96 channels were allocated for broadcast use, ranging from 550 to 1500 kilocycles. *National Broadcasting Co. v. United States*, 319 U.S. 190, 211 (1943). Thus, during the development of the broadcast industry, the government was required to divide the spectrum and assign frequencies. *See id.* at 210-18 (recounting the evolution of the FCC and its authority to allocate and assign frequencies). This naturally resulted in a concomitant abridgement of the "right of every individual to speak, write, or publish." *Red Lion*, 395 U.S. at 388.

107. *See, e.g.*, RICHARD E. LABUNSKI, *THE FIRST AMENDMENT UNDER SIEGE: THE POLITICS OF BROADCAST REGULATION* 9 (1981) (asking if conditions have not changed sufficiently so that "scarcity" no longer accurately describes the availability of broadcasting channels and no longer justifies government regulation"); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1007 (1989).

108. *Turner*, 114 S. Ct. at 2457.

109. *Id.*

110. *Id.* Given that the lower courts had explicitly rejected this theory as inapplicable to cable, it is mystifying why the Government even advanced an argument for it. *See supra* note 32, 95-103 and accompanying text.

111. *Turner*, 114 S. Ct. at 2458.

that single out the press, or certain elements thereof . . . are always subject to at least some degree of heightened First Amendment scrutiny."¹¹²

c. *Content-neutral or content-based?*

Before analyzing the must-carry provisions further, the Court first considered whether the provisions were content-neutral or content-based,¹¹³ stating that "[o]ur precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."¹¹⁴ Laws compelling speech are subject to the same level of scrutiny as those prohibiting speech.¹¹⁵ If content-neutral, however, the regulations would be subject to merely an intermediate level of scrutiny.¹¹⁶

Admitting that a determination of whether a regulation is content-based or content-neutral "is not always a simple task,"¹¹⁷ the Court stated that "the 'principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'"¹¹⁸

The basic test for content-based status is whether a law distinguishes favored from disfavored speech because of the ideas, viewpoints, or message it contains.¹¹⁹ Generally, a law is content-neutral if it "confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed."¹²⁰

112. *Id.*

113. After determining that the *Red Lion* standard was inapplicable, the Court was at a crossroads. Should it, as the lower courts had done in *Quincy* and *Century*, simply analyze the must-carry provisions under the intermediate-level protection of *O'Brien* without determining, definitively, whether this or the strict scrutiny analysis was the proper test? Thankfully, it went the one step further.

114. *Turner*, 114 S. Ct. at 2459.

115. *Id.*

116. *Id.* The Court noted that these regulations receive lesser scrutiny "because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.*; see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (holding that a Park Service regulation prohibiting camping in Lafayette Park was not content-based when applied to prevent demonstrators from sleeping there).

117. *Turner*, 114 S. Ct. at 2459.

118. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding a New York City ordinance on the use of a concert amphitheater as a reasonable regulation of time, place, and manner of speech)).

119. *Id.*; see *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding a Tennessee statute prohibiting electioneering within 100 feet of a voting-place as narrowly tailored to further the state's compelling interest in protecting voters from undue influence); *Boos v. Barry*, 485 U.S. 312 (1988) (plurality opinion) (holding that an ordinance against picketing foreign embassies was an unconstitutional, content-based restriction).

120. *Turner*, 114 S. Ct. at 2459; see *City Council of Los Angeles v. Taxpayers for*

d. Content basis declined

While admitting that the must-carry provisions "interfere with cable operators' editorial discretion by compelling them to offer carriage," the Court concluded that "the extent of the interference does not depend upon the content of the . . . programming."¹²¹ The Court noted that the burdens of offering carriage were imposed upon all operators, regardless of the content of their programming¹²² and felt that the Act extracts no penalty as a result of any program which the cable operator may select.¹²³ The Court further concluded that the burden imposed upon cable programmers was, likewise, unrelated to content, as it "extends to all cable programmers irrespective of the programming they choose to offer viewers."¹²⁴ Likewise, the benefits conferred by the must-carry provisions are unrelated to content, as "[t]he rules benefit all full power broadcasters who request carriage."¹²⁵

In addressing Turner Broadcasting System's (TBS) differential treatment argument, the Court admitted that the must-carry provisions placed broadcasters in a favored position.¹²⁶ Despite this, the requirements were found to be based upon medium, rather than content.¹²⁷ In con-

Vincent, 466 U.S. 789 (1984) (holding that a city ordinance prohibiting placing signs on utility poles did not infringe on First Amendment freedom of speech guarantees); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding a rule requiring that literature at the state fair be distributed only from registered booths as the least restrictive means of effectively ensuring proper crowd control).

121. *Turner*, 114 S. Ct. at 2460.

122. *Id.*

123. *Id.* This reasoning seems specious, especially in light of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). See *infra* note 147. Although not limited in the same way as broadcasters, cable operators are, nevertheless, subject to the restraints of their individual systems. While potentially capable of carrying hundreds of channels, most systems actually have merely between 30 and 50 activated channels, which are those capable of use at any given time.

In *Tornillo*, the Court noted that a penalty was exacted in the amount of ink, paper, and even time spent by the newspaper in printing viewpoints which they did not wish to. 418 U.S. at 257-58. It is unclear why, given the relative value of each active channel, the same "taking" rationale would not apply to cable operators.

124. *Turner*, 114 S. Ct. at 2460.

125. *Id.* The Court noted that the rules extended to all full power broadcasters, regardless of whether they are commercial, non-commercial, independent, network-affiliated, English, Spanish, religious, or secular. *Id.*

126. *Id.*

127. *Id.*

cluding his brief treatment of this argument, Justice Kennedy wrote: "So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment."¹²⁸

i. Purpose of must-carry

After determining that the must-carry provisions are not content-based *prima facie*, the Court next examined the "manifest purpose" of the rules for a basis in content, noting that such an illicit purpose could invalidate "even a regulation neutral on its face."¹²⁹

Despite TBS's contention that Congress' self-avowed interest in promoting localism clearly showed a content preference, the Court stated simply, "we do not agree."¹³⁰

Noting the breadth of findings upon which Congress based the Act, the Court observed that requiring cable systems to carry broadcast stations would ensure a large enough audience to continue advertising revenues sufficient to "guarantee the survival of a medium that has become a vital part of the Nation's communication system."¹³¹ The Court also noted that protecting broadcast television is an "important and substantial federal interest."¹³²

128. *Id.* at 2460-61. The majority seemed to ignore the legitimate concerns voiced by Justices O'Connor and Ginsburg. *See infra* notes 220-57 and accompanying text. In fact, the Congressional Record clearly supports the contention that Congress considered local content when the must-carry provisions were debated. *See generally* S. REP. NO. 92, 102d Cong., 2d Sess. 1 (1991), H.R. CONF. NO. 102-862, 102d Cong., 2d Sess. 1 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1136-1286.

129. *Turner*, 114 S. Ct. at 2461; *see* *United States v. Eichman*, 496 U.S. 310 (1990) (striking down the Flag Protection Act as clearly intending to suppress free expression); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217 (1993) (striking down a city ordinance aimed at preventing members of the Santeria religion from practicing animal sacrifice).

130. *Turner*, 114 S. Ct. at 2461.

131. *Id.* If broadcast's existence is so vital, would these stations not be ripe for direct government subsidies? Additionally, the Court's reasoning calls to mind Judge Sporkin's criticism of TBS for bringing this action for purely economic motives. *See supra* note 69. It seems clear that the sole rationale for the must-carry provisions, at least from the broadcasters' standpoint, was economic.

132. *Turner*, 114 S. Ct. at 2461 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)). The Court stated that Congress' objective was merely to "preserve access to free television programming for the 40 percent of Americans without cable." *Id.* The reasoning behind this is a bit obscure. If a broadcast station was dropped from every home with cable, instead of being merely one channel among 30, or even 50, on the cable system, it would now be one of only five or six over-the-air stations. Thus, while reaching a smaller total number of homes, the actual market share could, potentially, increase.

If Congress were truly interested in merely ensuring access, the use of an A/B

In determining that the provisions are unrelated to any particular viewpoint, the Court noted that all broadcasters are covered, irrespective of content.¹³³ The Court concluded that, given the value Congress placed upon local broadcasting,¹³⁴ the must-carry provisions do nothing more than "prevent cable operators from exploiting their economic power to the detriment of broadcasters."¹³⁵

As an additional argument that the provisions are content-based, TBS pointed to the fact that the FCC has greater control over the content of broadcasters, implying intent on the part of Congress to ensure that particular programs or program types would be shown on cable.¹³⁶ While agreeing that the FCC does have greater regulatory power over broadcast television, the Court stated that "the argument exaggerates the extent to

selector switch would be just as effective. This requirement was, however, dropped from the current Act. See 47 U.S.C. § 534(e) (Supp. V 1993).

Additionally, if over-the-air television is truly worthy of protection, why are UHF or low-power stations not afforded the same degree of protection? The preference for VHF stations (traditional broadcasters) tilts the scales in favor of mainly network-affiliated stations, to the exclusion of smaller, independent stations, that need must-carry even more. For example, in 1971 58% of American homes with televisions that could receive broadcast had no VHF independent stations. CARTER ET AL., *supra* note 21 at 636 (citing ROGER G. NOLL ET AL., ECONOMIC ASPECTS OF TELEVISION REGULATION 168 (1973)).

133. *Turner*, 114 S. Ct. at 2461-62. Earlier, the Court noted the conditions under which a low power broadcast station would be eligible for must-carry. *Id.* at 2460. The Act states that such stations must be carried if the FCC determines that it "would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license." 47 U.S.C.A. § 534(h)(2)(B).

It seems unlikely that the standard for carriage of a low power station would stray very far from the Congressional intent behind the main portions of the must-carry provisions. Additionally, otherwise ineligible broadcast stations may be granted must-carry status if their programming "provides news coverage of issues of concern to such community . . . or coverage of sporting and other events of interest to the community." 47 U.S.C. § 534(h)(1)(C)(ii). Both of these sections clearly point to a content-based preference, showing Congress' intent to preserve a particular point of view.

134. *Turner*, 114 S. Ct. at 2462; see Cable Act of 1992, 47 U.S.C. § 521 (Supp. V 1993).

135. *Turner*, 114 S. Ct. at 2462. The Court ignored the fact that the power cable operators have is mainly a result of exclusive franchises awarded to them by local governments. Should cable be penalized for the lawful actions of these bodies? This almost seems to be a nod to the government's antitrust argument. See *supra* note 104, 111-12 and accompanying text.

136. *Turner*, 114 S. Ct. at 2462-63.

which the FCC is permitted to intrude into matters affecting the content of broadcast programming.¹³⁷

The Court also noted that the FCC is prohibited from engaging in censorship,¹³⁸ interfering with journalistic judgment,¹³⁹ or imposing “its private notions of what the public ought to hear.”¹⁴⁰ Indeed, both commercial and non-commercial stations are subject to the same “public interest, convenience or necessity” standard.¹⁴¹ Specifically, the Court pointed to both regulations and case law prohibiting the use of governmental “leverage” on the Corporation for Public Broadcasting (CPB).¹⁴² The Court noted that, given the “minimal extent” of influence over programming exercised by the FCC and Congress, TBS’s concerns were “without foundation.”¹⁴³

In concluding its analysis of the content-neutrality of the must-carry provisions, the Court felt that the provisions were enacted neither to punish cable,¹⁴⁴ nor to reward broadcasting, but to “preserve the existing structure of the Nation’s broadcast television medium while permitting the concomitant expansion and development of cable television.”¹⁴⁵

137. *Id.* at 2463. It is interesting to note that the very type of right-of-reply statute which was invalidated in *Tornillo* is permitted of broadcasters. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); FCC Personal Attacks Rule, 47 C.F.R. § 73.1920 (1993), see *infra* note 147 and accompanying text.

138. *Turner*, 114 S. Ct. at 2463 (citing 47 U.S.C. § 326 (1988)).

139. *Id.* (quoting *Hubbard Broadcasting Inc.*, 48 F.C.C.2d 517, 520 (1974)).

140. *Id.* (quoting *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7291, 7293 (1960)).

141. *Id.* (quoting *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2312 (1960) (citing the *Communication Act of 1934*, 47 U.S.C. §§ 307, 309 (1988) (superseded by the *Cable Act of 1992*, 47 U.S.C. §§ 531-558 (Supp. V 1993))).

142. *Turner*, 114 S. Ct. at 2463-64; see 47 U.S.C. §§ 396(g)(1)(D) (1988) (stating that the Corporation for Public Broadcasting (CPB) will carry out its activities “in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities”); *id.* at 398(a) (mandating that other agencies not “exercise any direction, supervision, or control” over the CPB’s programming); see also *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 381 (1984) (holding that a prohibition on editorializing by stations funded by the CPB was unconstitutional as it sought to suppress a function of the press which “lies at the heart of First Amendment protection”).

It is rather simplistic to believe that the CPB would not conform, even subconsciously, to the desires of Congress, the one who holds the purse strings. See, e.g., *Judith Michaelson, PBS President Urges Grass-Roots Lobbying Effort*, L.A. TIMES, Jan. 5, 1995, at B2 (recounting efforts of the PBS President to secure funding to counter the threatened cuts from the Republican House).

143. *Turner*, 114 S. Ct. at 2464.

144. *But see* 138 CONG. REC. H11477 (1992) (statement of Rep. Lent) (calling the Act “an attempt to punish the cable industry”).

145. *Turner*, 114 S. Ct. at 2464.

ii. Compelled speech

To justify application of strict scrutiny, TBS argued that the must-carry provisions "compel cable operators to transmit speech not of their choosing."¹⁴⁶ In support of its argument, TBS cited *Miami Herald Publishing Co. v. Tornillo*,¹⁴⁷ contending that the same interference with editorial control which was invalidated in *Tornillo* was fostered by the must-carry rules.¹⁴⁸

Despite TBS's contentions, the Court found both *Tornillo* and *Pacific Gas & Electric v. Public Utilities Commission*¹⁴⁹ inapposite, because the must-carry provisions are not triggered by the content of the speech.

146. *Id.*

147. 418 U.S. 241 (1974). In *Tornillo*, the Court invalidated Florida's "right of reply" statute as violative of the First Amendment. Pat Tornillo, a candidate for the Florida House of Representatives, was the subject of severely critical editorials by the Miami Herald. *Id.* at 243-44. Florida statutes mandated a "right of reply," which stated: "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election . . . such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make there-to . . ." *Id.* at 244 n.2 (quoting FLA. STAT. ch. 104.38) (1973).

In its analysis, the Court conceded that newspapers today bear little resemblance to those of 1791; instead, the "concentration of control of media" has resulted in "vast accumulations of unreviewable power in the modern media empires." *Id.* at 249-50. The Court noted that access proponents argued that "[t]he First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market." *Id.* at 251.

Relying on its holding in *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (noting that "a free press is a condition of a free society"), the Court stated that there was no difference between preventing the Miami Herald from publishing what it wanted and forcing it to print something it did not. *Id.* at 256. The Court wrote that "[t]he Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant [Miami Herald] to publish specified matter." *Id.*

Furthermore, the Court found the statutes unconstitutional for two reasons: first, because they effectively "exact[ed] a penalty" in the amount of "the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print," and, second, because of the "intrusion into the function of editors." *Id.* at 256-58. This editorial function encompasses both deciding the content and size of the newspaper, as well as treating issues. *Id.* at 258. Concerning the editorial function, the Court observed (*in re* this editorial function) that "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*

148. *Turner*, 114 S. Ct. at 2464-65.

149. 475 U.S. 1 (1986) (invalidating as compelling speech a rule requiring inclusion of a newsletter critical of the utility company).

Additionally, there was no “counterbalancing” interest in their enactment, as there was in the right of reply statute invalidated in *Tornillo*.¹⁵⁰ Thus, the Court determined that the statutes were based on neither the cable operators’ nor the broadcasters’ speech content.¹⁵¹

The Court also rejected TBS’s “altered message” argument, a subset of the compelled speech argument in which TBS argued that in complying with the must-carry provisions, it would be forcibly identified with messages it did not wish to convey.¹⁵² In dismissing this contention, the Court relied on the fact that cable has, historically, served merely as a conduit for broadcast signals, with “little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.”¹⁵³

Lastly, the Court found *Tornillo* uncontrolling because of the fundamental technological differences between newspapers and cable television.¹⁵⁴ The Court observed that, regardless of the extent of the control which a newspaper may exert over its own content, it has no influence over the distribution of competing newspapers in the same area.¹⁵⁵ Cable, on the other hand, does have that power, thanks to the very nature of the medium; “the physical connection between the television set and the cable network gives the cable operator bottleneck or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber’s home.”¹⁵⁶ This control gives the cable operator power that a newspaper editor does not have: the power to silence competing voices “with a mere flick of the switch.”¹⁵⁷

Realizing that the potential abuse of this power must be considered, the Court stated that “[t]he First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through

150. *Turner*, 114 S. Ct. at 2465; see *supra* note 147. While the purpose of the right of reply statute invalidated in *Tornillo* was to ensure a balance of competing viewpoints, is Congress not attempting to affect the same type of counterbalancing with must-carry by ensuring that the cable-viewing public is exposed to both local and distant stations?

151. *Turner*, 114 S. Ct. at 2465.

152. *Id.* Here, TBS contended that cable operators might be forced to alter their programming in order to respond to that of the broadcasters. *Id.* Additionally, they voiced fears that viewers would associate the views espoused by broadcasters with the cable operators themselves. *Id.*

153. *Id.* The Court also noted that broadcasters are required to identify themselves once per hour. *Id.* at 2465-66; see FCC Rule Concerning Station Identification 47 C.F.R. § 73.1201 (1993).

154. *Turner*, 114 S. Ct. at 2466.

155. *Id.*

156. *Id.*

157. *Id.*

physical control of a critical pathway of communication,¹⁵⁸ the free flow of information and ideas."¹⁵⁹

iii. Favored speaker

TBS also argued for a strict scrutiny analysis based on the language in *Buckley v. Valeo*,¹⁶⁰ in which the Court stated that "the government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others.'"¹⁶¹ TBS contended that a broadcast coverage requirement would lead to cable programmers being dropped, creating an inequity in treatment.¹⁶²

The Court felt, however, that TBS misinterpreted *Buckley's* reasoning and holding, stating that the holding was not so broad as to render all speaker-partial laws presumptively invalid.¹⁶³ Instead, *Buckley* was more properly grounded in the communicative impact of the speech involved.¹⁶⁴

As with *Tornillo* and *Pacific Gas*, the regulations invalidated in *Buckley* were content-based.¹⁶⁵ Thus, the Court noted that "*Buckley* . . . stands for the proposition that laws favoring some speakers over others

158. Strangely enough, while both the Court and Congress have repeatedly stressed the importance of broadcasting, here, for the first time, the Court referred to cable as a critical area. *See id.*

159. *Id.* This philosophy is apparent in the regulation of broadcasting. *See, e.g.*, 47 U.S.C. § 312(a)(7) (1988) (allowing revocation of license for failure to allow access to candidates for federal office); FCC Personal Attacks Rule, 47 C.F.R. § 73.1920 (1993) (requiring notification and an opportunity to respond to victims of on-air personal attacks).

This philosophy notwithstanding, the Court seems to blame the cable industry as if it had invented its own regulatory scheme. The "bottleneck" had been addressed in earlier legislation requiring an A/B switch, which allowed cable subscribers to switch effortlessly between cable and broadcasters, but was dropped in the 1992 Act. *See* 47 U.S.C. § 534(e) (Supp. V 1993). Lastly, the Court referred at several points to the almost monopolistic power of cable operators, while admitting that "the cable medium may depend for its very existence upon express permission from local governing authorities." *Turner*, 114 S. Ct. at 2452.

160. 424 U.S. 1 (1976) (*per curiam*) (upholding a regulation prohibiting political contributions of more than \$1,000.00).

161. *Turner*, 114 S. Ct. at 2466 (quoting *Buckley*, 424 U.S. at 48-49).

162. *Id.*

163. *Id.* at 2467.

164. *Id.*

165. *Id.*; *see Buckley*, 424 U.S. at 17.

demand strict scrutiny when the legislature's speaker preference reflects a content preference.¹⁶⁶

Since the Court already determined that the must-carry provisions are not content-based,¹⁶⁷ it quickly dismissed TBS's proposed application of *Buckley*, stating that "the fact that the provisions benefit broadcasters . . . does not call for strict scrutiny under our precedents."¹⁶⁸

iv. Disfavored treatment

As its last argument for strict scrutiny analysis, TBS contended that Congress had singled out certain members of the press for disfavored treatment by imposing burdens on cable, while not imposing like burdens on other, non-broadcast media.¹⁶⁹

The Court agreed that laws which "discriminate among media . . . often present serious First Amendment concerns."¹⁷⁰ Nevertheless, such regulations do not *per se* merit strict scrutiny.¹⁷¹ The Court stated that

166. *Turner*, 114 S. Ct. at 2467.

167. *See supra* note 121-28 and accompanying text.

168. *Turner*, 114 S. Ct. at 2467.

169. *Id.*

170. *Id.* at 2468. The Court noted two examples of such discrimination. In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983), the Court ruled unconstitutional a state tax on newspapers which consumed over \$100,000 in paper and ink per year. *Id.* The Court found this burden unconstitutional for two reasons: first, because it singled out the press for disfavored treatment, and second, because it targeted a small group within the press itself. *Id.* at 591.

The Court found that the ability of the Government to single out the press for regulation was a "powerful weapon" which had the potential for abuse in censoring the press in its fundamental role—acting as a restraint on government. *Id.* at 585. The Court did suggest, however, that a "special characteristic" of the press could justify differential treatment. *Id.*

The Court also found that, while "[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment," the law here impacted such a small group that it raised a presumption that it was, in fact, a penalty. *Id.* at 592.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court, following the line of reasoning in *Minneapolis Star*, invalidated an Arkansas tax scheme which exempted newspapers while taxing magazines, stating that "[o]ur cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment." *Id.* at 227.

The Court found that this tax treated some members of the press (magazines) less favorably than others (newspapers, etc.); thus, it targeted a small group—the second part of the analysis in *Minneapolis Star*. *Id.* at 227-28; *see Minneapolis Star*, 460 U.S. at 591. Additionally, the Court found the tax to be inextricably linked to content, a distinction which Justice Marshall called "particularly repugnant." *Arkansas Writers'*, 481 U.S. at 229. Applying a strict scrutiny analysis, the Court determined that Arkansas had failed to justify the statute. *Id.* at 233.

171. *Turner*, 114 S. Ct. at 2468. For example, in *Leathers v. Medlock*, 499 U.S. 439 (1991), the Court upheld an Arkansas law requiring taxation of cable services, while

both *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* and *Arkansas Writers' Project, Inc. v. Ragland* were not controlling, as both were based on fears of distortion of the "marketplace of ideas" due to the small number of speakers targeted.¹⁷² Additionally, the Court noted that such differential treatment may be justified by special characteristics of the medium.¹⁷³

In the Court's view, one such special characteristic which justifies differential treatment in the instant case is the "bottleneck monopoly power" of cable.¹⁷⁴ The Court called this power "a demonstrable threat to the survival of broadcast television."¹⁷⁵ This threat, combined with the fact that the regulations are broad-based, rendered the reasoning of *Minneapolis Star* and *Arkansas Writers' Project* inapposite.¹⁷⁶ Thus, TBS's last argument for strict scrutiny was rejected. In dismissing the applicability of strict scrutiny analysis, the Court stated that "[i]n sum, the must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny."¹⁷⁷

3. Narrowly Tailored

After agreeing with the district court that the *O'Brien* standard was applicable, the Court next examined the must-carry provisions to see if "the restriction was no greater than essential to further the Government's interest."¹⁷⁸

The Court observed that Congress found three compelling interests to be served by the must-carry provisions: first, "preserving the benefits . . .

providing an exemption for newspapers. *Id.* The Court stated that, while "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints," in the instant case, the tax did not target the press and posed no threat to the press' function as "a watchdog of government activity." *Id.* at 447.

172. *Turner*, 114 S. Ct. at 2468 (quoting *Leathers*, 499 U.S. at 448).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 2469.

178. *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The Court noted that this does not equate to the best restrictive means available, but merely that the regulation must be no more restrictive than necessary. *Id.*

of over-the-air local broadcast television;" second, "promoting the widespread dissemination of information;" and, third, "promoting fair competition in . . . television programming."¹⁷⁹ The Court stated that "each of [these] is an important governmental interest."¹⁸⁰

Despite this, the Court stated that in order to show that the provisions are, indeed, narrowly tailored, the Government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."¹⁸¹

Thus, in order to validate the must-carry provisions, the Government has the burden of showing that the local broadcast industry is in economic peril, that the must-carry provisions will alleviate their plight, and that the provisions do not impose burdens on "substantially more speech than necessary to further the government's legitimate interests."¹⁸² In examining the record, the Court stated that "we are unable to conclude that the Government has satisfied either inquiry."¹⁸³

179. *Id.*

180. *Id.* In a review of the importance of over-the-air broadcast, the Court looked at the rationale behind the creation of the Communications Act of 1934, 'stating that Congress wished "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern." *Id.* (citing *United States v. Southwestern Cable*, 392 U.S. 157, 173-74 (1968)). Additionally, the compelling interest in broadcast still exists, even with the advent of cable, as forty percent of Americans still do not have cable. *Id.* at 2469-70.

The Court also noted two other interests. The first interest is in "assuring that the public has access to a multiplicity of information sources." *Id.* at 2470; see *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978) (stating that "[i]t was not inconsistent with the statutory scheme, therefore, for the Commission to conclude that the maximum benefit to the 'public interest' would follow some allocation of broadcast licenses so as to promote diversification of the mass media as a whole"); *United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n.27 (1972) (upholding FCC's authority to regulate cable television) (stating that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of a free society") and (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1944)).

Second, the Government has a compelling interest in "eliminating restraints on fair competition." *Turner*, 114 S. Ct. at 2470; see *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (holding that a newspaper which refused to accept advertising from anyone who advertised on the local radio station an attempt to establish an illegal monopoly).

181. *Turner*, 114 S. Ct. at 2470; see *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (stating that the Court may not "simply assume" that an ordinance will advance the state interests asserted); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (stating that a regulation which is reasonable on its face may be "highly capricious" if the problem does not exist).

182. *Turner*, 114 S. Ct. at 2470 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

183. *Id.*

While agreeing with the Government that substantial deference should be given to the predictive judgments of Congress,¹⁸⁴ such deference does not, in the Court's view, insulate judgments involving the First Amendment from judicial review altogether.¹⁸⁵ Rather, the Court is obligated to assure that "Congress has drawn reasonable inferences based on substantial evidence."¹⁸⁶

The Government put forth two propositions in support of the necessity of the must-carry provisions: first, that without must-carry, cable operators would refuse carriage to significant numbers of broadcasters; and, second, that those stations denied carriage would deteriorate or fail.¹⁸⁷

Noting substantial disagreement over the statistics cited by the Government, the Court stated that, even if it assumed, *arguendo*, the veracity of the statistics, the Government must also demonstrate that financial harm would be suffered by those broadcasters that would be dropped.¹⁸⁸ Citing a "paucity of evidence"¹⁸⁹ in this regard, the Court noted that the Government failed to carry its burden of proof.¹⁹⁰

Additionally, the Court stated that the impact of must-carry in other areas, such as the extent to which cable operators will be forced to change their programming, how many programmers will be dropped, and whether must-carry provisions can be satisfied by merely using unused channels, must be furthered investigated.¹⁹¹ The Court, calling these answers "critical," stated that "unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech than . . . necessary.'"¹⁹²

184. *Id.* at 2471.

185. *Id.*

186. *Id.*; see *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987) (stating that, when infringing on First Amendment rights, the Government "must be able to adduce either empirical support or at least sound reasoning on behalf of its measures"); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (stating that "we recognize[] that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations").

187. *Turner*, 114 S. Ct. at 2471.

188. *Id.* at 2471-72.

189. *Id.* at 2472. The Court observed that the Government introduced no evidence of any local broadcasters filing for bankruptcy, turning in their licenses, cutting back on operations, or even suffering serious reductions in revenues. *Id.*

190. *Id.*

191. *Id.* The Court also noted the absence of judicial findings on the availability of any less restrictive means of accomplishing Congress' asserted goals. *Id.*

192. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

The Court concluded that, "the importance of the issues to the broadcast and cable industries" necessitated that it remand the case to allow for a fuller development of the record before passing on the constitutional validity of the must-carry provisions.¹⁹³

B. Justice Blackmun's Concurring Opinion

Justice Blackmun, in a brief, one-paragraph concurrence,¹⁹⁴ wrote that Justice Kennedy's opinion "aptly identifies and analyzes the First Amendment concerns and principles" involved in regulation of the cable industry.¹⁹⁵ Justice Blackmun wrote separately merely to stress a single point—deference to the judgment of Congress.¹⁹⁶

Justice Blackmun emphasized the "paramount importance" of deferring to the predictions and findings of Congress.¹⁹⁷ To support his position, this deference, Justice Blackmun pointed to the "extensive" findings that Congress made in the course of hearings on the 1992 Cable Act.¹⁹⁸

193. *Id.*

194. *Turner*, 114 S. Ct. at 2472 (Blackmun, J., concurring).

195. *Id.* (Blackmun, J., concurring).

196. *Id.* (Blackmun, J., concurring); see *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973). Justice Blackmun obviously felt that Congress acted in the public good in passing the Cable Act, but Oliver Wendell Holmes' words on the development of the Common Law are instructive:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark D. Howe ed., 1963).

197. The "predictions" which Justice Blackmun refers to are those relative to the broadcast industry's need for protection. *Turner*, 114 S. Ct. at 2472 (Blackmun, J., concurring). The value of the predictions of Congress are called into question by Justice Ginsburg's dissent. See *Turner*, 114 S. Ct. at 2481; *infra* notes 247-57 and accompanying text.

198. *Turner*, 114 S. Ct. at 2472 (Blackmun, J., concurring). One commentator has outlined more pragmatic reasons for the 1992 Cable Act. Frank Lloyd has posited three main reasons for the Act: first, cable operators were unable to expand service capacity after the 1984 Cable Act; second, some cable operators were in "highly visible disputes" with members of congressional committees charged with communications legislation; and third, a coalition of cable's competitors mounted "relentless attacks" on the cable industry. Lloyd, *supra* note 6, at 24. Mr. Lloyd stated that these competitors included the "wireless cable" industry, the direct broadcast satellite industry and the telephone industry. *Id.* Most importantly, broadcasters lobbied strongly for the "must-carry" provisions, which were eventually made a part of the Act. *Id.*

When the fate of the Act was in doubt, and when several unions joined with the powerful Consumer Federation of America in backing the broadcasters, the "must-carry" provisions were included, and the Act was passed. *Id.*

This picture of influence and power is undoubtedly a far cry from what Justice

While supporting the remand,¹⁹⁹ Justice Blackmun concluded by intimating that, with proper development of the record on the congressional findings, the Government will likely be able to support a motion for summary judgment.²⁰⁰ Referring to the Government's introduction of Congressional findings, Justice Blackmun stated that "[t]he record before the District Court no doubt will benefit from any additional evidence the Government and the other parties now see fit to present."²⁰¹ In essence, Justice Blackmun concurred with the remand purely on principle, while hinting that the outcome will eventually be the same.

C. Justice Stevens' Concurrence

Justice Stevens, in his separate opinion,²⁰² agreed with Justice Kennedy's reasoning, yet disagreed with his conclusion, writing that there was no reason to remand the case, as the lower court "reached the correct result the first time around."²⁰³ Misgivings notwithstanding, Justice Stevens wrote in concurrence with the judgment as an "accommodation" in order to assure a majority.²⁰⁴

Blackmun envisioned when he called for deference to Congressional predictions. Justice Blackmun seemed to envision legislators as trustees of the public good. Francois Rene De Chateaubriand's words are relevant here: "[A]re Americans perfect men? Do they not have their vices as do other men? Are they morally superior to the English from whom they draw their origin Will not the mercantile spirit dominate them? Will not self-interest begin to be the dominant national fault?" Francois Rene De Chateaubriand, *The United States Today' in Travels in America*, in THE FABER BOOK OF AMERICA 162, 163 (Christopher Ricks & William L. Vance eds. & Richard Switzer trans., 1992).

Indeed, Walt Whitman once wrote, excoriating the very legislative body in which Justice Blackmun places so much faith, that "[t]he official services of America, national, state, and municipal, in all their branches and departments, except the judiciary, are saturated in corruption, bribery, falsehood, mal-administration; and the judiciary is tainted." WALT WHITMAN, DEMOCRATIC VISTAS 179 (1871). Whitman concluded his essay by noting that "our New World democracy, however great a success in uplifting the masses out of their sloughs . . . is, so far, an almost complete failure in its social aspects, and in really grand religious, moral, literary, and esthetic [sic] results." *Id.* at 180. In point of fact, *qui nescit dissimulare nescit regnare* (he who does not know how to lie does not know how to rule) seems germane. See EUGENE EHRLICH, AMOS, AMAS, AMAT AND MORE 239 (1985).

199. *Turner*, 114 S. Ct. at 2473 (Blackmun, J., concurring).

200. *Id.* (Blackmun, J., concurring).

201. *Id.* (Blackmun, J., concurring).

202. *Id.* (Stevens, J., concurring in part).

203. *Id.* (Stevens, J., concurring in part).

204. *Id.* at 2475 (Stevens, J., concurring in part).

Justice Stevens agreed that the interest in ensuring the continued existence of the broadcast industry is “unquestionably substantial.”²⁰⁵ He also felt, like Justice Kennedy, that the “bottleneck monopoly,” which cable operators enjoy merits more intrusive regulation than other media.²⁰⁶ While agreeing with Justice Kennedy’s reasoning, Justice Stevens disagreed with his conclusion, stating that “the question for us is merely whether Congress could fairly conclude that cable operators’ monopoly position threatens the continued viability of broadcast television and that must-carry is an appropriate means of minimizing that risk.”²⁰⁷ While this seems to be merely a reformulation of the standard applied by Justice Kennedy,²⁰⁸ Justice Stevens stated frankly that “[i]n my view . . . application of that standard would require affirmance here,”²⁰⁹ as he found that the threat posed by cable “is at least plausible.”²¹⁰

The main point of divergence between the two concerned the sufficiency of the evidence supporting the must-carry provisions.²¹¹ Justice Stevens felt it a “practical certainty” that broadcasters would suffer economic harm if dropped from the local cable service.²¹² He felt it a reasonable inference that the unregulated power of cable operators would, inevitably, lead to such harm.²¹³ Justice Stevens noted that the must-carry provisions are “a simple and direct means of dealing with the dangers posed.”²¹⁴ Additionally, he noted that economically viable broadcasters would pursue the alternative retransmission consent route, leaving must-carry to those without the bargaining power of high ratings or network affiliation.²¹⁵

205. *Id.* at 2473 (Stevens, J., concurring in part).

206. *Id.* (Stevens, J., concurring in part).

207. *Id.* (Stevens, J., concurring in part). Justice Stevens noted that the basis for such legislation could not be overly firm, as “economic measures are always subject to second-guessing.” *Id.* (Stevens, J., concurring in part). The Justice called the forecasts upon which the Act was predicated “provisional” and “uncertain.” *Id.* (Stevens, J., concurring in part).

208. *Id.* at 2471.

209. *Id.* at 2473 n.1 (Stevens, J., concurring in part).

210. *Id.* at 2474 (Stevens, J., concurring in part).

211. *Id.* at 2473 (Stevens, J., concurring in part).

212. *Id.* at 2474 (Stevens, J., concurring in part). The Justice noted two facts in support of this contention: first, that 60% of Americans have cable, and second, that most cable customers’ only way to receive television signals is through their cable. *Id.* (Stevens, J., concurring in part).

213. *Id.* (Stevens, J., concurring in part). Justice Stevens cited the lower court’s opinion, in which Judge Jackson wrote of the “indisputable” dominance of cable, giving operators “both incentive and present ability” to destroy the broadcast industry. *Id.* (Stevens, J., concurring in part) (citing *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 46 (D.D.C. 1993), *vacated*, 114 S. Ct. 2445 (1994)).

214. *Id.* (Stevens, J., concurring in part).

215. *Id.* (Stevens, J., concurring in part).

Justice Stevens was also somewhat critical of the Court's insistence on a fuller development of the record at the District Court, because to him, the questions which Justice Kennedy posited did not lend themselves to definitive answers, but to predictive judgment.²¹⁶ The Justice wrote that such evidence might help in determining "the efficacy and wisdom" of the must-carry regulations, but was not needed to determine their constitutionality.²¹⁷

Lastly, Justice Stevens was suspicious of the value of such evidence, stating that interpreting such evidence would "require the District Court to engage in speculation; it may actually invite the parties to adjust their conduct in an effort to affect the result of this litigation."²¹⁸ The Justice concluded by stating that the provisions are "rationally calculated to redress the dangers that Congress discerned after its lengthy investigation of the relationship between the cable and broadcasting industries."²¹⁹

D. Justice O'Connor's Opinion, Concurring in Part, Dissenting in Part

Justice O'Connor, in her separate opinion,²²⁰ reached a conclusion diametrically opposed to that of Justice Kennedy, writing that the must-carry provisions fail *any* level of heightened First Amendment scrutiny.²²¹ As Justice O'Connor noted, "[i]t is as if the government ordered all movie theaters to reserve at least one-third of their screening for films

216. *Id.* (Stevens, J., concurring in part); *see id.* at 2470.

217. *Id.* at 2475 (Stevens, J., concurring in part). Indeed, Justice Stevens admitted that the provisions "may ultimately prove an ineffective or needlessly meddlesome means of achieving Congress' legitimate goals." *Id.* (Stevens, J., concurring in part). In point of fact, the Cable Act of 1992 had already proven a failure. According to a survey conducted in September 1993, 34% of respondents reported that they had been notified in the past month that their cable bill was going up. G. GALLUP, JR., THE GALLUP POLL, PUBLIC OPINION 1993 163 (1994).

218. *Turner*, 114 S. Ct. at 2475 (Stevens, J., concurring in part). It seems strange that Justice Stevens had no such doubts about the prognostications of Congress. *See id.* at 2473 (Stevens, J., concurring in part) (urging "special respect" for the findings of Congress).

219. *Id.* at 2475 (Stevens, J., concurring in part).

220. *Id.* (O'Connor, J., concurring in part, dissenting in part). Justice O'Connor was joined by Justices Ginsburg and Scalia and, in part, by Justice Thomas. *Id.* (O'Connor, J., concurring in part, dissenting in part).

221. *Id.* at 2480-81 (O'Connor, J., concurring in part, dissenting in part).

made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers.²²²

1. Content-based Analysis

Justice O'Connor began her analysis by noting the two groups of speakers which must-carry implicates.²²³ The first is cable operators, as they are required to carry particular programmers and simultaneously prevented them from carrying others.²²⁴ The second is cable programmers, who are deprived of access to one-third of available channels by the must-carry provisions.²²⁵ In examining the burden imposed on each of these, Justice O'Connor observed that laws singling out specific speakers present a substantial danger.²²⁶ This danger is present even when the laws do not draw explicit distinctions based on content.²²⁷

While agreeing that content-neutral restrictions on speakers are not *ipso facto* subject to strict scrutiny analysis, Justice O'Connor found that the must-carry provisions are, quite clearly, based on a preference for content.²²⁸ In support of this conclusion the Justice noted several Congressional findings which referenced a content preference,²²⁹ calling them "strong evidence of the statute's justifications."²³⁰

222. *Id.* at 2476 (O'Connor, J., concurring in part, dissenting in part).

223. *Id.* at 2475 (O'Connor, J., concurring in part, dissenting in part).

224. *Id.* (O'Connor, J., concurring in part, dissenting in part).

225. *Id.* at 2476 (O'Connor, J., concurring in part, dissenting in part).

226. *Id.* (O'Connor, J., concurring in part, dissenting in part).

227. *Id.* (O'Connor, J., concurring in part, dissenting in part); see *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 584, 591-92 (1983); see also *Leathers v. Medlock*, 499 U.S. 439, 447-49 (1991).

228. *Turner*, 114 S. Ct. at 2476 (O'Connor, J., concurring in part, dissenting in part).

229. *Id.* (O'Connor, J., concurring in part, dissenting in part); see 47 U.S.C. § 521 (Supp. V 1993). The first statement that Justice O'Connor highlighted was Congress' justification of the must-carry provisions by reference to the importance in promoting "a diversity of views." *Id.* § 521(a)(6). Additionally, the Act states that public television's educational and informational programming advances "the Government's compelling interest in educating its citizens." *Id.* § 521(a)(8)(A). The Act further stated that there is a "substantial governmental interest" in preserving locally originated programming. *Id.* § 521(a)(10). Lastly, the Act states that broadcast stations "continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." *Id.* § 521(a)(11).

230. *Turner*, 114 S. Ct. at 2477 (O'Connor, J., concurring in part, dissenting in part). Justice O'Connor also noted the mandate that the FCC "afford particular attention to the value of localism" when determining if a station is eligible for must-carry. *Id.* at 2476 (O'Connor, J., concurring in part, dissenting in part) (quoting 47 U.S.C. § 534(h)(1)(C)(ii) (1988 & Supp. V 1993)). In examining low-power stations, the FCC must determine if the station would provide "local news and informational needs which are not being adequately served by full power television broadcast stations." *Id.* (O'Connor, J., concurring in part, dissenting in part) (quoting 47 U.S.C.

Even after finding that the must-carry provisions were founded on a preference for broadcasters over cable operators and not on actual hostility toward cable operators, or a desire to suppress their speech, Justice O'Connor nevertheless found that strict scrutiny analysis applied, stating that "benign motivation . . . is not enough."²³¹ Indeed, Congress's motivation, "no matter how praiseworthy, is directly tied to the content of what the speakers will likely say."²³² Justice O'Connor further stated that, even if Congress had content-neutral reasons in mind, "we have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification."²³³

In analyzing the must-carry provisions under strict scrutiny, the restrictions are unconstitutional unless narrowly tailored to a compelling state interest.²³⁴ Under Justice O'Connor's analysis, "compelling" means more than merely "legitimate, or reasonable, or even praiseworthy;" it means that the restriction preserves "some essential value" or serves some

§ 534(h)(2)(B) (1988 & Supp. V 1993)).

231. *Turner*, 114 S. Ct. at 2477 (O'Connor, J., concurring in part, dissenting in part); see *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (invalidating New York's "Son of Sam" anti-crime-profit statute); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

Justice O'Connor also noted that the First Amendment generally prohibits the Government from exempting preferred speech from regulation. *Turner Broadcasting Sys.*, 114 S. Ct. at 2477 (O'Connor, J., concurring in part, dissenting in part). See generally *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (invalidating a regulation prohibiting the color reproduction of United States currency, but permitting the black-and-white reproduction, on the grounds that it was content-based); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (plurality opinion) (holding a ban on noncommercial advertising facially invalid as showing a preference for commercial advertising); *Carey v. Brown*, 447 U.S. 455 (1980) (finding unconstitutional an Illinois statute which allowed only labor-dispute-related picketing of homes); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (holding an ordinance that prohibited one form of picketing while allowing another was violative of the Equal Protection Clause); *Cox v. Louisiana*, 379 U.S. 536 (1965) (noting that a law against meetings and assemblies had not been applied uniformly and consistently).

232. *Turner*, 114 S. Ct. at 2477 (O'Connor, J., concurring in part, dissenting in part). Justice O'Connor strongly disagreed with Justice Kennedy's conclusion that the must-carry provisions are content-neutral, stating that "it is fair to assume that those findings reflect the basis for the legislative decision." *Id.* (O'Connor, J., concurring in part, dissenting in part). In the instant case, "[t]he controversial judgment at the heart of the statute is not that broadcast television has some value—obviously it does—but that broadcasters should be preferred over cable programmers." *Id.* at 2477-78 (O'Connor, J., concurring in part, dissenting in part).

233. *Id.* at 2478 (O'Connor, J., concurring in part, dissenting in part).

234. *Id.* (O'Connor, J., concurring in part, dissenting in part).

“pressing public necessity.”²³⁵ For Justice O’Connor, the interest in preserving localism, while legitimate, or possibly even important, “cannot be described as ‘compelling’ for the purposes of the compelling state interest test.”²³⁶

2. Content-neutral Analysis

Justice O’Connor, assuming *arguendo* that the must-carry provisions are not content-based, stated that the provisions are so broad that “they fail content-neutral scrutiny as well,”²³⁷ as they are not narrowly tailored.²³⁸ A regulation is not narrowly tailored if “a substantial portion of the burden on speech does not serve to advance [the State’s content-neutral] goals.”²³⁹

Given that the goal of the 1992 Act was the promotion of competition,²⁴⁰ Justice O’Connor found the must-carry provisions “fatally overbroad,” as they impose burdens on cable operators who have no anticompetitive motives and afford must-carry status to broadcasters who would survive even without it.²⁴¹

To Justice O’Connor, the cable operators, rather than Congress, should control programming.²⁴² While admitting that many cable operators are monopolists,²⁴³ Justice O’Connor wrote that there are many other ways in which Congress could better serve these interests, such as direct subsidies²⁴⁴ or encouraging the development of new media.²⁴⁵ In exam-

235. *Id.* (O’Connor, J., concurring in part, dissenting in part).

236. *Id.* (O’Connor, J., concurring in part, dissenting in part).

237. *Id.* at 2479 (O’Connor, J., concurring in part, dissenting in part).

238. *Id.* (O’Connor, J., concurring in part, dissenting in part); see *United States v. O’Brien*, 391 U.S. 367 (1968).

239. *Turner*, 114 S. Ct. at 2479 (O’Connor, J., concurring in part, dissenting in part) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 122 (1991)); see, e.g., *Schneider v. New Jersey*, 308 U.S. 147 (1939) (stating that a ban on all leafleting in order to eradicate litter is overly broad).

240. See *supra* note 29 and accompanying text.

241. *Turner*, 114 S. Ct. at 2480 (O’Connor, J., concurring in part, dissenting in part). Justice O’Connor echoed the language of Justice Marshall in *Arkansas Writers’ Project v. Ragland*, when he criticized the Arkansas tax scheme as “both overinclusive and underinclusive,” as “the most lucrative and well-established” newspapers received tax breaks, while struggling magazines would not, 481 U.S. 221, 232 (1987). See *Turner*, 114 S. Ct. at 2480 (O’Connor, J., concurring in part, dissenting in part).

242. *Turner*, 114 S. Ct. at 2480 (O’Connor, J., concurring in part, dissenting in part).

243. *Id.* (O’Connor, J., concurring in part, dissenting in part); see *Affiliated Capital Corp. v. Houston*, 735 F.2d 1555, 1563 (5th Cir. 1984) (stating that “[c]able television, like electric utilities, is generally considered a natural monopoly”), *cert. denied*, 474 U.S. 1053 (1986).

244. *Turner*, 114 S. Ct. at 2478 (O’Connor, J., concurring in part, dissenting in part).

245. *Id.* at 2480 (O’Connor, J., concurring in part, dissenting in part).

ining the current version of must-carry, Justice O'Connor wrote that, while Congress may restrict speech, it must comply with the requirements of the First Amendment—"requirements that were not complied with here."²⁴⁶

E. Justice Ginsburg's Opinion, Concurring in Part, Dissenting in Part

In a pithy dissent,²⁴⁷ Justice Ginsburg stated that the 1992 Cable Act does have a base in content.²⁴⁸ She further expressed her doubts about the broadcast industry actually being in danger.²⁴⁹ Thus, she believed that the Cable Act was properly analyzed under a strict scrutiny paradigm, which it failed.²⁵⁰

Relying heavily on the dissenting opinion from the lower court, Justice Ginsburg argued that the must-carry provisions have an "unwarranted content-based preference."²⁵¹ While acknowledging that the must-carry provisions do not differentiate on the basis of viewpoint, Justice Ginsburg stated that "the rules . . . do reflect a content preference, and on that account demand close scrutiny."²⁵²

Additionally, Justice Ginsburg pointed out that, even though a content-neutral reason was found for the Act,²⁵³ she found persuasive the words of Circuit Judge Williams, who noted that "Congress rested its decision to promote [local broadcast] stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.'"²⁵⁴

246. *Id.* at 2480-81 (O'Connor, J., concurring in part, dissenting in part).

247. *Id.* at 2481 (Ginsburg, J., concurring in part, dissenting in part).

248. *Id.* (Ginsburg, J., concurring in part, dissenting in part).

249. *Id.* (Ginsburg, J., concurring in part, dissenting in part).

250. *Id.* (Ginsburg, J., concurring in part, dissenting in part).

251. *Id.* (Ginsburg, J., concurring in part, dissenting in part).

252. *Id.* (Ginsburg, J., concurring in part, dissenting in part).

253. *See supra* notes 113-28 and accompanying text. Justice Ginsburg noted the majority's finding that the objective of the Act was "the preservation of over-the-air television service for those unwilling or unable to subscribe to cable." *Turner*, 114 S. Ct. at 2481 (Ginsburg, J., concurring in part, dissenting in part); *see id.* at 2461-62, 2471-72.

254. *Id.* at 2481 (Ginsburg, J., concurring in part, dissenting in part) (quoting *Turner Broadcasting Sys. v. FCC*, 819 F. Supp. 32, 58 (D.D.C. 1993) (Williams, J., dissenting), *vacated*, 114 S. Ct. 2445 (1994)) (alteration in original).

Finally, Justice Ginsburg expressed doubt that the broadcast industry is actually in jeopardy,²⁵⁵ writing bluntly that “the ‘facts do not support an inference that over-the-air television is at risk.’”²⁵⁶ In Justice Ginsburg’s view, if such facts are not adduced on remand, it should “impel” a judgment for Turner Broadcasting.²⁵⁷

V. IMPACT OF THE DECISION

Turner, more than any of its must-carry progenitors, has had an immediate economic impact on Americans. Although the Cable Act gave municipalities the power to regulate rates, most waited for the outcome of this case to exercise those powers. Many towns, taking the Court’s decision as a tacit validation of the Act *in toto*, quickly moved to slash rates in its wake.²⁵⁸ This power, however, has proven illusory, for while they do have the power to regulate rates on basic service, cable operators make up for the loss of revenue by raising prices on premium channels, such as HBO.²⁵⁹ Thus, many cable subscribers have actually seen a rise in cable prices.²⁶⁰

As to must-carry itself, it, too, has proved to be a mixed blessing. While more local broadcasters are being carried, many consumers are confused and upset at the constant reshuffling of channel lineups.²⁶¹ Due to the channel positioning requirements, many stations which are local favorites have been moved to less-favorable, higher-numbered channels.²⁶²

The broadcasters, however, find themselves in a position of power since they must either be carried or compensated. This has led to de-

255. *Id.* (Ginsburg, J., concurring in part, dissenting in part).

256. *Id.* (Ginsburg, J., concurring in part, dissenting in part) (quoting *Turner*, 819 F. Supp. at 63 (Williams, J., dissenting), *cert. denied*, *Turner*, 114 S. Ct. 2445). Justice Ginsburg’s doubts may be confirmed by Congress itself. Tentative figures that were provided by Congress show that during the period of deregulation, 1985-1992, only 20% of cable operators dropped even a single broadcast station. MacLachlan, *supra* note 8, at 29. This statistic questions contentions that, absent protectionist legislation, broadcast stations would be summarily ejected in droves from cable systems.

257. *Turner*, 114 S. Ct. at 2481 (Ginsburg, J., concurring in part, dissenting in part). Interestingly, Judge Ginsburg was part of the unanimous decision in *Quincy Cable* which invalidated a previous “must-carry” provision. See *Quincy Cable Television v. FCC*, 768 F.2d 1434, 1438 (D.C. Cir. 1985).

258. See Angela Paik, *Board Orders Cuts in Basic Cable Rates*, PHILA. INQUIRER, Feb. 13, 1995, at MD3.

259. See Scott Hadly, *Simi Orders Comcast to Cut Rates*, L.A. TIMES, Feb. 14, 1995, at B5.

260. See GALLUP, *supra* note 217, at 163.

261. See Anthony Faiola, *Cable Changed, but Was It for the Better?*, MIAMI HERALD, July 10, 1994, at 1K.

262. See Phil Kloer, *Remodeling at CNN*, ATLANTA CONST., June 14, 1994, at E1.

mands by some broadcasters that border on extortion.²⁶³ For other broadcasters, must-carry has been a Godsend, affording them exposure that would have been impossible without the rules.²⁶⁴ For at least one broadcaster, must-carry may be a boon in the salability of the station itself, as the price of the station trebles if the must-carry rules are upheld on remand.²⁶⁵

Implications for the future impact of this decision are, perhaps, more far-reaching. By rejecting the *Red Lion* standard for cable, the Court has effectively adjudged the *O'Brien* analysis applicable to all forms of communication which are not subject to application of the scarcity rationale. It follows, therefore, that any new form of communication which fits within the rather broad parameters of the decision here will be treated likewise.

For example, the "information superhighway" will rely heavily on the cable systems of telephone companies and cable operators for transmission of data.²⁶⁶ If the current must-carry provisions are viewed as an obstacle by those companies, they will be reticent about making the capital investment needed to establish the infrastructure for the information superhighway.²⁶⁷

Additionally, even though the current Act contains provisions exempting Direct Broadcast Satellite (DBS) systems from must-carry, the current success of GM Hughes Electronics' direct-to-home satellite television service seems to cast doubt upon the industry's further exemption.²⁶⁸

263. Frederic Biddle, *Cablevision, Channel 4 Play "Game of Chicken,"* BOSTON GLOBE, Aug. 3, 1994, at 68. In Boston, one particularly popular broadcasting station threatened to drop off the cable system if the cable operator did not pay. *Id.* In other locales, however, accommodation has been the order of the day. For example, many cable operators have agreed to carry NBC-affiliated cable programming in lieu of cash compensation. *Id.*

264. Phil Kloer, *On Television; WTLK Finally Gets Big-Time Cable Break,* ATLANTA CONST., Aug. 2, 1994, at C8. In WTLK's instance, must-carry gave the small station access to more than 80% of Atlanta's homes with cable. *Id.*

265. *In Brief,* MINN. STAR TRIBUNE, Aug. 18, 1994, at 3D. In the sale of WHAI, in Bridgeport, Connecticut, the station commanded a price of 3.9 million dollars. *Id.* The price will rise to almost twelve million dollars if must-carry is finally upheld. *Id.*

266. *See* Paul Farhi, *Southwestern Bell, Cox Call Off Cable Merger,* WASH. POST, Apr. 6, 1994, at D1.

267. *See id.* As James Robbins, president of Cox Cable stated, "[t]he Administration seems intent on creating the information highway and the FCC seems intent on blowing up the bridges." *Id.*

268. *See* James F. Peltz, *Hughes' DirecTv Already a Rival to Cable,* L.A. TIMES, Mar. 10, 1995, at D1.

Due to the affordability and programming selection afforded by Hughes' DirecTv, DBS has enjoyed phenomenal growth since its inception.²⁶⁹ Some analysts feel that it may eventually supplant cable as the medium of choice.²⁷⁰ While local broadcasters are not currently available via DBS, if cable is replaced as the dominant means of conveying television signals, it is highly likely that legislation analogous to the current must-carry would place those broadcasters on the DBS menu.

VI. CONCLUSION

While not answering the question of whether the current must-carry provisions are invalid, the Court has, finally, set the standard for free speech analysis of cable television, once again reaffirming the validity of tripartite First Amendment protection. Under this new paradigm, the print media is entitled to strict scrutiny, cable to the mid-tier *O'Brien* protection, and broadcast to the least-restrictive *Red Lion* standard.

In the arena of must-carry, it is highly probable that each new medium will be subject to these provisions. Indeed, given that cable has been heavily regulated almost from creation, it is not clear if Congress (or the courts) would even wait to examine the viability of each before subjecting them to must-carry.²⁷¹ Regardless, local broadcasters will be protected. Given the clout which these broadcasters wield in the communications milieu, George Orwell's First Commandment still rings true:

"ALL ANIMALS ARE EQUAL. BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS."²⁷²

R. STUART PHILLIPS

269. *Id.* DirecTv costs, on average, thirty dollars a month to provide access to at least 150 channels. *Id.*

270. *See id.* DirecTv already has 400,000 subscribers and will probably reach over 1.5 million by 1996. *Id.* The service will soon be expanding to Mexico, South America, and the Caribbean, with a potential audience of 77 million households. *Id.* In fact, DirecTv's sales have surpassed the popularity of the VCR and compact disc. *Id.* at D11. As Rich D'Amato, spokesman for the National Cable Television Association stated, "We view them as real, significant and very well-financed competition." *Id.*

271. *See generally* Fred H. Catz, *Communications Policy Making, Competition, and the Public Interest: The New Dialogue*, 68 *IND. L.J.* 665 (1993); Allen S. Hammond, IV, *Regulating Broadband Communication Networks*, 9 *YALE J. ON REG.* 18 (1992).

272. GEORGE ORWELL, *ANIMAL FARM* 112 (1946).