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CRASH TEST ON THE INFORMATION SUPERHIGHWAY: CONSTITUTIONAL PROBLEMS WITH THE 1992 CABLE ACT MUST-CARRY REGULATIONS

INTRODUCTION

The First Amendment protects speech from excessive government regulation. However, different forms of media have different levels of First Amendment protection. For instance, the Supreme Court has held that government cannot interfere with a newspaper's editorial discretion, but government can regulate the broadcast medium in various ways due to the scarcity of broadcast airwaves. Regulation of the cable medium, on the other hand, is less defined. The Federal Communications Commission (FCC) has jurisdiction to regulate cable television and has tried to impose mandatory signal-carriage rules on the industry. Only recently has the Supreme Court established a First Amendment standard for cable television regulations.

Compulsory signal-carriage (must-carry) rules force cable operators to carry the signals of local broadcasters and certain other qualified stations. In 1986 and 1987, the U.S. Circuit Court of Appeals for the District of Columbia twice struck down must-carry regulations promulgated by the FCC as violative of the First Amendment. In 1992, Congress passed the Consumer

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1. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const. amend. I.
2. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 547 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").
9. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), clarified,
Protection and Competition Act of 1992 (1992 Cable Act) over President Bush's veto. Under authority granted by the Act, the FCC formulated new must-carry regulations, which cable programmers and operators challenged as violative of free speech. In April 1993 a special three-judge district court rejected this challenge and held that the must-carry provisions of the 1992 Cable Act comported with the First Amendment. The Supreme Court heard the 1992 Cable Act challenge in January 1994, and in July 1994 vacated and remanded the decision of the district court.

The mass media market is currently developing into a fiber-optic information superhighway that will link the various media. This information superhighway combines the resources of cable television companies, phone companies, and newspaper publishers to provide subscribers with a cornucopia of services including interactive television, electronic yellow pages, classified advertisements, news, and other information. Different standards of review for cable television and newspapers cannot survive when these media are merged into one.

The first two sections of this Note will discuss the history of must-carry regulations and the First Amendment standard of review for these regulations. These sections provide the necessary backdrop for fully understanding the Supreme Court's most recent decision on the standard of review for the must-carry regulations. Sections I and II familiarize the reader with the setting and the options facing the Supreme Court as it established a standard of review for cable regulation. The Supreme Court's decision on this issue is discussed in detail in Section III. Finally, Section IV will focus on potential problems.

13. Id. at 32.
16. Wise to Pause; Bullock Right To Hold Up on "Information Highway," HOUS. CHRON., Apr. 11, 1993, at Outlook 2.
that may arise when the electronic highway and the must-carry provisions collide.

I. OVERVIEW OF MUST-CARRY REGULATIONS

A. Background and History

The First Amendment ensures freedom of speech and freedom of the press from unreasonable governmental regulation.\textsuperscript{17} The Supreme Court has held that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”\textsuperscript{18} Thus, courts have developed separate tests for the various forms of media.\textsuperscript{19}

Cable television technology is distinguishable from broadcast television.\textsuperscript{20} Television broadcasters transmit information to the consumer by emitting electromagnetic waves from a transmitting antenna.\textsuperscript{21} The consumer’s television antenna intercepts the waves and transforms them into video images on the television screen.\textsuperscript{22} The physical capacity of the airwaves limits the number of potential broadcast stations.\textsuperscript{23} Broadcasters obtain their revenues by selling air time to advertisers, and the price of broadcast advertisements increases as the audience size increases.\textsuperscript{24}

On the other hand, cable operators convert signals received from other sources into electronic impulses and deliver these impulses to consumers via coaxial cable or fiber optics.\textsuperscript{25} Most of the programs on cable television are retransmissions of signals generated by independent entities, including local broadcasters.\textsuperscript{26} Unlike broadcasters, cable operators can carry a myriad of channels or stations.\textsuperscript{27} However, “all cable television

\textsuperscript{17} U.S. CONST, amend. I.
\textsuperscript{19} Andrew A. Bernstein, Note, Access to Cable, Natural Monopoly, and the First Amendment, 86 COLUM. L. REV. 1663, 1665 (1986).
\textsuperscript{21} Id. at 6.
\textsuperscript{22} Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).
\textsuperscript{24} Quincy, 768 F.2d at 1438.
\textsuperscript{26} Id. at 335, 341-43.
\textsuperscript{27} Hollinrake, supra note 20, at 19.
systems have a defined channel capacity" due to the cost of adding new channels.\textsuperscript{28} Cable television consumers pay the cable operators a fee to receive cable service in their home.\textsuperscript{29} Cable operators also derive some revenue by originating their own programming and charging an additional fee to the subscriber.\textsuperscript{30}

The FCC was initially reluctant to regulate cable, but began to do so in the 1960s.\textsuperscript{31} The FCC developed must-carry rules fearing that cable television would threaten the existence of broadcast television.\textsuperscript{32} The FCC believed that advertisers would prefer to buy time from cable operators since television viewers might prefer cable's higher-quality reception and varied programming.\textsuperscript{33} Without their major source of revenue from advertisers, the broadcasters would go out of business. Consequently, people without cable would be unable to receive free local programming.\textsuperscript{34} The FCC also feared that cable subscribers would dismantle their antennas or otherwise destroy features of their television sets so that they could not receive both cable and broadcast television.\textsuperscript{35} Basically, the FCC wanted to ensure the continued availability of "free, community-oriented television" to the public.\textsuperscript{36}

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\textsuperscript{28} Affidavit of Gregory L. Klein \textsuperscript{¶} 7, 10, Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. Cir. 1993) (No. 92-2247) [hereinafter Klein Aff.]. "As of April 1, 1992, 88 percent of all U.S. systems for which capacity data was available had a maximum capacity of less than 54 channels. Twenty-six percent had a capacity of less than 30 channels. The average cable system currently has a capacity of approximately 40 channels." \textit{Id.} \textsuperscript{¶} 7.
\textsuperscript{29} Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438 (D.C. Cir. 1985), \textit{cert. denied}, 476 U.S. 1169 (1986).
\textsuperscript{30} Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1410 n.10 (9th Cir. 1985), \textit{aff'd}, 476 U.S. 488 (1986).
\textsuperscript{31} \textit{Quincy}, 768 F.2d at 1438; \textit{see United States v. Southwestern Cable}, 392 U.S. 157 (1968) (approving FCC jurisdiction over cable). The FCC was hesitant to regulate cable because it reasoned that CATV systems were neither broadcasters nor common carriers and not within the power granted to the FCC by the Communications Act. \textit{Id.} at 164.
\textsuperscript{32} JAMES C. GOODALE, ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION 2-22 (1993).
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} GOODALE, \textit{supra} note 32, at 2-22.
\end{flushright}
Must-carry rules require cable operators to transmit certain broadcast signals upon request and without compensation.\(^{37}\) The FCC attempted to impose these requirements as early as 1962.\(^{38}\) In 1965, at the request of local broadcasters, the FCC promulgated regulations that required cable operators to carry the signals of all local television stations.\(^{39}\) The FCC concluded that the mandatory carriage of local broadcast signals promoted the public interest of localism and allowed all viewers access to local and community broadcasting.\(^{40}\) The FCC extended the must-carry rules to all cable systems in 1966\(^{41}\) and reformed these rules in 1972.\(^{42}\) Later, the FCC admitted that, contrary to earlier beliefs, cable television did not present a significant threat to broadcast television.\(^{43}\) Despite this finding and a wave of deregulation, the must-carry rules remained in effect until 1985.\(^{44}\)

The lower federal courts dealt with the initial challenges to the constitutionality of the must-carry rules.\(^{45}\) Most of the lower courts simply treated cable television the same as broadcast television for the purposes of First Amendment review.\(^{46}\) Many

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37. *Quincy*, 768 F.2d at 1437.
38. *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 361-62 (D.C. Cir.) (holding that FCC could deny community antenna system (CATV) license until CATV company could show that it would not duplicate the programming of the local station and that it would carry the signal of the local station), *cert. denied*, 375 U.S. 951 (1963).
42. *Cable Television Report & Order*, 36 F.C.C.2d 143, 164-65 (1972) (amending rules to address the issue of overlapping markets), *reconsidered*, 36 F.C.C.2d 326 (1972), *aff’d*, ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975). These were the rules later struck down by *Quincy*. *See infra* notes 53-83 and accompanying text.
46. *Quincy*, 768 F.2d at 1443; *e.g.*, *Black Hills Video*, 399 F.2d at 69.
of the regulations were upheld on the premise of preserving local broadcasting as a public interest.\textsuperscript{47}

Today, cable television falls under the protection of the First Amendment.\textsuperscript{48} In \textit{Home Box Office, Inc. v. FCC}, the FCC defended rules that limited the amount of programming that a cable operator could offer a customer.\textsuperscript{49} The court upheld the First Amendment challenge while treating the regulations as incidental burdens on speech.\textsuperscript{50} The court applied the test from \textit{United States v. O'Brien}, which provides that a governmental regulation that incidentally burdens First Amendment rights "is sufficiently justified . . . if it furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."\textsuperscript{51} The court in \textit{Home Box Office} held the regulations unconstitutional since the FCC's fears of cable's effect on broadcasting were merely speculative, and because the regulations were "overbroad."\textsuperscript{52}

\section{Quincy Cable TV, Inc. v. FCC}

In 1985, the District of Columbia Circuit Court struck down the must-carry rules that had been in place for nearly twenty years because the rules violated the First Amendment.\textsuperscript{53} The cable operators in \textit{Quincy Cable TV, Inc. v. FCC} argued that the must-carry rules violated their First Amendment rights by restricting their editorial discretion in choosing which stations to carry.\textsuperscript{54} The cable operators based their reasoning on the Supreme Court's decision in \textit{Miami Herald Publishing Co. v.

\begin{footnotesize}
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\item[47.] \textit{Quincy}, 768 F.2d at 1444; see also \textit{Buckeye Cablevision}, 387 F.2d at 225.
\item[48.] Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1336 (D.C. Cir. 1985); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir.), aff'd, 476 U.S. 488 (1986).
\item[49.] 567 F.2d 9 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977).
\item[50.] \textit{Id.} at 48.
\item[52.] \textit{Home Box Office}, 567 F.2d at 50-51.
\item[53.] Cowles, \textit{supra} note 44, at 1252. The \textit{Quincy} case evolved from two separate petitions to review: 1) Turner Broadcasting Systems petition for the FCC to institute rule-making procedures to delete the must-carry regulations; and 2) Quincy's petition for review of an FCC order requiring it to carry certain broadcast signals. \textit{Quincy}, 768 F.2d at 1437-38.
\item[54.] \textit{Quincy}, 768 F.2d at 1446-47.
\end{enumerate}
\end{footnotesize}
Tornillo.\textsuperscript{55} The Court in \textit{Miami Herald} held that the First Amendment protects the editorial functions of a newspaper; therefore, a state could not require a newspaper editor to publish an individual's reply to an article, even if ample space was available.\textsuperscript{56} The cable operators in \textit{Quincy} argued that their editorial analysis of which programs or stations to carry was similar to the analysis of the newspaper editors who are given complete discretion to decide which articles to run.\textsuperscript{57}

The D.C. Circuit Court in \textit{Quincy} declined to adopt the view that cable television should have the same protection as newspapers.\textsuperscript{58} However, the court did decide that cable regulation required more scrutiny than used in analyzing the constitutionality of broadcast regulations.\textsuperscript{59} The FCC's rationale for regulating the broadcast medium is the scarcity of the broadcast airwaves.\textsuperscript{60} The court found the broadcast model inappropriate for cable since the scarcity rationale does not apply to cable television, which may transmit an unlimited number of stations.\textsuperscript{61} The court in \textit{Quincy} avoided determining a specific standard of review for the constitutionality of cable regulations by holding that the must-carry rules could not even pass the lenient standard of review outlined in \textit{United States v. O'Brien}.\textsuperscript{62}

Before the court in \textit{Quincy} applied the \textit{O'Brien} test, it had to decide whether the must-carry regulations were incidental burdens on speech.\textsuperscript{63} The First Amendment distinguishes between incidental burdens on speech, which are not aimed at controlling the content of speech, and restrictions, which are "intended to curtail expression."\textsuperscript{64} Generally, the First Amendment does not permit regulations that control the content of speech, "unless the speech falls within [an] unprotected

\textsuperscript{55} See id. at 1452-63.
\textsuperscript{57} See \textit{Quincy}, 768 F.2d at 1452.
\textsuperscript{58} Id. at 1454.
\textsuperscript{59} Id. at 1449.
\textsuperscript{60} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400-01 (1969).
\textsuperscript{61} Id.
\textsuperscript{62} \textit{Quincy}, 768 F.2d at 1448, \textit{cert. denied}, 434 U.S. 829 (1977); \textit{see supra} note 51 and accompanying text.
\textsuperscript{63} \textit{Quincy}, 768 F.2d at 1450.
\textsuperscript{64} Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (D.C. Cir.) (per curiam), \textit{cert. denied}, 434 U.S. 829 (1977).
categor[y] such as obscenity. The court in Quincy noted that the effect of the FCC’s objective in enacting the must-carry rules was “a far cry from... a merely ‘incidental’ burden on speech" because the rules “favor[ed] certain classes of speakers over the others.” Nonetheless, the court found it unnecessary to decide whether a more exacting standard of review was necessary, since the regulations were “clearly impermissible” even under the incidental burden standard of O’Brien.

In Quincy, the court concluded that the FCC did not demonstrate the existence of a substantial governmental interest. The court noted that even if it accepted the FCC’s argument that the preservation of free local television was an important regulatory goal, the FCC failed to prove that the “destruction of free, local television was more than a “fanciful threat.” The FCC did not substantiate its assertion either with factual proof of the imminent destruction local broadcasters would suffer in the absence of the must-carry rules, or with analysis of the effect of cable on local broadcasters for the last two decades.

The court in Quincy also concluded that, even if the governmental interest was deemed to be substantial, the must-carry rules were fatally overbroad. The rules “indiscriminately sweep into their protective ambit each and every broadcaster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community.” After concluding that the must-carry rules were unconstitutional, the court added that the decision did not preclude the FCC from redrafting the rules “in a manner more sensitive to the First Amendment.”

65. Cowles, supra note 44, at 1255.
66. Quincy, 768 F.2d at 1451.
67. Id. (quoting Home Box Office, 567 F.2d at 48). “Their very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers.” Id.
68. Id. at 1454.
69. Id. at 1457.
70. Id.
71. Id.
72. Id. at 1459-62.
73. Id. at 1463.
74. Id.
After the *Quincy* decision, the FCC suspended enforcement of the must-carry rules. A few months later, the FCC announced its intention to revise the must-carry rules. In November 1986 the FCC released a new version of the must-carry rules in an attempt to pass constitutional scrutiny. The FCC rationalized the rules as necessary for the “federal interest” in the “development of a nationwide television system that maximizes diversity and choice of television services.”

The FCC argued that its regulations furthered a First Amendment goal by providing an open forum for ideas and their distribution. However, “[t]he Commission recognized that must-carry rules could be contrary to such a goal, because they might foster duplication of delivered signals to the extent that cable systems must carry broadcast signals instead of programming that is not otherwise made available.” The FCC decided that the must-carry rules should temporarily remain in effect to provide time for viewers to become accustomed to the input-selector device, which would allow viewers to switch between cable and local broadcast television by flipping a switch. The five-year interim rules based the number of stations that the cable operators had to carry on the size of the cable system and the popularity of the various local broadcast stations.

The FCC feared that most cable viewers assumed their cable service carried all local over-the-air stations and, without the interim rules, local broadcasting would be threatened.


82. *Goodale, supra* note 32, at 2-26; see *supra* note 77.


[Subscribers have not perceived the need to maintain or install antennas and input selector switches, their access to off-the-air broadcast signals is limited to those carried by the cable system to which they subscribe. If
C. Century Communications Corp. v. FCC

Century Communications Corporation and thirteen other cable operators challenged the interim must-carry rules as "violative of the [F]irst [A]mendment." The plaintiffs alleged that the must-carry rules were more than an incidental burden on speech because they restricted the editorial judgment of the cable operators.

The District of Columbia Court of Appeals once again struck down the must-carry rules as unconstitutional under the First Amendment. The court again avoided articulating a standard of review for cable regulations since the new rules could not pass the less demanding O'Brien test. The court observed that the FCC did not demonstrate that the rules furthered a substantial government interest; the court labeled the FCC's stated reasons as "speculative" and based on "several highly dubious assertions." "Such speculative fears alone have never been held sufficient to justify trenching on [F]irst [A]mendment liberties." The court reasoned that the FCC provided no polls or surveys which suggested that the consumer would have trouble adapting to the input-selector device. The court also reasoned that the FCC provided no information which showed that a five-year period was necessary to teach consumers how to switch between broadcast and cable television. Responding to the FCC's fears that cable companies would drop the local broadcasters without the must-carry rules, the court noted that most cable operators continued to carry local broadcasting during

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we did not adopt interim must-carry rules . . . harm to the public interest would ensue. Subscribers would be disadvantaged by not being able to view broadcast signals dropped by their cable systems.

Id.
84. Century, 835 F.2d at 297.
85. Id. at 298.
86. Id. at 304-05.
87. Id. at 298.
88. Id. at 300 (referring to Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977)). To meet the "substantial interest" prong of the O'Brien test, the court in Home Box Office requires an agency to present "a record that convincingly shows a problem to exist." Home Box Office, 567 F.2d at 50.
89. Century, 835 F.2d at 300.
90. Id.
91. Id. at 302.
the time between the *Quincy* decision and the new must-carry rules.\(^\text{92}\) The court in *Century Communications Corp. v. FCC* held that even if the must-carry rules were advancing a substantial governmental interest, they would fail the second prong of the *O'Brien* test, which requires congruence between the means and the end.\(^\text{93}\) The court held that the five-year duration of the rules was too extensive to pass the test considering the rapid evolution of cable television.\(^\text{94}\) The court also reasoned that if viewers can rely on the must-carry rules to view local broadcasting, they have no need to become accustomed to the input-selector device until the last few months of the regulation period.\(^\text{95}\) Although the court held that the revised must-carry rules were too lengthy to be considered narrowly tailored under the *O'Brien* test, it noted that must-carry rules were not unconstitutional per se.\(^\text{96}\)

**D. The 1992 Cable Act**

Because of the FCC's failure in the courts, Congress enacted the 1992 Cable Act, despite former President Bush's veto.\(^\text{97}\) Sections 4 and 5 of the 1992 Cable Act require cable operators to carry the signals of certain noncommercial broadcast stations and local broadcast stations that request carriage.\(^\text{98}\) Section 4 requires cable systems with twelve or fewer user-activated channels to carry at least three local commercial broadcast stations.\(^\text{99}\) However, if the cable system has 300 or fewer subscribers, it is not subject to the requirements of the Act.\(^\text{100}\) Cable systems with more than twelve user-activated channels must carry, upon request, the signals of local commercial broadcast stations.

\(^\text{92. Id. at 303. A Federal Trade Commission study indicated that “absent must-carry rules, cable systems can be expected to carry many or most local broadcast stations.” Amendment to Part 76 Report & Order, 1 F.C.C.R. 864, 871 (1986).}\)

\(^\text{93. Century, 835 F.2d at 303-04.}\)

\(^\text{94. Id. at 304.}\)

\(^\text{95. Id. “OPTING for a five-year interim period therefore merely delays the inevitable, but almost certainly brief, period during which TV owners will learn of, purchase, and install the requisite equipment.” Id.}\)

\(^\text{96. Id.}\)


\(^\text{99. Id. § 534(b)(1)(A).}\)

\(^\text{100. Id.}\)
broadcast stations, using up to one-third of their channel capacity.\textsuperscript{101} However, if there are not enough local stations to fill one-third of the channel capacity, the cable operator must carry the signal of one or two qualified low power systems.\textsuperscript{102} Also, each qualified local broadcaster has a right to a specific channel position on a cable system.\textsuperscript{103}

Section 5 of the 1992 Cable Act requires cable operators with a channel capacity greater than thirty-six channels to carry the signals of three local, noncommercial educational broadcast television stations requesting carriage.\textsuperscript{104} If the educational station’s programming substantially duplicates the programming of another station carried by the cable system, the cable operator does not have to carry both.\textsuperscript{105} Cable operators with twelve or fewer channels must carry one qualified noncommercial station, and systems with thirteen to thirty-six channels must carry between one and three qualified noncommercial stations.\textsuperscript{106}

\textit{E. Turner Broadcasting Systems, Inc. v. FCC}

On the day Congress enacted the 1992 Cable Act, Turner Broadcasting Systems, Inc. instituted a lawsuit against the FCC and the United States arguing that the must-carry provisions of the 1992 Cable Act were unconstitutional.\textsuperscript{107} Within a few weeks of the \textit{Turner} lawsuit, four other plaintiff groups (cable system operators and programmers) brought similar lawsuits seeking to invalidate the 1992 Cable Act as unconstitutional under the First Amendment.\textsuperscript{108} Pursuant to Section 23 of the 1992 Cable Act, which requires that a three-judge court hear “any civil action challenging the constitutionality of section [4] or [5],” a special three-judge district court convened.\textsuperscript{109} The judges were Thomas P. Jackson, District Judge; Stanley Sporkin,

\begin{footnotesize}
\begin{enumerate}
\item Id. § 534(b)(1)(B).
\item Id. § 534(c)(1)(A)-(B) (qualified low power stations are defined at id. § 534(h)(2)).
\item Id. §§ 534(b)(6), 535(g)(5).
\item Id. § 535(e).
\item Id.
\item Id. §§ 534(b)(2)(A), 535(b)(3)(A)(i) ("Qualified noncommercial educational station" is defined at id. § 535(f)(1)).
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
District Judge; and Stephen F. Williams, Circuit Judge. The court consolidated the five cases to determine the constitutionality of Sections 4 and 5 of the 1992 Cable Act. Judge Jackson wrote the opinion for the majority.

The petitioners in Turner argued that the must-carry provisions of the 1992 Cable Act were facially unconstitutional because they infringed on the petitioner’s editorial rights and favored the class of local broadcasters.

The court considered Congress’ findings regarding the necessity of the cable legislation. Congress found that cable was the most prominent medium and that there was insufficient competition within the cable industry. Congress concluded that local broadcast television was in jeopardy and that must-carry rules were necessary to alter unfair trade practices, to preserve local broadcasting, and to ensure a diversity of programs for viewers.

The court in Turner held that the must-carry regulations were essentially “economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators’ anti-competitive practices.” The court reasoned that the commodity Congress was regulating was the “means of delivery of video signals to individual receivers”; the fact “[t]hat the video signals can only be used to convey a message is of no particular significance.” Consequently, the court held that the must-carry provisions were unrelated to the content of speech.

In Turner, the court applied the O’Brien test, as modified by Ward v. Rock Against Racism, since the economic regulation

110. Id. at 35.
111. Id.
112. Id.
113. Id. at 38.
114. Id. at 40.
116. Id. § 2(a)(8)-(12). Since cable operators compete with broadcasters for advertising revenue, operators have an economic incentive to refuse to carry broadcast signals, which would reduce broadcast audiences and thus provide even more revenue to cable operators. Id. § 2(a)(14)-(15).
118. Id.
119. Id. “[T]o the extent First Amendment speech is affected at all, it is simply a by-product of the fact that video signals have no other function than to convey information.” Id.
120. Id.
121. 491 U.S. 781, 799-800 (1989). “The narrow tailoring requirement is satisfied if
on the cable industry posed an incidental burden on speech. The *Turner* court found that the regulations furthered the significant governmental interest of protecting local broadcasting. Although the plaintiffs cited much evidence to the contrary, the court gave deference to the congressional determination that local broadcasting was in jeopardy.

The court in *Turner* also held that the 1992 Cable Act regulations passed the second prong of the *O'Brien* test: they were narrowly "tailored to Congress's larger economic market-adjusting objective." The court noted that the government does not have to use the least restrictive means possible in enacting regulations, and the must-carry regulations do not "unnecessarily burden a substantial amount of plaintiffs' own speech" because cable operators had enough open channels to transmit their messages.

Judge Sporkin concurred in the majority opinion, and he emphasized that the 1992 Cable Act imposed only incidental burdens on speech. Judge Sporkin also commented that "[p]laintiffs have come before this Court, not because their freedom of speech is seriously threatened, but because their profits are; 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." He noted that "[p]laintiffs' attempt to substitute Congress's regulation of the government's regulation will effectively remedy the condition that the government has identified as in need of correction, and if it does not burden substantially more speech than necessary in doing so." *Turner*, 819 F. Supp. at 45 (citing *Ward*, 491 U.S. at 799).

123. *Id.* at 45.
126. *Id.* (relying on *Ward* v. Rock Against Racism, 491 U.S. 781, 800 (1989) (stating "the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative").
127. *Id.* Cable operators have enough open channels to transmit their messages despite the must-carry rules. *Id.*
128. *Id.* at 51 (Sporkin, J., concurring).
129. *Id.* at 54.
cable industry with regulation by the First Amendment is mischievous."\textsuperscript{130}

Judge Stephen F. Williams, Circuit Judge, dissented in the opinion of the three-judge court.\textsuperscript{131} Judge Williams argued that the must-carry provisions of the 1992 Cable Act extend a privilege to a special class of speakers—"local commercial and non-commercial television stations."\textsuperscript{132} Judge Williams pointed out that Congress based its decision for the must-carry rules on a finding regarding the content of the speech; Congress said these stations were "an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."\textsuperscript{133} Judge Williams observed that FCC licensing requirements mandate that local broadcasters carry local programming;\textsuperscript{134} thus, by requiring the carriage of local broadcasters, Congress is also regulating the content of local programming.\textsuperscript{135} Since Judge Williams viewed the 1992 Cable Act as content-based regulation, he found that a stricter scrutiny than required under \textit{O'Brien} must be applied when determining the constitutionality of the 1992 Cable Act.\textsuperscript{136} To pass muster under a strict scrutiny test, speech regulation "must serve a 'compelling' governmental purpose and its 'means must be carefully tailored to achieve those ends.'"\textsuperscript{137}

Judge Williams argued that no evidence indicated that over-the-air television service was in jeopardy; therefore, no compelling governmental interest existed.\textsuperscript{138} Judge Williams cited surveys and reports that indicated that the number of commercial broadcast stations had increased by twenty-two percent, and the number of educational broadcast stations had

\textsuperscript{130} \textit{Id.} at 56.
\textsuperscript{131} \textit{Id.} at 57 (Williams, J., dissenting).
\textsuperscript{132} \textit{Id.} at 58.
\textsuperscript{134} \textit{Id.} (citing Commercial TV Stations Report & Order, 98 F.C.C.2d 1076, 1091-92 (1984)).
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 59 (relying on Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988)).
\textsuperscript{137} \textit{Id.} at 60 (quoting Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989)).
\textsuperscript{138} \textit{Id.} at 62-63. Judge Jackson noted that "federal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts." \textit{Id.} at 41. However, Judge Williams said that he was not questioning Congress' power to "engage in critical fact-finding," but in this case the "legislative findings . . . do not support the inferences needed to sustain must-carry" since "there is no finding of any present or imminent harm." \textit{Id.} at 65.
increased by fifteen percent since the Quincy decision in which the must-carry rules were initially invalidated.\textsuperscript{139} Judge Williams also noted that cable television is somewhat dependent on local broadcasters since local programming is the most popular with cable subscribers.\textsuperscript{140} Thus, Judge Williams argued, local broadcasting would not disappear from the media market in the absence of must-carry regulations.\textsuperscript{141}

In short, Judge Williams concluded that none of the interests advanced by Congress were compelling enough to pass First Amendment strict scrutiny since less restrictive means were available and the findings in the record did not indicate any real threat to local broadcasters.\textsuperscript{142}

II. STANDARD OF REVIEW FOR CABLE REGULATIONS BEFORE TURNER II

The Supreme Court has noted that cable television is considered “speech” within the bounds of the First Amendment freedom of speech clause.\textsuperscript{143} The First Amendment freedom of speech clause equally protects those who generate their own speech and those who disseminate the speech of others.\textsuperscript{144} However, “[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”\textsuperscript{145} In Quincy, the D.C. Circuit Court noted that “the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed,” but “distinctive features that differentiate” each form of expression should be considered.\textsuperscript{146}

Cable television is a unique medium in which cable operators play several roles: broadcasters, publishers, and common carriers.\textsuperscript{147} Consequently, courts have had a difficult time

\textsuperscript{139} Id. at 63.
\textsuperscript{140} Id. at 64.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 59, 67.
\textsuperscript{146} Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).
\textsuperscript{147} Cowles, supra note 44, at 1265.
fashioning a standard of review for cable regulations and have approached the problem in several ways. Lower courts have often compared cable television with other media to determine a standard of review.

A. The Broadcast Television Standard

Courts have justified broadcast regulations under the scarcity rationale. The Supreme Court has sustained the FCC’s power to regulate broadcasting because the physical scarcity of the airwaves limits the number of potential broadcast channels. The Supreme Court noted that without governmental control over the competing voices, no one would be heard. As the court in Quincy stated, “limited regulation, by converting aural and visual chaos into channels of effective communication, furthers rather than impedes the First Amendment’s mission.” The Eighth Circuit Court of Appeals was the only court to uphold physical scarcity as a grounds for regulating cable. But the Quincy court rejected the Eighth Circuit’s rationale and noted a trend away from applying the broadcasting standard of review to cable television. In fact, the Court of Appeals for the District of Columbia noted that some lower courts incorrectly relied on Supreme Court rationale for broadcast regulation when considering the constitutionality of cable regulations. The court in Quincy ultimately rejected the scarcity rationale since cable channel capacity is exceptionally vast, unlike broadcast channel capacity. In Midwest Video Corp. v. FCC, the court held that the FCC’s “constitutionally permitted authority over broadcast television in areas impinging on the First Amendment is broader than its authority over cable

148. Quincy, 768 F.2d at 1443.
151. Id.
152. Id. at 376; NBC v. United States, 319 U.S. 190, 212-13 (1943).
154. See Black Hills Video Corp. v. FCC, 399 F.2d 65, 69-70 (8th Cir. 1969).
155. Quincy, 768 F.2d at 1444-45.
156. Id. (referring to Black Hills Video, 399 F.2d at 65).
157. Quincy, 768 F.2d at 1449-50.
television.\footnote{158} The Midwest court also noted that the First Amendment constitutionality of the regulations must be based on a “record, not merely on argument regarding precedent.”\footnote{159} In addition, some “constitutional scholars have suggested that modern communications technology and the plethora of speakers and outlets now available to the public via the electronic media render the scarcity rationale obsolete” even when applied to the broadcast media.\footnote{160}

B. The Print Media Standard

Not only were courts reluctant to apply the broadcast standard to cable regulation, they also hesitated to allow the same freedom allocated to print media. Cable petitioners in several cases have argued that Midwest Video Corp. v. FCC, 571 F.2d 1025, 1053 (8th Cir. 1978) (quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 28, 43-46 (D.C. Cir. 1977) (stating scarcity rationale is not sufficient justification to regulate cable television)).

Midwest Video Corp. v. FCC, 571 F.2d 1025, 1053 (8th Cir. 1978).

\footnote{160} Cole, supra note 144, at 352 n.15.

\footnote{161} 418 U.S. 241 (1974).


\footnote{163} 418 U.S. at 243-44.

\footnote{164} Id. at 244.

\footnote{165} Id. at 256.

\footnote{166} Id.

\footnote{167} Id. at 257.
protect discussion of governmental matters. Finally, the Supreme Court rejected the argument that the editorial discretion of the newspaper could be regulated because it was an economic monopoly.

The cable operators in *Quincy* and *Century Communications v. FCC* argued that the coaxial wire used in cable dissemination was “functionally analogous to newsprint,” and that the editorial judgment used in both media was similar. Although both the *Quincy* and *Century* courts discussed the protected editorial discretion in *Miami Herald*, the courts did not adopt the *Miami Herald* standard since the must-carry rules in both cases could not pass even a more lenient standard of review. The court in *Turner* rejected the strict scrutiny of *Miami Herald*, stating that the must-carry provisions were neither content-based nor official government censorship. However, in his dissent in the *Turner* case, Judge Williams commented that the editorial discretion of cable programmers would fall under the strict scrutiny requirement of *Miami Herald*.

While comparing newspapers to cable television, the *Midwest* court noted that although

> [N]ewspapers “retransmit” hundreds of government press releases, we assume that no government agency had the fatal-to-freedom power to force a newspaper to add 20 pages to its publication, or to dedicate three pages to free, first-come-first-served access by the public, educators, and government, or to lease a fourth page on the same basis, or to “advance the public interest by opening of [letters-to-editor columns] for use by public and other specified users who would otherwise not likely have access to [newspaper] audiences.”

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168. *Id.*
169. *Id.* at 250-51.
170. *Cowles*, *supra* note 44, at 1253; see *Century Communications Corp. v. FCC*, 835 F.2d 292, 298 (D.C. Cir. 1987); *Quincy*, 768 F.2d at 1452.
171. *Century*, 835 F.2d at 303-04; *Quincy*, 768 F.2d at 1454.
173. *Id.* at 59-60.
174. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978) (citing *Amendment of Part 76 of the Commission’s Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 59 F.C.C.2d 294, 296 (1976)*).
Despite these arguments in favor of treating cable and broadcast similarly, the court in Midwest made no decision on the appropriate standard of review for cable television regulations.\(^{175}\)

C. The Economic Scarcity Argument

Other courts have tried to justify cable regulation on an economic basis by citing the cable industry's monopolistic tendencies.\(^{176}\) Defenders of the regulations argue that the cable industry creates economic restraints on competition analogous to the physical restraints of the broadcast spectrum.\(^{177}\) Cable markets indicate that it is not economically practical for more than one cable company to operate in a geographic area.\(^{178}\) In Miami Herald, the state argued that Florida's right of reply statute was a constitutional regulation since the newspaper industry was primarily in one geographic area.\(^{179}\) The state argued that economic constraints limited the number of media in the area; thus, regulations were necessary to preserve a marketplace of ideas.\(^{180}\) The Court held that economic scarcity could not be used as a rationale for press regulations.\(^{181}\)

In Home Box Office, Inc. v. FCC, the court discussed the standard of review for the constitutionality of cable regulations.\(^{182}\) The court commented on an economic scarcity argument, stating that nothing on the record indicated a need to treat cable television differently from print media. Consequently, economic scarcity is an insufficient reason to intrude on the First Amendment rights of cable television operators.\(^{183}\) The Home...

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\(^{175}\) Id.

\(^{176}\) Healy, supra note 149, at 860.

\(^{177}\) Quincy, 768 F.2d at 1449-50.

\(^{178}\) Healy, supra note 149, at 860-61 (citing Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1374 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982)).


\(^{180}\) Id. at 249-53.

\(^{181}\) Healy, supra note 149, at 857-58 & n.54.

\(^{182}\) Home Box Office, Inc. v. FCC, 567 F.2d 9, 48 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977); see also Community Communications Co., 660 F.2d at 1374 (discussing that cable television has monopolistic tendencies such that it is not economically feasible for more than one cable company to operate in a particular geographic area).

\(^{183}\) Home Box Office, 567 F.2d at 46.
Box Office court ultimately held that the regulations in question were not content-based and applied the O'Brien test.\textsuperscript{184}

Nevertheless, some courts have found economic scarcity to be a sufficient rationale for cable regulations.\textsuperscript{185} "[T]hese courts... found government franchising to be essential because the installation of cable systems interfered with the use of public streets and other municipal facilities, and thus provided the local municipality with a legitimate interest in limiting access to these facilities."\textsuperscript{186}

D. The Threshold: The O'Brien Test

Courts have frequently resorted to treating cable regulations as an incidental burden on speech, thus applying the O'Brien test.\textsuperscript{187} Prior to the Supreme Court's recent decision in Turner II, the O'Brien test appeared to be the threshold or minimum standard that cable regulations must pass to be constitutional.\textsuperscript{188}

III. THE SUPREME COURT'S HOLDING IN TURNER II

In Turner II, the Supreme Court not only vacated and remanded the decision handed down by the three-judge panel in Turner, it also concluded that intermediate scrutiny was the appropriate standard by which to evaluate the must-carry provisions.\textsuperscript{189} Justice Kennedy wrote the majority opinion; Justices Blackmun and Stevens filed concurring opinions; and Justices O'Connor and Ginsburg dissented in part.\textsuperscript{190}

\textsuperscript{184} Id. at 48.
\textsuperscript{185} Healy, supra note 149, at 862. But see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding that economic scarcity of newspapers is not sufficient justification for government to interfere with the editorial discretion of newspaper publishers).
\textsuperscript{186} Healy, supra note 149, at 862-63 (citing Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982)); see also Community Communications, 680 F.2d at 1378-79; Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976, 985 (D. R.I. 1983), vacated and remanded, 773 F.2d 382 (1st Cir. 1985)).
\textsuperscript{188} Bernstein, supra note 19, at 1669-71.
\textsuperscript{190} Id. at 2446.
A. The Majority Opinion

After providing a factual and procedural history of the must-carry provisions of the 1992 Cable Act, the majority reaffirmed that cable programmers and operators "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."\[191\] The Court concluded that the must-carry rules regulate speech by "reduc[ing] the number of channels over which cable operators exercise unfettered control, and... render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining."\[192\]

Before proceeding, the Court had to determine the appropriate level of scrutiny for the must-carry provisions. The Court dismissed the government's contention that cable should be regulated with more relaxed scrutiny, as in broadcast regulation, reasoning that the scarcity rationale\[193\] does not apply to cable.\[194\] Likewise, the Court disagreed with the government's contention that the must-carry provisions are industry-specific, antitrust legislation and noted that laws which single out the press are "always subject to at least some degree of heightened First Amendment scrutiny."\[195\]

Next, the Court concluded that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech."\[196\] Although acknowledging that the must-carry provisions interfere with the cable operators' editorial discretion,\[197\] the Court reasoned that the rules impose obligations on all operators with three hundred or more subscribers, regardless of the programming chosen by each

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191. Id. at 2456 (citing Leathers v. Medlock, 499 U.S. 439, 444 (1991)).
192. Id.
193. See supra notes 150-60 and accompanying text.
194. Turner II, 114 S. Ct. at 2457-58. "[G]iven the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel." Id. at 2457.
195. Id. at 2458.
196. Id. at 2460.
197. Id. The rules compel cable operators to "offer carriage to a certain minimum number of broadcast stations." Id.
operator. Thus, the regulations turn on channel capacity rather than programming content.

The Court recognized that the must-carry provisions reduced the number of channels for which cable programmers could compete; nevertheless, it held that this burden was “unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers.” The Court added that the privileges conferred to broadcasters by the must-carry provisions were not content-based since the rules benefitted all full-power broadcasters who requested carriage regardless of affiliations. Finally, the Court conceded that the must-carry provisions “distinguish between speakers in the television programming market”; however, this distinction was based on the manner of message transmission and not the content of the message.

In addition to holding that the must-carry provisions were facially content neutral, the Court held that the regulations did not violate the First Amendment by having a manifest purpose of regulating the content of speech. Despite references by Congress seeming to favor the value of broadcast programming, the Court concluded that “Congress’ overriding objective in enacting must-carry [provisions] was . . . to preserve access to free television programming,” not to favor certain programming. The Court focused on the paucity of influence that Congress and the FCC actually have over broadcast programming and held that the must-carry provisions are “meant to protect broadcast television from what Congress determined to be unfair competition by cable systems.”

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198. Id.
199. Id.
200. Id.
201. Id.
202. Id. “Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored.” Id.
203. Id. at 2461.
205. Turner II, 114 S. Ct. at 2461. The Turner II Court reasoned that “‘protecting noncable households from loss of regular television broadcasting service due to competition from cable systems’ is not only a permissible governmental justification, but an ‘important and substantial federal interest.’” Id. (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).
206. Id. at 2464.
In addition, the Court dispensed with arguments that the must-carry provisions warrant strict scrutiny. First, the Court held that the provisions do not interfere with editorial control or compel speech by cable operators because the provisions are content neutral.\footnote{See id. at 2464-66. Appellants had contended that the must-carry regulations interfered with cable operators' editorial discretion by limiting their otherwise broad discretion in program selection. Id. at 2464; see also, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). The Supreme Court in City of Los Angeles v. Preferred Communications, Inc., commented that cable operators exercise editorial discretion when deciding "which stations or programs to include in its repertoire," and that First Amendment protection applies to the editorial discretion of cable operators. 476 U.S. 488, 494-95 (1986); see also FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979) (commenting that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include"). Appellants largely relied on the argument that government clearly cannot regulate the editorial discretion of newspapers. In Miami Herald Publishing Co. v. Tornillo, the Supreme Court noted that "[i]t has yet to be demonstrated how governmental regulation of [the editorial process] can be exercised consistently with First Amendment guarantees." 418 U.S. at 258. The Court commented that the "choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment." Id. The Court held that any compulsion on newspapers "to publish that which 'reason' tells them should not be published is unconstitutional." Id. at 256. Appellants in Turner II argued that cable operators closely resemble the print media, and thus, "the First Amendment protection applicable to cable television should at least be virtually co-extensive with that of the print media." Plaintiff Time Warner Entertainment Company, L.P.'s Memorandum in Support of its Motion for Summary Judgment in the Must Carry Proceedings at 26, Turner Broadcasting Sys. Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993) (No. 92-2247) [hereinafter Plaintiff Time Warner's Memorandum]; see Cox Cable Communications, Inc. v. United States, 774 F. Supp. 633, 636 (M.D. Ga. 1991) ("The analogy of cable television to the traditional media of newspapers is close enough to afford the cable the same [F]irst [A]mendment protection as print media."); Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, 1554 (N.D. Cal. 1987) (applying Miami Herald to access and universal service requirements), appeal dismissed, 484 U.S. 1053 (1988); see also Midwest Video Corp. v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978) ("Though we are not deciding that issue here, we have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access."); aff'd on statutory grounds, 440 U.S. 689 (1979). Cable operators also argued that they have the right not to be compelled to speak in a certain way. Reply Memorandum in Support of Motions of National Cable Television Association, Inc. for Summary Judgment and Preliminary Injunction and Memorandum in Opposition to Defendants' Motion to Dismiss at 6, Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993) (No. 92-2247). "[A]ll speech inherently involves choices of what to say and what to leave unsaid. . . ."

Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 11 (1986) (emphasis omitted); see also Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 599, 599 (1985) ("[F]reedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.' " (quoting Wooley v. Maynard, 430}{0.35}
"bottleneck" control that a cable operator has over programming, the Court reasoned that the must-carry provisions further "the free flow of information and ideas."\textsuperscript{208}

The Court also dismissed the appellants' argument for strict scrutiny since it was based on the premise that the must-carry provisions favor broadcasters over cable programmers.\textsuperscript{209} The Court commented that the appellants' reliance on \textit{Buckley v. Valeo}\textsuperscript{210} was misplaced and noted that \textit{Buckley} only requires strict scrutiny when regulations reflect governmental preference for the content of certain favored speakers.\textsuperscript{211} As the Court had already concluded, no such congressional preference for broadcast speech existed; therefore, certain speakers were not truly favored over others.\textsuperscript{212}

Finally, the Court held that the must-carry provisions do not single out certain members of the press for disfavored treatment.\textsuperscript{213} The Court reasoned that heightened scrutiny is unnecessary if the "differential treatment is justified by some special characteristic of the particular medium being regulated," as it is with the potential bottleneck monopoly power of cable television.\textsuperscript{214}

Ultimately, the Court concluded that the must-carry provisions should be evaluated with the "intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech."\textsuperscript{215} The Court emphasized that the regulation does not have to be the least restrictive means, but must promote a " 'substantial government interest that would be

\textsuperscript{208} U.S. 705, 714 (1977)). Appellants contended that the must-carry rules require cable operators to speak by carrying the programming of local broadcasters and to be identified with the broadcasters' speech. \textit{Turner}, 819 F. Supp. at 36; Plaintiff Time Warner's Memorandum at 48, \textit{Turner} (No. 92-2247).

\textsuperscript{209} \textit{Id.} at 2466-67.

\textsuperscript{210} 424 U.S. 1, 48-49 (1976) (holding that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others").

\textsuperscript{211} \textit{Turner II}, 114 S. Ct. at 2467.

\textsuperscript{212} See id.

\textsuperscript{213} \textit{Id.} at 2467-68.

\textsuperscript{214} \textit{Id.} (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 466 U.S. 575, 585 (1989)).

\textsuperscript{215} \textit{Id.} at 2469. A content-neutral regulation is valid if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." \textit{Id.} (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).
achieved less effectively absent the regulation’” and not substantially burden “‘more speech than is necessary to further the government’s legitimate interests.’”$216 Acknowledging that the government’s interest in regulating cable with the must-carry provisions is “important in the abstract,” the Court held that further inquiry was necessary.$217 The Court held that 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.”$218 Consequently, the Court vacated and remanded the decision because of a lack of factual evidence in the record of either the direct impact on broadcasters or actual effects of must-carry provisions on cable operators.$219

B. The Concurrences

Justice Blackmun wrote a separate concurring opinion to emphasize the importance of giving deference to Congress’ predictive judgments.$220 Justice Blackmun also agreed that a remand was appropriate.$221

$216. Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989)).
$217. Id. at 2470.
$218. Id.

Thus, in applying O'Brien scrutiny we must ask first whether the Government has adequately shown that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry. Assuming an affirmative answer to the foregoing question, the Government still bears the burden of showing that the remedy it has adopted does not “burden substantially more speech than is necessary to further the government's legitimate interests.”

Id. (quoting Ward, 491 U.S. at 799).

$219. Id. at 2470-72. In their pretrial memorandum, appellants had given factual evidence of the effects of the 1992 Cable Act. For instance, under the 1992 Cable Act, Time Warner's Staten Island cable system is required to carry seventeen commercial stations, two of which are from Bridgeport, Connecticut. Time Warner would not normally carry these stations based on its perception of subscriber interests. Plaintiff Time Warner's Memorandum at 12, Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993) (No. 92-2247). Also, Time Warner's system in Leavenworth, Kansas, had to abandon plans to add the Mind Extension University Service (providing viewers with the opportunity to take college-level courses) because a must-carry request took the system's only available channel for new programming. Id. at 12 n.13.

$220. Turner II, 114 S. Ct. at 2472 (Blackmun, J., concurring).
$221. Id.
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Justice Stevens concurred in part and concurred in the judgment of the Court. However, he would have affirmed the opinion of the district court and upheld the must-carry provisions as valid. Justice Stevens argued that the district court had already evaluated the must-carry provisions under the content neutral intermediate standard described by the majority and said that a remand would only be asking the district court to engage in speculation. Despite his differing opinion, Justice Stevens concurred so that a disposition would “command the support of a majority of the Court.”

C. The Dissents

Justice O’Connor wrote a dissenting opinion in which Justices Scalia and Ginsburg joined and Justice Thomas joined in part. Justice O’Connor argued that the 1992 Cable Act affects the First Amendment rights of cable operators by telling them which programmers they must carry, thus preventing operators from carrying other programmers of their choice. In addition, the 1992 Cable Act “deprives a certain class of video programmers—those who operate cable channels rather than broadcast stations—of access to over one-third of an entire medium.”

Justice O’Connor pointed out that the must-carry regulations are a far cry from being content neutral. Relying on the congressional findings for the 1992 Cable Act, Justice O’Connor quoted provisions of the 1992 Cable Act to show that the must-carry provisions are justified with reference to content:

[Public television provides educational and informational programming to the Nation’s citizens, thereby advancing the

222. Id. at 2473 (Stevens, J., concurring).
223. Id.
224. Id. at 2475.
225. Id.
226. Id. (O’Connor, J., dissenting).
227. Id.
228. Id. at 2476. “It is as if the government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers.” Id.
229. Id. at 2476-80.
230. Id. at 2476. When Congress states findings, “it is fair to assume that those findings reflect the basis for the legislative decision.” Id. at 2477.
Government's compelling interest in educating its citizens. A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation. Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.231

Justice O'Connor noted that operative provisions of the 1992 Cable Act also reveal a preference for the content of broadcast programming.232 For instance, when determining must-carry eligibility, "the FCC must 'afford particular attention to the value of localism by taking into account such factors as ... whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.' "233

When determining mandatory carriage of low-power stations, the FCC must consider whether the station "would address local news and informational needs which are not being adequately served by full power television broadcast stations."234 Justice O'Connor commented that "[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content"235 and cannot be ignored.236 Regardless of the "benign motivation" of Congress in enacting the 1992 Cable Act, the must-carry provisions are "directly tied to the content of what the speakers will likely say."237

Justice O'Connor next stated that the must-carry provisions could not withstand the strict scrutiny that is required of content based restrictions on speech.238 Justice O'Connor argued that

231. Id. at 2476 (citations omitted) (quoting various provisions of the 1992 Cable Act, § 2).
232. Id.
235. Turner II, 114 S. Ct. at 2477.
236. Id.
237. Id.
neither the interest in protecting local broadcasters nor the interest in diverse viewpoints is compelling enough for strict scrutiny. She commented that the government may subsidize both interests, but "may not restrict other speakers on the theory that what they say is more conventional." Not even the interests in public affairs and educational programming would pass strict scrutiny, according to Justice O'Connor, since the Court has never allowed "educational content requirements on...newstands, bookstores, or movie theaters." Assuming the government could set aside channels for educational purposes, the 1992 Cable Act is not sufficiently tailored because the tax context that laws directly burdening the speech of a targeted few will be upheld only if "necessary to achieve an overriding governmental interest"; Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, 1554 (N.D. Cal. 1987) ("[F]orcing a speaker to communicate the views of another undoubtedly impacts the content of the speech of the primary speaker [in a manner] inconsistent with the principles of the First Amendment."), appeal dismissed, 484 U.S. 1053 (1988).

239. *Turner II*, 114 S. Ct. at 2478-79. Cable operators have argued that promoting local broadcasting is not a compelling governmental interest since available evidence does not indicate that local broadcasting is in jeopardy. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 62 (D.D.C. 1993) (Williams, J., dissenting), vacated, 114 S. Ct. 2445, reh'g denied, 115 S. Ct. 30 (1994) (mem.). First, broadcasters are obtaining 92% of television advertising revenues, and most local broadcast stations were already being carried by cable systems without the push of the must-carry rules. *Id.* at 64; Plaintiffs' Memorandum at 44, Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993) (No. 92-2247). Cable television depends on the programming of local broadcasters to attract subscribers since two-thirds of audience viewing is of local broadcast stations. *Turner*, 819 F. Supp. at 64; S. Rep. No. 92, 102d Cong., 2d Sess. 35 (1992), reprinted in 1992 U.S.C.A.A.N. 1133, 1168-69. In addition, Congress found that "the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of [broadcast] signals." 1992 Cable Act, Pub. L. No. 102-385, § 2(a)(19), 106 Stat. 1460. Approximately 80% of the cable systems reported no instances of denied carriage of local broadcast stations, and broadcasting has flourished since the must-carry rules were last struck down as unconstitutional. Plaintiffs' Memorandum at 44, *Turner* (No. 92-2247) (reporting no denied carriage); *Turner*, 819 F. Supp. at 64 (broadcasting has flourished). Likewise, cable operators argue that there is no shortage of a diversity of views as evidenced by the FCC's decision to abandon the "fairness doctrine" in Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1980). The "fairness doctrine," which required broadcast licensees "to provide coverage of vitally important controversial issues of interest in the community" and a reasonable opportunity for contrasting viewpoints, was abandoned by the FCC since media outlets had greatly expanded and provided significant sources of diverse information to the public. *Syracuse*, 867 F.2d at 655 (relying on Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 197, 208 (1985) (noting the "ready availability of a wide variety of cable networks which provide a significant array of diverse programming").


241. *Id.*
it burdens CNN, C-SPAN, and the Discovery Channel, as well as other educational channels.\textsuperscript{242}

Justice O'Connor concluded that the must-carry provisions failed content neutral scrutiny because they are over-inclusive and restrict too much speech.\textsuperscript{243} Justice O'Connor noted that Congress may act to protect certain speakers but that actions burdening speech must advance the legislative goals to be sufficiently tailored.\textsuperscript{244} The must-carry provisions "disadvantage cable programmers even if the operator has no anticompetitive motives, and even if the broadcaster that would have to be dropped to make room for the cable programmer would survive without cable access"; thus, the provisions are not sufficiently tailored to the goals.\textsuperscript{245}

Ultimately, Justice O'Connor contended that cable operators, rather than Congress, should have control over programming since cable operators will play largely to viewer preferences.\textsuperscript{246} Recognizing a potential danger in allowing cable operators complete control over programming, Justice O'Connor pointed out that Congress can foster, and has fostered, competition among cable systems by encouraging new media or subsidizing broadcasting.\textsuperscript{247} Justice O'Connor suggested that Congress may

\textsuperscript{242} \textit{Id.} at 2479. Cable operators contend that the must-carry provisions are overinclusive since they provide "every local commercial broadcast station with a right to carriage without regard to whether the particular station is competitively imperiled." Plaintiff Time Warner's Memorandum at 51, Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993) (No. 92-2247). In \textit{Quincy}, the court held that "[i]n his blanket protection, by sweeping even the most financially secure broadcaster under the rules' beneficent mantle, reaches well beyond the rules' asserted objective of assuring that . . . cable technology not undermine the financial viability of community-oriented, free television." Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1461 (D.C. Cir. 1985), \textit{cert. denied}, 476 U.S. 1169 (1986). Cable operators also argue that the must-carry provisions are not narrowly tailored since less restrictive alternatives are available to Congress. \textit{Turner}, 819 F. Supp. at 47. For instance, Congress could provide subsidies for local broadcasting, supervise compulsory access under the "essential facilities doctrine" of the antitrust laws, or expand leased access under the neutral provisions of section 612 of the Cable Communications Policy Act of 1984 "under which all programmers are eligible for leased access [unless they are] affiliates of a cable operator." \textit{Id.} at 57, 61-62 (Williams, J., dissenting). These approaches are less restrictive since they give no special privileges to one speaker over another. \textit{Id.} at 57.

\textsuperscript{243} \textit{Turner II}, 114 S. Ct. at 2479-80.

\textsuperscript{244} \textit{See id.} at 2479. For instance, "[i]f the government wants to avoid littering, it may ban littering, but it may not ban all leafleting." \textit{Id.}

\textsuperscript{245} \textit{Id.} at 2490.

\textsuperscript{246} \textit{Id.}

\textsuperscript{247} \textit{Id.}
obligate cable operators to carry certain programming on empty channels or even to act as common carriers.\textsuperscript{249}

Justice Ginsburg also filed a dissenting opinion, largely for the same reasons enunciated by Judge Williams in \textit{Turner}.\textsuperscript{249} Justice Ginsburg wrote separately to emphasize that “an intertwined or even discrete content-neutral justification does not render speculative, or reduce to harmless surplus, Congress’ evident plan to advance local programming.”\textsuperscript{250} Justice Ginsburg also pointed out the absence of evidence that broadcast television is in jeopardy and urged a judgment for the cable operators on remand if no such evidence surfaces.\textsuperscript{251}

IV. THE INFORMATION SUPERHIGHWAY

Problems may arise when the information superhighway of the future and the 1992 Cable Act must-carry provisions collide. The information superhighway is the media system of the future which will link the various media through fiber optics.\textsuperscript{252} Cable networks, television broadcasters, and regional telephone companies are “racing to control” this highway through expansions and mergers.\textsuperscript{253} In December 1993 the Clinton Administration introduced the National Information Infrastructure Initiative, “designed to link TV’s, telephones and computers with high speed lines to facilitate the rapid exchange of pictures, sounds and words.”\textsuperscript{254} Vice President Gore has actively promoted the information superhighway and has said that the Clinton Administration may consider deregulation to allow telephone and cable television companies to compete in offering interactive services.\textsuperscript{255} In addition, the United States district courts for the Eastern District of Virginia and the Western District of Washington have recently held that regulations in the Cable Communications Policy Act of 1984

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 2481 (Ginsburg, J., dissenting); see supra notes 131-42 and accompanying text.
\item Id.
\item Id.
\item See generally Kupfer, supra note 15.
\item Aaron Zitner, \textit{The Jewels at Paramount; Library of Films, TV Shows that Sparkle in Bidders’ Eyes}, B. GLOBE, Sept. 23, 1993, at 43.
\item Id.
\end{enumerate}
\end{footnotesize}
violated the First Amendment. These regulations prohibited telephone companies from providing video programming to subscribers within their service areas. Consequently, many telephone companies and cable companies, including Cox Cable and Southwestern Bell, are merging to create the resources to build the information superhighway. American Telephone & Telegraph Co. has discussed linking with cable television companies to create one large, interactive, multimedia network. The "Opportunity New Jersey" plan is another example of telephone company expansion. New Jersey Bell and its parent company, Bell Atlantic, intend to provide a communications system that will offer consumers access to video through service providers, including cable television companies and newspaper publishers. More recently, telephone lines have been used for Internet, "the massive network of networks" that connects millions of computer users "to thousands of electronic information storehouses worldwide." "Internet is evolving into a cost-effective meta-medium that can simultaneously carry everything from a new Stephen King short story to National Public Radio to video games."

Cable companies are working on ventures of their own in the race to build the information superhighway. Cable operators Comcast Corporation and Tele-Communications Inc. (TCI), the

nation's largest cable television operator, have announced a proposed merger to pool resources for the information superhighway.\textsuperscript{266} In addition, TCI plans to buy as much as fifteen percent of Interactive Network Inc., a company that is trying to introduce an interactive television system.\textsuperscript{267} Interactive Network is also being backed by the National Broadcasting Company (NBC) and Gannett, one of the nation's largest newspaper publishers.\textsuperscript{268} TCI is providing a foundation for interactive television by replacing its coaxial cable network with fiber-optic cable.\textsuperscript{269} "Fiber-optic cable uses light to transmit data," instead of the electronic impulses used by copper wire in coaxial cable.\textsuperscript{270} This innovation allows fiber-optic cable to transmit significantly more data faster and more efficiently than coaxial cable.\textsuperscript{271}

In addition, Cox Enterprises intends to deliver a variety of services, including access to daily newspapers, through cable television systems.\textsuperscript{272} Cox Cable has opened its "access ramp to the information superhighway" with a new unit called Cox Fibernet.\textsuperscript{273} The fiber-optic system will debut in Norfolk, Virginia and will allow companies to transmit voice, data, and video throughout the nation without using the local telephone company.\textsuperscript{274}

Even newspapers are moving away from strictly print journalism.\textsuperscript{275} Numerous newspaper publishers are "experimenting with a variety of electronic systems and many own cable television systems."\textsuperscript{276} For instance, the Atlanta

\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{271} Id.
\textsuperscript{273} Charles Haddad, \textit{Cox Cable Unit Set Up to Transmit Digital Data}, \textit{ATLANTA CONST.}, Oct. 16, 1993, at B3.
\textsuperscript{274} Id.
\textsuperscript{276} Id.
Journal-Constitution now provides subscribers with access to news and advertising via the telephone. The Atlanta Journal-Constitution has also started “Access Atlanta” which provides “local news and information on-line via the Prodigy computer service” to over 10,000 subscribers. Prodigy has alliances with other newspapers, including the Los Angeles Times, Tampa Tribune, and Newsday, which are expected to go online this year.

Big companies wanting a “ride” on the information superhighway are taking action to “identify a common set of technical standards for the giant network of the future.” Companies such as AT&T, the Baby Bells' Bell Communications Research arm, Kodak, IBM, Digital Equipment, and 1300 other companies are forming the Information Infrastructure Standards Panel.

The information superhighway has been launched as the inevitable medium of the future, and the lines between broadcasting, print, cable, and telephone are already beginning to blur.

CONCLUSION

If the must-carry provisions of the 1992 Cable Act are in effect when newspapers are carried on cable television, conflicts may arise when reviewing mandatory carriage rules or other regulations in light of the Supreme Court’s decisions in Miami Herald and Turner II. How can we have different standards of review for newspapers and cable television once both media are intertwined into one system?

Perhaps the dissenters in Turner II were looking ahead when they argued for stricter scrutiny. Applying strict scrutiny to cable regulations would allow for future harmony on the information

281. Id.
superhighway, where print and cable will merge into one. Unfortunately, the majority of the Turner II Court failed to look to the future of mass media; consequently, a collision on the information superhighway awaits.

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